Connecticut State Marshal Commission

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Capias as Civil Process, who has Power to Serve

Date: 03/07/2000

Opinion Number: 2000-010

2000-010

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

March 7, 2000

Honorable Patricia A. Wilson-Coker
Department of Social Services
25 Sigourney Street
Hartford, CT 06106-5033

Dear Commissioner Wilson-Coker:

This office previously responded to an inquiry concerning the authority of a Special Deputy Sheriff to serve a capias. At that time we provided an informal advice to the effect that the "better practice" was for a regular Deputy Sheriff to serve the capias, but that a Special Deputy Sheriff could assist, and suggested that it would be advisable to obtain legislative clarification with respect to what authority a Special Deputy Sheriff had.

During the period since that informal advice the issue of what authority a Special Deputy Sheriff had in connection with serving a capias has continued to arise. Accordingly, you have asked us to issue a formal opinion on this question. We have carefully considered the relevant legal authorities. For the reasons explained below we conclude that a Special Deputy Sheriff does not have the authority to serve a capias.[1]

In reaching this conclusion we have determined that a capias is civil process, and that a Special Deputy Sheriff is not authorized by statute to serve civil process. Additionally, the authority of a Special Deputy Sheriff to make a criminal arrest does not authorize the service of a capias since a capias is a civil process, not a criminal arrest. Finally, although in particular exigent circumstances a sheriff has the power to command assistance or specially deputize someone to serve process, that power cannot be used in the ordinary course of business to command a Special Deputy Sheriff to serve civil process, such as a capias.

Analyzing the question you have raised requires a discussion of the following: (1) the authority of the Sheriff and the two different classes of officers subordinate to the Sheriff, Deputy Sheriffs and Special Deputy Sheriffs and their respective statutory authority; (2) distinctions in the law between civil process and criminal process; (3) the arrest authority of both types of deputy sheriffs; and, (4) an understanding of the scope of the authority of a sheriff to command assistance, or to specially deputize someone to serve particular process..

1. **Authority of Sheriffs, Deputy Sheriffs and Special Deputy Sheriffs.**

   It is clear that "[t]he sheriff is an officer of very great antiquity..." Blackstone, William, Commentaries on the Laws of England, Vol. 1, p. 328 (1795). "The office is derived to us from England: but the power of it depends on statutes, which have varied it from what is in England." Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. I, p. 90 (1795).

   The sheriff is considered as the principal officer in the county, and has great and extensive authority. It is his duty and in his power to preserve the peace of the county, and to suppress all tumults, riots, routs, and unlawful assemblies, by force and strong hand. He may officially and without warrant, apprehend all persons whom he shall find in the

disturbance of the peace, and them carry before proper authority...

* * *

He is authorized to serve and execute all lawful writs, to him directed, by lawful authority... He is bound to receive all lawful writs, when they are tendered to him without his county, and make return according to law, and the direction therein given...

Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. I, p. 91 (1795).

The Sheriff's authority to serve all writs directed to him has long been recognized in Connecticut judicial decisions. *See, e.g., Dow v. Kelly*, 1 Root 552, 552 - 553 (Conn. 1793) (city sheriff possessed same power as county sheriff to "obey all lawful writs directed to them..."). The authority of the sheriff is presently codified in Conn. Gen. Stat. § 6-31.[2]

The historical authority of the Sheriffs themselves is quite broad.[3] In fact, the authority of Sheriffs is used to describe the powers of other law enforcement officers, such as: (1) state police[4]; (2) constables[5]; and, (3) local police officers.[6] The root authority that serves as the basis for understanding what powers other officers have, absent specific statutes conferring specific powers, is the authority of the Sheriff.

Under these legal provisions there is no question whatsoever that the Sheriff himself may serve a capias since he is clearly authorized by common and statutory law to serve *all* lawful process. The question that remains is what authority a Deputy Sheriff and a Special Deputy Sheriff have to serve a capias.[7]

The problem in evaluating what authority officers subordinate to the Sheriff have in Connecticut is that over time two entirely separate categories of officers subordinate to the Sheriff have been created. The positions of Deputy Sheriff and Special Deputy Sheriff evolved differently. The position of Deputy Sheriff has existed for a considerable period of time, while the position of Special Deputy Sheriff did not come into being until early in the 20th Century.

The position of Deputy Sheriff existed at least as far back as the 1824 revision to the Connecticut General Statutes. During most of Connecticut's history the Sheriff has been authorized to appoint Deputy Sheriffs who were given the same power as the Sheriff.[8] The authority to appoint one of the Deputy Sheriffs as Chief Deputy Sheriff was added in 1925. 1925 Conn. Public Acts ch. 69.

Sheriffs have long had the authority to depute any proper person to serve process on special occasions[9] — authority which is presently codified at Conn. Gen. Stat. §§ 6-38, 52-53. This authority of the Sheriff is a limited one, as pointed out in part IV of this opinion and is different from the position of Special Deputy Sheriff as we know it today.

The position of Special Deputy Sheriff as we know it actually originated in the 20th Century. In 1903 the General Assembly authorized the Sheriff to appoint Special Deputy Sheriffs in the event of riot or civil commotion who were provided with all of the powers of the Sheriff except as to the service of civil process.[10] 1903 Conn. Public Acts ch. 174. The circumstances in which the Sheriff could appoint Special Deputy Sheriffs were expanded in 1925 to include prevention or investigation of crime. 1925 Conn. Public Acts ch. 69. This provision was further expanded in 1959 to include attendance at court. 1959 Conn. Public Acts #362, § 2. The apparent purpose of the expanded role of Special Deputy Sheriffs in 1959 was to attend the former Circuit Courts[11] which had just been established.[12]

The Deputy Sheriffs and the Special Deputy Sheriffs each have a different subset of the very broad authority of the Sheriff. Each Deputy Sheriff "shall have the same powers as such sheriff to serve civil process..."[13] Conn. Gen. Stat. § 6-37. Each Special Deputy Sheriff has "all of the powers of the sheriff as provided by law, except as to service of civil process..." Conn. Gen. Stat. § 6-43. In addition, both Deputy Sheriffs and Special Deputy Sheriffs are separately empowered to make arrests without warrant. Conn. Gen. Stat. §§ 53a-3(9), 54-1f(a).

Taking the Deputy Sheriff first, it is fair to say that the customary understanding in Connecticut is that Deputy Sheriffs are authorized to take persons into custody on appropriate civil process.[14] The legal basis for doing so would either be: (1) that this is within the scope of the Sheriff's power to serve civil process, and therefore also the Deputy Sheriff's power; and/or (2) that this is within the scope of the authority of a Deputy Sheriff to make an arrest.

As far as the Special Deputy Sheriff is concerned, the act of a Special Deputy Sheriff actually making an arrest on a capias, as distinguished from assisting a Deputy Sheriff, appears to be of relatively recent origins. Our research has not disclosed reported judicial decisions in which the arrest on a capias, body attachment or writ of ne exeat (to take the most obvious examples of *civil* process authorizing an individual to be placed in custody) was effected by a Special Deputy Sheriff. The ability of a Special Deputy Sheriff to make an arrest on a capias would have to come either from the authority of the Sheriff excluding the authority to serve civil process[15] or the authority of a Special Deputy Sheriff to make an arrest.

The next parts of this opinion analyze the extent to which legal distinctions between civil and criminal process aid in determining who is authorized to serve a capias. This includes whether the arrest authority of Deputy Sheriffs and Special Deputy Sheriffs authorizes service of a capias.[16]

2. **Connecticut Law Distinctions Between Civil and Criminal Process.**

In addressing the ability to serve a capias it is important to understand what the process actually is. While we have not identified any Connecticut case law specifically explaining the nature of a capias, the situations in which a capias is customarily used shed a great deal of light on its purpose in the judicial system.

There are two primary purposes for issuing a capias, both of which involve bringing someone to court by taking the person into custody. First, when a witness fails to appear in court in response to a subpoena a capias may be issued "to arrest the witness and bring him before the court to testify."[17] Conn. Gen. Stat. § 52-143(e); *State v. Frye*, 182 Conn. 476, 483 (1980); *DiPalma v. Wiesen*, 163 Conn. 293, 298 (1972). Issuance of the capias is in the discretion of the court. *DiPalma*, 163 Conn. at 298. While the capias does result in a person being taken into custody in order to appear in court (which may involve temporary incarceration until court is in session), it is only after the witness refuses to testify that the court would find the witness in contempt and coercively incarcerate the witness until the testimony is provided.

Similarly, in the family relations area a capias may be issued when a person required to pay a child support order has failed to appear in court following service of a summons, subpoena or citation. Conn. Gen. Stat. §§ 17b-745(a), 46b-231(m)(1). Again, the purpose of the capias is to bring the person to court. The coercive incarceration of a person required to pay a child support order would come under the court's contempt power, following a finding that the obligor is in contempt by having failed to comply with the support order.

Conn. Gen. Stat. §§ 17b-745(a), 46b-231(m)(7).

The capias is coercive in nature, being intended merely to bring the person to court either to testify or to answer the summons or citation concerning child support. A capias neither charges nor adjudicates any offense. In this respect a capias is actually very different from an "arrest warrant" which flows from a judicial finding of probable cause based upon a charge by a prosecutorial official that an offense has occurred, as substantiated by the affidavits supporting the warrant application.

Connecticut law has long recognized a distinction between criminal process and civil process with respect to arrests.[18] "There is one important distinction, however, between criminal process and civil process as to arrests, as an officer can not break open outer doors to take a person on civil process; but when a warrant is granted on complaint for a crime, amounting to felony, or accompanied by violence, the officer has power to break open doors if necessary..." Joy, John W., Connecticut Civil Officer, 19th Edition, p. 310 (1948). This distinction derives from the common law rule to the same end which has been applied in several older Connecticut cases.[19] *E.g.*: *Fourette v. Griffin*, 92 Conn. 388, 391 (1918) (not permissible to break outer door to serve civil process of replevin); *Shaw v. Shaw and Six Others*, 1 Root 134 (Conn. 1789) (officer may break down door to make criminal arrest); *Fitch v. Loveland*, 1 Kirby 380, 386 - 387 (Conn. 1788) (Ellsworth, J., dissenting) (while outer door may not be broken open to effect civil arrest, inner door should have been). The important thing to be gleaned from this common law rule is that an arrest on civil process is different from an arrest on criminal process, and that Connecticut has preserved this distinction.

The capias is not the only form of process that does not initiate criminal charges but does result in the arrest of a person. The body attachment is one such example. While body attachment is no longer authorized, it was clearly a form of process well recognized in the formative years of Connecticut law. *E.g.:* Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. II, pp. 189 - 191 (1796); Joy, John W., Connecticut Civil Officer, 19th Edition, p. 245 (1948).

Another such example is the writ of ne exeat — a common law writ which may still be issued by Connecticut courts. Conn. Gen. Stat. § 52-489. "[A] writ of ne exeat is an order, directed to the sheriff, commanding him to commit a party to custody until he gives security in the amount set by the court to guarantee his appearance in court. *National Auto & Casualty Ins. Co. v. Queck, supra*, 1 Ariz.App. 600, 405 P.2d 905. *The writ of ne exeat is executed in all respects like an ordinary capias*, and the bond is taken in the same way. The defendant, if arrested under the writ, may give bond at any time and be discharged. *Griswold v. Hazard*, 141 U.S. 260, 280-81, 11 S.Ct. 972, 35 L.Ed. 678 (1891)." *Beveridge v. Beveridge*, 7 Conn. App. 11, 16 - 17 (1986) (emphasis added).

Yet another example of civil process to take someone into custody is the former statutory bastardy procedure. Bastardy proceedings in Connecticut were long settled to be a civil in nature. *Hamden v. Collins*, 85 Conn. 327, 330 (1912). The "civil" nature of a warrant in bastardy is very clear.

The plaintiff characterizes the action commanded by the warrant as an arrest, and argues therefrom that, while the proceeding may be civil in its nature the warrant was not a civil process. *This contention rests upon a misunderstanding of the scope and meaning of "arrest." It fails to distinguish between a civil and criminal arrest*, and to appreciate that the word "arrest" is as appropriately used to designate the former as the latter. [Citations omitted].

Hamden v. Collins, 85 Conn. 327, 331 (1912) (emphasis added).

The reason why it is necessary to look at whether a capias is civil or criminal is the statutory text that distinguishes the authority of a Deputy Sheriff from the authority of a Special Deputy Sheriff. A capias is certainly not a criminal arrest warrant as we understand it. The well established existence of several forms of process requiring a person to be taken into custody that are clearly civil in nature, as well as the ancient common law distinction between civil and criminal arrests with respect to the steps that an officer can take to execute the process, surely highlights the fact that a civil arrest is well known to Connecticut law.

Connecticut law clearly distinguishes between civil arrests and criminal arrests. The distinguishing characteristic of a criminal arrest is that it results in a person being charged with an offense for which a sentence of incarceration for a definite term and/or a fine may follow. A civil arrest merely brings a person to court to testify or to respond to a civil claim.[20] It seems clear to us, under this analysis, that a capias is civil process. The consequence of this is also the conclusion that service of a capias is within the authority of a Deputy Sheriff and outside of the authority of a Special Deputy Sheriff.

3. **Arrest Authority of Deputy Sheriffs and Special Deputy Sheriffs.**

Both Deputy Sheriffs and Special Deputy Sheriffs are empowered to arrest without warrant as peace officers. Conn. Gen. Stat. §§ 53a-3(9), 54-1f(a). Their authority in this regard is identical, and it extends to making an arrest for any "offense." The term "'offense' means any crime or violation which constitutes a breach of law ... *for which a sentence to a term of imprisonment or to a fine, or both, may be imposed*, except one that defines a motor vehicle violation or is deemed to be an infraction." Conn. Gen. Stat. § 53a-24(a) (emphasis added). An arrest under a capias is clearly not an arrest for an offense within the scope of this arrest authority. Accordingly, this authority cannot be the basis for either a Deputy Sheriff or Special Deputy Sheriff to execute a capias.

This brings us back to the Deputy Sheriff and Special Deputy Sheriff having mutually exclusive authority with respect to civil process — the Deputy Sheriff clearly has all of the power of the Sheriff with respect to civil process; the Special Deputy Sheriff has none. Therefore, it is only the Deputy Sheriff that has authority to execute a capias, because of its inextricable connection to the service of civil process.

4. **Authority To Command Assistance or Deputize Someone to Serve Process.**

The final legal doctrine to examine in analyzing whether there is any basis in law for a Special Deputy Sheriff to make an arrest with a capias is the authority of an officer to command assistance or deputize someone to serve process. Each Sheriff has the authority "to raise the power of the county and command any person to assist him in the execution of his office."[21] Conn. Gen. Stat. § 6-31. Similarly, each Sheriff has the authority to "depute any proper person to execute any process." Conn. Gen. Stat. § 6-38; *see also* Conn. Gen. Stat. § 52-53.

Failure to assist the Sheriff when commanded to assist him in the execution of his office is within the scope of the misdemeanor set forth at Conn. Gen. Stat. § 53a-167b. The power to command assistance is ancient in origin, "derived from a time in which the public peace depended upon the ability of the populace to summon their neighbors, through the raising of the 'hue and cry,' to come to their assistance when a crime had occurred. [Citations omitted]." *State v. Floyd*, 217 Conn. 73, 90 - 91 (1991).

[The sheriff] may command all proper persons within his county, to aid and assist him in the execution of his office. This is the same power that they have in England, and is called raising the posse commitatus, or power of the county.

Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. I, p. 91 (1795).

The sheriff has the liberty of deputing some meet person on special occasions, to serve and execute any *particular* process, which deputation, must be on the back of the writ... *The only instances where it is usual for sheriffs to make such special deputies are where no legal officer can conveniently be had, or the person against whom the writ is, secretes himself, and keeps himself out of the way of known officers*. In such cases, he deputes some person for that special purpose, so that there be no failure of justice...

Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. I, p. 92 (1795) (emphasis added).

Judge Swift's understanding of the ability of the Sheriff to command assistance or specially authorize someone to serve particular process is that this authority was limited. The limited nature of this authority is also reflected in sparse caselaw authority concerning this practice. "It is the wise policy of the law that its process shall be directed to known public officers, and *the law sanctions a departure from this policy only in cases of supposed necessity*. Statutes authorizing such departure should receive a strict construction. *Eno v. Frisbie*, 5 Day 122, 127 [(Conn. 1811)]." *Kelley v. Kelley*, 83 Conn. 274, 276 (1910) (emphasis added).

Similarly, the modern understanding of the authority to command assistance is consistent with Judge Swift's views early in Connecticut history. Statutes authorizing an officer to command assistance "have not been construed to confer unbounded discretion upon the peace officer." *State v. Floyd*, 217 Conn. 73, 92 (1991). These statutes authorize "a peace officer to command the assistance of a civilian[22] only when such assistance is both demonstrably necessary and reasonable under all of the circumstances." *State v. Floyd*, 217 Conn. at 92 - 93. Determining the reasonableness of a command to assist an officer looks at the following factors, at a minimum:

the urgency of the situation giving rise to a command for assistance; the availability of other trained law enforcement officers, rather than untrained civilians, to come to an officer's aid; the nature of the assistance sought; the appropriateness of commandeering the assistance of these individuals; the provocativeness of the situation in which aid is sought; the presence or threat of the use of weapons; and the risk of injury or death to the officer, to the individual being ordered to assist, and to any other parties present...

State v. Floyd, 217 Conn. 73, 92 (1991) (footnotes omitted).

The above legal authorities make it clear that the authority to command assistance or to specially deputize any person to serve any particular process is relatively narrow. A general authorization to a Special Deputy Sheriff to serve any capias that comes in through the ordinary flow of sheriff business[23] does not come within the Sheriff's authority either to command assistance or to specially deputize someone to serve specific process.

5. **Conclusion.**

For the above reasons we feel that the better reading of the law is and accordingly conclude that a Special Deputy Sheriff may not actually make an arrest under a capias. Of course, this could be changed with appropriate legislation.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Robert B. Teitelman
Assistant Attorney General

RB/RBT

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[1] A Special Deputy Sheriff would continue to be able to assist a regular Deputy Sheriff, provided that the regular Deputy Sheriff actually makes the arrest on the capias. The purpose of utilizing a Special Deputy Sheriff in this circumstance would be to help in preserving the peace while the regular Deputy Sheriff executed the process.

[2] "Each sheriff may execute in his county all lawful process directed to him, shall be conservator of the peace and may, when necessary, with force and strong hand, suppress all tumults, riots, unlawful assemblies and breaches of the peace and may raise the power of the county and command any person to assist him in the execution of his office." Conn. Gen. Stat. § 6-31.

[3] That the authority is broad does not mean that it is unlimited. Portions of this opinion identify limitations on the powers of the Sheriff which were first recognized early in the history of the State of Connecticut.

[4] "All state policemen shall have, in any part of the state, the same powers *with respect to criminal matters* and the enforcement of the law relating thereto as *sheriffs, policemen or constables* have in their respective jurisdictions..." Conn. Gen. Stat. § 29-7 (emphasis added).

[5] "Constables shall have the same power in their towns to serve and execute all lawful process legally directed to them as *sheriffs* have in their respective counties and shall be liable in the same manner for any neglect or unfaithfulness in their office." Conn. Gen. Stat. § 7-89 (emphasis added).

[6] "Active members of any legally organized police force in a town, city or borough shall have the same authority to execute *criminal* process in their respective towns, cities or boroughs as *constables* have in their respective towns..." Conn. Gen. Stat. § 7-281 (emphasis added). The power of constables is itself derivative of the power of sheriffs, as noted in the previous footnote.

[7] The issue of *assisting* in the service of a capias is an entirely differently issue which is not addressed at length in this opinion since the authority of a Special Deputy Sheriff to *assist* in the service of a capias is not seriously in dispute. A Special Deputy Sheriff clearly has criminal enforcement authority. If the Sheriff or any Deputy Sheriff has any reasonable concern about possible interference with the officer serving a capias, breach of peace, public commotion, etc. — all of which are reasonable concerns just about any time a person is taken into custody — the Sheriff's general criminal authority (like the authority of a local police department which is actually derivative of the Sheriff's authority) would justify assigning Special Deputy Sheriffs to be present to insure that the Deputy Sheriff serving the capias is able to do his job effectively. This opinion only addresses the scope of this authority. It goes without saying that any officer performing law enforcement functions also needs to be properly trained in those duties. Only Special Deputy Sheriffs who have suitable training should assist Deputy Sheriffs in serving a capias.

[8] *E.g.*: Conn. Gen. Stat. § 91-10 (1824 Revision); Conn. Gen. Stat. § 56-13 (1866 Revision); Conn. Gen. Stat. § 1763 (1902 Revision); Conn. Gen. Stat. § 213 (1918 Revision); Conn. Gen. Stat. § 230 (1930 Revision); Conn. Gen. Stat. § 456 (1949 Revision).

[9] This authority has been codified in virtually all of the compilations of the Connecticut General Statutes. *E.g.*: Conn. Gen. Stat. § 92-14 (1824 Revision); Conn. Gen. Stat. § 56-19 (1866 Revision); Conn. Gen. Stat. § 1763 (1902 Revision); Conn. Gen. Stat. § 216 (1918 Revision); Conn. Gen. Stat. § 233 (1930 Revision); Conn. Gen. Stat. § 457 (1949 Revision).

[10] A separate category of Special Deputy Sheriff, appointed on the request of any town, city, borough, district or corporation was first created in 1917. 1917 Conn. Public Acts ch. 369. This category of Special Deputy Sheriff still exists. Conn. Gen. Stat. § 6-44. This opinion does not address the authority belonging to this category of Special Deputy Sheriff.

[11] This was pointed out in the sparse legislative history of this act. As Rep. Shea noted: "Mr. Speaker, this act simply allows the appointment of special deputy sheriffs; these are not men who serve process but who will be able to appear in court upon [sic] the needs of the Circuit Court..." 1959 Conn. House Proc., p. 3388 (May 14, 1959).

[12] The Circuit Courts were created during 1959 by act of the General Assembly. 1959 Conn. Public Acts #28.

[13] Interestingly the limitation of the authority of the deputy sheriffs to serving civil process did not happen until recently. This limitation is derived from 1982 Conn. Pub. Acts 82-307, § 7. Prior to the 1982 public act Deputy Sheriffs had all of the authority of the Sheriff. The legislative history of the 1982 change is limited. *See* 1982 Conn. Senate Proceedings, pp. 1786 - 1791, 1833; 1982 Conn. House Proceedings, pp. 6301 - 6308; 1982 Conn. Judiciary Committee Proceedings, pp. 1008 - 1009. None of this legislative history addresses this change — portions address changes in laws regarding jurors and other portions address shifting the liability for Deputy Sheriff misconduct from the Sheriff to the Deputy Sheriffs.

[14] In fact, prior to the modern trend of directing all legal process "To any proper officer" the customary form for a capias was directed "To the Sheriff of the county of ... *his Deputy*, or either Constable of the town of ... within said county." Joy, John W., Connecticut Civil Officer, 19th Edition, p. 159 (1948) (form for capias; emphasis added). During this time period the office of Special Deputy Sheriff also existed. Conn. Gen. Stat. § 459 (Revision of 1949). Similarly, the customary form for a body attachment was directed "To the Sheriff of the county of H— *his deputy*, or to either of the constables of the town of G— in said county..." Swift, Zephaniah, A System of the Laws of the State of Connecticut, Vol. I, p. 443 (1795) (emphasis added).

[15] If this was the basis for the authority to serve a capias then the regular Deputy Sheriff would not have such authority. In this regard the authority of a Deputy Sheriff and a Special Deputy Sheriff are mutually exclusive.

[16] In addition, the final part of this opinion looks at the "power to command assistance" and at the Sheriff's authority to specially deputize a person to serve specific process as a basis for permitting a Special Deputy Sheriff to serve a capias.

[17] A capias may also be used to bring a witness to court for a criminal case who failed to appear in response to a subpoena or to bring a non-appearing criminal defendant to court. Conn. Gen. Stat. §§ 54-1h, 54-2a(a)(3).

[18] The court's contempt power is another area where the distinction between "civil" and "criminal"

is often drawn. Contempt remedies that are coercive or compensatory are civil while those that are punitive are criminal. *Ullmann v. State*, 230 Conn. 698, 710 (1994). Incarceration for contempt which is coercive in nature, whether to imprison someone until an order is complied with or for a fixed term with an opportunity for earlier release upon compliance, is civil in nature, while incarceration for contempt for a fixed term for a completed act of disobedience is criminal in nature. *International Union, UMWA v. Bagwell*, 512 U.S. 821, 828 - 829, 114 S.Ct. 2552, 2557 (1994). Similarly, contempt fines that are not compensatory must afford the contemnor the opportunity to purge the contempt to be considered civil, while a flat unconditional fine is criminal contempt. *International Union, UMWA v. Bagwell*, 512 U.S. at 829, 114 S.Ct. at 2557; *Ullmann*, 230 Conn. at 698. This is another area where the essential distinction between "civil" and "criminal" is coercion as opposed to punishment. By analogy, the capias, being intended to coerce the appearance of a person in court, would be a civil arrest, while an arrest warrant, starting the process by which a person might be punished, would be a criminal arrest.

[19] There is also a constitutional dimension to this distinction. The U.S. Supreme Court has noted the existence of this ancient common law rule. *Miller v. U.S.*, 357 U.S. 301, 306 - 307, 78 S.Ct. 1190 (1958). Similarly, the Court has noted in *dictum* that the justification for a forcible entry to serve a civil capias may be weaker than the justification for forcible entry to serve an arrest warrant. *See Pembaur v. Cincinnati*, 475 U.S. 469, 488, 106 S.Ct. 1292 (1986) (Stevens, J., concurring). Of course, whether or not action of an officer is constitutional is not necessarily probative of whether the officer is authorized to take that action by statute or common law.

[20] While the consequences of the person not adhering to the court's orders in connection with the civil claim could involve incarceration, it is very clear under the law that coercive incarceration under the court's contempt power is civil in nature rather than criminal. *E.g., International Union, UMWA v. Bagwell*, 512 U.S. 821, 828 - 829, 114 S.Ct. 2552, 2557 (1994).

[21] Similarly, each Deputy Sheriff and Special Deputy Sheriff, having all of the powers of the Sheriff as to certain specified matters, would have the power to command assistance with respect to whatever they were each authorized to do, and are also within the purview of Conn. Gen. Stat. § 53a-167b. However, this just begs the question of determining the scope of authority that each category of officer possesses since the officer could not command assistance for an act the officer was not authorized to perform.

[22]We have not found any legal authority addressing a circumstance where an officer commanded the assistance of another officer, thereby increasing the authority of the latter.

[23] The way in which a person is specially deputized is by the Sheriff endorsing his action on the original process itself. Conn. Gen. Stat. § 52-53. It is significant that the failure to endorse this deputation on the copy served is a material irregularity which vitiates the service. *Kelley v. Kelley*, 83 Conn. 274, 277 (1910). That the deputation itself needs to be endorsed on the original process and on the copy served would prevent the Sheriff from providing any general authorization for Special Deputy Sheriffs to perform the task of serving capias. It is also clear that prior to making such a special deputation for a particular process the Sheriff would have to determine the necessity of doing so, in light of the legal principles that are addressed in this opinion.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Peace Officers/Oath/Scope of Powers

Date: 07/05/2001

Opinion Number: 2001-017

2001-017
Formal
Opinion

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

July 5, 2001

Mitchell R. Harris, Esq., Chairman
State Marshal Commission
c/o Day, Berry & Howard
CityPlace I
Hartford, CT 06103-3499

Dear Attorney Harris:

As Chairman of the State Marshal Commission you have requested a formal Opinion of the Attorney General as to the following four questions:

1. While the State Marshal Commission has duly appointed all state marshals, none has been "sworn." Must state marshals be "sworn"? If so, what oath is to be administered and who may administer it?
2. Does a state marshal have "police" or law enforcement powers? If so, what is the scope of such powers?
3. State marshals are referred to in the General Statutes as "peace officers." What powers are conferred upon "peace officers"? Are these the only "police" or law enforcement powers that state marshals possess?
4. Do you have any suggested modifications to the above[1] certificate language?

For the reasons explained below, our answers to these questions are as follows:

1. State marshals should be sworn. The oath to be administered is the oath prescribed by Conn. Const. Art. XI, §1, which is also set forth at the beginning of Conn. Gen. Stat. §1-25. The oath may be administered by any officer empowered to administer an oath in Conn. Gen. Stat. §1-24. It is prudent for the State Marshal Commission to have the oath executed in writing.
2. A State Marshal has very limited "police" or law enforcement powers, that may be exercised only when a State Marshal is acting pursuant to his authority. In addition, the State Marshal Commission may further regulate the actual exercise of such powers through the Commission's authority to establish professional requirements and training standards.
3. As "peace officers" State Marshals have very limited arrest authority. No State Marshal may actually exercise such authority without first obtaining proper training as described below.
4. Any certificate or credential issued by the State Marshal Commission to a State Marshal should do no more than accurately describe the actual status of the State Marshal. The language suggested in footnote 1 is not appropriate since it is broader in scope than the status of a State Marshal that we have described in this opinion. Suggested text is included in the narrative below.

The reasons for these conclusions are explained below.

I. State Marshals Should Be Sworn.

The Sheriffs system in Connecticut was abolished by Constitutional Amendment effective November 30, 2000. The process serving functions formerly handled by sheriffs are now

performed by State Marshals. State Marshals are authorized "to provide legal execution and service of process." Conn. Gen. Stat. §6-38a.

The first question posed in your request is whether or not State Marshals should be sworn. The text of Conn. Const. Art. XI, §1 provides as follows:

> Members of the general assembly, and *all officers,* executive and judicial, *shall,* before they enter on the duties of their respective offices, *take the following oath or affirmation,* to wit: [text of oath omitted].

Conn. Const. Art. XI, §1 (emphasis added).

If a State Marshal is an officer, then being sworn is required. If a State Marshal is not an officer, then no oath is required.[2]

> The test for determining whether someone is an officer is as follows:
>
> "A public office is a right, authority, and duty created and conferred by law, by which *** an individual is invested with some portion of the sovereign functions of the government to be exercised by him for the benefit of the public." [Citation omitted]. "It implies a delegation of a portion of the sovereign power to and possession of it by the person filling the office." [Citations omitted]. It is a trust conferred by public authority for a public purpose, and involving the exercise of the powers and duties of some portion of the sovereign power. [Citations omitted].

State ex rel. Stage v. Mackie, 82 Conn. 398, 401 (1909).

The provisions of Conn. Gen. Stat. §6-38a[3] clearly authorize each State Marshal "to provide legal execution and service of process..." Service of process in Connecticut has always been considered a sovereign function of government entrusted to public officials empowered by law. "It is the wise policy of the law that its process shall be directed to known public officers, and the law sanctions a departure from this policy only in cases of supposed necessity. Statutes authorizing such departure should receive a strict construction. *Eno v. Frisbie,* 5 Day 122, 127 [(Conn. 1811)]." *Kelley v. Kelley,* 83 Conn. 274, 276 (1910). Service of process is a sovereign function for the overall benefit of the public through enabling the fair administration of our judicial system and enforcement of judicial decrees. By this standard each State Marshal in whom is vested the authority to serve process is an "officer" who is required to be sworn.[4]

The form of oath for an "officer" is prescribed by Conn. Const. Art. XI, §1, and restated in Conn. Gen. Stat. §1-25. Applied to a State Marshal the form of the oath would be as follows:

You do solemnly swear (or affirm, as the case may be) that you will support the constitution of the United States, and the constitution of the state of Connecticut, so long as you continue a citizen thereof; and that you will faithfully discharge, according to law, the duties of the office of [Connecticut State Marshal] to the best of your abilities. So help you God.

Conn. Const. Art. XI, §1; Conn. Gen. Stat. §1-25.

This oath can be administered by any of the many categories of officer empowered by Conn. Gen. Stat. §1-24 to administer oaths. It is also prudent for the State Marshal Commission to maintain a written record of the oath which can contain the text of the oath, the dated original signature of the State Marshal, a proper certificate of the administration of the oath containing the original dated signature of the officer administering the oath, title of the officer, and place where the oath

was administered.

Since Conn. Const. Art. XI, §1 requires the officer to be sworn *before* assuming the duties of the office, the State Marshal Commission should take steps to ensure that new State Marshals in the future are in fact sworn before beginning to function as State Marshals. However, the fact that existing State Marshals have been performing State Marshal duties prior to being sworn does not invalidate any of their actions. *See, Berger v. Town of Guilford,* 136 Conn. 71, 81 - 82 (1949); *see also, State ex rel. Comstock v. Hempstead,* 83 Conn. 554, 557, (1910); *State ex rel. Eberle v. Clark,* 87 Conn. 537, 540 - 541 (1913).

II. Nature of the Authority of State Marshals.

State Marshals have only the authority specifically granted them by statute. There is simply no source of law other than statute authorizing State Marshals to do anything.[5]

Specific statutory provisions empower State Marshals, as follows:

A. Service of Process.

The provisions of Conn. Gen. Stat. §6-38a give State Marshals "authority to provide legal execution and service of process... as an independent contractor compensated on a fee for service basis." This would empower each State Marshal to serve all legal process, civil or criminal,[6] given to the State Marshal for service.

B. "Peace Officer" Status.

The provisions of Conn. Gen. Stat. §53a-3(9) give "peace officer" status to, *inter alia,* "a state marshal while exercising authority granted under any provision of the general statutes..." This status is limited to those times that a State Marshal is actually exercising authority granted by statute. Accordingly, a State Marshal is a peace officer *only* while actually performing duties that a State Marshal is statutorily empowered to perform, that is while providing legal execution and service of process. By contrast, the State Police or members of a local police department are peace officers 24 hours a day, whether or not on duty. A State Marshal cannot function as a peace officer unless otherwise engaged in a State Marshal function (i.e. while actually serving process).

The primary significance of "peace officer" status here is in relation to other statutes that specifically refer to such status. For example, crimes associated with interfering with or assaulting an officer in Conn. Gen. Stat. §§53a-167a, 53a-167b and 53a-167c could apply to interference with or assault on a State Marshal actually engaged in the service of process.

C. Arrest Authority.

The provisions of Conn. Gen. Stat. §54-1f(a) authorize all "peace officers" to make warrantless arrests.[7] A State Marshal is a peace officer only while actually exercising authority granted under any provision of the general statutes. Accordingly, a State Marshal is only authorized to make a warrantless arrest while otherwise exercising a State Marshal's authority, such as actually attempting to serve process.

For these reasons, the outer bounds of the authority of a State Marshal are very different from those of a police officer. While a state trooper or member of a local police department is a peace officer 24 hours a day, whether or not on duty, and is empowered to act if such officer should come upon an incident warranting intervention by a law enforcement officer, a State Marshal is

not. Unless the State Marshal is actually engaged in the performance of an authorized function, the State Marshal is simply not authorized to function as a peace officer. Limitations on the exercise of police powers by State Marshals are discussed below.

It is important to bear in mind that the primary function of a State Marshal, as specified in Conn. Gen. Stat. §6-38a, is providing service and execution of process. State Marshals are not generally empowered, as police officers are, to enforce the criminal laws of the State.[8]

III. Limitations On Police Powers of State Marshals.

To the extent State Marshals possess police powers, those powers are extremely limited. In addition, the State Marshal Commission has the authority to further circumscribe the powers that State Marshals may exercise.

A. Authority of the State Marshal Commission.

The State Marshal Commission, among other things, is empowered to "establish professional standards, including training requirements..." for State Marshals. Conn. Gen. Stat. §6-38b(f). Through establishing professional standards and training requirements the State Marshal Commission can limit the duties State Marshals are empowered to perform. For example, although their limited peace officer status authorizes State Marshals to make arrests while attempting to serve process, the State Marshal Commission may require specific training as a prerequisite for State Marshals to make such arrests. Any State Marshal who did not complete such training or maintain the required certification would not be authorized to make arrests. The State Marshal Commission may exercise this authority in any area related to professional standards or training requirements within the scope of a State Marshal's authority that the State Marshal Commission, in its discretion, deemed appropriate.

B. Any Officer Exercising Criminal Enforcement Authority Should Be Properly Trained.

While this opinion will not restate several decades of judicial decisions concerning the enforcement of criminal laws, it is well established in this day and age that no officer should in fact exercise any function associated with the enforcement of the criminal laws without training in criminal law and procedure that is current. To the extent that State Marshals are empowered to serve criminal process, or to make arrests in very limited circumstances, the State Marshal Commission should take great care to insure that no State Marshal actually exercises such authority in the absence of appropriate and current training and certification.

C. Role of the Police Officer Training Council.

The Police Officer Standards and Training Council is created by Conn. Gen. Stat. §§7-294a, et seq. The POTC is generally empowered to establish minimum standards for training and certification of police officers, among other things. Conn. Gen. Stat. §7-294d. Failure to obtain or retain certification from the POTC could result in a person not being permitted to function as a police officer. Conn. Gen. Stat. §7-294a(b). The POTC statutes also apply to "any person who performs police functions," which includes a person who in the course of official duties "carries a firearm and exercises arrest powers pursuant to [Conn. Gen. Stat.] section 54-1f." Conn. Gen. Stat. §7-294d(e). Certain categories of officer, such as the State Police, are excluded from the POTC statutes. Conn. Gen. Stat. §7-294d(f).[9]

State Marshals are *not* included in the list of law enforcement officers who are exempt from the permit requirements of Connecticut firearms laws. E.g., Conn. Gen. Stat. §29-35(a). While Public Act 00-99 eliminated sheriffs from those exempted from the permit requirement, the Act did not substitute State Marshals. This means that a State Marshal is no different from any other member

of the general public in being required to obtain a firearms permit where such a permit is required by Connecticut law. That State Marshals are not exempted from these permit requirements also suggests that the General Assembly did not intend that they carry firearms in the ordinary course of performing State Marshal duties even if they have a permit to carry a weapon while not in the performance of official duties.

Should the State Marshal Commission authorize a State Marshal to carry a firearm while performing State Marshal duties, any State Marshal authorized to carry a firearm would be covered by the POTC statutes since a State Marshal who carried a firearm would meet both prongs of Conn. Gen. Stat. §7-294d(e) — carrying a firearm and exercising arrest authority under Conn. Gen. Stat. §54-1f. Thus, if the State Marshal Commission authorizes State Marshals to carry a firearm, training pursuant to the POTC statutes is required. Furthermore, the provisions of Conn. Gen. Stat. §54-1f(c) appear to authorize "immediate pursuit" only by a State Marshal who has been certified under the POTC statutes. The text of Public Act 00-99, §6 strongly suggests that the General Assembly intended that only those State Marshals who were actually certified by the POTC could in fact exercise authority with respect to enforcing Connecticut's criminal laws.

IV. Text of State Marshal Credentials.

The State Marshal Advisory Board has asked that the State Marshal Commission issue certificates to each State Marshal with the following text: "This is to certify that the individual identified below is a duly sworn officer pursuant to Public Act 00-99 and has the police power to enforce the laws of this state and the authority to serve Criminal and Civil process pursuant to the Connecticut General Statutes." (Emphasis omitted). In light of the discussion in the preceding portions of this opinion, such text could be misleading.

While we understand the desirability of issuing appropriate credentials to State Marshals who may need to present such credentials to serve or otherwise execute upon process, such credentials should do no more than accurately state the status of the State Marshal who carries them. One possible version of credentials which is not misleading could read as follows: "This is to certify that the individual identified below is a duly sworn Connecticut State Marshal and has the authority as a Connecticut State Marshal to 'provide legal execution and service of process' pursuant to Conn. Gen. Stat. §6-38a."

V. Conclusion.

For the above reasons, it is our opinion that State Marshals should be sworn, that they have very limited "police" or law enforcement powers, that certain of the powers possessed by State Marshals can be further limited by the State Marshal Commission and should only be exercised with proper training, and that any certificates issued to them should do no more than accurately state their actual status.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Henri Alexandre
Assistant Attorney General

RB/HA

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[1]The beginning of your letter makes reference to a request by the Marshal Advisory Board for a certificate to be issued to each state marshal stating as follows: "This is to certify that the individual identified below is a duly sworn officer pursuant to Public Act 00-99 and has the police power to enforce the laws of this state and the authority to serve Criminal and Civil process pursuant to the Connecticut General Statutes. (emphasis added)."

[2]Of course, an oath could still be administered in this circumstance. Such an oath would be gratuitous.

[3]The provisions of Public Act 00-99 and Public Act 00-210 have been codified into the Connecticut General Statutes. Accordingly, this opinion refers to the current version of Connecticut General Statutes.

[4]The provisions of Conn. Gen. Stat. §6-38a which empower State Marshals to serve process also categorize them as independent contractors compensated on a fee for service basis. By defining each State Marshal as an "independent contractor" when serving process, the Legislature established both the legal status of the State Marshals performing their authorized function of service of process and the method of their compensation. As independent contractors, State Marshals were designated by the General Assembly to be outside the control of the state when they execute their duties, and so they are not entitled to legal representation or indemnification by the State for their actions as State Marshals. *See Hunte v. Blumenthal,* 238 Conn.146 (1996); *Spring v. Constantino,* 168 Conn. 563 (Conn. 1975). This clear, unavoidable dictate of the statute can be altered only by the legislature, if it should choose to do so.

[5]Unlike the former sheriff system, all duties, status, and the relevant details of the State Marshal's office are defined by statute. The office of sheriff, since abolished, predated our state constitution, and existed as a state constitutional office from early in the 19th century until late last year.

[6]While a State Marshal who is properly trained and certified would have the authority under Conn. Gen. Stat. §6-38a to serve criminal process, issues concerning a State Marshal actually serving criminal process in Connecticut are largely hypothetical. It is unlikely under Connecticut's current criminal justice system that a prosecutorial authority or a police department would actually utilize a State Marshal for service of criminal process. In addition, please refer to part III of this opinion with respect to other laws that clearly limit the exercise of criminal law enforcement authority.

[7]A warrantless arrest is different from an arrest with an arrest warrant. It is also different from taking someone into custody on a capias. As noted in formal Opinion of the Attorney General #2000-010, even though a capias authorizes taking a person into custody, it is a civil rather than criminal process.

[8]This point marks another major departure from the former sheriff system in Connecticut where the Sheriff, Deputy Sheriffs and Special Deputy Sheriffs continued to have residual authority to enforce criminal laws, even if that authority had not customarily been exercised in practice for some time.

[9]Sheriffs and Deputy Sheriffs were also excluded from the application of the POTC statutes. Conn. Gen. Stat. §7-294d(f)(5). No such provision excludes State Marshals.

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Content Last Modified on 6/6/2005 3:28:58 PM

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Deceased Marshals Protocol

Date: 10/10/2001

Opinion Number: Informal Advice

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October 10, 2001

Mitchell R. Harris, Esq., Chairman
State Marshal Commission
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Hartford, CT 06103-3499

RE: REQUEST FOR ADVICE CONCERNING ACCOUNTS OF A DECEASED STATE MARSHAL

Dear Attorney Harris:

This letter responds to the State Marshal Commission's August 22, 2001, letter seeking advice concerning disbursement of funds, management of accounts and allocation of fees of a deceased State Marshal. Please note that while this letter represents the views of the undersigned it is *not* a formal Opinion of the Attorney General.

In this letter we are briefly addressing the following issues: who may complete service of executions that were commenced by the deceased State Marshal; allocation of fees; and the choice of one or more State Marshals to complete the service of executions that were commenced by the deceased State Marshal. We have also included some observations concerning the "audit" performed on the accounts of the deceased State Marshal.

1. Completion of Service of Executions

The State Marshal Commission has asked whether Conn. Gen. Stat. § 52-55(a)[1/] applies to service of wage executions. This statutory provision clearly applies to wage executions. A wage execution is clearly process. Service of a wage execution is commenced by serving the execution on the employer but is not completed until it is returned to court, satisfied (in full or in part) or unsatisfied, with an officer's return. Where the State Marshal who commenced service is not able to complete it due to the death of that State Marshal then any other proper officer may

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1/ "(a) If an officer to whom process is directed dies or is removed from office, or becomes physically incapacitated, or because of other good and sufficient reason is unable to complete service of the process, after he has commenced to serve it but before completing service, any other proper officer may complete service." Conn. Gen. Stat. § 52-55(a).

complete the service — administering collections and return to court in the case of a wage execution.

2. Allocation of Fees

Under Conn. Gen. Stat. § 52-261(a)(6) the officer serving an execution also levies a 10% fee. It is clear from the statute that the fee is only due "when the money is actually collected and paid over..." Accordingly, under the fee statute the deceased State Marshal would be entitled to the fees associated with actual collections that he administered before his death. Any such fees that were not yet disbursed from his trustee account would belong to his estate and should be turned over to the fiduciary of the estate.

Any lawful fees associated with collections administered by any other proper officer who completed service of the execution would belong to the officer who completes service. The provisions of Conn. Gen. Stat. § 6-38d[2/] would not bar the latter officer from collecting fees since they would be associated with work actually performed by the officer who took over service of the process — in the case of a wage execution this would be continuing to administer the collections on the execution and making return to court.

There is no statutory provision for providing any additional fee to the estate of an officer who commences service of an execution but dies before service is completed.[3/] Of course, the General Assembly could change this through legislation.

3. Choice of One or More State Marshals to Complete Service of Executions

While it is clear that "any proper officer" may complete service of process that a deceased State Marshal commenced, it is not entirely clear who gets to choose which particular proper officer or proper officers may be assigned particular process to complete. Since the statutes do not provide a clear answer, this is an area where the State Marshal Commission may wish to seek legislative clarification. We offer the following observations, however, recognizing that decisions

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2/ "No state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform." Conn. Gen. Stat. § 6-38d.

3/ This is very different from the situation where an officer's term of office expires prior to completing service. In such a case the former officer is specifically empowered by Conn. Gen. Stat. § 52-55(b) to complete service. In this circumstance the former officer could still collect the lawful fees associated with the service since the former officer is specifically empowered to complete service. To contrast this with the situation of a deceased State Marshal there is simply no authority for the fiduciary of the estate of the deceased State Marshal to complete service, and accordingly no authority to collect any fees associated with such completion of service.

need to be made with respect to this particular deceased State Marshal's accounts long before legislative action is possible, and also recognizing that some proper officer needs to take over each and every one of the deceased State Marshal's accounts.

First, the decision of which particular proper officer to employ is one that is typically made in Connecticut by the party who needs a serving officer or such party's duly authorized representative (typically the party's attorney) in the first instance. If that proper officer dies and the party who first arranged for the use of a serving officer (in this case the judgment creditor or attorney) selects another proper officer to complete the service, that action should generally be sufficient. This could well mean that different serving officers will take over different accounts depending on the choices made by the parties. It also may not address the needs of *pro se* parties who are not sufficiently familiar with the legal system to know how to go about doing this.

There is also the question of what authority the State Marshal Commission has to select the proper officers to complete service on the deceased State Marshal's accounts. The Commission's authority in the situation where a State Marshal has passed away is set forth in Conn. Gen. Stat. § 6-38e.[4/] The Commission is required to appoint a qualified individual to oversee and audit the records and accounts of the deceased State Marshal as well as rendering an accounting. It appears that this authority is designed both to get an accounting and to ensure that no one absconds with funds held by the deceased State Marshal. However, the authority to appoint a qualified individual to oversee accounts could be read sufficiently broadly to enable the Commission itself to appoint a proper officer to complete service on the deceased State Marshal's open executions. Ideally this ambiguity should be resolved by the legislature and we strongly recommend that the Commission seek clarification of this question through legislation. However, in the absence of any other selection of a proper officer to complete service of any executions, this authority could be read to authorize the State Marshal Commission to make the selection.

4. Preliminary Observations Concerning "Audit" of Accounts of Deceased State Marshal

Attached to the State Marshal Commission's August 22, 2001 letter is what was described as the "preliminary report" of the accounting firm hired by the State Marshal Commission to audit the records of the deceased State Marshal. We have some brief observations concerning that report.

4/ "The State Marshal Commission shall periodically review and audit the records and accounts of the state marshals. Upon the death or disability of a state marshal, the commission shall appoint a qualified individual to oversee and audit the records and accounts of such state marshal and render an accounting to the commission." Conn. Gen. Stat. § 6-38e.

First, with respect to audits actually performed under the State Marshal Commission's audit authority, the Commission should ensure that the issues raised in the Preliminary Recommendations of the Attorney General and Auditors of Public Accounts, dated July 10, 2001, are included within the scope of the audit.[5/] This does not appear to have been done here.[6/]

Next, the assets and liabilities should be broken down in more detail or explained further. This should include at least the following:

1. The court executions receivable line ($26,587) should either be broken down in more detail or explained further in a note, or both. Is this receivable amount the face value of outstanding executions, the face value plus projected officer fees, or something else? With respect to the face value of outstanding executions there is a risk that not all of it will be collected (i.e. judgment debtor ceasing to be employed, funds in account levied upon not being sufficient to satisfy execution, or similar reasons). At the very least this should be reflected in a note.
2. The due to plaintiffs line ($24,202) should either be broken down in more detail or explained further in a note, or both. The amounts that are due from funds currently on hand (a portion of the $977?) should be reported separately from amounts that may become due from future anticipated collections. In addition, as noted above, there is a risk that not all of the funds will be collected which should certainly be reflected in the report.
3. The due to State Marshal line ($3,362) should either be broken down in more detail or explained further in a note, or both. The amounts that are due from funds currently on hand (a portion of the $977?) should be reported separately from amounts that may become due from future anticipated collections. In addition, as noted above, there is a risk that not all of the funds will be collected which should certainly be reflected in the report. Finally, the funds due to State Marshal line should be itemized (i.e. fees associated with serving executions, fees associated with tax warrants, fees associated with serving other process, and any other categories of expenses).
4. The due to State Marshal line ($3,362) is considerably more than 10% of the due to plaintiffs line ($24,202). Our understanding from your letter is that the deceased State Marshal's accounts consist primarily of wage executions. Since the fee for an execution is generally 10% of the actual collections, this is clearly an area that needs to be examined and explained further.

5/ We recognize that an audit upon the death of a State Marshal could well be different from an audit of a State Marshal who is continuing in business.

6/ While we recognize that the Preliminary Recommendations of the Attorney General and the Auditors of Public Accounts may not have been available at the time the accounting firm was engaged they can still be taken into account before a final report of the auditors is issued.

If you have any further questions about this matter please feel free to give me a call. Thank you for your attention.

Very truly yours,

Michael J. Lanoue
Assistant Attorney General

MJL/bjo

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Execution Powers End With Appointment

Date: 12/06/2001

Opinion Number: 2001-025

CT Attorney General

2001-025

Attorney General's Opinion

Attorney General, Richard Blumenthal

December 6, 2001

Mitchell R. Harris
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Chairman Harris:

You have requested a formal opinion of the Attorney General as to "whether a former Deputy Sheriff, former High Sheriff or a State Marshal who resigns from his appointment may continue to collect wage executions they had served while acting in their official capacities." As discussed below, the answer to your inquiry is no.

The provisions of Conn. Gen. Stat. §6-38a give State Marshals "authority to provide legal execution and service of process ...". Prior to the enactment of Public Act 00-99, High Sheriffs and Deputy Sheriffs had such authority.[1]

Wage executions are governed by Conn. Gen. Stat. §52-361a. Subsection (d) of that statute provides:

> (d) **Levy.** The levying officer shall levy on all earnings which are due or become due to the judgment debtor to the extent specified in the wage execution, until the judgment is satisfied, or the execution is modified or set aside, by serving the employer with two copies of the wage execution, the required notice of rights and the claim forms. On receipt thereof, the employer shall forthwith deliver a copy thereof to the judgment debtor, or mail such copy postage prepaid to the judgment debtor at his last-known address. On service of the execution on the employer, the execution shall automatically be stayed for a period of twenty days and shall thereafter immediately become a lien and continuing levy on such portion of the judgment debtor's earnings as is specified therein, provided if a claim is filed in accordance with subsection (d) of section 52-361b within twenty days of such service on the employer, the stay shall continue until determination of the claim.

The term "levying officer" means "a state marshal or constable acting within his geographical jurisdiction or in IV-D cases, any investigator employed by the Commissioner of Social Services." Conn. Gen. Stat. §52-350a(12). Public Act 00-99, §114 amended Conn. Gen. Stat. §52-350a(12) by substituting state marshal for "sheriff" and "deputy sheriff." Thus, sheriffs and deputy sheriffs no longer are deemed "levying officers" for the purpose of Conn. Gen. Stat. §52-361a(d). Further, anyone who was a "state marshal" who no longer holds such appointment is not a "levying officer" for wage execution purposes. Since the statutory authority to execute on wages is limited to officers identified in Conn. Gen. Stat. §52-350a(12), sheriffs, deputy sheriffs and former state marshals have no authority to exercise the powers enumerated in Conn. Gen. Stat. §52-361a except insofar as they initiated a wage execution prior to the expiration of their term of office and such execution is not completed.

Conn. Gen. Stat. §52-55 provides:

> **Sec. 52-55. When completion of service by another officer allowable.** (a) If an officer to whom any process is directed dies or is removed from office, or becomes physically incapacitated, or because of other good and sufficient reason is unable to complete service of the process, after he has commenced to serve it but before completing service, any other proper officer may complete service.
>
> (b) If the term of office of any officer to whom any process is directed and who has commenced to serve it expires before the completion of service, he may nevertheless proceed to complete service in the same manner and with the same effect as if he still remained in office.

Since your question asks whether a former High Sheriff, Deputy Sheriff, or State Marshal who resigns may continue to collect wage executions, the provisions of subsection (b) above would not apply since that subsection refers to an officer whose term of office has expired. Since a resignation is a form of voluntary removal from office, it is our opinion that subsection (a) is applicable. Thus, "any other proper officer" should complete the execution, not the officer who has removed himself from office.

While it is clear that "any proper officer" may complete service of process that another officer or State Marshal commenced, in those situations outlined above, the statutes do not specifically determine who gets to choose which particular proper officer or proper officers may be assigned particular process to complete. Since the statutes do not provide a clear answer, this is an area where the State Marshal Commission may wish to seek legislative clarification. We offer the following observations. First, the decision of which particular proper officer to employ is one that is typically made in Connecticut by the party who needs a serving officer or such party's duly authorized representative (typically the party's attorney) in the first instance. If that proper officer dies and the party who first arranged for the use of a serving officer (in this case the judgment creditor or attorney) selects another proper officer to complete the service, that action should generally be sufficient. This could well mean that different serving officers will take over different accounts depending on the choices made by the parties. It also may not address the needs of *pro se* parties who are not sufficiently familiar with the legal system to know how to go about handling this situation.

There is also the question of whether the State Marshal Commission has the authority to select the proper officers to complete service when an officer resigns, if the party has not done so. There is no clear legislative enactment answering these questions. The Commission does have certain authority in the situation where a State Marshal has passed away or become disabled, which is set forth in Conn. Gen. Stat. §6-38e.[2] In that case, the Commission is required to appoint a qualified individual to oversee and audit the records and accounts of the deceased or disabled State Marshal and render an accounting. It appears that this authority is designed both to get an accounting and to ensure that no one absconds with funds held by the deceased State Marshal. The authority to appoint a qualified individual to oversee accounts may be read broadly to enable the Commission itself to appoint a proper officer to complete service on the deceased or disabled State Marshal's open executions, if the party has not chosen another State Marshal to do so. Likewise, in the absence of clear direction, the authority of the Commission could be read to grant such authority in other cases such as those resulting in disability, removal and resignation. Ideally, this ambiguity should be resolved by the legislature and we strongly recommend that the Commission seek clarification of this question through legislation. However, in the absence of any other selection of a proper officer to complete service of any executions, and to ensure that all executions are served in a timely manner, we believe the authority given to the State Marshal Commission in this section is sufficient to make the selection.

We are aware from discussions with your staff that there is concern regarding Conn. Gen. Stat. §6-38d. The question is whether that statute implies that only the officer who initiated the wage execution may continue collecting wage executions they initiated. Conn. Gen. Stat. §6-38d

provides:

> No state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform.

Under Conn. Gen. Stat. §52-261(a)(6) the officer serving an execution also levies a 10% fee. It is clear from the statute that the fee is only due "when the money is actually collected and paid over ...". Accordingly, under the fee statute the officer serving an execution would be entitled only to the fees associated with actual collections that he administered. Any lawful fees associated with collections administered by any other proper officer who completed service of the execution would belong to the officer who completes service. The provisions of Conn. Gen. Stat. §6-38d would not bar the latter officer from collecting fees since they would be associated with work actually performed by the officer who took over service of the process.

We conclude that the answer to your question of whether High Sheriffs, Deputy Sheriffs or State Marshals who have resigned may continue to collect on wage executions they initiated, must be answered in the negative.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Michael J. Lanoue
Assistant Attorney General

RB/MJL/bjo

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[1]Public Act 00-99 repealed Conn. Gen. Stat. §6-31 which authorized High Sheriffs to execute all lawful process directed to them. That Act amended Conn. Gen. Stat. §6-32, which had authorized Deputy Sheriffs to receive each process directed to them and to execute such process. Public Act 00-99, §§129, 153, 154.

[2]"The State Marshal Commission shall periodically review and audit the records and accounts of the state marshals. Upon the death or disability of a state marshal, the commission shall appoint a qualified individual to oversee and audit the records and accounts of such state marshal and render an accounting to the commission." Conn. Gen. Stat. §6-38e.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Restraining Orders Assignment;
Powers of State Marshal Commission

Date: 12/20/2001

Opinion Number: 2001-028

and return of service to the court. The court clerk's office advises each applicant that a state marshal will be present in the courthouse from 12:30 to 1:00 and from 4:30 to closing Monday through Friday to meet with the applicant, to take the court order and to discuss the procedure for serving the court order. Each applicant is also told that the use of the on-call state marshal is not mandatory. A list of state marshals authorized to make service is provided. Each applicant is also given two forms intended to inform the applicant about the process and to provide information from the applicant to the state marshal so that service can be made.

The implementing procedure states the responsibility of the state marshals for compliance.

The on-call State Marshal shall be responsible for the following:

> a) complying with the Standard Rotation System for the Service of Restraining Orders...
>
> b) ensuring that the applicant is made aware of the procedure for service of a restraining order,
>
> c) ensuring the service of the restraining order in a timely manner.
>
> d) providing a copy of each restraining order and the 'Police Department Confirmation Sheet'... to the local police department immediately after service to the respondent.
>
> e) ensuring the proper return of service to the Court Clerk's office.

The standard rotation system for the service of restraining orders referenced in the implementing procedure states that

> [a]ll State Marshals will be assigned to serve restraining orders through a rotation schedule within their jurisdiction.
>
> 1) All State marshals will be assigned to the rotation schedule.
>
> If a State Marshal is unable to comply with their assignment, it is their responsibility to obtain coverage from another Marshal who will be available to serve the orders.
>
> 2) The State Marshal who has obtained a substitute for his/her assignment MUST verbally notify both the Court Clerk's office liaison and the Administrative Office of the State Marshal Commission forty-eight hours in advance of any change. Written notification must be made to the Administrative Office within one week subsequent to the date of the change stating the reason the change was necessary.
>
> 3) The duration of the assignment will be one Week. The week will run from Wednesday through Tuesday.
>
> 4) There will be two State Marshals assigned for the week to be responsible for a 12:30 to 1:00 and a 4:30 until closing appearance at the courthouse. A marshal responsible for the 12:30 to 1:00 p.m. appearance may contact the Court Clerk's office designee sufficiently in advance of the reporting time to determine whether any restraining orders have been issued to determine whether their presence is required. A Marshal responsible for the 4:30 closing appearance must report to the courthouse to cover the late issuance of any orders. Marshals will be required to remain at the courthouse if they are notified that an order remains to be issued.

5) The State Marshal is 'on-call' 24 hours a day/7 days a week for the duration of the assignment.

6) The Administrative Office of the State Marshal Commission will issue the rotation schedule and will coordinate the distribution and monitoring of the schedule with the Court Clerk's office liaisons.

Your request for our opinion was prompted by a letter the Commission received from an attorney representing a state marshal, which claimed that the Commission is without authority to compel state marshals to be present in the courthouse at any time without providing fair financial remuneration to them for the services rendered. You have asked for our opinion on this issue.

II. Authority to Implement the Procedure

The Commission's statutory authority to implement the procedure in question is clear from the terms of § 6-38b, as amended by Public Act No. 01-9, Section 8, of the June Special Session, which provides in relevant part: "[t]he commission shall be responsible for the equitable assignment of restraining orders to the state marshals in each county and ensure that such restraining orders are served expeditiously." The procedure which the commission has adopted to implement the provisions of Public Act No. 01-9 is a standard with which state marshals must comply. The Commission has the authority to establish professional standards under Conn. Gen. Stat. § 6-38b(f).

The terms of the restraining order policy are clearly consistent with the legislative intent expressed in Public Act 01-9, codified at Conn. Gen. Stat. § 6-38b(g). As required by the Act, the procedure established by the Commission ensures that all restraining orders are served promptly by having them picked up from court twice a day, and that the assignment of the work to the state marshals is equitable by spreading the assignments among all the state marshals on a rotating basis.

Clearly, then, the Commission has the authority to establish this procedure, and the state marshals are required to follow it or be subject to removal under the terms of Conn. Gen. Stat. § 6-38b(g), as amended by Public Act 01-9.

III. State and Federal Law

You further ask whether the failure of the state to provide remuneration to state marshals for the period they are required to be at the courthouse while awaiting the assignment of restraining orders violates any state or federal law. We conclude that it does not.

A. State Law

The terms of the General Statutes address claims for the payment of wages by the state. Conn. Gen. Stat. § 31-71a defines the state as an employer subject to the state's wage laws in connection with its employees.[1] The terms of the General Statutes make clear that state marshals are independent contractors and therefore are not the beneficiaries of the state's wage laws. A state marshal has the authority to "provide legal execution and service of process as an independent contractor compensated on a fee for service basis." Conn. Gen. Stat. § 6-38a(a) (emphasis added). The lack of state employee status is emphasized at Conn. Gen. Stat. § 6-38b (h) which states that "no person may be a state marshal and a state employee at the same time." The status of state employee and independent contractor are mutually exclusive. Tianti v. William Raveis Real Estate, Inc., 231 Conn. 690, 698 (1995). The objective in determining employee status is to discern legislative intent through the language of the statutes. Id.

The terms of the General Statutes do not require payment by the state due to compliance with the implementing procedure. Rather, they contemplate payment by the individual for whom service is made. Had the General Assembly intended state marshals to be paid by the state in regard to serving restraining orders it could have so provided. See Federal Aviation Administration v. Administrator, 196 Conn. 546, 551 (1985).

We conclude that state wage laws do not apply to state marshals.

B. Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) states that its wage and hour provisions apply only to "employers." 29 U.S.C. § 203(e). The term "employee" is defined as "any individual employed by an employer." Id. To employ means "to suffer or permit to work." 29 U.S.C. § 203(g). Although as discussed above, state marshals are denominated "independent contractors" by statute; see Conn. Gen. Stat. § 6-38a(a); the FLSA does not define the term for use in the Act.

Federal courts for purposes of the Act determine whether a worker is an employee or an independent contractor by the application of factors termed the "economic realities test."

The factors of this test were recited in a 1996 attorney general opinion as follows:

1. the extent to which the services performed are an integral part of the employer's business;
2. the extent of the worker's investment in equipment and facilities;
3. the nature and degree of control exercised by the 'employer';
4. The 'employee's' opportunity for profit and loss;
5. the amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise; and
6. the permanency and duration of the relationship between the worker and the 'employer.'

Rutherford Food Corp. v. McComb, 331 U.S. 722, 67 S.Ct. 1473, 91 L.Ed. 1772 (1947); Bartels v. Birmingham, 332 U.S. 126, 67 S.Ct. 1547, 91 L.Ed. 1947 (1947)(Social Security Act); Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28, 81 S.Ct. 933, 6 L.Ed.2d 100 (1961) (FLSA); Real v. Driscoll Strawberry Associates, Inc., 603 F.2d 748 (9th Cir. 1979) (FLSA); Brock v. Lauritzen, 624 F.Supp. 966 (E.D. Wisc. 1985)(FLSA).

96 Conn. Op. Atty. Gen. (April 19, 1996), 1996 Conn. Ag. Lexis 16. An additional factor cited by courts is whether the worker is dependent upon the alleged employer for his continued employment in that line of business. Halferty v. Pulse Drug Co., 821 F.2d 261 (5th Cir. 1987). The totality of the circumstances governs in making independent contractor determinations. No one factor is determinative. Courts examine the "circumstances of the whole activity" or relationship. Rutherford Food Corp., 331 U.S. at 730.

Applying these factors to the present issue we conclude that state marshals are independent contractors under the FLSA.

(1) The extent to which the services performed are an integral part of the alleged employer's business

Services performed by the state marshals in providing legal execution and service of process are not an integral part of the state's business. State marshal services, with the exception of when the state is in need of service of process, are not performed for the state. The economic reality is that those in need of service of process are those for whom the state marshals work. It is the

duty of the state marshal to make service of all civil process delivered to him. Conn. Gen. Stat. § 6-32.

(2) The extent of the worker's investment in equipment and facilities

State marshals make investment in their own material and equipment in varying degrees, according to information provided by your administrative director. An automobile is a practical necessity, as is record keeping equipment such as filing cabinets. The use of computers, fax machines, and cell phones is common. Some state marshals have office space with clerical staffs. All necessary equipment is provided by the state marshals. The state provides no equipment, and gives state marshals only a badge and identification card.

(3) The degree and nature of control exercised by the alleged employer

The employment relationship determination under the FLSA turns upon the degree of the right to control the manner in which the work is to be performed. Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1382 (3rd Cir. 1985).

The General Statutes do not give the state the right to control the work of a state marshal. The General Statutes set standards as to the end result, not as to how the work of a state marshal is to be done. Service of process is to be executed promptly. Conn. Gen. Stat. § 6-32. Restraining orders are to be served expeditiously. Conn. Gen. Stat. § 6-38b(g).

The policy and implementing procedure of the State Marshal Commission also do not demonstrate the right to control. State marshals are not directed by the State Marshal Commission as to how to serve restraining orders or how to discuss the procedure for making service with the person for whom service is made. They are told to be available in the courthouse and on call periodically in order to fulfill their duty to serve restraining orders expeditiously.

The absence of control is similar to that for attorneys. State marshals must appear in court and be on call to fulfill their duties. Attorneys must appear in court as officers of the court to fulfill their duties to their clients. Conn. Gen. Stat. § 51-84. Both state marshals and attorneys work for private individuals by whom they are paid. Each state marshal determines his own means and methods of making service of process. Each attorney determines how to best represent his client.

The state's right to remove a state marshal from office for cause after a hearing is consistent with the absence of the right to control. Conn. Gen. Stat. § 6-38b(j). A state marshal in such an instance is not being discharged by the state from his work, but prohibited from continuing in his office for the protection of the public.

(4) The worker's opportunity for profit or loss

State marshals have the potential for financial profit or loss. They are paid by their private clients for whom they make service, not by the state. No payment is made to them if service of process is unsuccessful. They expend money in terms of travel, record keeping and other expenses related to their work. They must purchase personal liability insurance. Conn. Gen. Stat. § 6-30a. They are liable for double the amount of damages to an aggrieved party for failing promptly to execute and return service of process or for making a false return. Conn. Gen. Stat. § 6-32. They are liable to pay interest at the rate of five per cent per month on money collected that is not paid to a person authorized to receive it in the required time. Conn. Gen. Stat. § 6-35. The manner in which they organize, operate and assume the risk of being a state marshal determines whether and to what extent they are financially successful. Profit is the gain realized from a business over and above its expenditures. Brock v. Lauritzen, 624 F. Supp. 966 (E.D. Wisc. 1985), aff'd, 835 F.2d 1529 (7th Cir., 1988), cert. denied, 488 U.S. 898 (1988), reh. denied, 488

U.S. 987 (1988).

(5) The amount of initiative, skill, judgment or foresight required for the success of the claimed independent enterprise

This factor is indicative of independent contractor status, although to a lesser degree than most of the others. State marshals need initiative, skill, judgment and foresight in order to be successful, and must organize, operate and assume the risk of their work. Their proficiency in making service of process will determine the success and profitability of their operation. Courts consider specialized skills to be relevant in determining whether workers are employees or independent contractors. Bonnetts v. Arctic Express, 7 F. Supp. 2d 977, 981 (SD Ohio 1998).

(6) The permanency and duration of the relationship between the worker and the alleged employer

State marshals have permanency with respect to their office, but not as state employees. State marshals can be removed from their offices only for cause after due notice and a hearing. Conn. Gen. Stat. § 6-38b(j). Yet, the right to hold office does not impart employment status. It only indicates that a state marshal is fulfilling his obligations as an office holder. A fifty year member of the bar, licensed to practice law in the state, does not acquire employment status with the state as a result of compliance with the statutory requirements for the practice of law.

(7) Dependency on the alleged employer for continued employment in that line of business

State marshals are dependent upon the members of the public for whom they make service of process for further work in their field. Good work will presumably lead to further assignments by those who retained their services and due to word of mouth recommendations. The proper test of economic dependence is whether the worker is dependent on the alleged employer for his continued employment in that line of business. Halferty v. Pulse Drug Co., 821 F.2d 261 (5th Cir. 1987). The touchstone of economic reality in analyzing possible employment relationships for purposes of the FLSA is dependency. Weisel v. Singapore Joint Venture, Inc., 602 F.2d 1185 (5th Cir. 1979).

The totality of the circumstances demonstrates that state marshals are not state employees for the purpose of the FLSA. They work for the public and are subject to the requirements of state law in order to maintain their offices as state marshals. In our view, there is no valid argument to be made that the state is subject to the FLSA as an employer of state marshals, and is therefore not required to pay them for coming to the courthouse for a short period on a rotating basis to pick up restraining orders and explaining service procedures to the person retaining them to make service of the order.

C. The Thirteenth and Fourteenth Amendments to the United States Constitution

In his letter to the Commission, the private attorney complaining about the new procedure maintains that the Commission's policy and procedure for restraining orders violate the Thirteenth and Fourteenth Amendments of the United States Constitution. The former prohibits involuntary servitude within any state. The latter prohibits any state from depriving any person of life, liberty or property without due process of law and from denying any person within its jurisdiction the equal protection of the laws. We conclude that there are no such constitutional violations.

The state marshals have no reasonable claim as to a Thirteenth Amendment violation. A state marshal holds office voluntarily. No one is required to fulfill the duties of a state marshal against his or her will. Any state marshal who considers the conditions of office to be onerous can resign.

Similarly, we see no equal protection violation. An equal protection claim involves a two step analysis. A statutory classification is justified only by a compelling state interest if it impinges upon an inherently suspect class or affects a fundamental personal right. State Management Association of Connecticut v. O'Neill, 204 Conn. 746, 750 (1987). Otherwise a statute is consistent with equal protection rights if it bears a reasonable relation to a legitimate state interest. Id.

The strict standard of a compelling state interest is not applicable. State marshals are not an inherently suspect class. A claimed right to payment in return for fulfilling the conditions of office is not a fundamental constitutional right. Such a right is not explicitly or implicitly guaranteed by the Constitution. Such rights include First Amendment rights explicitly provided by the Constitution, the right to travel interstate found implicit in the Constitution and the right to vote. Id., at 751. The key to determining whether a right is fundamental is assessing whether it is explicitly or implicitly guaranteed by the Constitution. Id.

The State Marshal Commission's policy and procedure satisfy the equal protection standard in that they bear a reasonable relation to a legitimate state interest. The state's interest is that restraining orders be assigned equitably among the state marshals and that they be served expeditiously for the protection of the public. The policy and procedure promote the state's interest by dividing the responsibility for the service of restraining orders among the state marshals and by setting standards for expeditious service. The requirement that state marshals come to the courthouse on a rotating basis for one half hour to pick up the orders is a necessary incident to service for which the marshals are paid their fees by their clients, and does not further require payment by the state.

In like fashion, the state marshals do not have a valid claim as to a deprivation of due process. The analysis here is the same as with the equal protection issue. The State Marshal Commission's policy and provision accomplish a legitimate purpose in a fair and reasonable way. The legitimate purpose is to provide for the expeditious service of restraining orders. The equitable assignment of the restraining orders among the state marshals and the requirements to appear periodically at the courthouse to pick up orders for service and discuss the procedures for serving them, to make timely service, to notify the police and to ensure return of service to the court are fair and reasonable ways to achieve that legitimate purpose. In the absence of a violation of a fundamental right, a party bears a heavy burden of proving that a challenged policy has no reasonable relationship to any legitimate state purpose and that the party has suffered a specific injury as a result of the policy's enforcement in order to succeed on a substantive due process claim. Campbell v. Board of Education of the Town of New Milford, 193 Conn. 93, 104-05 (1984).

We conclude that the State Marshal Commission is authorized to establish and implement its policy and procedure for the service of restraining orders by state marshals. Payment to the state marshals for compliance with the State Marshal Commission policy and procedure is not required by either state or federal law.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Thadd A. Gnocchi
Assistant Attorney General

RB/TAG/dh
Attachment

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[1]The federal Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 et seq., to be discussed below, also applies to the state as an employer. 29 U.S.C. § 203(e). Congress has the authority to impose the FLSA on state government. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985). The terms of the General Statutes may nevertheless apply in spite of federal coverage if state law provisions are more beneficial to the worker than those of the FLSA. Davenport Taxi, Inc. v. State Labor Commissioner, 164 Conn. 233, 240 (1973.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: State Marshal Cannot Be A State Employee

Date: 01/08/2002

Opinion Number: Informal Advice

RICHARD BLUMENTHAL
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860 808-5340

Office of The Attorney General
State of Connecticut

January 8, 2002

Mitchell R. Harris, Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

RE: REQUEST FOR ADVICE RE: STATE MARSHALS

Dear Attorney Harris:

You have asked for our advice regarding Public Act 00-99, section 8(h), which provides that "[e]xcept as provided in section 142 of this act, no person may be a state marshal and a state employee at the same time." Specifically, you have asked whether:

1) All individuals who are state marshals as of December 1, 2000 are precluded from holding any concurrent state employment regardless of their date of appointment or by whom they are appointed;

2) a) State marshals appointed under sections 142(a) through 142 (c) of PA 00-99 are exempt from this prohibition;

b) This provision refers to a prohibition only against being a state marshal and a judicial marshal and, if so how shall it be interpreted relative to the different dates of appointment cited above;

3) Only state marshals appointed subsequent to December 1, 2000 would be restricted by this provision.

For reasons explained below, our opinion is that all individuals who are state marshals as of December 1, 2000 or are appointed on or after December 1, 2000 are precluded from holding concurrent state employment, regardless of the date of appointment or by whom they were appointed. Further, we conclude that this prohibition applies to all state employment not simply employment as a judicial marshal.

Public Act 00-99, An Act Reforming The Sheriff System, eliminated the position of deputy sheriff and created the position of "state marshal" effective December 1, 2000 and subject to the approval by the voters of a constitutional amendment eliminating county sheriffs. Section

7 of the Act (now codified as Conn. Gen. Stat. §6-38a) defines the term "state marshal" to mean "a qualified deputy sheriff incumbent on June 30, 2000, under section 6-38 of the general statutes, as amended by this act, or appointed pursuant to section 8 of this act who shall have authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38 of the general statutes, as amended by this act, as an independent contractor compensated on a fee for service basis, determined, subject to any minimum rate promulgated by the state, by agreement with an attorney, court or public agency requiring execution or service of process." Section 8 of the Act (codified as Conn. Gen. Stat. §6-38b), which was effective on April 27, 2000, created the State Marshal Commission and authorized the Commission to fill "...any vacancy in the position of state marshal in any county as provided in section 6-38, as amended by this act...subject to the application and investigation requirements of the commission." P.A. 00-99, §8(g). Section 8(h) of the Act provides that "[e]xcept as provided in section 142 of this act, no person may be a state marshal and a state employee at the same time." Section 142 of the Act provides as follows:

> Sec. 142. (NEW) (a) Notwithstanding the provisions of section 6-38 of the general statutes, until the appointment of members of the State Marshall Commission under section 8 of this act, the Chief Court Administrator is authorized to appoint as a state marshal any eligible individual who applies for such a position. For purposes of this section "eligible individual" means an individual who was a deputy sheriff on May 31, 1999, who had served as a deputy sheriff for a period of not less than four years and who has submitted an application to the Chief Court Administrator on or before June 30, 2000.
>
> (b) (1) Any deputy sheriff serving as a deputy sheriff on the effective date of this act shall notify the Chief Court Administrator on or before June 30, 2000, of the desire of such deputy sheriff to be appointed as a state marshal.
>
> (2) Any deputy sheriff performing court security, prisoner custody or transportation services on the effective date of this act who desires to perform such functions as a judicial marshal, or desires to be appointed as a state marshal, shall so notify the Chief Court Administrator on or before June 30, 2000.
>
> (3) The Chief Court Administrator shall notify, in writing, the State Marshal Commission of the decisions of the deputy sheriffs pursuant to subdivisions (1) and (2) of this subsection.

> (c) For purposes of the State Marshal Commission filling any vacancy in the position of state marshal in any county in accordance with subsection (g) of section 8 of this act, nothing in subsection (a) of this section shall be construed to authorize the State Marshal Commission to fill a vacancy in any county if the total number of state marshals in such county is equal to or exceeds the number allowed under section 6-38 of the general statutes, as amended by this act.

Thus, the legislature created three categories of state marshals: qualified deputy sheriff incumbents on June 30, 2000, whose appointments as state marshal were effective on December 1, 2000; marshals appointed by the Commission to fill vacancies in accordance with §8 of P.A. 00-99, effective December 1, 2000; and marshals appointed by the Chief Court Administrator in accordance with §142 of P.A. 00-99, from April 27, 2000, the effective date of §142, until December 1, 2000. [1/]

Section 142 does not expressly provide an exception to the general rule in Section 8(h) of the Act prohibiting a person from being a state marshal and a state employee at the same time and the purpose and meaning of that exception is unclear. Nor does the legislative history of the statute contain any relevant discussion of the issue that would clarify the meaning of the exception referred to in §8(h). However, in response to your first and third questions, we see nothing in the Act suggesting that the exception applies to any individuals who are state marshals as of December 1, 2000, regardless of their date of appointment or by whom they were appointed, or that only state marshals appointed subsequent to December 1, 2000 would be restricted by this provision. With regard to your second question, we also see nothing in the Act to support a conclusion that the state marshals appointed by the Chief Court Administrator under §142 are exempt from the prohibition (at least after December 1, 2000) or that the prohibition is limited to concurrent employment as a state marshal and a judicial marshal.

Accordingly, we answer your questions as follows:

1. Yes 2(b). No

2(a). No 3. No

1/ The legislature later amended section 142(a) of P.A. 00-99 by adding that " [a]ny eligible individual appointed prior to December 1, 2000, shall have the same powers, duties and liabilities as a deputy sheriff from the date of such individual's appointment until December 1, 2000." See Public Act 00-210, §2(a).

This opinion represents the views of the undersigned Assistant Attorney General and is not intended to be a formal opinion of the Attorney General.

Very truly yours,

Margaret Q. Chapple
Assistant Attorney General

mqc

State of Connecticut
STATE MARSHAL COMMISSION

Mitchell R. Harris, Esquire
Chairman

Patricia C. Lempicki
Administrative Director

January 22, 2001

The Honorable Richard Blumenthal
Attorney General of the State of Connecticut
55 Elm Street
Hartford, CT 06106

Dear Attorney Blumenthal:

On behalf of the State Marshal Commission, I wish to request an Attorney General's Opinion of Section 8 (h) of Public Act 00-99 that states "Except as provided in section 142 of this act, no person may be a state marshal and a state employee at the same time." Although, on its face, the language appears to exclude a state marshal from any concurrent state employment, the reference to section 142 clouds the issue. We therefore request an opinion as to whether

1) All individuals who are state marshals as of December 1, 2000 are precluded from holding any concurrent state employment regardless of their date of appointment or by whom they were appointed;
2) a) state marshals appointed under section 142 (a) through 142 3 (c) are exempt from this prohibition;
   b) this provision refers to a prohibition only against being a state marshal and a judicial marshal and, if so, how shall it be interpreted relative to the different dates of appointment cited above;
3) only state marshals appointed subsequent to December 1, 2000 would be restricted by this provision.

This is a matter of some urgency, as it appears that there may be individuals so situated. Questions in regard to this issue may be addressed to Patricia Lempicki, Administrative Director at 860-566-7109.

Sincerely,

Mitchell R. Harris
Chairman

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Failure to Pay Insurance Sanctions

Date: 01/08/2002

Opinion Number: Informal Advice

RICHARD BLUMENTHAL
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Office of The Attorney General
State of Connecticut

January 8, 2002

Mitchell R. Harris, Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

RE: REQUEST FOR ADVICE RE: STATE MARSHALS

Dear Attorney Harris:

You have informally asked for our advice regarding the appropriate action that the State Marshal Commission may take against a state marshal who has failed to pay the annual fee required by June Sp. Sess. Public Act 01-11, §11(b), and has failed to provide the Commission with verification of his liability insurance coverage required by Conn. Gen. Stat. §6-30a. For reasons explained below, it is our opinion that the Commission may suspend or remove the marshal from his position for failure to comply with these statutory mandates, but only after providing him or her with due notice and a hearing.

Public Act 00-99, §7 created the position of "state marshal" and authorized duly appointed marshals to "provide legal execution and service of process in the counties in this state pursuant to section 6-38 as an independent contractor compensated on a fee for service basis...." Section 8 of that Act established a State Marshal Commission, whose duties include filling "[a]ny vacancy in the position of state marshal in any county as provided in section 6-38...." Section 6-30a requires "...each state marshal...to carry personal liability insurance for damages caused by reason of his tortious acts..." committed in the performance of the marshal's official duties, including "...negligent acts, errors or omission for which such state marshal may become legally obligated to any damages for false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, violation of property rights or assault and battery if committed while making or attempting to make an arrest or against a person under arrest...." In the June 2001 Special Session, the legislature enacted Public Act 01-11. Section 11 of that Act established a state marshal account and required that "[c]ommencing October 1, 2001, and not later than October first each year thereafter, each state marshal shall pay an annual fee of two hundred fifty dollars to the State Marshal Commission." The first $250,000.00 collected each fiscal year pursuant to the statute is credited to the state marshal account and is available for expenditure by the State Marshal Commission for its operating expenses. Neither of the public acts enumerates a sanction for marshals who fail to comply with these requirements.

We note that the State Marshal Commission Standards, which the Commission adopted pursuant to the provisions of Conn. Gen. Stat. §6-38b(f), contain two sections that appear to address this issue. Section 6.00(a) of those Standards requires a State Marshal to "comply with all federal, state and local laws, including all applicable state laws, rules of court and regulations concerning a State Marshal's duties." Clearly, the payment of the annual fee and maintaining personal liability insurance are requirements of the "state laws" referred to in §6-38b(f). Section 7.00(a)(10) authorizes the Commission to "...revoke a State Marshal's appointment when it determines, following an investigation and after notice and hearing that the State Marshal...failed to maintain the insurance required...." Thus, the Standards provide for a remedy for the failure to maintain personal liability insurance. Although the Standards do not contain a similar provision relating to the annual fee, section 7.00(a)(12) authorizes removal "for other good cause shown." As explained below, it appears that failure to pay the annual fee would constitute such "good cause".[1/]

The authority to perform the duties of a state marshal is somewhat analogous to the issuance of a license. It is well established that the failure to comply with certain mandatory requirements for obtaining or maintaining a license may constitute grounds for suspension or revocation of the license. (See e.g., Conn. Gen. Stat.§20-314 (requiring payment of annual renewal fee for real estate broker's license); §§20-305 and 306 (requiring payment of fee to obtain and renew license for professional engineer and land surveyor; §20-13c (authorizing the Connecticut Medical Examining Board to restrict, suspend or revoke the license or limit the right to practice of a physician...for...failure to maintain professional liability insurance or other indemnity against liability for professional malpractice...); §19a-88 (requiring payment of fee for renewal of certain health care provider licenses)). Likewise, the failure of a state marshal to comply with statutory mandates requiring payment of an annual fee and the carrying of personal liability insurance would justify, if not require, the Commission to order the marshal's suspension or removal from his position, pursuant to and in accordance with the provision of §6-38b(i) and the State Marshal Commission Standards cited above. This is especially so in light of the stated purposes of the fee (to cover the administrative costs of the State Marshal Commission) and the liability insurance (to insure the marshal against claims of tortious acts). Such removal or suspension can be accomplished, of course, only after providing the "due notice and hearing" required by §6-38b(i).

1/ The Commission may wish to amend its standards to specifically add the failure to pay the annual fee as a grounds for suspension or revocation of appointment. In addition, we note that while Section 7.00 is titled Suspension or Revocation of Appointment, subsection (a) lists the various grounds for revocation but does not contain a similar list of grounds for suspension. If the intent of the Standards is to authorize the Commission to impose suspensions of appointment as well as revocations, we recommend that the Commission amend the Standards accordingly.

This opinion represents the views of the undersigned Assistant Attorney General and is not intended to be a formal opinion of the Attorney General.

Very truly yours,

Margaret Q. Chapple
Assistant Attorney General

mqc

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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(860) 808-5340

Office of The Attorney General
State of Connecticut

January 8, 2002

Mitchell R. Harris, Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

RE: REQUEST FOR ADVICE RE: STATE MARSHALS

Dear Attorney Harris:

You have informally asked for our advice regarding the appropriate action that the State Marshal Commission may take against a state marshal who has failed to pay the annual fee required by June Sp. Sess. Public Act 01-11, §11(b), and has failed to provide the Commission with verification of his liability insurance coverage required by Conn. Gen. Stat. §6-30a. For reasons explained below, it is our opinion that the Commission may suspend or remove the marshal from his position for failure to comply with these statutory mandates, but only after providing him or her with due notice and a hearing.

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The authority to perform the duties of a state marshal is somewhat analogous to the issuance of a license. It is well established that the failure to comply with certain mandatory requirements for obtaining or maintaining a license may constitute grounds for suspension or revocation of the license. (See e.g., Conn. Gen. Stat.§20-314 (requiring payment of annual renewal fee for real estate broker's license); §§20-305 and 306 (requiring payment of fee to obtain and renew license for professional engineer and land surveyor; §20-13c (authorizing the Connecticut Medical Examining Board to restrict, suspend or revoke the license or limit the right to practice of a physician...for...failure to maintain professional liability insurance or other indemnity against liability for professional malpractice...); §19a-88 (requiring payment of fee for renewal of certain health care provider licenses)). Likewise, the failure of a state marshal to comply with statutory mandates requiring payment of an annual fee and the carrying of personal liability insurance would justify, if not require, the Commission to order the marshal's suspension or removal from his position, pursuant to and in accordance with the provision of §6-38b(i) and the State Marshal Commission Standards cited above. This is especially so in light of the stated purposes of the fee (to cover the administrative costs of the State Marshal Commission) and the liability insurance (to insure the marshal against claims of tortious acts). Such removal or suspension can be accomplished, of course, only after providing the "due notice and hearing" required by §6-38b(i).

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This opinion represents the views of the undersigned Assistant Attorney General and is not intended to be a formal opinion of the Attorney General.

Very truly yours,

Margaret Q. Chapple
Assistant Attorney General

mqc

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: AG Comments on Creation of Professional Standards SMC

Date: 01/11/2002

Opinion Number: Informal Advice

RICHARD BLUMENTHAL
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Office of The Attorney General
State of Connecticut

January 11, 2002

Mitchell R. Harris, Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

RE: STATE MARSHAL COMMISSION PROFESSIONAL STANDARDS

Dear Attorney Harris:

You have asked us to informally review for legal sufficiency the State Marshal Commission's Professional Standards, which were established pursuant to the provisions of Public Act 00-99, §8(f). We have reviewed those standards and make the following comments:

I. Qualifications

1. Section 1.00 (c) requires that the applicant "have resided in Connecticut for at least one year immediately preceding the date of application." Courts will generally not uphold residency requirements that restrict nonresidents from conducting business in another state. In Supreme Court of New Hampshire v Piper, 470 U.S. 274 (1985), the U.S. Supreme Court found that a court rule that limited bar admissions to state residents was unconstitutional. The court held as follows:

> Article IV, 2, of the Constitution provides that the "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This Clause was intended to "fuse into one Nation a collection of independent, sovereign States." Toomer v. Witsell, 334 U.S. 385, 395 (1948). Recognizing this purpose, we have held that it is "[o]nly with respect to those `privileges' and `immunities' bearing on the vitality of the Nation as a single entity" that a State must accord residents and nonresidents equal treatment. Baldwin v. Montana Fish & Game Comm'n, supra, at 383.

> Derived, like the Commerce Clause, from the fourth of the Articles of Confederation, the Privileges and Immunities Clause was intended to create a national economic union. It is therefore not surprising that this Court repeatedly has found that "one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." Toomer v. Witsell, supra, at 396.
>
> The Court has stated that "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute." Toomer v. Witsell, 334 U.S., at 396; see United Building & Construction Trades Council v. Mayor & Council of Camden, 465 U.S. 208, 222 (1984). The Clause does not preclude discrimination against nonresidents where (i) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective. Ibid. In deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of less restrictive means.

Thus, under the Privileges and Immunities Clause, the residency requirement may be invalid unless the Commission can demonstrate a substantial reason for it and a substantial relationship to a state objective, such as knowledge of the state.

2. Section 1.00 (d) requires that state marshals be at least 21 years of age. In order to protect this provision from a challenge under Conn. Gen. Stat. §46a-73, we suggest that the Commission might assert that the age requirement is a bona fide occupational qualification for the appointment for the reason that the position requires maturity and judgment commensurate with this age.

3. Section 1.00 (f) requires that the applicant must "be free from any mental or emotional disorder that may adversely affect performance as a State Marshal." In order to comply with state and federal statutes prohibiting discrimination against individuals with disabilities, that requirement should use the language in Conn. Gen. Stat. §46a-73; we recommend the following: "be free from any physical, mental or emotional disorder that would prevent the person from performing the duties of a State Marshal."

4. Sections 1.00 (i) and (j) deal with criminal convictions. Conn. Gen. Stat. §46a-80 prohibits discrimination in employment and in the issuance of licenses, permits, certificates or

registration solely because of a prior conviction of a crime. The statute further sets forth the factors that must be considered prior to disqualifying an applicant because of a prior conviction of a crime. We recommend that the Commission delete the above referenced sections from its standards and replace them with the following language based on the statutory language: "The Commission may deny appointment of an applicant because of a prior conviction of a crime if, after considering (1) the nature of the crime and its relationship to the job for which the person has applied; (2) information pertaining to the degree of rehabilitation of the convicted person; and (3) the time elapsed since the conviction or release, the Commission determines that the applicant is not suitable to be a state marshal. If a conviction of a crime is used as a basis for rejection of an applicant, the Commission shall notify the applicant in writing specifically stating the evidence presented and the reasons for the rejection. The Commission shall send a copy of the rejection by registered mail to the applicant."

5. In accordance with Conn. Gen. Stat. §6-38h, the Commission should include the following language in its standards: "Any person who pays, lends or contributes anything of value to a person who is an appointing authority for the Commission for political purposes is not eligible for appointment for 2 years."

II. Application

1. Section 2.00(8) requires the applicant to disclose his or her citizenship. It is unclear to us why this information is being requested, since U.S. citizenship is not included as a qualification for appointment. Requiring disclosure of this information may subject the Commission to claims of discrimination on the basis of nationality or ethnic origin. Instead the Commission may ask the applicant if he/she is an elector in the county in which the vacancy occurs in order to ensure compliance with §6-38b(g).

2. Section 2.00(9) requires the applicant to disclose his/her arrest record. This provision raises the same concerns articulated in our comments regarding sections 1.00(i) and (j) above. The Commission may ask the applicant to disclose both convictions and pending criminal charges, rather than his or her overall arrest record.

3. Section 2.00(12) should be modified to read "whether the applicant is free from any physical, mental or emotional disorder that would prevent him/her from performing the duties of a State Marshal." (see comments to section 1.00(f) above)

4. Section 2.00(d) authorizes the Commission to review the applicant's relevant medical records. The Commission is not qualified to make determinations of a medical nature and thus should not be reviewing medical records. The Commission may require an applicant to submit a letter from a physician stating whether he/she has any physical, mental or emotional disorder that

would prevent the person from performing the duties of a State Marshal or may require the applicant to undergo a physical/mental examination at the Commission's expense.

III. Examination

It is our understanding that the Commission is working with the Department of Administrative Services on a written examination for applicants for appointment as State Marshal and we therefore will not comment on the examination section.

IV. Training

1. Section 4.00(a) provides that the Commission shall publish a manual providing information on the duties and responsibilities of State Marshals. This section should list the individuals to whom the manual will be distributed.

V. Appointment

1. Sections 5.00 (a)(4) and (5) reference public acts that have now been codified. The cite to the general statutes should be used. (Section 127 is now Conn. Gen. Stat. §6-39; section 128 is Conn. Gen. Stat. §6-30a.)

2. If the Commission wishes to include a section on provisional appointments contained in suggested language for an emergency regulation provided earlier to the Commission of State Marshals, it should be included in Section 5.00, perhaps as subsection (b).

VI. Standards of Conduct

1. Section 6.00(c) provides that a state marshal must not engage in the practice of law or render legal advice. We note that §6-29 prohibits judges and justices of the peace from being state marshals, but we do not see a similar prohibition regarding attorneys. The Commission may want to modify section 6.00(c) to provide that a state marshal may not, while performing the duties of a marshal, engage in the practice of law or render legal advice.

2. Section 6.00 (j) provides that the state marshal shall not use his or her powers or appointment "for personal gain or to gain an advantage for another person." We recommend that the Commission clarify this provision by adding the following: "other than the authorized collection of fees for service of process or other duties performed by the marshal." If the Commission wishes, it could add that the state marshal is prohibited from using the position for an unlawful, unauthorized, or improper purpose, or language to that effect.

3. Section 6.00(m) requires a state marshal to "cooperate fully and truthfully in any inquiry or investigation conducted by the Commission or any law enforcement agency." In some situations, this requirement may raise certain legal issues, such as the individual's 5th Amendment rights. Therefore we recommend that at the end of section 6.00(m), the Commission add "subject to the exercise of applicable privileges."

4. Section 6.00 (o) requires that a State Marshal "remain at all times in a physical and mental condition suitable to the satisfactory performance of the duties of a State Marshal." This provision raises the same concerns noted in our comments on sections 1.00 (f) and 2.00(c)(12) above and is overly broad. It is unclear how the Commission can or will enforce this provision. We suggest that this section be revised so as to explain how the provision in section 7.00(a)(1) of the removal/suspension section would cover a situation where a marshal became physically or mentally incapacitated. An alternative would be to delete that section.

5. Section 6.00(q) requires that a State Marshal must "not display any badge except as authorized by the Commission." However, the standards do not explain when the display of the badge would be authorized. We suggest that this provision prohibit "the display of the credentials of a state marshal for any unauthorized, unlawful or improper purpose."

VII. Suspension or Revocation of Appointment

1. Section 7.00(a) provides that the Commission may revoke an appointment but does not mention suspension. The section should specify grounds upon which the Commission may suspend an appointment. Also, the word "due" should be added before "notice" to comply with the requirement of Conn. Gen. Stat. §6-38(i). We recommend that the Commission refer to the Uniform Administrative Procedures Act, Conn. Gen. Stat. §4-166, for guidance on the notice and hearing requirements.

2. Section 7.00(a)(3) authorizes suspension or revocation only for intentional or reckless failure to perform the duties and responsibilities of a marshal and only if the failure results in the life, health or safety of a member of the public being placed in jeopardy or a person's property being placed in jeopardy of loss or damage. We are concerned that this language is so restrictive that it may be interpreted to prohibit suspension or removal for negligent conduct or other misconduct that does not put a person or property at risk. The Commission may want to consider whether that result was intended.

3. Section 7.00(a)(4) authorizes suspension/revocation when a marshal is arrested and/or convicted of a crime. We refer to the concerns articulated in our comments on §1.00(i) and (j) above. In addition, we question whether an arrest (without a conviction) constitutes "cause" for removal under Conn. Gen. Stat. §6-38b(i). The Uniform Administrative Procedures Act

authorizes summary suspension of a license pending proceedings for revocation or other action upon a finding that the public health, safety or welfare imperatively requires emergency action. (See Conn. Gen. Stat. §4-182(c)). We recommend that the Commission consider adopting a similar provision for summary suspension that may be utilized, under appropriate circumstances, when criminal charges are pending against a marshal.

4. References to the public act in sections 7.00(a)(9) and (10) should be changed to references to the general statutes (P.A. 00-99, §127 is Conn. Gen. Stat. §6-39; P.A. 00-99, §128 is Conn. Gen. Stat. §6-30a).

5. In section 7.00(a)(12), the word "good" should be deleted to be consistent with Conn. Gen. Stat. §6-38b(i).

6. Conn. Gen. Stat. §6-38d provides that "[n]o state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform." Section 7.00 of the standard should include violations of this provision in the grounds for suspension/revocation.

7. The remainder of §7.00 and §7.10 deal with the Commission's hearing and disciplinary procedures. We recommend that these sections be revised to comply with the notice and hearing procedures set forth in the Uniform Administrative Procedures Act (See Conn. Gen. Stat. §4-176e, et seq.). We can work with the Commission and/or staff to draft the appropriate language.

As always, we are prepared to answer specific questions regarding these provisions and others.

This opinion represents the views of the undersigned Assistant Attorney General and is not intended to be a formal opinion of the Attorney General.

Very truly yours,

Margaret Q. Chapple
Assistant Attorney General

mqc

Copy

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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Office of the Attorney General
State of Connecticut

TELEFAX COMMUNICATION

Date:	**January 11, 2002**
To:	**Pat Lempicki**
Telefax #:	**(860) 566-3743**
Number of Pages: (including this)	**7 Pages**
From:	**Margaret Q. Chapple Assistant Attorney General**
Telephone #:	**(860) 808-5340**
Telefax #:	**(860) 808-5385**
Information Faxed By:	**Florence S. Dube Administrative Assistant**

COMMENTS:

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Bar to Billing for Work Didn't Do; Can Share Work and Fee for Value of Work; Bank Executions Sequential Service

Date: 01/16/2002

Opinion Number: Informal Advice

RICHARD BLUMENTHAL
ATTORNEY GENERAL

MacKenzie Hall
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(860) 808-5318

Office of The Attorney General
State of Connecticut

January 16, 2002

Mitchell R. Harris
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, Connecticut 06105

Dear Chairman Harris:

You have requested our informal advice on two issues involving operation of the state marshal system. The first issue involves the provisions of Conn. Gen. Stat. § 6-38d. You asked whether section 6-38d is intended to bar state marshals from banding together to share work and the fees therefrom. It is our opinion, as more fully discussed below, that section 6-38d simply bars a state marshal from billing or receiving fees for work not actually performed by the marshal. It does not bar state marshals from sharing work or receiving fees for work actually performed.

Conn. Gen. Stat. § 6-38d provides that "[n]o state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform."

This statute is clear and unambiguous. It clearly provides that a state marshal can only bill for, and receive fees for, work actually performed by that state marshal[1/]. Where, however, more than one marshal has actually performed the work, there is no expressed prohibition in section 6-38d which would prevent each marshal from billing and receiving fees for the work actually performed by such marshal.[2/] Thus, it does not appear that section 6-38d prohibits the sharing of work by state marshals or the receiving of fees for work actually performed by

1/ The work must be related to actually serving or executing on the process. For example, a state marshal cannot collect any fee for merely forwarding the papers or process to another state marshal to be served by the latter marshal.

2/ We note that it may be difficult to accurately assess the monetary value of

Footnote continued on next page.

each marshal, assuming the fee is divided according to the work actually performed by each marshal.[3/]

The second issue concerns the manner of service of bank executions. In this regard, you posed two questions. Your first question asked whether it is permissible for a state marshal, serving a bank execution, to serve as a true and attested copy of the original, a fax of the original. You advised us that some state marshals are accepting faxed documents from attorneys and serving them as true and attested copies of originals, before receiving and examining the originals. It is our opinion that a fax of a document cannot be served as a true and attested copy of the original unless the state marshal has the original in his possession for comparison, and has determined that the fax is a true and accurate copy of the original. A state marshal cannot attest to a fax being a true copy of the original without first examining the original. Webster's II Dictionary defines the word "attest" as follows: "to assure the certainty or validity of; to certify by signature or oath; to certify in an official capacity". Only after examining the original can a state marshal attest as to whether the fax is a true copy of the original. Accordingly, it is our opinion that it is not permissible for a state marshal serving a bank execution, to serve as a true and attested copy of the original, a fax of the original unless the marshal has the original in his possession and has determined that the fax is a true copy of the original.

In your second question on bank executions you asked whether bank executions must be done sequentially or whether several banks may be served at

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Footnote continued from previous page.

the work actually performed by each marshal. Of course, in a situation where the fees are divided between more than one state marshal the total of all fees charged may not exceed the statutorily authorized fee for service of that particular process.

3/ In a previous letter to you, we expressed the opinion that it is permitted for another marshal to complete service on an execution commenced by another state marshal who has resigned. We further opined that it would be proper for the marshal completing the service to bill and receive fees for the work he actually performed. See, Attorney General Opinion, Letter to Mitchell R. Harris, Chairman, State Marshal Commission, December 6, 2001.

one time. It is our opinion that bank executions must be done sequentially in order to avoid the possibility of executing on more funds than permitted.

Conn. Gen. Stat. § 52-367b, as amended by section 12 of Public Act No. 01- 09, June 2001 Session, provides for the execution against debts due from a banking institution when the debtor is a natural person. Subsection (b) of Section 52-367b provides in relevant parts as follows:

> If execution is desired against any such debt, the plaintiff requesting the execution shall notify the clerk of the court. . . . If the papers are in order, the clerk shall issue such execution containing a direction that the officer serving the same shall, within seven days from the receipt by the officer of such execution, make demand (1) upon the main office of any banking institution having its main office within the county of such officer or (2) if such main office is not within such officer's county and such banking institution has one or more branch offices within such county, upon an employee of such a branch office, such employee and branch office having been designated by the banking institution in accordance with regulations adopted by the Commissioner of Banking in accordance with chapter 54, for payment of any such nonexempt debt due to the judgment debtor and, after having made such demand, shall serve a true and attested copy of the execution, together with the affidavit and exemption claim form prescribed by subsection k of this section with such officer's doings endorsed thereon, with the banking institution officer upon whom such demand is made. <u>If the officer serving such execution has made an initial demand pursuant to this subsection within such seven-day period, the officer may make additional demands on the main office of other banking institutions or employees of other branch offices pursuant to subdivision (1) or (2) of this subsection, provided any such additional demand is made not later than forty-five days from the receipt by the officer of such execution.</u> (The underlined language was added by P.A. No. 01-09, June 2001 Session)

You raise the concern that if execution is made on more than one bank at one time, it is possible for the marshal to execute on an amount greater than permitted by the execution papers. Your concern is well-founded.

The recent language added to section 52-367b (b) by Public Act No. 01-09 makes it clear that if the initial execution does not secure sufficient funds, "the officer may make additional demands on the main office of other banking institutions or employees of other branch offices." This language makes it clear that the execution must be done sequentially, with the subsequent executions being made only if the initial execution fails to secure the amount of the indebtedness. Moreover, subsection (c) of 52-367b only permits a banking institution to remove from a debtor's account an amount not to exceed the amount due on the execution. Accordingly, it is our opinion that bank executions should be done sequentially.

The foregoing advice addresses only the specific questions you asked. It should not be construed to extend beyond those questions. Moreover, it represents the opinion of the undersigned and is not a formal opinion of the Attorney General.

Very truly yours,

Henri Alexandre
Assistant Attorney General

State of Connecticut
STATE MARSHAL COMMISSION

Mitchell R. Harris, Esquire
Chairman

Patricia C. Lempicki
Administrative Director

June 13, 2001

Honorable Richard Blumenthal
Attorney General of the State of Connecticut
55 Elm Street
Hartford, CT 06106

Re: Request for an Opinion

Dear Attorney General Blumenthal:

In my capacity as Chairman of the State Marshal Commission, I write to request a formal advisory opinion of the Attorney General regarding Section 6-38d of the Connecticut General Statutes. That section states "No state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform."

A question has been raised as to whether Section 6-38d is intended to bar state marshals from banding together to share work and the fees therefrom. This is a matter of some urgency as the Commission is about to embark on statutorily-mandated audits of state marshals.

We have enclosed research submitted to the Commission by Christopher Reinhart at the Office of Legislative Research following our inquiry about legislative intent in this matter. It is provided for your information.

Questions in regard to this matter may be directed to Patricia Lempicki, Administrative Director at 860-566-7109.

Sincerely,

Mitchell R. Harris
Chairman, State Marshal Commission

enc.
cc: State Marshal Commission
Patricia Lempicki

765 Asylum Avenue
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Tel. (860) 566-7109 Fax. (860) 566-3743

From: Reinhart, Christopher <Christopher.Reinhart@po.state.ct.us>
To: 'pat.lempicki@po.state.ct.us' <pat.lempicki@po.state.ct.us>
Sent: Thursday, May 31, 2001 2:29 PM
Subject: Marshals fees

I did some searching through the House and Senate transcripts from the sheriffs debate last year and found a couple of references to the billing provision that you asked about. The provision (Sec. 150 of the bill) was part of House Amendment B and Rep. Lawlor briefly described it when introducing the amendment. There are also a couple of other references to it. I couldn't find any reference to it in the Senate. I copied the excerpts I found and put them into the document below. There may be some more references burried in the debates somewhere else but these are the only ones my search discovered.

I hope this is helpful.

–Chris Reinhart

<<Marshals debate excerpts–House.doc>>

HOUSE TRANSCRIPT
Discussion on House Amendment B

REP. LAWLOR: (99TH)
Thank you, Madam Speaker. This amendment does basically four things. The first two are very significant. And the second two are important and I don't they would be controversial at all.
So let me start with the least controversial parts. In Section 150 which is on the second to the last page of the amendment it says that "no state marshall shall knowingly bill for or receive fees for work that such state marshall did not actually perform." This is to cover a controversial practice of fee splitting. This means that basically if you're a state marshall and you serve process, you can't split the money with someone who didn't perform any work on that particular process.
Second...

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REP. PRELLI: (63RD)
Thank you, Madam Speaker. I thank the gentleman for his answer. I never question LCO's ability to write the amendments and usually they are correct. It just seems to me that in this case, we shouldn't be tying that. If we have to make some other adjustment to a public act that we passed, then we should be doing it here also. We shouldn't try to jury rig an effective date to make sure it works. I think that's wrong. I think that whole approach is wrong, especially with the ease of that change.
The other thing is, though, in this case I will say to you that LCO didn't do a very good job drafting this amendment because this amendment has a number of technical flaws and, in effect, I'm not sure that some of the sections remain and how we rewrite them. And I will point out to the Representative that in the underlying bill when we started Section 130, we renumbered all the remaining sections. So we were able to add new sections in.
Yet, in our new bill, on line number 79, we say to strike three sections from the underlying bill. We then add in - and if you'll notice, it doesn't say and renumber the remaining sections. So what we basically did was just struck those three sections.
Then we added a bunch of new sections, including overriding a number of sections that were in the underlying bill. And we never renumbered those, so I would assume that the new sections here take their place.
So therefore, all the sections where we deleted the old statutory references are now gone. So technically, this amendment isn't drafted correctly.
Technically in two cases I don't believe this amendment is drafted correctly because I don't think the effective date works correctly either.
Now, those are just a couple of technical points and I know I always bring up technical points of amendments and people say we'll fix them later. Well, this amendment is worse than that. This amendment says that we're abdicating
our responsibilities, that we're not moving forward, and as I've stated many times, I'm for initiative and referendum and if we want that, let's put it

And let's say that's what we really believe, but until that point, let's follow the standards that we've established for ourselves. Let's follow what we have always done in the past and what we have always done in the ten years I have been here is we have made the legislative changes necessary. We should be doing that now making that effective now. There has been enough problems pointed out by other members on this side of the aisle about the contributions and gee, maybe that's not -- it's not a concern. Then why do we have this in this bill? It's going to happen. We all weren't born yesterday. We all aren't so naive to believe that there aren't ways around these provisions.

I find it unique that we have to put a provision in law to say it's illegal to charge for something that you shouldn't be charging for. It's illegal to charge for something you shouldn't be charging for and we have to add a new section of law for that now in the sheriffs' bill on one fee.

So for a lot of those reasons, I'm not going to be supporting this amendment. I don't think that comes to a surprise to anybody. But you know,

the other side of it was the first amendment and Representative Lawlor brought it out. It was a hard working, bipartisan amendment. It's the only bipartisan piece of legislation we've had in the last week and one-half. Not because we haven't been willing to contribute, not because we haven't been willing to work on it, but because we've been isolated. The same thing happens here. So what you did was take a good piece of legislation on Amendment "A". You added Amendment "B" and ruined a good piece of legislation. We shouldn't be moving forward with this amendment. We should be defeating this amendment. We should be moving forward making the changes

we, as a legislative body, think we should be making. That's the steps we should be taking now.

I urge you vote against this amendment.

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REP. FARR: (19TH)

Representative Lawlor, Section 150 which is the provision about a prohibition on fee splitting. Can you tell me - first of all, it's my understanding in reading this that that becomes effective December 1st. Am I also correct that if the referendum on the Constitutional Amendment were to fail, that would no longer be effective?

Through you, Madam Speaker to Representative Lawlor.

SPEAKER LYONS:

Representative Lawlor.

REP. LAWLOR: (99TH)

Thank you, Madam Speaker. Yes, that's correct.

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REP. FARR: (19TH)

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, it's not a true referendum. Section 149 - I'm sorry, Section 150 which has nothing really to do with the underlying powers of the sheriffs, is a provision that says that there's not going to be any fee splitting anymore. And guess what, folks? It doesn't go into effect under this amendment until December 1st and after December 1st, if the sheriffs can defeat the referendum, they can also keep the fee splitting. We get rid of that provision.

The fact of the matter is that what we're now creating is a system where for the sheriffs it's win/win and for the deputies it's winner take all because what you've got here, as I understand it, we're grandfathering in deputy sheriffs. We've got eight sheriffs. My understanding is that in the last couple of months, six of those sheriffs have made sure they're appointed deputies. As I understand the language of the bill, those sheriffs, should the referendum pass, will continue to be deputy sheriffs and will continue probably to get their salary as a sheriff. For them it's win/win. But for the deputy sheriffs, it's not.

And for the people of the State of Connecticut, it's not. To suggest that we ought not to reform the sheriff system because first we need a constitutional amendment is absurd. We spent hours the other night talking about reforming the Treasurer's system. We didn't have Representative Tulisano tell us that it's a constitutional office and we can't reform it because first we have to have a constitutional amendment. We made some changes. Not as many as many of us on this side of the aisle would have liked to have done, but we made changes. We clearly have the power to make most of the changes and I would argue all of the changes in the underlying bill.

So why not make them? Why turn a referendum on the issue of whether we get rid of eight sheriffs into a referendum on a whole bunch of other issues like whether you want fee splitting. Whether you want to reform the deputy sheriffs - sorry, the special deputy sheriff system. This amendment is not what we ought to be doing. We ought to take our responsibility and we've heard a lot of argument on that side that we share the responsibility. I heard Representative Lawlor and Representative Tulisano say it's partly our problem. We had the ability to do something. And then they bring out an amendment that say we're going to duck the issue, we're going to say we won't do anything unless the Constitutional Amendment passes.

We have the power to change the system. We have the power to do reform. We ought to do it. I would ge you to reject this amendment.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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(860) 808-5318

Office of The Attorney General
State of Connecticut

January 16, 2002

Mitchell R. Harris
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, Connecticut 06105

Dear Chairman Harris:

You have requested our informal advice on two issues involving operation of the state marshal system. The first issue involves the provisions of Conn. Gen. Stat. § 6-38d. You asked whether section 6-38d is intended to bar state marshals from banding together to share work and the fees therefrom. It is our opinion, as more fully discussed below, that section 6-38d simply bars a state marshal from billing or receiving fees for work not actually performed by the marshal. It does not bar state marshals from sharing work or receiving fees for work actually performed.

Conn. Gen. Stat. § 6-38d provides that "[n]o state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform."

This statute is clear and unambiguous. It clearly provides that a state marshal can only bill for, and receive fees for, work actually performed by that state marshal[1/]. Where, however, more than one marshal has actually performed the work, there is no expressed prohibition in section 6-38d which would prevent each marshal from billing and receiving fees for the work actually performed by such marshal.[2/] Thus, it does not appear that section 6-38d prohibits the sharing of work by state marshals or the receiving of fees for work actually performed by

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1/ The work must be related to actually serving or executing on the process. For example, a state marshal cannot collect any fee for merely forwarding the papers or process to another state marshal to be served by the latter marshal.

2/ We note that it may be difficult to accurately assess the monetary value of

Footnote continued on next page.

each marshal, assuming the fee is divided according to the work actually performed by each marshal.[3/]

The second issue concerns the manner of service of bank executions. In this regard, you posed two questions. Your first question asked whether it is permissible for a state marshal, serving a bank execution, to serve as a true and attested copy of the original, a fax of the original. You advised us that some state marshals are accepting faxed documents from attorneys and serving them as true and attested copies of originals, before receiving and examining the originals. It is our opinion that a fax of a document cannot be served as a true and attested copy of the original unless the state marshal has the original in his possession for comparison, and has determined that the fax is a true and accurate copy of the original. A state marshal cannot attest to a fax being a true copy of the original without first examining the original. Webster's II Dictionary defines the word "attest" as follows: "to assure the certainty or validity of; to certify by signature or oath; to certify in an official capacity". Only after examining the original can a state marshal attest as to whether the fax is a true copy of the original. Accordingly, it is our opinion that it is not permissible for a state marshal serving a bank execution, to serve as a true and attested copy of the original, a fax of the original unless the marshal has the original in his possession and has determined that the fax is a true copy of the original.

In your second question on bank executions you asked whether bank executions must be done sequentially or whether several banks may be served at

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Footnote continued from previous page.

the work actually performed by each marshal. Of course, in a situation where the fees are divided between more than one state marshal the total of all fees charged may not exceed the statutorily authorized fee for service of that particular process.

3/ In a previous letter to you, we expressed the opinion that it is permitted for another marshal to complete service on an execution commenced by another state marshal who has resigned. We further opined that it would be proper for the marshal completing the service to bill and receive fees for the work he actually performed. See, Attorney General Opinion, Letter to Mitchell R. Harris, Chairman, State Marshal Commission, December 6, 2001.

one time. It is our opinion that bank executions must be done sequentially in order to avoid the possibility of executing on more funds than permitted.

Conn. Gen. Stat. § 52-367b, as amended by section 12 of Public Act No. 01- 09, June 2001 Session, provides for the execution against debts due from a banking institution when the debtor is a natural person. Subsection (b) of Section 52-367b provides in relevant parts as follows:

> If execution is desired against any such debt, the plaintiff requesting the execution shall notify the clerk of the court. . . . If the papers are in order, the clerk shall issue such execution containing a direction that the officer serving the same shall, within seven days from the receipt by the officer of such execution, make demand (1) upon the main office of any banking institution having its main office within the county of such officer or (2) if such main office is not within such officer's county and such banking institution has one or more branch offices within such county, upon an employee of such a branch office, such employee and branch office having been designated by the banking institution in accordance with regulations adopted by the Commissioner of Banking in accordance with chapter 54, for payment of any such nonexempt debt due to the judgment debtor and, after having made such demand, shall serve a true and attested copy of the execution, together with the affidavit and exemption claim form prescribed by subsection k of this section with such officer's doings endorsed thereon, with the banking institution officer upon whom such demand is made. If the officer serving such execution has made an initial demand pursuant to this subsection within such seven-day period, the officer may make additional demands on the main office of other banking institutions or employees of other branch offices pursuant to subdivision (1) or (2) of this subsection, provided any such additional demand is made not later than forty-five days from the receipt by the officer of such execution. (The underlined language was added by P.A. No. 01-09, June 2001 Session)

You raise the concern that if execution is made on more than one bank at one time, it is possible for the marshal to execute on an amount greater than permitted by the execution papers. Your concern is well-founded.

The recent language added to section 52-367b (b) by Public Act No. 01-09 makes it clear that if the initial execution does not secure sufficient funds, "the officer may make additional demands on the main office of other banking institutions or employees of other branch offices." This language makes it clear that the execution must be done sequentially, with the subsequent executions being made only if the initial execution fails to secure the amount of the indebtedness. Moreover, subsection (c) of 52-367b only permits a banking institution to remove from a debtor's account an amount not to exceed the amount due on the execution. Accordingly, it is our opinion that bank executions should be done sequentially.

The foregoing advice addresses only the specific questions you asked. It should not be construed to extend beyond those questions. Moreover, it represents the opinion of the undersigned and is not a formal opinion of the Attorney General.

Very truly yours,

Henri Alexandre
Assistant Attorney General

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Marshal Misconduct Pre-2000

Date: 05/31/2002

Opinion Number: 2002-017

2002-017

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

May 31, 2002

Mitchell R. Harris, Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Attorney Harris:

You have asked for our opinion regarding the State Marshal Commission's authority to investigate and, if appropriate, withdraw the appointment of a state marshal for improper conduct engaged in prior to December 1, 2000. You have provided us with a copy of a letter complaining about the actions of a former deputy sheriff (who is now a state marshal) pertaining to a wage execution matter that began in 1996. For reasons explained below, it is our opinion that the Commission may investigate alleged improper conduct engaged in prior to December 1, 2000 and may take appropriate action against the state marshal, up to and including removal after notice and hearing, if the Commission determines that the conduct has a bearing on the person's current suitability to be a state marshal.

By way of background, Public Act 00-99, An Act Reforming The Sheriff System, eliminated the position of deputy sheriff and created the position of "state marshal" effective December 1, 2000, subject to the approval by the voters of a constitutional amendment eliminating county sheriffs. Section 8 of the Act (codified as Conn. Gen. Stat. §6-38b), which was effective on April 27, 2000, created the State Marshal Commission and authorized the Commission to (among other things) "...establish professional standards, including training requirements and minimum fees for execution and service of process...[that] shall be in force and effect by December 1, 2000..." (§6-38b(f)); and "...adopt such rules as it deems necessary for conduct of its internal affairs...." (§6-38b(j). Conn. Gen. Stat. §6-38a defines the term "state marshal" to mean "a qualified deputy sheriff incumbent on June 30, 2000, under section 6-38 of the general statutes, as amended by this act, or appointed pursuant to section 8 of this act who shall have authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38 of the general statutes, as amended by this act...." Thus, any person who was serving as a deputy sheriff on June 30, 2000 and notified the Chief Court Administrator of the desire to be appointed as state marshal (pursuant to the provisions of §6-38f(b)(1)) became a state marshal on December 1, 2000.

We understand from conversations with your staff that professional standards required by §§ 6-38b(f) were adopted by the Commission and were effective on December 1, 2000, and that you are now in the process of seeking to have those standards adopted as regulations pursuant to the provisions of June Sp. Sess. P.A. 01-9, §8(f). To the extent that conduct by a current State Marshal violates those standards of professional conduct, such conduct calls into question the state marshal's suitability to hold his or her position. The former sheriff's system was abolished because of widespread abuses by former sheriffs and their deputies, and the new statutory scheme establishing State Marshals and the State Marshal Commission was specifically designed to ensure that the position of State Marshal would only be held by individuals whose conduct demonstrated that they were suitable for the position. Under such circumstances, it would not make sense to limit the Commission to reviewing the conduct of current state marshals to actions occurring after December 1, 2000, particularly if such conduct has a bearing on a state marshal's

suitability to fulfill the responsibilities of his or her position. We believe that the legislative intent in creating the State Marshal system and the Commission's adoption of Professional Standards allow the Commission, if it deems appropriate, to initiate an investigation of activities that occurred prior to December 1, 2000, if the alleged activities would have a bearing on a State Marshal's current responsibilities.

The second part of your inquiry asks whether the Commission may, "...if appropriate, withdraw the appointment of a State Marshal for improper conduct engaged in prior to December 1, 2000...." The relevant statutes do not authorize the Commission to "withdraw" an appointment. Rather, Conn. Gen. Stat. §6-38b(i) provides that "[n]o state marshal shall be removed except by order of the commission for cause after due notice and hearing." We are informed that the Commission's duly adopted Professional Standards describe several grounds for such removal, after an investigation, notice and hearing, including a finding that the marshal "...lacks the ability, knowledge, skill or professional judgment to perform the duties of a State Marshal", "..failed to maintain any of the qualifications" for the position, or "for other cause shown." It is our opinion that if the facts established during the investigation and subsequent hearing, even if they predatethe state marshal system, have a bearing on the person's current suitability to be a state marshal, as set forth in the Professional Standards, the Commission, pursuant to those standards, may act on those facts.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Margaret Q. Chapple
Assistant Attorney General

RB/MQC

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Number of State Marshals – Statute Sets Maximum, Not Minimum

Date: 10/22/2002

Opinion Number: 2002-035

2002-035

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

October 22, 2002

Mitchell R. Harris
Chairman
State Marshal Commission
765 Asylum Avenue
260 Constitution Plaza
Hartford, CT 06105

Dear Chairman Harris:

You have requested our advice as to the required number of State Marshals in each county pursuant to the provisions of Conn. Gen. Stat. § 6-38. Specifically, you have requested a formal opinion of the Attorney General as to "whether the Commission has the discretion to determine whether to fill these vacancies or whether the Commission is required [to] fill all vacancies in every county up to the statutory maximum." We conclude that the Commission may, but is not required to, appoint state marshals to the maximum number allowed in each county by statute.

Conn. Gen. Stat. § 6-38 provides that

> **Sec. 6-38. Number of state marshals.** The number of state marshals to be appointed for Hartford County shall not exceed seventy-two; for New Haven County, sixty-two; for New London County, thirty-eight; for Fairfield County, fifty-five; for Windham County, eighteen; for Litchfield County, thirty; for Middlesex Count, twenty-one; for Tolland County, twenty-two.

The plain meaning of the phrase "shall not exceed" in Section 6-38 is simply that no more than the statutory limit may be appointed. This section does not require a minimum number of appointments. The General Assembly could have required a specific number of State Marshals simply by stating that number. The use of the phrase "shall not exceed" strongly suggests that a lesser number may be appointed, but not more than the maximum. Furthermore, the phrase "shall not exceed" would be rendered superfluous if § 6-38 were to be read as requiring the appointment of the exact number of State Marshals listed for each county. Statutes should be construed so that no word, clause or sentence shall be superfluous, void or insignificant. Robinson v. Unemployment Security Board of Review, 181 Conn. 1, 7 (1980).

Accordingly, it is our opinion that the Commission is not required to appoint State Marshals to the maximum number allowed in each county by statute.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Liability Insurance Lapsing - Sanctions

Date: 08/29/2003

Opinion Number: Informal Advice

MEMORANDUM

To: Gerald E. Farrell, Jr.
Vice Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

From: Henri Alexandre
Assistant Attorney General
Office of the Attorney General
110 Sherman Street
Hartford, CT 06105
Tel: (860) 808-5450

Date: August 29, 2003

Subject: Informal Advisory Opinion – State Marshal Personal Liability Insurance

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You have requested our advice on questions concerning the provisions of Connecticut General Statutes § 6-30a which require state marshals to obtain personal liability insurance for tortious acts occurring in the performance of their official duties. You specifically ask whether the State Marshal Commission (Commission) can compel state marshals to purchase their insurance, through the Commission, from one specific company. Our answer is no. You ask, in your second question, what kind of financial liability, if any, the Commission would incur if many marshals do not participate in the insurance purchasing plan proposed by the Commission, and whether individual members of the Commission could be exposed to liability. For the reasons more fully explained below our answer is that neither the Commission nor the individual members would be subject to liability.

You have advised us, by way of background, that representatives of the Commission met with the State Insurance and Risk Management Board (Board) regarding the insurance requirements of Section 6-30a. You state that the Board informed you that since Section 6-30a does not go into great detail on the term "tortious act", the Board is of the opinion that a marshal's coverage must include coverage for a wide variety of what is termed 'peace officer issues', such as false arrest, false imprisonment, use of a firearm and all the other things that might go wrong where a marshal takes someone into custody, or must respond to a situation with physical or deadly force."

You further advise us that based on its reading of the statute, the Board had a nationwide search done to find insurance carriers willing to provide coverage in accordance with the Board's reading of the statute. The search resulted in only one company in the entire country willing to write coverage meeting the Board's specifications. Moreover, the Board informed the Commission that the company would only undertake such work if the Commission was the entity purchasing the policy. The company will not deal with individual marshals. Your plan, if authorized by this opinion, is to require each marshal to pay $1,000.00 to the Commission toward the purchase of the policy.

Conn. Gen. Stat. § 6-30a provides as follows:

> On or after December 1, 2000, each state marshal shall be required to carry personal liability insurance for damages caused by reason of such marshal's tortious acts in not less than the following amounts: For damages caused to any one person or to the property of any one person, one hundred thousand dollars and for damages caused to more than one person or to the property of more than one person, three hundred thousand dollars. For purposes of this section "tortious act" means negligent acts, errors or omissions for which such state marshal may become legally obligated to any damages for false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, violation of property rights or assault and battery if committed while making or attempting to make an arrest or against a person under arrest; provided, it shall not include any such act unless committed in the performance of the official duties of such state marshal.

Your regulations provide for the appointment of state marshals. Conn. Regs. State Agencies § 6-38b-5 (a) (6) provides, inter alia, "[n]o person shall be appointed a state marshal pursuant to section 6-38b of the Connecticut General Statutes unless such person: . . . (6) provides the State Marshal Commission sufficient evidence that the applicant has in effect personal liability insurance which complies with the requirement of Section 6-30a of the General Statues. . . ."

In construing a statute or regulation, the most important factor to be considered is the language. State v. Courchesne, 262 Conn. 537, 563 (2003). In considering the statutory language, the court attempts to determine the range of plausible meanings of the language and, if possible, narrow that range to those that appear most plausible. Id. at 577. Second, the court looks to the purpose or purposes of the statute, in the context of the language, to determine the meaning of the language. Id.

In the present case, both Conn. Gen. Stat. § 6-30a and your regulation are clear. They require that each state marshal carry, and provide evidence to the Commission of, personal liability insurance coverage for tortious acts committed in the performance of the official duties of such state marshal. The legislative history of General Statutes § 6-30a indicates that the legislature's express purpose for passing the statute was to protect the public from "any acts which the sheriff[1] may incur in the event that he does not have personal assets of his own to cover either misservice of process, assault or battery or any other [of] these items listed in the statute." 19 H.R. Proc., Pt. 2, 1976 Sess. P. 494, remarks of Representative Tulisano. See, Miller v. Egan, 2001 WL 1178868 (Conn. Super. 2001); Antinerella v. Rioux, 44 Conn. Supp. 368, 372 (1995). There is, however, nothing in the statute or your regulations that requires marshals to purchase the insurance from a particular insurer or that the insurance be purchased through the Commission. Conn. Gen. Stat. § 6-30a specifically defines "tortious acts." The duty of the Commission is simply to determine whether the insurance policy submitted provides the coverage required by Conn. Gen. Stat. § 6-30a and to take appropriate action if it does not.

You have the authority under your regulations to refuse to appoint an applicant for state marshal who does not provide the Commission with sufficient evidence that he has in effect personal liability insurance which complies with the requirement of § 6-30a. Regs. Conn. State Agencies § 6-38b-5(a) (6). You also have the authority under your regulation to suspend or revoke the appointment of a state marshal who fails to maintain the insurance required by § 6-30a. Regs. Conn. State Agencies § 6-38b-8(b) (11) provides that "[t]he Commission may suspend or revoke the appointment of a state marshal when it determines, after due notice and hearing that the state marshal: . . . (11) Failed to maintain the insurance required by Section 6-30a of the Connecticut General Statutes."

Moreover, Conn. Gen. Stat. § 6-38a makes it clear that state marshals are independent contractors. It states that a state marshal has the authority to "provide legal execution and service of process as an independent contractor compensated on a fee for services basis." See also, Connecticut Attorney General Opinions No. 2001-028, Honorable Mitchell R. Harris December 20, 2001. The Commission's authority over the state marshals is defined by the controlling statutes and regulations. Thus, the Commission is limited to assuring that the state marshals comply with the statutory and regulatory requirements. Id.

In conclusion, it is our opinion that you have the authority to require each state marshal to carry appropriate insurance which complies with the requirement specified in Conn. Gen. Stat. § 6-30a. You do not have the authority, however, to require the state marshals to purchase the insurance from one particular company or through the Commission.

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[1] Section 6-30a was changed effective on December 1, 2000, substituting "state marshal" for "sheriff".

Gerald E. Farrell, Jr.
August 29, 2003

Your second question asks whether the Commission or members of the commission would incur financial liability if any state marshals do not participate in the insurance program you propose.

Conn. Gen. Stat. § 5-141d (a) provides that "[t]he state shall save harmless and indemnify any state officer or employee, as defined in section 4-141 . . . from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee . . . is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton reckless or malicious." Conn. Gen. Stat. § 4-141 defines state officers and employees as "[e]very person elected or appointed to or employed in any office, position or post in the state government, whatever such person's title, classification or function and whether such person serves with or without remuneration or compensation . . ."

It is clear that members of the Commission, as appointed government officials, are entitled to protection from liability as long as they fall within the terms of Conn. Gen. Stat. § 5-141d.

THIS ADVICE REPRESENTS THE OPINION OF THE UNDERSIGNED AND SHOULD NOT BE CONSTRUED AS A FORMAL OPINION OF THE ATTORNEY GENERAL.

Henri Alexandre
Assistant Attorney General

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: No Indemnification on Capias (changed by statute)

SM Trainers no Indemnification

Date: 05/10/2004

Opinion Number: 2004-005

2004-005

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

May 10, 2004

Gerald D. Farrell, Jr., Chairman
State Marshal Commission
765 Asylum Ave.
450 Capitol Avenue
Hartford, Connecticut 06105

Dear Chairman Farrell:

In separate letters to us you requested our advice on two questions concerning indemnification of state marshals. Your first question seeks our opinion on whether state marshals serving capias warrants on behalf of Support Enforcement Services are entitled to indemnification by the State of Connecticut. Your second question asks whether state marshals who train new appointees would be indemnified under Connecticut General Statutes § 4-165. Our answer to both questions is no.

We conclude that state marshals serving capias warrants are independent contractors who do not qualify for the statutory indemnification afforded to state officers and employees. Instead, state marshals are required by statute to carry their own personal liability insurance. Similarly, state marshals under contract with the state to provide training services are independent contractors required to obtain their own personal liability insurance to protect themselves and the state from liability in connection with their training activities.

With respect to your first question you advised us that a select group of marshals has been specifically trained and authorized to use state vehicles for the service of capias warrants. You further advised us that the State Marshal Advisory Board has expressed concern about indemnification when marshals are serving capias warrants.

Conn. Gen. Stat. § 5-141d (a) provides for indemnification of state officers and employees. It states as follows:

> The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.

State marshals are not included within the statutory definition of "state officers and employees" who may be indemnified pursuant to Conn. Gen. Stat. § 5-141d(a). Conn. Gen. Stat. § 4-141 provides, in part, as follows:

> . . ."state officers and employees" includes every person elected or appointed to or employed in any office, position or post in the state government, whatever such person's title, classification or function and whether such person serves with or

> without remuneration or compensation, including judges of probate court and employees of such courts. In addition to the foregoing, "state officers and employees" includes attorneys appointed as victim compensation commissioners, attorneys appointed by the Public Defenders Services Commission as public defenders, assistant public defenders or deputy assistant public defenders, and attorneys appointed by the court as special assistant public defenders, the Attorney General, the Deputy Attorney General and any associate attorney general or assistant attorney general, any other attorneys employed by any state agency, any commissioner of the Superior Court hearing small claims matters or acting as a fact-finder, arbitrator or magistrate or acting in any other quasi-judicial position, any person appointed to a committee established by law for the purpose of rendering services to the Judicial Department, including but not limited to, the Legal Specialization Screening Committee, the State-Wide Grievance Committee, the Client Security Fund Committee, and the State Bar Examining Committee, any member of a multidisciplinary team established by the Commissioner of Children and Families pursuant to section 17a-106a, and any physicians or psychologists employed by any state agency . . . .

The General Assembly has specifically determined that state marshals are independent contractors, not state officers or employees. Conn. Gen. Stat. § 6-38a (a) , as amended by Public Act No. 03-224, provides that "[f]or purposes of the general statutes, 'state marshal' means a qualified deputy sheriff incumbent on June 30, 2000, under section 6-38 or appointed pursuant to section 6-38b, as amended by this act, who shall have the authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38 **as an independent contractor** compensated on a fee for service basis, determined, subject to any minimum rate promulgated by the state, by agreement with an attorney, court or public agency requiring execution of service of process." Emphasis added.

Moreover, Conn. Gen. Stat. § 6-30a requires state marshals to carry personal liability insurance. It states as follows:

> On or after December 1, 2000, each state marshal shall be required to carry personal liability insurance for damages caused by reason of such marshal's tortious acts in not less than the following amounts: For damages caused to any one person or to the property of any one person, one hundred thousand dollars and damages caused to more than one person or the property of more than one person, three hundred thousand dollars. For the purpose of this section "tortious act" means negligent acts, errors or omissions for which such state marshal may become legally obligated to any damages for false arrest, erroneous service of civil papers, false imprisonment, malicious prosecution, libel, slander, defamation of character, violation of property rights or assault and battery if committed while making or attempting to make an arrest or against a person under arrest; provided, it shall not include any such act unless committed in the performance of the official duties of such state marshal.

Furthermore, Conn. Gen. Stat. § 6-38b (i), as amended by Public Act No. 03-224, specifically prohibits a person from being a state employee and a state marshal at the same time. It states:

> Except as provided in section 6-38f, no person may be a state marshal and a state employee at the same time. This subsection does not apply to any person who was both a state employee and a deputy sheriff or special deputy sheriff on April 27, 2000.[1]

Conn. Gen. Stat. § 6-38a (a) makes it clear that state marshals are independent contractors and not state employees. See, Connecticut Attorney General Opinion No. 2001-028, Honorable Mitchell R. Harris December 20, 2001. As independent contractors, they are not covered by the indemnification provisions of Conn. Gen. Stat. § 5-141d (a). Rather, they are required to obtain

personal liability insurance to protect the public from tortious acts committed in the performance of their official duties. Conn. Gen. Stat. § 6-30a; see also, Antinerella v. Rioux, 44 Conn. Supp. 368, 372 (1995).

Although state marshals are not entitled to indemnification by the state, Conn. Gen. Stat. § 6-38a (b) protects state marshals from personal liability with respect to entry on private property while performing executions or service of process, including the service of capias warrants on behalf of Support Enforcement Services. Conn. Gen. Stat. § 6-38a (b)states:

> Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable in damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions.

Your second question asks whether "the marshals, acting as an agent of the state in a training capacity, would be indemnified under Connecticut General Statute 4-165." For the reasons stated above, our answer to this question is no.

You advised us that as part of the training program for new marshals, your Commission would like the new marshals to train outside the classroom serving process with seasoned marshals. You further advised us that you contemplate entering into personal service contracts with existing marshals to provide the field training. Lastly, you advised us that the marshals who would do the field training are asking whether they would be indemnified under Conn. Gen. Stat. § 4-165.[2]

Our analysis with respect to your first question is similarly applicable here. The marshals performing the field training under a state contract would not be entitled to the protection of the indemnification statute since they are independent contractors, not state officers or employees. As independent contractors, the state contracts should require them to carry appropriate liability insurance to protect themselves and the state from liability in connection with their training activities.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Henri Alexandre
Assistant Attorney General

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[1]The exceptions contained in section 6-38f are not relevant for purposes of this opinion.

[2]General Statutes 4-165 is not an indemnification statute but rather an immunity statute. Conn. Gen. Stat. 5-141d is the indemnification statute.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Tax Warrants

Date: 10/12/2004

Opinion Number: 2004-017

2004-017

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

October 12, 2004

Robert S. Rudewicz
Director of Operations
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Mr. Rudewicz:

A recent inquiry from the City of Waterbury has brought to our attention that some marshals are charging a fee of fifteen per cent of the amount of taxes collected for the service of alias tax warrants under Conn. Gen. Stat. § 52-261 as amended by Public Act No.03-224. It is our opinion that the statutorily authorized fee to charge for executing such tax warrants is ten percent of the amount of taxes collected, as provided in Conn. Gen. Stat. § 12-162. Any amount charged by a state marshal in excess of the statutorily authorized amount must be reimbursed to the affected taxpayer. The commission should require audits of these accounts and take appropriate action to ensure that taxpayers are fully compensated for their overpayments.

Conn. Gen. Stat. § 52-261, as amended by Public Act No. 03-224 provides in relevant part:

> (a) Except as provided in subsection (b) of this section and section 52-261a, each officer or person who serves process, summons or attachments shall receive a fee of not more than thirty dollars for each process served and an additional fee of thirty dollars for the second and each subsequent service of such process, except that such officer or person shall receive an additional fee of ten dollars for each subsequent service of such process at the same address or for notification of the office of the Attorney General in dissolution and postjudgment proceedings if a party or child is receiving public assistance. Each such officer or person shall also receive the fee set by the Department of Administrative Services for state employees for each mile of travel, to be computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return. . . . Notwithstanding the provisions of this section, for summoning grand jurors, such officer or person shall receive only such officer's or person's actual expenses and such reasonable sum for services as are taxed by the court. The following fees shall be allowed and paid: . . . (6) for the levy of an execution, when the money is actually collected and paid over, or the debt or a portion of the debt is secured by the officer, fifteen per cent on the amount of the execution, provided the minimum fee for such execution shall be thirty dollars; . . . The court shall tax as costs a reasonable amount for the care of property held by any officer under attachment or execution. The officer serving any attachment or execution may claim compensation for time and expenses of any person, in keeping, securing or removing property taken thereon, provided such officer shall make out a bill. The bill shall specify the labor done, and by whom, the time spent, the travel, the money paid, if any, and to whom and for what. The compensation for the services shall be reasonable and customary and the amount of expenses and shall be taxed by the court with the costs. (emphasis added)

Conn. Gen. Stat. § 12-162 provides, in part, as follows:

> Any collector of taxes, in the execution of tax warrants shall have the same authority as state marshals have in executing the duties of their office, and any constable or other officer authorized to serve any civil process may serve a warrant for the collection of any tax assessed, and the officer shall have the same authority as the collector concerning taxes committed to such officer for collection. Upon nonpayment of any property tax when due, demand having been made therefore as prescribed by law for the collection of such tax, an alias tax warrant may be issued by the tax collector . . . . Any officer serving such warrant shall make return to the collector of such officer's actions thereon within ten days of completion of such service and shall be entitled to collect from such person the fees allowed by law for serving executions issued by any court. Notwithstanding the provisions of section 52-261, any state marshal or constable, authorized as provided in this section, who executes such warrant and collects any delinquent municipal taxes as a result thereof shall receive in addition to expenses otherwise allowed, an amount equal to ten per cent of the taxes collected pursuant to such warrant. The minimum fee for such service shall be twenty dollars . . . . (Emphasis added)

We note that Conn. Gen. Stat. § 52-261 as amended by Public Act No. 03-224 generally discusses fees and expenses of officers and persons serving process. Conn. Gen. Stat. § 12-162, on the other hand, specifically governs alias tax warrants. By its terms, Section 12-162 controls reimbursement for the service of alias tax warrants, "notwithstanding the provisions of section 52-261." "It is a well-settled principle of [statutory] construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." Plourde v. Liburdy, 207 Conn. 412, 417 (1988). In this case, the General Assembly has expressly directed that the specific terms of Conn. Gen. Stat. § 12-162 prevail over the general terms of Conn. Gen. Stat. § 52-261.

It is also our opinion that to the extent that an executing officer has charged and collected a fee of fifteen per cent for executing an alias tax warrant, it was done without any legal basis. Accordingly, any marshal who charged more than 10% of the proceeds must repay to the taxpayer any excess fees charged beyond the amount permitted by Conn. Gen. Stat. § 12-162.

The Commission should exercise its statutory and regulatory authority to review the records of state marshals who have executed alias tax warrants during the period from 2003, when Public Act 03-224 became effective, to the present to determine whether unauthorized fees were charged. Conn. Gen. Stat. § 6-38e requires the State Marshal Commission "to periodically review and audit the records and accounts of the state marshals." Section 6-38b-6 of the Regulations of Connecticut State Agencies sets forth the standards of conduct for state marshals. It states, inter alia, that state marshals must maintain up-to-date records that identify all fees collected and disbursed, and make their records available for inspection by the State Marshal Commission upon request.

The Commission should also ensure that any excess fees that were charged by state marshals for the service of alias tax warrants are returned to taxpayers. Appropriate action should be taken by the Commission against any marshal who refuses to return any excess fees or fails to account for these funds. Section 6-38b-8(b) of the Regulations of Connecticut State Agencies provides in part: "The commission may suspend or revoke the appointment of a state marshal when it determines, after due notice and hearing that the state marshal: ...(6) Misapplied or misappropriated money or property; or ... 8) Failed to account for funds."[1]

If my office may be of further assistance, do not hesitate to contact me.

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Henri Alexander
Assistant Attorney General

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[1]The Commission may also suspend or revoke the appointment of a state marshal for any conduct that could harm or otherwise impugn his or her professional reputation, standing or integrity, including violations of section 6-38b-6 of the Regulations of Connecticut State Agencies. Section 6-38b-8(c) of the Regulations of Connecticut State Agencies.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Deceased Marshal – Executions Must be Done by a Levying Officer. Power to Seek Records

Date: 01/03/2005

Opinion Number: 2005-001

2005-001

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

January 3, 2005

Robert S. Rudewicz
Director of Operations
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Mr. Rudewicz:

You have requested our advice regarding the State Marshal Commission's course of action regarding auditing the records of a deceased marshal. You advised us in your letter that the daughter of a deceased marshal inquired of your office as to whether or not she could "continue to collect on wage executions," which collection had apparently been commenced by her deceased father but had not been completed at the time of his death. You note in your letter that "she was informed that she could not, that executions must be collected by a state marshal."

You further noted that your office has attempted to locate the deceased marshal's daughter for the purpose of recovering the marshal's records and accounts. These materials are needed for the purpose of performing the audit required under the provisions of Conn. Gen. Stat. § 6-38e. You have made efforts to locate the daughter by "certified mail" but your correspondence was returned 'unclaimed." You now seek our advice on "what our further responsibilities are in relation to this audit."

For the reasons amplified below, it is our opinion that only a "levying officer" may collect on wage executions and an audit and accounting of the deceased state marshal's records and accounts is required. In this regard, the Commission must undertake additional and more comprehensive efforts at locating the accounts and records of the deceased state marshal.

Before turning to your specific question, it is necessary to correct what may be a misunderstanding concerning who has the authority to collect wage executions. In your letter you state, in part, that "[wage] executions must be collected by a state marshal." This statement is not literally accurate. Pursuant to relevant statutory provisions, "[i]f a judgment debtor fails to comply with an installment payment order, the judgment creditor may apply to the court for a wage execution . . . . On receipt of the application, a clerk of the Superior Court shall issue a wage execution against the judgment debtor, directed to a levying officer, to enforce payment of the judgment." Conn. Gen. Stat. §§ 52-361a (a) (b) (emphasis added)[1]

As noted above, your office has advised the marshal's daughter that "executions must be collected by a state marshal." Actually, the relevant statute, Conn. Gen. Stat. § 52-361a (b) requires that "a wage execution [shall be] directed to a levying officer." The term "levying officer means a state marshal or constable acting within such marshal's or constable's geographical jurisdiction or in IV-D cases, any investigator employed by the Commissioner of Social Services." Thus, although not specifically requested in your letter, we wish to correct this possible misunderstanding in the statutory definition of "levying officer."

With regard to your specific question on whether an effort to locate the marshal's daughter by mail satisfies your statutory obligation, our advice is that it does not.

Conn. Gen. Stat. § 6-38e as amended by Public Act No. 03-224, § 4 distinctly vests the duty in your commission "[u]pon the death . . . of a state marshal, [to] appoint a qualified individual to oversee and audit the records and accounts of such state marshal and render an accounting to the commission."[2]

In our letter of December 6, 2001, we observed that the purpose of these statutory provisions concerning audits is "to ensure that no one absconds with funds held by the deceased State Marshal." In our view, a public duty of significance calls for a thorough and comprehensive search for these records. Your attempt to locate the daughter was an appropriate first step, but you should now conduct a broader investigation to locate the records. The Commission or an investigator may need to contact business associates, court officers or anyone else who may have information relevant to the location of the records in question.

We also suggest that you contact the State Police because Conn. Gen. Stat. § 53-153 provides, in relevant part, that "any person who willfully and corruptly, takes away, . . . any . . . record . . . in the possession or custody or under the control of any . . . department or officer of the state . . ." may have committed a felony.

When the records are located, if you have any difficulty in obtaining their possession, you should notify this office. In our view, the Commission has the legal standing -- indeed duty -- to commence legal action to obtain custody of these materials so that this mandatory audit may be performed. This office will be prepared to bring an appropriate legal action if necessary.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Henri Alexandre
Assistant Attorney General

RB/HA

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[1] In our letter to Chairman Mitchell R. Harris, dated December 6, 2001, we advised your office that "the decision of which particular proper officer to employ is one that is typically made in Connecticut by the party who needs a serving officer or such party's duly authorized representative (typically the party's attorney) in the first instance. If that proper officer dies and the party who first arranged for the use of serving officer . . . selects another proper officer to complete the service, that action should generally be sufficient. ... There is also the question of whether the State Marshal Commission has the authority to select the proper officers to complete service when an officer resigns, if the party has not done so . . . . [I]n the absence of any other selection of a proper officer to complete service of any executions, and to ensure that all executions are served in a timely manner, we believe the authority given to the State Marshal Commission in this section [Conn. Gen. Stat. § 6-38e]is sufficient to make the selection."

[2] Except as may be entailed in reviewing the audit of the appointed "qualified individual" the statute does not, as indicated in your letter, require the Commission to perform the audit itself.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Ex-Officios to SMC can Attend Executive Sessions – but Can't Vote

Date: 07/01/2005

Opinion Number: 2005-016

2005-016

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

July 1, 2005

Gerald E. Farrell, Jr.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, Connecticut 06105

Dear Chairman Farrell:

As Chairman of the State Marshal Commission you have requested a formal Opinion of the Attorney General as to the following two questions:

1. Are the two ex officio, nonvoting members of the State Marshal Advisory Board, appointed pursuant to Conn. Gen. Stat. § 6-38b(a), entitled to attend executive sessions of the State Marshal Commission's meetings?

2. If the answer to the first question is in the affirmative, are they entitled to attend all executive sessions, or are there executive sessions they are not entitled to attend? Specifically, are ex officio members entitled to attend executive sessions regarding personnel and disciplinary matters?

For the reasons explained below, our answers to these questions are as follows:

1. Ex officio members are entitled to attend executive sessions of the State Marshal Commission.

2. They are entitled to attend all executive sessions, including those regarding personnel and disciplinary matters.

The reasons for these conclusions are explained below.

Conn. Gen. Stat. §6-38b(a) provides for the creation and appointment of a State Marshal Commission. It states as follows:

> There is established a State Marshal Commission which shall consist of eight members appointed as follows: (1) The Chief Justice shall appoint one member who shall be a judge of the Superior Court; (2) the speaker of the House of Representatives, the president pro tempore of the Senate, the majority and minority leaders of the House of Representatives and the majority and minority leaders of the Senate shall each appoint one member; and (3) the Governor shall appoint one member who shall serve as the chairperson. No member of the commission shall be a state marshal, except that two state marshals appointed by the State Marshals Advisory Board in accordance with section 6-38c shall serve as ex officio, nonvoting members of the commission.

"Executive sessions" is defined by Conn. Gen. Stat. §1-200. Subsection (6) of that statute provides:

> "Executive Sessions" means a meeting of a public agency at which the public is excluded for one or more of the following purposes: (A) Discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting; (B) strategy and negotiations with respect to pending claims or pending litigation to which the public agency or a member thereof, because of the member's conduct as a member of such agency, is a party until such litigation or claim has been finally adjudicated or otherwise settled; (C) matters concerning security strategy or the deployment of security personnel, or devices affecting public security; (D) discussion of the selection of a site or the lease, sale or purchase of real estate by a political subdivision of the state when publicity regarding such site, lease, sale, purchase or construction would cause a likelihood of increased price until such time as all of the property has been acquired or all proceedings or transactions concerning same have been terminated or abandoned; and (E) discussion of any matter which would result in the disclosure of public records or the information contained therein described in subsection (b) of section 1-210.

Conn. Gen. Stat. §1-231(a) specifies who may be in attendance at an executive session. It provides:

> At an executive session of a public agency, attendance shall be limited to members of said body and persons invited by said body to present testimony or opinion pertinent to matters before said body provided that such persons' attendance shall be limited to the period for which their presence is necessary to present such testimony or opinion and, provided further, that the minutes of such executive session shall disclose all persons who are in attendance except job applicants who attend for the purpose of being interviewed by such agency.

"Ex officio members of a public body are members for all purposes." 2 Am. Jur. Administrative Law, section 34. As this office stated in a 1981 opinion to the Commissioner of Mental Health:

> The term "ex officio' is used to indicate that the membership in question is created by the individual's position in another office. The term according to Black's Law Dictionary, 5th Edition, means 'from office; by virtue of the office; without any other warrant or appointment than resulting from the holding of a particular office'. . . Ex officio members of a board are members for all purposes and have all the rights and duties of appointed members. 'They are each vested with full power and authority to do any and all things necessary and essential to carry out the purpose of the law in creating the board or body. . .' Barber Pure Milk Co. v. Alabama Milk Control Board, 156 So.2d 351, 358, 275 Ala, 489 (1963). 1981 Conn. Op. Atty. Gen. Lexis 105 (Nov. 25, 1981)

In light of these principles, there is no reason that ex officio members of the Commission cannot attend executive sessions of the Commission. They are clearly members of the Commission, pursuant to Conn. Gen. Stat. § 6-38b(a), even though they cannot vote. Furthermore, there is no express limitation in §1-231 which prohibits the appointed ex officio members from participating at these executive sessions. See, Borer v. Board of Education, 2003 WL 21675344 (Conn. Super. 2003). To the contrary, it is clear from the text of §1-231 that all members of the Commission may attend executive sessions, including ex-officio members, because section 1-231 neither includes nor excludes any member according to categories of either voting or non-voting members. "The meaning of a statute shall be ascertained from the text of the statute itself and its relationship to other statutes," especially when "the meaning of such text is plain and unambiguous." Conn. Gen. Stat. § 1-2z.

For these reasons we conclude that the answers to your questions regarding whether or not the two ex officio members are entitled to attend executive sessions, must be answered in the affirmative

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Henri Alexandre
Assistant Attorney General

RB/HA

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: SMC Cannot Mandate that a State Marshal Execute a Capias. Legislative Options; Sovereign Immunity

Date: 02/02/2007

Opinion Number: 2007-002

2007-02

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

February 2, 2007

Honorable Dennis Kerrigan, Chairman
State Marshall Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Mr. Kerrigan:
In your letter dated August 15, 2006 you have asked this office to render a formal opinion concerning the service of capias mittimus by state marshals. Your letter raises the following questions:

1. Is a capias mittimus a criminal or civil process?

2. Does the State Marshal Commission have the authority to establish a procedure by which all state marshals are required to serve capias mittimus similar to the process set by the Commission regarding the service of domestic violence restraining orders?

3. If the answer to the previous question is yes, what principles should the Commission use in establishing a procedure to enforce such obligation?

4. Would a rule mandating that individual state marshals serve capias mittimus violate the Americans with Disabilities Act?

5. Is a state marshal personally liable for injuries that an arrestee may suffer while in custody of a marshal?

6. Can a state marshal claim sovereign immunity as a defense to any claim by an arrestee for injuries suffered while in the custody of the marshal?

As discussed in this opinion, a capias mittimus in this context is a civil process compelling the court attendance of parents who have failed to appear for child support proceedings. State marshals are authorized to serve capias, and the use of capias is a critical component of the state's child support enforcement program. Although numerous measures have already been taken by the General Assembly, the Judicial Department and the State Marshal Commission to assist marshals in the service of capias, additional action is required to ensure that state marshals serve capias, as they do other forms of civil process.

By law, each state marshal "shall receive each process directed to such marshal when tendered, execute it promptly and make true return thereof." Conn. Gen. Stat. §6-32. Additionally, the Commission has the authority to adopt regulations establishing "professional standards" for state marshals, including standards that govern their responsibility to serve civil process, and to discipline or terminate those marshals who do not comply with those standards. Conn. Gen. Stat. §6-38b(f) and (j). Because capias mittimuses are civil process, these statutes appear to give the Commission the authority to require state marshals to serve all capias mittimus directed to them.

Despite this apparent legislative authority, the 2001 enactment of Conn. Gen. Stat. §6-

38b(g) makes the Commission's authority to require marshals to serve capias mittimus ambiguous. In that statute the legislature gave the Commission the specific authority to require state marshals to serve restraining orders - - another type of civil process. The absence of similar specific statutory authorization for the Commission to require state marshals to serve capias calls into question the Commission's authority to do so. Legislative clarification on this critical issue is, therefore, essential.

Additionally, current law appears to imply that state marshals may not serve process outside the county in which they are appointed, but legislative clarification of this issue is also appropriate.

The Americans with Disabilities Act would not prevent the Commission from adopting a rule requiring service of capias mittimus by state marshals. Instead, to the extent the Americans with Disabilities Act applies to state marshals in this context, the provisions of the ADA must be applied on an individual, case-by-case basis.

Finally, state marshals are independent contractors and may not raise the defense of sovereign immunity to claims of damage or personal injury. Nevertheless, state marshals are statutorily immune from suit for damages or injuries caused "in the performance of execution or service of process functions," if their actions are not wanton, reckless or malicious. State marshals are also required to carry personal liability insurance.

Is a Capias Mittimus a Civil or a Criminal Process?

The question of whether a capias mittimus is civil or criminal process was the subject of a prior Opinion. That Opinion, rendered pursuant to a request from the Commissioner of Social Services in 2000, contains an extensive, historically based and clear analysis of the several factors that distinguish civil and criminal arrest process. It concludes that,

> Connecticut law clearly distinguishes between civil arrests and criminal arrests. The distinguishing characteristic of a criminal arrest is that it results in a person being charged with an offense for which a sentence of incarceration for a definite term and/or a fine may follow. A civil arrest merely brings a person to court to testify or to respond to a civil claim. **It seems clear to us, under this analysis, that a capias is civil process.** (Emphasis added).

Opinion of the Attorney General, No. 2000-010 (March 7, 2000).

There have been no developments since the referenced prior Opinion that would change its conclusion.

Does the State Marshal Commission Have the Authority to Establish Procedures Mandating that All State Marshals Accept and Serve Capias Mittimus?

We conclude that the Commission's authority to establish a procedure by which all marshals are required to serve capias mittimus is uncertain and requires legislative clarification.

Connecticut General Statutes § 6-32 sets forth the duties of a state marshal. It provides, in its entirety, as follows:

> Each state marshal **shall** receive each process directed to such marshal when tendered, execute it promptly and make true return thereof; and shall, without any fee, give receipts when demanded for all civil process delivered to such marshal to be served, specifying

> the names of the parties, the date of the writ, the time of delivery and the sum or thing in demand. **If any state marshal does not duly and promptly execute and return any such process or makes a false or illegal return thereof, such marshal shall be liable to pay double the amount of all damages to the party aggrieved. (Emphasis added).**

Connecticut General Statutes § 6-38b establishes the State Marshal Commission. Subsection (f) of that section provides, in its entirety, as follows:

> The commission, in consultation with the State Marshals Advisory Board, **shall adopt regulations** in accordance with the provisions of chapter 54 **to establish professional standards**, including training requirements and minimum fees for execution and service of process. (Emphasis added).

The plain language of § 6-32 appears to prohibit a state marshal from picking and choosing the type of work he will perform. By use of the mandatory "shall," it appears that the General Assembly did not intend to give a state marshal the choice of accepting or rejecting civil process for service depending on the type of civil process to be served. While it is true that state marshals are independent contractors, a court has stated that it is a privilege (and not a right) to be a state marshal. He can either comply with the law or resign. *Page v. State of Connecticut*, 2006 Conn. Super. LEXIS 941(2006).[1]

The State Marshal Commission, which came into being in 2000 as a part of legislation abolishing the County Sheriff system, is the regulatory agency charged with responsibility for the appointment[2], termination[3] and discipline[4] of state marshals. The statutory grant of authority contained in § 6-38b(f) to "adopt regulations...to establish professional standards..." could be viewed as authority to ensure that state marshals provide the full panoply of service of process functions normally expected from such officers.[5] That a state marshal might use his commission to "specialize" in a certain type of service of process to the exclusion of all other types of service appears to violate the spirit, if not the clear language of § 6-32. By use of its regulatory authority to "establish professional standards," the Commission could be seen as having to have the authority to set standards to ensure that all process, and not only those types of process that individual state marshals find most desirable, is served within each county.

Although § 6-32 and 6-38b together may be read to give the Commission the authority to require state marshals to serve capias warrants, the legislative enactment of Conn. Gen. Stat. § 6-38b(g) makes the issue unclear. Section 6-38b(g) contains a specific statutory requirement that the Commission ensure the equitable assignment of restraining orders for service and specifically authorizes the Commission to ensure that restraining orders are served by state marshals, under threat of removal from office. Restraining orders, like capias mittimuses, are civil "process" under Section 6-32.

Subsection (g) was not in the original legislative enactment by which the County Sheriff system was abolished and the position of state marshal created for the service of civil process. Rather, it was added to the statute in 2001 by Public Act 01-9, §8 (June Special Session). The legislative history of that Public Act discloses that the proposal was first introduced in the 2001 June Special Session by an emergency certification on June 29, 2001, approved by both houses of the General Assembly on the same date and signed by the Governor on July 2, 2001. There were no committee hearings or committee votes on the proposal and there was no reference to the proposal during the debate on the floor of the House. Moreover, there is no record of any debate on the bill in the Senate.

Because there is no record to establish the legislative intent in enacting Section 6-38b(g),

the question raised by its enactment is whether, despite Conn. Gen. Stat. §6-32 and §6-38b, a similar, specific statute is necessary to enable the Commission to order state marshals to serve capias mittimus, under threat of discipline or removal. Given the uncertainty of the legislature's intent in enacting subsection (g), legislative clarification is required concerning the Commission's authority to compel state marshals to serve capias warrants.

What Principles Should Guide the Commission in Establishing Procedures Mandating Service of Capias Mittimus?

Should the legislature clarify the Commission's authority to require the service of capias mittimus, the Commission, in consultation with the State Marshals Advisory Board, must promulgate regulations pursuant to, and in accordance with, the provisions of Chapter 54 of the General Statutes. Those regulations may follow the methodology adopted by the Commission in response to its statutory responsibility to ensure that restraining orders are served. However, beyond stating that the process should ensure that capias mittimus warrants should be served expeditiously, as information relative to the whereabouts of the individual who failed to appear in court as ordered becomes stale very quickly, the Commission should strive to also ensure that the distribution among the several marshals in each county is equitable.

Would a Rule Mandating that All Marshals Accept and Serve Capias Mittimus be Impacted by the Americans with Disabilities Act?

The authority of the Commission to mandate that all marshals accept and serve capias mittimus is not likely to be in any way impacted by the Americans with Disabilities Act of 1990 (42 U.S.C. 12101, *et. seq.*). It is not clear whether the ADA applies to state marshals in this context; however, to the extent it does, the provisions of the ADA must be applied on an individual case-by-case basis.

The ADA is divided into three distinct sections. Title I of the ADA prohibits discriminatory employment practices; Title II prohibits a public entity, i.e., any governmental body, from discrimination in its provision of public services, programs and activities on account of a disability; and Title III prohibits discrimination in public accommodations operated by private entities on account of a disability.

It seems clear that neither Title I nor Title III apply to the appointment of state marshals. Title I of the ADA does not apply because a state marshal is not a state employee as defined by Title I. State marshals are, by statutory definition, "independent contractors" who are not "employees" for purposes of the Act. See, *Lerohl v. Friends of Minn. Sinfonia*, 322 F.3d 486 (8th Cir. 2003);[6] Conn. Gen. Stat. § 6-38a(a). Title III of the ADA, which prohibits discrimination in places of employment and commercial facilities on account of disability, does not apply because the obligations of Title III only extend to private entities. Because the Commission is not a private entity or commercial facility, it is not subject to the provisions of Title III.

However, the applicability of Title II of the ADA is somewhat less clear. Title II prohibits excluding a qualified individual with a disability from benefits of services, programs or activities provided by public entities such as public assistance benefits, public transportation, housing, government sponsored medical or mental health services, or the like, by reason of a disability. Although appointment of a state marshal does not appear to be such a "service, program, or activity," it is not entirely clear whether the licensing and certification provisions in Title II would be applicable to the Commission's appointment of state marshals. Section II-3.7200 of the Title II Technical Assistance manual provides, in relevant part, as follows:

> A public entity may not discriminate on the basis of disability in its licensing, certification, and regulatory activities. A person is a "qualified individual with a disability" with respect to licensing or

> certification, if he or she can meet the essential eligibility requirements for receiving the license or certification. The phrase "essential eligibility requirements" is particularly important in the context of State licensing requirements. While many programs and activities of public entities do not have significant qualification requirements, licensing programs often do require applicants to demonstrate specific skills, knowledge and abilities. Public entities may not discriminate against qualified individuals with disabilities who apply for licenses, but may consider factors related to the disability in determining whether the individual is "qualified."

Arguably, the appointment of a state marshal is not a licensing, certification, or regulatory activity as the terms are used in Title II. Further, a marshal who is unable to serve capias mittimus may not meet the "essential eligibility requirements" for such an appointment and therefore may not be a "qualified individual with a disability". In the event a state marshal (or an applicant for appointment to a state marshal position) requests to be excused from the requirement of serving capias mittimus, the Commission should evaluate such request on a case-by-case basis and is encouraged to seek further guidance and advice from this office as necessary.

Is a State Marshal Personally Liable for Injuries an Arrestee May Suffer While in Custody of a Marshal and May He Assert a Defense of Sovereign Immunity?

Your letter specifically asks whether a state marshal is personally liable for damages that an arrestee may suffer in the process of serving a capias mittimus, and whether a state marshal may claim the state's sovereign immunity in such circumstances. The underlying issue is in reality whether a state marshal is generally liable for damages that may arise during the performance of his duties, which include the service of capias mittimus warrants, or whether he is included within the state's sovereign immunity protection. These questions require a two-facet analysis.

The analysis begins with Connecticut General Statutes § 6-30a, which provides, in pertinent part, as follows:

> On and after December 1, 2000, each state marshal shall be required to carry personal liability insurance for damages caused by reason of such marshal's tortious acts in not less than the following amounts: For damages caused to any one person or to the property of any one person, one hundred thousand dollars and for damages caused to more than one person or to the property of more than one person, three hundred thousand dollars.

This provision was first enacted in 1976 as to the former state sheriffs, and was amended in 2000 as part of legislation which replaced the County Sheriff system. The only change made in the 2000 amendment was to replace references to sheriffs and deputy sheriffs with references to state marshals, as necessary. No substantive changes were made in the text of the statute.

Connecticut General Statutes § 6-30a, when first enacted and to the present, recognizes the possibility that a state marshal may cause damage in the performance of his/her service of process duties and seeks to ensure that insurance coverage is available to protect any party injured by virtue of the marshal's tortious conduct. Indeed, in *Miller v. Egan*, 265 Conn. 301, 329-330 (2003), a case in which the Supreme Court was required to consider the purpose behind the General Assembly's original enactment of §6-30a in 1976, the Court concluded that sheriffs were personally liable for damages caused by them in the performance of their duties:

> We fail to see how a requirement that sheriffs and deputy sheriffs

> purchase *personal* liability insurance necessarily implies that the legislature intended to waive the state's sovereign immunity, either from suit or liability, under § 6-30a. **In fact, the opposite inference makes more sense, namely, that the legislature intended the individual sheriffs and deputy sheriffs, rather than the state, to bear liability for the conduct covered by the statute.** This conclusion is bolstered by the statute's definition of "tortious acts" as "negligent acts, errors or omissions *for which such sheriff or deputy sheriff may become legally obligated* . . . ." (Emphasis added.) General Statutes (Rev. to 1999) § 6-30a.
>
> **The legislative history of the statute could not be more clear on this issue.** During the floor discussion of Public Acts 1976, No. 76- 15, which eventually became § 6-30a, Representative Richard D. Tulisano, a member of the judiciary committee, which sponsored the legislation, explained the purpose of the act: **"We want to make sure that the public is protected from any acts which the sheriff may incur in the event that he does not have personal assets of his own to cover either misservice of process, assault or battery or any other [of] those items listed in the statute."** 19 H.R. Proc., Pt. 2, 1976 Sess., p. 494. If the legislature had intended to waive the state's sovereign immunity by enacting Public Act 76-15, it is difficult to see why the personal assets of the individual sheriffs or deputy sheriffs, or, more particularly, the possible lack thereof, would be a matter of concern. Even more persuasive is the subsequent exchange that took place between Representative Tulisano and Representative Gerald F. Stevens. Specifically, Representative Stevens asked whether it was **"the intention of this legislation that no state funds be expended for the purchase of such insurance or for reimbursement of sheriffs."** Id., p. 495. Representative Tulisano replied: **"It is absolutely the intention of this bill to have it be a personal liability of the sheriff *and not the state*."** (Emphasis added.) Id. It would be unreasonable, both in light of this clear evidence to the contrary and our duty to construe statutes strictly in order to effect the least change to sovereign immunity, to interpret the language and history of § 6-30a necessarily to imply a legislative intent to waive sovereign immunity. Therefore, we conclude, based on the statutory language and the legislative history, that the legislature did not intend § 6-30a to constitute such a waiver. (Emphasis in bold added, italics in original).

Given that § 6-30a was re-enacted by the General Assembly in 2000 with the only changes as stated above, it is clear that the General Assembly intended that state marshals be liable for damages caused by their tortious conduct and instituted an insurance requirement for the protection of the public. *Grodis v. Burns*, 190 Conn. 39, 47 (1983) (legislature, in re-enacting statute, is presumed to have ratified prior judicial decision); *Davis v. Forman School*, 54 Conn App. 841, 846 (1999).

Moreover, Connecticut General Statutes §6-39 provides that

> Each state marshal, before entering upon the duties of a state marshal, shall give to the State Marshal Commission a bond in the sum of ten thousand dollars conditioned that such state marshal will faithfully discharge the duties of state marshal **and answer all damages which any person sustains by reason of such state**

marshal's unfaithfulness or neglect. (Emphasis added).

This section reinforces that state marshals are liable for damages arising from the performance o their duties. The requirement that they each post a bond before entering upon the duties of a state marshal is independent of the insurance requirement.

However, the General Assembly did provide state marshals with limited statutory immunity from liability for certain tortious acts in the performance of execution or service of process functions. Connecticut General Statutes § 6-38a (b) provides as follows:

> (b) Any state marshal, shall, in the performance of execution or service of process functions, have the right of entry on private property and no such person shall be personally liable for damage or injury, not wanton, reckless or malicious, caused by the discharge of such functions.

Accordingly, in the performance of his duties, a state marshal is not liable for damage or injury, even if it occurs on private property, unless it is caused by behavior that is wanton, reckless or malicious. See, *Opinion of the Attorney General*, No. 2004-005 (May 10, 2004).

We therefore conclude that, subject to the statutory immunity provisions contained in § 6-38a (b), state marshals may be liable for damages arising from the performance of their duties, including injuries suffered by an arrestee. As this office stated in *Opinion of the Attorney General*, No. 2004-005 (May 10, 2004):

> ...state marshals serving capias warrants are independent contractors who do not qualify for the statutory indemnification afforded to state officers and employees. Instead, state marshals are required by statute to carry their own personal liability insurance. Similarly, state marshals under contract with the state to provide training services are independent contractors required to obtain their own personal liability insurance to protect themselves and the state from liability in connection with their training activities.

Nor may state marshals claim the state's sovereign immunity as a defense in such actions.

The doctrine of sovereign immunity generally provides that the state is immune from suit unless it consents to be sued. *White v. Burns*, 213 Conn. 307, 312, 567 A.2d 1195 (1990). Its protection extends to negligence actions against individual state officials and employees acting within the scope of their authority. *Horton v. Meskill*, 172 Conn. 615, 623, 376 A.2d 359 (1977). Connecticut General Statutes § 4-165 provides that "No state officer or employees shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment," and Connecticut General Statutes § 5-141d provides that "any state officer or employee" sued for damages accruing while in the performance of their duties will be indemnified by the state for any such award arising from conduct that is not wanton, reckless or malicious conduct.

State marshals are not state officers or state employees within the meaning of Conn. Gen. Stat. § 4-165 and § 5-141d. This conclusion is based on the language of Connecticut General Statutes §§ 6-38a (a) and 6-38b(i). The former describes a marshal as "...an independent contractor compensated on a fee for service basis..." while the latter provides, in pertinent part, that "...no person may be a state marshal and a state employee at the same time." We have previously found that, taken together, the provisions of the aforementioned sections preclude a state marshal from qualifying as a state employee for purposes of immunity from suit or indemnification from damages. *Opinion of the Attorney General*, No. 2001-28 (December 20, 2001) (The status of state employee and of independent contractor are mutually exclusive)

Additionally, the Connecticut Supreme Court has specifically stated that the state has not waived its sovereign immunity and will not indemnify state marshals in suits that may be brought against state marshals. *Miller v. Egan*, 265 Conn. 301, 329-330 (2003).

Since a state marshal is not a state employee and, as an independent contractor, is clearly not a governmental agency, the doctrine of sovereign immunity is not available as a defense to an action for tortuous conduct against a state marshal.

Thank you for your letter. We hope this has been helpful.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

Robert A. Nagy
Assistant Attorney General

[1] It appears that, subject to certain exceptions set forth in Conn. Gen. Stat. §52-56, state marshals may only serve process in the county in which they are appointed. This is because, prior to the abolition of the County Sheriff system, the High Sheriff of each county had the authority to serve all legal process directed to him in his county. Deputy Sheriffs had the same power to serve legal process as the High Sheriff. While Public Act 00-99 made many significant changes, it did not change the number of process servers that could be appointed in each county and the statutes governing service of process were left largely intact. Section 6-38a(a) provides that a state marshal "... shall have authority to provide legal execution and service of process in the counties in this state pursuant to section 6-38...," and § 6-38b(h) requires that an applicant for appointment to the position of state marshal must be an elector in the county in which a vacancy is to be filled. When read with the provisions of § 52-56, which authorizes a state marshal to leave his "precincts" (county) in limited sets of circumstances, these statutes appear to indicate a legislative intent to limit state marshals to service of process in the county in which they are appointed. However, since there is no explicit prohibition in the statutes against marshals serving process in counties other than the county in which they are appointed, legislative clarification is appropriate.

[2] See, Connecticut General Statutes §§ 6-38 and 6-38b (h).

[3] See, Connecticut General Statutes § 6-38b (j).

[4] See, Connecticut General Statutes § 6-38b (f).

[5] Connecticut General Statutes § 6-38 currently authorizes the appointment of a maximum of 318 state marshals state-wide. Statistics compiled by the Judicial Branch show that, as of 12/31/05, there were 3,200 outstanding capias mittimus warrants, all issued by Family Support Magistrates; that during calendar 2005, 25 state marshals served about 500 warrants of which nearly 50% were served by only 4 marshals; that only about 20% of all ordered capias mittimus warrants are executed; that of the approximately 195 capias mittimus warrants ordered each month by Family Support Magistrates, 66 are vacated and only 39 served, adding approximately 90 orders to the backlog of unserved capias mittimus warrants each month.

[6] *See, Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998) which held that the test enunciated by the Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 117 L. Ed. 2d 581, 112 S. Ct. 1344 (1992) to determine whether an employer/employee relationship exists, is applicable for that purpose under the ADA. The Court in *Darden* held that,

> A court, in determining whether a hired party is an employee or an independent contractor under the general common law of agency, must consider the hiring party's right to control the manner and means by which the product is accomplished; among the other factors relevant to this inquiry are (1) the skill required, (2) the source of the instrumentalities and tools, (3) the location of the work, (4) the duration of the relationship between the parties, (5) whether the hiring party has the right to assign additional projects to the hired party, (6) the extent of the hired party's discretion over when and how long to work, (7) the method of payment, (8) the hired party's role in hiring and paying assistants, (9) whether the work is part of the regular business of the hired party, (10) whether the hiring party is in business, (11) the provision of employee benefits, and (12) the tax treatment of the hired party; since the common-law test contains no shorthand formula or magic phrase that can be applied to find the answer, all of the incidents of the relationship must be assessed and weighed with no one factor's being decisive. 503 U.S. at 323-324.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Process Must go to a Marshal Not a Business Entity. No Fee Allowed to be Charged to a Marshal in Order to get Work

Date: 09/21/2007

Opinion Number: 2007-019

2007-019

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

September 21, 2007

Dennis F. Kerrigan, Jr., Esq.
Chairman
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Chairman Kerrigan:

As Chairman of the State Marshal Commission, you have requested a formal opinion of the Attorney General as to whether state marshals are prohibited from participating in a business entitled Connecticut Service Network, LLC, and what action, if any, our office would recommend to the Commission concerning such a business.

According to the materials provided to us, this business entity would establish a network of state marshals who would pay an annual fee to belong, collect legal process from officers of the court and distribute it to individual marshals, along with necessary copies for service of process. The marshals would then report service back to the entity on software supplied by the network, for which the marshal would pay a fee.

Until recently, the service of legal process in Connecticut was performed by deputy sheriffs acting under a constitutional officer, the High Sheriff of each county in Connecticut. The sheriffs system in Connecticut was abolished by constitutional amendment effective November 30, 2000. The process-serving functions formerly performed by sheriffs are now performed by state marshals. The service of process is a sovereign governmental function subject to control and oversight by the Connecticut General Assembly. *Kelly v. Kelly*, 83 Conn. 274 (1910). Although state marshals are "independent contractors" (Conn. Gen. Stat. § 6-38a), state marshals are appointed by a statutorily empowered state agency, the State Marshal Commission, which has the authority to appoint marshals, "establish professional standards, including training requirements and minimum fees for execution and service of process," and remove state marshals for cause. Conn. Gen. Stat. § 6-38b.

State Marshals have the statutory duty to "receive each process directed to such marshal when tendered, execute it promptly and make true return thereof." Conn. Gen. Stat. § 6-32. (emphasis added). State marshals are authorized "to provide legal execution and service of process compensated on a fee for service basis, determined, subject to any minimum rate promulgated by the state, by agreement with an attorney, court or public agency requiring execution or service of process." Conn. Gen. Stat. § 6-38a.

The procedure for serving legal process is articulated in Conn. Gen. Stat. § 52-50. That section in relevant part provides:

> **Sec. 52-50. Persons to whom process shall be directed.** (a) All process shall be directed to a state marshal, a constable or other proper officer authorized by statute, or, subject to the provisions of subsection (b) of this section, to an indifferent person. A direction on the process "to any proper officer" shall be sufficient to direct the process to a state marshal, constable or other proper officer.

(emphasis added).

This statute unequivocally requires all process to be directed to a state marshal, a constable, or other proper officer authorized by statute, or subject to the provisions of subsection (b) of § 52-50, an indifferent person. The summons form itself is a signed order from an officer of the court and directed "to any proper officer authorized by statute." Conn. Gen. Stat. § 52-45b (emphasis added).

Quite simply, there is no statute authorizing a private business entity such as you described to have legal process directed to such an entity. Such an entity is not a "state marshal, constable or other proper officer." Section 52-50. Nor is there any statutory authority for such an entity to collect legal process from officers of the court, to assign or otherwise direct in any manner service of process to or by state marshals, to establish a "network" of state marshals, or to collect any fees from state marshals related to the legal execution and service of process.

The operations of a business entity such as you described, and the actions of state marshals who may participate in such a business entity, are completely inconsistent with the service of process system established by the General Assembly. Such an arrangement would intrude upon and usurp the statutory duties and responsibilities of state marshals and the State Marshal Commission, and would thus be in violation of Conn. Gen. Stat. § 6-32, 6-38a,6-38b,6-38d,6-38f, 52-50 and 52-45b.

Further, Section 2 of Public Act 07-69, effective October 1, 2007, states: "A state marshal shall not be charged any fee by a private entity for performing such state marshal's statutory duties." According to its legislative history, Public Act 07-69 prohibits private business entities from charging state marshals any annual contractual fee or any fee for utilizing private business entities' computer systems: "if there is a fee that would be essentially charged to the marshal by that private business entity for the opportunity to serve that process, or for facilitating that service, it would be prevented by this bill." Remarks of Senator McDonald, 50 Conn. S. Proc., pt. 81 2007 Sess. 2457 (May 16, 2007). As of October 1, 2007, therefore, the fees charged state marshals by the Connecticut Service Network to join its network and to use its computer systems will be expressly illegal.

We recognize that many State Marshals use third parties to perform various services, such as copying of documents. We do not believe such delegation of duties by state marshals is improper, provided they are performed at the direction of the Marshal, who remains responsible for the accuracy of the work performed.

We recommend you advise all State Marshals that legal process must be directed to them by the attorney or officer of the court signing the summons and that it is illegal for them to participate in the type of business entity you have described.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Calculation of Mileage Fee

Date: 06/16/2008

Opinion Number: 2008-011

2008-011

CT Attorney General

Attorney General's Opinion

Attorney General, Richard Blumenthal

June 16, 2008

Martin R. Libbin
State of Connecticut Judicial Branch
Court Operations Division
100 Washington Street
Hartford, CT 06115-0474

Dear Mr. Libbin:

You have requested a formal legal opinion concerning the calculation of mileage fees owed to state marshals and indifferent persons who serve process. Specifically, you have asked:

(1) whether mileage fees are owed for unsuccessful attempts at service of process, in addition to when service is successful; [1]

(2) whether the computation of mileage is "limited to 'direct' mileage to the place of service (i.e., the shortest possible driving distance from place of receipt to place of service) or, instead, allows for mileage resulting from a more circuitous route if it was incurred in connection with a bona fide effort to effectuate service or otherwise added value to the service (such as travel for legitimate investigative purposes relative to service);" and

(3) what mileage fees are owed when travel to serve process is started at a location other than where the process was sent. "For example, if a summons and complaint are sent to a state marshal at his or her office in Waterbury for service on a defendant that resides two miles from the marshal's office, is the marshal entitled to be paid for mileage for service from New Haven to Waterbury if in fact after being in New Haven the marshal goes directly to the defendant's home in Waterbury?"

The provisions of Conn. Gen Stat. § 52-261(a) and 52-261a compel the following conclusions: mileage fees are not owed for unsuccessful attempts to serve process, mileage should be calculated using the most direct route from the place of receiving the process to the place of service, and mileage fees should not be paid for travel that begins at a location further from the destination point than the place where process was received.

Section 52-261(a) of the Connecticut General Statutes sets forth the fees to be paid to individuals who serve process, summons or attachments, including mileage fees for the travel incurred in effecting such service. In pertinent part, section 52-261(a) states:

> [E]ach officer or person who serves process, summons or attachments shall receive a fee of not more than thirty dollars for each process served and an additional fee of thirty dollars for the second and each subsequent service of such process, ... **Each such officer or person shall also receive the fee set by the Department of Administrative Services for state employees for each mile of travel, to be computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return.**

Conn. Gen. Stat. § 52-261(a)(emphasis added). Conn. Gen. Stat. § 52-261a, which pertains to individuals serving process for the Judicial Department or Division of Criminal Justice, contains

similar language.[2]

In construing a statute, the "fundamental objective is to ascertain and give effect to the apparent intent of the legislature." American Promotional Events, Inc. v. Blumenthal, 285 Conn. 192, 202 (2008). In searching for the legislative intent, a court looks "first to the text of the statute itself and its relationship to other statutes." Id., citing Conn. Gen. Stat. § 1-2z. If the text of the statute is not clear and unambiguous, it is appropriate to look to the statute's "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." Jagger v. Mohawk Mountain Ski Area, Inc., 269 Conn. 672, 679 (2004).

Looking at the language of § 52-261(a), there is no express mention of whether the mileage fees apply to unsuccessful, as well as successful, attempts to serve process. The language implies, however, that mileage fees are payable only for successful service. This implication arises because the first sentence of § 52-261(a) states that "each officer or person **who serves process**, summons or attachments shall receive a fee of not more than thirty dollars **for each process served**." Conn. Gen. Stat. § 52-261(a)(emphasis added). The phrase "each process served" describes a completed action. Thus, the service fee is payable to those officers and persons who successfully serve process. The second sentence of § 52-261(a), which pertains to mileage fees, begins with the words "[e]ach such officer or employee," thereby referring back to the officers and persons in the first sentence who have successfully served process and implying that fees for mileage are payable specifically to those individuals who have completed the act of serving process.

The conclusion that mileage fees are payable when process is successfully served is supported by the second half of the sentence, which states that the mileage fee is computed "from the place where such officer or person received the process to the place of service." Conn. Gen. Stat. § 52-261(a). The use of the past tense, coupled with the reference to "the place of service" implies that the mileage fee is payable for service that has been successfully effected.[3]

Although no Connecticut case law or legislative history was found that considered whether § 52-261(a) permits the payment of mileage fees for unsuccessful attempts at service, the court in Rioux v. State Ethics Commission, 45 Conn. Supp. 242 (1997), aff'd, 48 Conn. App. 214 (1998), interpreted the statute to permit only those fees explicitly enumerated. Specifically, the court found a sheriff's $15 "service fee" for advice and review of documents to be improper because § 52-261(a) makes no mention of such a fee. According to the court, "[u]nless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." Rioux, 45 Conn. Supp. at 247. This conclusion is consistent with the view expressed in Corpus Juris Secundum that "[t]he right to mileage . . . is purely statutory; for services in connection with which no mileage is allowed by statute a sheriff or constable is entitled to none." 80 Corpus Juris Secundum, Sheriffs and Constables § 498 (2000).

Courts and Attorneys General in other jurisdictions have similarly concluded that mileage fees are purely statutory and, "[i]n the absence of a statute, a sheriff is not entitled to mileage for service of process." Sears, Roebuck and Co. v. Braney, 627 A.2d 698, 699 (N.J. Superior Ct., 1992), aff'd in part, rev'd in part, 627 A.2d 662 (N.J. Superior Ct., Appellate Div. 1993). Although out-of-state decisions have reached varying conclusions as to whether mileage fees must be paid for unsuccessful service, in each case the determination has turned on the legislative intent as evidenced, primarily, by the language of the relevant statutes.[4] Based on the language of Conn. Gen. Stat. §§ 52-261(a) and 52-261a discussed above, I conclude that the Connecticut General Assembly intended mileage fees to be paid only for those trips that result in successful service.

Your second question asks whether the computation of mileage is "limited to 'direct' mileage to the place of service (i.e., the shortest possible driving distance from place of receipt to place of service) or, instead, allows for mileage resulting from a more circuitous route if it was incurred in connection with a bona fide effort to effectuate service or otherwise added value to the service (such as travel for legitimate investigative purposes relative to service)." Although neither Conn.

Gen. Stat. § 52-261(a) nor § 52-261a addresses this issue explicitly, both statutes provide that mileage shall be "computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return," thereby implying that payment applies to direct travel along this specific route and not to other destinations that could be reached along the way if the route were circuitous. Indeed, construing the statute to permit payment for a circuitous route would open the door to potential abuse of the statute by those seeking to augment their fees. Because courts may not "supply statutory language that the legislature may have chosen to omit," Connecticut Light & Power Co. v. Dept. of Public Utility Control, 206 Conn. 108, 119 (2003), I conclude that Conn. Gen. Stat. §§ 52-261 (a) and 52-261a should be construed to permit mileage payments only for the most direct route between the place of receiving process and the place of service.

The answer to your third question follows from the answer to your second question. Your third question asks what mileage fees are owed when travel to serve process begins at a location other than where the process was received. This is a problem, as you point out, when travel begins at a location that is further from the sheriff's destination than the place where he received the process to be served. As noted above, Conn. Gen. Stat. §§ 52-261(a) and 52-261a state that mileage shall be "computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return." There is no provision in either statute for payment for travel that begins at a location other than "the place where such officer or person received the process." Because courts "are not permitted to supply statutory language that the legislature may have chosen to omit," Connecticut Light & Power Co., 206 Conn. at 119, I conclude that mileage fees are not payable for travel from a location further from the destination point than the place where the process was received.

I trust that this opinion answers your questions.

Very truly yours,

RICHARD BLUMENTHAL
ATTORNEY GENERAL

[1] You note that the current practice of the State Marshal Commission is to encourage the allowance of mileage fees when a marshal has made a bona fide, but unsuccessful, effort to effectuate service. Recently, you have received several invoices for service of process that included claims for mileage for unsuccessful attempts at service.

[2] Conn. Gen. Stat. § 52-261a(2) states, in pertinent part, that "each officer or person who serves process shall receive, for each mile of travel, the same amount per mile as provided for state employees pursuant to section 5-141c, to be computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return."

[3] A similar analysis applies to Conn. Gen. Stat. § 52-261a(2), which states that "each officer or person who serves process shall receive, for each mile of travel, the same amount per mile as provided for state employees pursuant to section 5-141c, to be computed from the place where such officer or person received the process to the place of service, and thence in the case of civil process to the place of return." As in section 52-261(a), the underlined language suggests that mileage fees apply when service has been successfully effected.

[4] None of the decisions found analyzed statutory language identical to Connecticut's. The following decisions disallowed mileage fees for unsuccessful service: Commonwealth v. Brown, 4 Pa. D. & C. 2d 42 (1955)(constable not entitled to mileage for eleven unsuccessful attempts to serve a warrant); Schneider v. Waukesha County, 79 N.W. 228 (Wis. 1899)(sheriff not entitled to mileage fees for travel in an honest but unsuccessful attempt to execute a criminal warrant); 1987 La. AG Lexis 257, La. Atty. Gen. Op. No. 1987-462 (Sept. 17, 1987)(state statute did not provide fees for unsuccessful service); 1984 Wisc. AG Lexis 10, 73 Op. Atty Gen. Wisc. 106 (Oct. 11, 1984)(statute allowing mileage fee for "each mile actually and necessarily traveled" in serving any summons, writ or other process did not entitle sheriff to payment for unsuccessful service); 1952 N.Y. AG Lexis 279, 1952 N.Y. Op (Inf.) Atty. Gen. 76 (Aug. 15, 1952)(statute providing payment for "miles necessarily traveled going and returning" only applied to the one round trip in which service was effected).

The following decisions allowed mileage fees for unsuccessful service: Sears, Roebuck and Co. v. Braney, 627 A.2d 698 (N.J. Superior Ct., 1992), aff'd in part, rev'd in part, 627 A.2d 662 (N.J. Superior Ct., Appellate Div. 1993)(statutory fee for "mileage

actually traveled" "[f]or serving or executing process" applied to unsuccessful attempts); Garbenis v. Elrod, 454 N.E. 2d 719 (App. Ct. Ill. 1983)(statute allowing fee for each "mile each way necessarily traveled in making . . . service" permitted sheriff to retain mileage fee for unsuccessful service); 1978 Ky. AG Lexis 672 (Jan. 24, 1978)(mileage for unsuccessful service allowed where sheriff's affidavit supported conclusion that specific trips were actually made and necessary); 1941 Ore. AG Lexis 209, 20 Op. Atty. Gen. Ore. 381 (Aug. 27, 1941).

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Content Last Modified on 6/16/2008 10:20:00 AM

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Lis Pendens Service

No LLC – Corporation Business Entities

Marshals Cannot Employ Each Other or be Controlled by any Private Entity

Indifferent Person Work

Sharing Administrative Costs

Date: 09/21/2009

Opinion Number: 2009-009

2009-009

CT Attorney General

2009 Formal Opinions

Attorney General's Opinion

Attorney General, Richard Blumenthal

September 21, 2009

Herbert J. Shepardson, Esq., Chairperson
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Attorney Shepardson:

You have asked our opinion on several questions concerning State Marshals. In particular your questions are as follows:

1. Under Conn. Gen. Stat. § 52-261 and § 52-325(c), if the service of the lis pendens occurs at the same time as the underlying civil action, can the simultaneous service of a lis pendens and the underlying civil action result in multiple service fees, or is there authority for denying the State Marshal multiple fees for such simultaneous service?

2. If an indifferent person and a State Marshal can both work on a lis pendens, please consider the situation where the indifferent person records the original lis pendens on the land records at the town hall and the State Marshal serves the certified copy of the lis pendens on the property owner. Under those circumstances may the State Marshal state the following: "I caused to be filed on the land records" language, or something similar, in the return, or, in the alternative, are separate returns required by the indifferent person and the State Marshal on each of their actions?

3. Can a State Marshal create a single member LLC and conduct State Marshal work regarding service of process and executions under the LLC?

4. Can a group of State Marshals create a multi-member LLC and conduct their State Marshal work regarding service of process and executions under the LLC??

5. Can State Marshals, as appointed public officials, as well as independent contractors, employ other state marshals?

6. A January 16, 2002 informal advice issued by the Attorney General's office discussed whether Conn. Gen. Stat. §6-38d authorized State Marshals to divide fees for actual work shared between State Marshals. Although the mere referral of a service for process is legally insufficient to allow fee sharing, the Commission seeks clarification on what general elements constitute work actually performed that can be put into the monetary calculation of actual work?

7. Can State Marshals, as appointed officials, as well as independent contractors, employ indifferent persons to assist them in civil process work, such as subpoenas, lis pendens, notices to quit and other areas in which indifferent persons are empowered by statute? If so, are their fees to be set by the value of the actual work performed by each individual, as would

occur between State Marshals?

In evaluating these questions we have taken into consideration applicable statutes, judicial decisions and prior Opinions of the Attorney General. For the reasons summarized below we conclude as follows:

1. The provisions of Conn. Gen. Stat. § 52-261 do not allow multiple fees for simultaneous service of a lis pendens and the underlying civil action. Multiple fees for a single service of a notice of lis pendens and the underlying lawsuit are not authorized by law and are therefore improper. Further, Conn. Gen. § 52-325(c) does not authorize service of the notice of lis pendens on the property owner in a foreclosure proceeding.
2. Under no circumstances should a State Marshal include language to the effect of "I caused to be filed on the land records" or "I caused to be served" on a return where the State Marshal did not personally record and/or serve the papers involved. The State Marshal (or indifferent person where specifically authorized by law) who actually performed the service must sign the return attesting to the personal actions performed by that individual to effectuate service. If different documents are served or recorded by different people, separate returns are required, each personally signed by the persons performing each service or recording.
3. The laws governing State Marshals are inconsistent with the LLC form of business organization because the statutory authority and responsibilities of State Marshals are personal to each State Marshal as "public officers." A business organization such as an LLC is not authorized to be a "public officer" for the purpose of receiving process to be served, receiving fees for service of such process or performing any of the other statutory duties of a State Marshal. If the Commission believes that a State Marshal LLC should be permitted, legislation would be necessary.
4. Concerns regarding a State Marshal LLC would be severely heightened by an LLC formed by several State Marshals because such an LLC would also raise questions about inappropriate fee sharing.
5. State Marshals may not employ other State Marshals. Neither may State Marshals be employed by an LLC owned by one or more State Marshals. State Marshals receive statutory fees, not salaries, and their statutory duties and responsibilities may not be performed, directed or controlled by any private entity or other State Marshal. No State Marshal may receive any direct or indirect payment from service of process work performed by another State Marshal.
6. While there are some circumstances where several State Marshals, working collaboratively, could each receive legitimate fees for serving process, current law does not authorize fee sharing or referral fees. State Marshals may share administrative costs, such as the maintenance of an office, as long as each Marshal's share of such costs is clearly apportioned according to work actually performed.
7. State Marshals may not generally use indifferent persons for the service of process. Indifferent persons may only serve process in the few discrete areas where the law *expressly* allows indifferent person service. The same fee schedule applies to service by a State Marshal and service by an indifferent person.

I. A STATE MARSHAL MAY NOT CHARGE TWICE FOR THE SIMULTANEOUS SERVICE OF A NOTICE OF LIS PENDENS AND THE UNDERLYING CIVIL ACTION.

You have asked what fees are appropriate for serving a notice of lis pendens. Specifically,

you ask whether multiple fees can be charged for the simultaneous service of a notice of lis pendens and the underlying civil action. The potential fees in this situation could be: (1) charging two $30 service fees -- $30 for service of the lawsuit and $30 for serving a notice of lis pendens; and (2) charging twice for mileage and copies by treating service of the notice of lis pendens and service of the underlying action as separate service of process. We conclude that multiple fees for the simultaneous service of a lis pendens and underlying civil action are not authorized by law and are therefore improper.

The starting point for our analysis is the statutory framework governing the position of State Marshal and the service of process. The position of State Marshal is governed generally by Conn. Gen. Stat.§§ 6-29 et. seq. A notice of lis pendens is governed generally by Conn. Gen Stat. § 52-325. Fees authorized for serving process are governed by Conn. Gen. Stat. § 52-261.

A. Statutes Governing State Marshals and Notice of Lis Pendens

For many years, the service of legal process in Connecticut was performed by deputy sheriffs acting under a constitutional officer, the Sheriff for each county in Connecticut. The sheriff system in Connecticut was abolished by constitutional amendment effective November 30, 2000, along with sheriff reform legislation enacted by the General Assembly. Conn. Const. Amend. Art XXX; 2000 Conn Public Acts 00-99. The process-serving functions formerly performed by sheriffs and their deputies are now performed by State Marshals. State Marshals have no inherent authority or powers, but are empowered by Connecticut statute to "provide legal execution and service of process." *See* Conn. Gen. Stat. § 6-38a. It is well settled that "an enumeration of powers in a statute is uniformly held to forbid things not enumerated."[1] *State v. White*, 204 Conn. 410, 424 (1987); *Rioux v. State Ethics Commission*, 45 Conn. Supp. 242, 247 (Conn Super. 1997) (holding that "statutory itemization indicates that the legislature intended the list to be exclusive") *affirmed* 48 Conn App. 214 (1998) (per curiam).

Lis pendens is Latin for litigation pending. The only purpose of a notice of lis pendens is to provide public notice that litigation is pending relating to real property. In Connecticut, "[f]rom the face of the statute [Conn. Gen. Stat. § 52-325(a)] it is clear that a notice of lis pendens is appropriate only where the pending action will in some way, either directly or indirectly, affect the title to or an interest in the real property itself. [Citation omitted]." *Garcia v. Brooks Street Associates*, 209 Conn. 15, 22 (1988).

> A lis pendens is a creature of statute and a person invoking its provisions must comply with the statutory requirements. [Citation omitted]. "Nevertheless, the provisions of the statute should be liberally construed to implement reasonably and fairly its remedial intent of giving notice of claims pertaining to the real property which is the subject of the litigation." [Citation omitted].... Thus, if a person has actual notice of the lien and a suit commenced thereon, that actual notice may take the place of constructive notice imparted by the filing of a lis pendens....

First Constitution Bank v. Harbor Village Ltd. Partnership, 37 Conn. App. 698, 703 – 704 (1995).

A notice of lis pendens is recorded on the land records of the town where the property is situated. The notice is required to contain "the names of the parties, the nature and object of the action, the court to which it is returnable and the term, session or return day thereof, the date of the process and the description of the property." Conn. Gen. Stat. § 52-325(a). Under previous law, service of a notice of lis pendens on a property owner was authorized in a foreclosure matter. *See* Conn. Gen. Stat. § 52-325(c) (2003). In 2005, however, the legislature eliminated any authorization to serve a notice of lis pendens on the property owner in a foreclosure proceeding. *See* Conn. Public Acts 05-247, § 2. "[I]n any action *except a suit to foreclose a mortgage or other lien*, no recorded notice of lis pendens shall be valid ... unless the party recording such notice [serves the property owner]." (emphasis added). The purpose of this statutory change was explained by its proponent:

> The second portion, the second section of the Bill is designed to

> remove the requirement of serving a notice of lease pendings [sic] which is a notice of a lawsuit on the defendant property owner in a foreclosure matter.
>
> And the reason this is done is to clarify title searching and make it more efficient and properly to determine the status of the title, and there is no danger to the due-process rights of the defendant in the foreclosure action because they would be [sic] received the writ summons and complaint and would be aware of the foreclosure action.

2005 Conn. House Proceedings (June 6, 2005)

Thus, current Connecticut law does not authorize service of a notice of lis pendens on a property owner in a foreclosure proceeding. Connecticut law authorizes only that the notice of lis pendens be served on the property owner in non-foreclosure proceedings and that the notice of lis pendens be recorded[2] on the land records. Recording a notice of lis pendens can be effectuated without a State Marshal by any person or by mail.

B. Statutes Governing Fees For Service Of Process

Fees for service of process are governed by Conn. Gen. Stat. § 52-261 and Conn. Gen. Stat. § 52-261a.[3] These provisions set caps on fees and are exclusive, meaning that no fees for serving papers may be charged that are not authorized in these statutes.

> The statutes indicate that the server of process may charge "not more than" the specified fee plus mileage, copies and endorsements. "Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive." (Internal quotation marks omitted.) *Zachs v. Groppo*, 207 Conn. 683, 693, 542 A.2d 1145 (1988).

Rioux v. State Ethics Commission, 45 Conn. Supp. 242, 247 (Conn. Super. 1997) *affirmed* 48 Conn App. 214 (1998) (per curiam).

A lengthy schedule of fees for serving process is set forth at Conn. Gen. Stat. § 52-261. These include the following:

1. A fee of not more than $30 for each process served and an additional fee of $30 for each subsequent service of process, except that each subsequent service at the same address is $10;
2. Mileage at the same rate set for state employees from the place of receipt of the process to the place of service and place of return, except that if more than one process is served on one person at any one time the total cost should not exceed the cost of serving one process;
3. Copies at the rate of $1 per page, not to exceed a total of $900;[4]
4. Endorsements at the rate of 40¢ per page; and,
5. Actual fees paid to the town clerk.

State Marshal fees for service of process in foreclosure proceedings are limited to the fees authorized by this statute. The statute clearly contains several provisions designed to reduce fees where multiple services are made on one person or at one address.

C. The Simultaneous Service Of A Notice Of Lis Pendens With The Underlying Cause Of Action Constitutes Only One Service Of Process

A notice of lis pendens is a *notice* that litigation has been commenced. By recording a notice of lis pendens on the land records notice is provided to all who check the land records that litigation is pending which could affect ownership of that real estate.

Varying types of notices and documents accompany different types of lawsuits, but those documents are all part of the same service of process. A simple lawsuit involves a summons and complaint. Process in other lawsuits may involve multiple documents. For example, a lawsuit seeking an injunction may also have an application for a preliminary injunction, a proposed preliminary injunction, an application for an order to show cause, an order of notice setting a hearing date (possibly before the return date) for judicial proceedings, and either additional language in the summons or an entirely separate summons or citation commanding appearance at the court hearing. If an ex parte injunction was signed by a judge, that would also be included. In all instances the entire package of papers accompanying the lawsuit constitutes the process that is being served and fees may be charged only for serving one set of papers under Conn. Gen Stat. §52-261. There is no precedent and no authority for treating each separate document as a separate process and charging a fee for service of each.

Similarly, in a foreclosure action, if a State Marshal serves a homeowner with a summons, complaint, numerous court notices specific to foreclosures, and a notice of lis pendens, the State Marshal may only charge for one service - - in other words, $30. The State Marshal may not charge more than one fee for the simultaneous service of the summons and complaint and the lis pendens because the lis pendens is not a process separate from the underlying lawsuit. Charging multiple fees for simultaneous service would also contradict the intent of provisions in the fee statute clearly designed to reduce fees where multiple services are made on one person or at one address. *See* Conn. Gen. Stat. § 52-261 (reducing a second service fee at the same address to $10 and prohibiting double billing of travel expenses for multiple services at one address). Finally, as stated previously, there is no present statutory authority or need to serve a notice of lis pendens on the property owner at all in a foreclosure proceeding. There is simply no justification for charging a separate service fee for an unauthorized service.

Accordingly, if the State Marshal concludes that a State Marshal is charging multiple service fees for the simultaneous service of a summons and complaint and a lis pendens, the Commission should take action to bar or reimburse such excessive and unauthorized fees and take disciplinary action if appropriate. Conn. Gen. Stat. §6-38b. *See also* Conn. Gen. Stat. §52-70.[5]

II. A STATE MARSHAL IS A PUBLIC OFFICER WHOSE AUTHORITY IS DERIVED FROM THE STATE OF CONNECTICUT AND WHOSE DUTIES AND RESPONSIBILITIES ARE THE PERSONAL DUTIES AND RESPONSIBILITIES OF THE STATE MARSHAL.

You ask us several questions concerning the ability of a State Marshal or State Marshals to form a Limited Liability Company ("LLC") for conducting business as a State Marshal. You also ask whether a State Marshal can employ or be employed by another State Marshal.

A. A State Marshal Is A Public Officer Whose Powers and Duties Must Be Fulfilled Personally By the State Marshal.

The provisions of Conn. Gen. Stat. §6-38a clearly authorize each State Marshal "to provide legal execution and service of process..." Service of process in Connecticut has always been considered a sovereign function of government entrusted to public officials empowered by law.[6] "It is the wise policy of the law that its process shall be directed to known public officers, and the law sanctions a departure from this policy only in cases of supposed necessity. Statutes authorizing such departure should receive a strict construction. *Eno v. Frisbie*, 5 Day 122, 127 [(Conn. 1811)]." *Kelley v. Kelley*, 83 Conn. 274, 276 (1910).

State Marshals have the statutory duty to "receive each process directed to such marshal when tendered, execute it promptly and make true return thereof." Conn. Gen. Stat. § 6-32. In Connecticut, an officer's return is prima facie evidence of the facts stated therein. *Jenkins v. Bishop Apartments, Inc.* 144 Conn. 389, 390 (1957); *Buckingham v. Osborne*, 44 Conn. 133, 141 (1876). There are substantial consequences to filing a false return. In fact, intentionally falsely attesting to having personally served process is a crime. Conn. Gen. Stat. §53a-132(a)(2). False returns also subject State Marshals to monetary liability and discipline by the State Marshal Commission. Conn. Gen. Stat. 6-32, 6-38b.

> If any state marshal does not duly and properly execute and return such process *or makes a false or illegal return thereof, such marshal shall be liable to pay double the amount of all damages to the party aggrieved.*

Conn. Gen. Stat. §6-32 (emphasis added).

> [I]t has so long been the practice in this state, to give the whole sum in damages, *for an officer's neglect of duty*, in not levying or returning an execution, *or for making a false return*, that it may now be considered as settled law.
>
> ... The sheriff and other officers know what their duty is on this subject, and what will be the consequences of their negligence. *The rule, thus settled, is not too rigorous upon them, and is very beneficial to the public.*

Ackley v. Chester, 5 Day 221, 222 – 223 (Conn. 1811) (emphasis added).

Several other statutes directly relate to service of process.

> All process shall be directed to a state marshal, a constable or other proper officer authorized by statute, or, subject to the provisions of subsection (b) of this section, to an indifferent person.[7] A direction on the process "to any proper officer." shall be sufficient to direct the process to a state marshal, constable or other proper officer.

Conn. Gen. Stat. § 52-50(a).

The form of summons used in Connecticut specifies that it is directed to a "proper officer,' not to an indifferent person or to some type of artificial entity: Conn. Gen. Stat. §52-45b. The form requires action by the officer personally: "By authority of the state of Connecticut *you* are hereby commanded to summon..." Conn. Gen. Stat. §52-45b (emphasis added). Statutory provisions specifically govern the manner of service of process in numerous situations. *E.g.,* Conn Gen. Stat. §§ 52-54 to 52-69.

Thus, State Marshals clearly are required to make due service of process tendered to them and file an accurate return. This obligation of service and return is personal to each State Marshal.

Very limited situations exist where the law allows someone other than the State Marsha who received process to complete service. If "an officer to whom any process is directed dies or is removed from office, or becomes physically incapacitated, or because of other good and sufficient reason is unable to complete service of the process, after he has commenced to serve it but before completing service, *any other proper officer* may complete service." Conn. Gen. Stat. §52-55(a) (emphasis added). Also a State Marshal who commences service of process in the State Marshal's precinct that requires going into other precincts may either complete the service anywhere else in Connecticut or deliver it to "an officer" in the other precinct. Conn. Gen. Stat. § 52-56. The applicable statutes clearly allow service by State Marshals to be completed by other State Marshals only in precisely defined situations.[8] The statutes do not provide for indifferent persons or artificial entities to have a role in the service of process.

Consequently, a State Marshal cannot lawfully provide a return to the effect that "I caused to be filed on the land records" when in fact the State Marshal did not personally perform such task, utilizing an indifferent person instead.[9] Such a return is patently inappropriate and clearly misleading. The person who effectuated service, whether a State Marshal or indifferent person, must sign the return and attest to what that person actually did. If multiple people performed different portions of service on the same papers, then multiple returns are necessary.

B. A State Marshal's Formation of a Limited Liability Company Conflicts With the Statutory Authority and Responsibility of State Marshals.

Under Connecticut law an LLC can be formed "for the transaction of any business or the

promotion of any purpose which may be lawfully carried on by a limited liability company..." Conn. Gen. Stat. §34-119(a). An LLC can be formed to render professional services, but only for professional services enumerated in Conn. Gen. Stat. §34-101(23). Conn. Gen. Stat. §34-119(b). State Marshal services are not enumerated as professional services in Section 34-101(23). Nor can an LLC be appointed as a State Marshal.

Generally the personal liability of members and managers of an LLC to third parties is limited. Conn. Gen. Stat. §34-133. A State Marshal, however, is personally liable to pay double damages for failing to properly execute and return process or making a false or illegal return. (Conn. Gen. Stat. §6-32) and the LLC form cannot shield a State Marshal from such liability. Further, the statutes impose legal obligations that are personal to State Marshals. These include: (1) filing annual statements of financial interests with the Office of State Ethics, pursuant to Conn. Gene Stat. §1-83; (2) maintaining liability insurance, pursuant to Conn. Gen. Stat. § 6-30a; (3) being subject to periodic review and audit by the State Marshal Commission, pursuant to Conn. Gen. Stat. §6-38e: (4) being bonded, pursuant to Conn. Gen. State. §6-39; and (5) training and client fund requirements set by the State Marshal Commission pursuant its statutory authority. These obligations are all personal to State Marshals and cannot be avoided by the creation of an LLC.

A State Marshal is a public officer and must be a person, not an artificial entity, responsible for the personal obligations and duties imposed upon him or her by statute. Service of process may not be directed to or effectuated by an LLC and statutory fees for the services of process are payable only to a State Marshal, not to an LLC. Therefore, an LLC form of business organization is inconsistent with State Marshal work.

Concerns regarding a State Marshal LLC are heightened for any LLC formed by several State Marshals because such an LLC would also raise questions concerning inappropriate fee sharing in violation of Conn. Gen. Stat. §§6-38d & 6-39a, as explained below.

C. State Marshals May Not Be Employees of Other State Marshals or Employ Other State Marshals.

State Marshals may not perform State Marshal services for other State Marshals where service has commenced except in extremely limited circumstances set forth in Conn. Gen. Stat. §§52-55(a) & 52-56. State Marshals may not receive salaries from other State Marshals, but may only receive fees for work they actually perform and only as established by statute. A State Marshal is "an independent contractor compensated on a fee for service basis." Conn. Gen. Stat. §6-38a. No State Marshal may receive a monetary benefit from service of process performed by other State Marshals. "No state marshal shall knowingly bill for, or receive fees for, work that such state marshal did not actually perform." Conn. Gen. Stat. §6-38d. Nor may a State Marshal who performs process serving work pay, directly or indirectly, another State Marshal for such work. "A state marshal shall not be charged any fee by a private entity for performing such state marshal's statutory duties." Conn. Gen. Stat. §6-39a.

Under the statute there are a limited number of State Marshals appointed by the State Marshal Commission for each county who have been vested with the authority to serve legal process under the authority of the State of Connecticut. Conn. Gen. Stat. §§6-38, 6-38a. All State Marshals are classified by law as independent contractors, and all have the same statutory authority and fee schedule. The duties and responsibilities of each State Marshal are personal to each State Marshal and, therefore, cannot be changed, directed or controlled by another State Marshal.

An employer-employee relationship between and among State Marshals, whether directly or through an artificial entity such as an LLC, is incompatible with State Marshals' status as public officers, with their statutory duties and responsibilities, and with the statutory fee schedule. As we stated in a previous opinion: "Nor is there any statutory authority for [a private-business entity] to collect legal process from officers of the court, to assign or otherwise direct in any manner service of process to or by state marshals, to establish a network of state marshals, or to collect any fees from state marshals related to the legal execution and service of process." Conn.

Attorney General Opinions 2007-019 (September 21, 2007). This lack of legal authority to interfere with or direct the personal authority and responsibility of State Marshals or to collect any fees for service of process is equally applicable to situations where one State Marshal may seek to employ other State Marshals to perform State Marshal work in an employer-employee relationship.[10]

On the other hand, there is nothing in the existing statutory scheme that prohibits multiple State Marshals from sharing office space and administrative expenses in order to improve efficiency and reduce overhead. The provisions of Conn. Gen. Stat. §6-38d would bar the sharing of fees and a clearly defined mechanism would be needed to properly allocate administrative expenses among the State Marshals.[11]

The State Marshal Commission has clear authority to review and audit the records and accounts of State Marshals. Conn. Gen. Stat. §6-38e. We strongly advise the State Marshal Commission to use this authority to obtain detailed information about the types of business organizations used by State Marshals and/or any employer-employee relationships currently in place among State Marshals to assist the Commission in determining whether appropriate action should be taken to ensure compliance with the law.

III. INDIFFERENT PERSONS MAY NOT GENERALLY BE USED FOR SERVICE OF PROCESS.

You have asked us whether State Marshals may use indifferent persons in connection with the service of process. Except in the limited circumstances *expressly* authorized by statute, indifferent persons may not serve legal process in Connecticut.

A. INDIFFERENT PERSONS MAY ONLY SERVE PROCESS WHERE EXPRESSLY AUTHORIZED BY STATUTE.

There are a few statutory provisions permitting indifferent persons to serve specific types of legal papers. For example, an indifferent person may serve a subpoena (Conn. Gen. Stat. §52-143(a)), a notice to quit for a summary process action (Conn. Gen. Stat. §47a-23(c)), and a notice of lis pendens on a property owner, where service on the property owner is needed[12] (Conn. Gen. Stat. §52-325(c)). Such service is permissible only because it is expressly authorized by statute. None of these statutes provides authority for an indifferent person to serve any other process.

B. THE AUTHORITY OF A STATE MARSHAL TO MAKE A SPECIAL DEPUTATION IS EXTREMELY LIMITED

Conn. Gen. Stat. § 52-53 authorizes State Marshals to make special deputations in some limited circumstances.

> A state marshal may, on any special occasion, depute, in writing on the back of the process, any proper person to serve it. After serving the process, such person shall make oath before a justice of the peace that he or she faithfully served the process according to such person's endorsement thereon and did not fill out the process or direct any person to fill it out; and, if such justice of the peace certifies on the process that such justice of the peace administered such oath, the service shall be valid.

Conn. Gen. Stat. § 52-53.

This statute is a relic of the former sheriff system. The provisions of 2000 Conn. Public Acts 00-99, § 109 substitute the words "state marshal" for "sheriff" in the statutory text. Further, the use of justices of the peace for judicial functions in Connecticut ended in 1959. Our comments about this statute in Conn. Attorney General Opinions 2000-010 (March 7, 2000) are just as applicable today, and are repeated below.

> The power to command assistance is ancient in origin, "derived from

> a time in which the public peace depended upon the ability of the populace to summon their neighbors, through the raising of the 'hue and cry,' to come to their assistance when a crime had occurred. [Citations omitted]."" *State v. Floyd*, 217 Conn. 73, 90 - 91 (1991).
>
> [The sheriff] may command all proper persons within his county, to aid and assist him in the execution of his office. This is the same power that they have in England, and is called raising the posse commitatus, or power of the county.

Swift, Zephaniah, *A System of the Laws of the State of Connecticut*, Vol. I, p. 91 (1795).

> The sheriff has the liberty of deputing some meet person on special occasions, to serve and execute any particular process, which deputation, must be on the back of the writ... *The only instances where it is usual for sheriffs to make such special deputies are where no legal officer can conveniently be had, or the person against whom the writ is, secretes himself, and keeps himself out of the way of known officers*. In such cases, he deputes some person for that special purpose, so that there be no failure of justice...

Swift, Zephaniah, *A System of the Laws of the State of Connecticut*, Vol. I, p. 92 (1795) (emphasis added).

Judge Swift's understanding of the ability of the Sheriff to command assistance or specially authorize someone to serve particular process was limited. The limited nature of this authority is also reflected in the sparse caselaw concerning this practice. "It is the wise policy of the law that its process shall be directed to known public officers, *and the law sanctions a departure from this policy only in cases of supposed necessity*. Statutes authorizing such departure should receive a strict construction. *Eno v. Frisbie*, 5 Day 122, 127 [(Conn. 1811)]." *Kelley v. Kelley*, 83 Conn 274, 276 (1910) (emphasis added).

Similarly, the modern understanding of the authority to command assistance is consistent with Judge Swift's views. Statutes authorizing an officer to command assistance "have not been construed to confer unbounded discretion upon the peace officer." *State v. Floyd*, 217 Conn. 73, 92 (1991). These statutes authorize "a peace officer to command the assistance of a civilian only when such assistance is both demonstrably necessary and reasonable under all of the circumstances." *State v. Floyd*, 217 Conn. at 92 - 93. Determining the reasonableness of a command to assist an officer looks at the following factors, at a minimum:

> the urgency of the situation giving rise to a command for assistance; the availability of other trained law enforcement officers, rather than untrained civilians, to come to an officer's aid; the nature of the assistance sought; the appropriateness of commandeering the assistance of these individuals; the provocativeness of the situation in which aid is sought; the presence or threat of the use of weapons; and the risk of injury or death to the officer, to the individual being ordered to assist, and to any other parties present...

State v. Floyd, 217 Conn. 73, 92 (1991) (footnotes omitted).

Hence, the authority of State Marshals to command assistance or to specially deputize any person to serve any particular process is extremely limited. Such authority certainly does not allow deputation for the service of process in the ordinary course of business.[13]

C. Statutory Provisions For Directing A Summons To An Indifferent Person In Limited Circumstances Confer No Authority On State Marshals.

The provisions of Conn. Gen. Stat. §52-50(b) permit process to be directed to indifferent persons in only certain very limited circumstances. Generally process is issued "by a commissioner of the Superior Court[14] or a judge or clerk of the court to which it is returnable."[15] Conn. Gen

Stat. §52-45a. A State Marshal has no role in the issuance of the process. The duty of the State Marshal is to serve process delivered to the State Marshal in accordance with law. As noted above, under Conn. Gen. Stat. §52-50(a), process directed "to any proper officer" is only directed to such a proper officer and not to an indifferent person. There is nothing in this statutory provision that permits a State Marshal to redirect process issued "to any proper officer" to an indifferent person for service.

Under Conn. Gen. Stat. §52-50(b) "[p]rocess shall not be directed to an indifferent person" except under very limited circumstances. These include situations where there are multiple defendants in different counties and the plaintiff (or its agent or attorney) makes oath to the authority signing the process of a true belief that the plaintiff is in danger of losing his demand unless an indifferent person is deputed for the immediate service of process.

> The authority signing the writ shall certify on the writ that he administered the oath and insert in the writ the name of the person to whom it is directed, but he need not insert the reason for such direction. *Any process directed to an indifferent person by reason of such an affidavit shall be abatable on proof that the party making the affidavit did not have reasonable grounds, at the time of making it, for believing the statements in the affidavit to be true.*

Conn. Gen. Stat. §52-50(b) (emphasis added).

This statutory command operates to limit the authority of the person issuing the process. The general rule of not directing process to an indifferent person is stated above. Further, utilization of this provision creates a significant risk that the court will abate the process, effectively dismissing the case, if there were not proper grounds for believing that the plaintiff's demand would be lost if an indifferent person was not deputed for the immediate service of process.

In discussing a very early case under the statute from which Conn. Gen. Stat. § 52-50(b) is derived, the Connecticut Supreme Court of Errors observed:

> The service of writs, in general, is required to be made by a known public officer; and it is no unwarrantable inference, that the protection and security of the citizen are interested in the prevention of any unnecessary departure from this principle. The plaintiff's declaration, if the facts are stated truly is an illustration and proof of this position. The direction of a writ to an indifferent person, is an exception from the general rule; and all exceptions from the common principle are to receive a strict construction.
>
> * * *
>
> The direction of the writ not being legal, the indifferent person was, in no sense, an officer, nor invested with authority to make service. There being no service, nor even possibility of it, under the illegal direction, the judgment of the court was extra-judicial and void.

Case v. Humphrey, 6 Conn. 130, 139 (1826).

The legal authority to use this provision is clearly very limited. In the very narrow category of cases where Conn. Gen. Stat. §52-50(b) could be legitimately utilized, the process would be directed to a specifically named person rather than "to any proper officer." That indifferent person would serve it and sign the return of service, with all appropriate endorsements on the process itself, and subject to the risk of the process abating.

Such process need not ever be given to a State Marshal. Further, nothing in Conn. Gen Stat. §52-50(b) permits a State Marshal to utilize an indifferent person to serve process directed "to any proper officer."

D. State Marshals May Not Generally Use Indifferent Persons For Service Of

PROCESS.

Several principles flow from the above analysis. As a general rule, legal process must be served by a proper officer, of which a State Marshal is one type. Where there is express statutory authority (such as for service of a subpoena, service of a notice to quit, or service of a notice of lis pendens on a property owner) for use of an indifferent person to make service, the use of an indifferent person is permissible. It is not permissible under any other circumstances.

State statutes direct that State Marshals serve legal process without the use of indifferent persons except in narrowly defined circumstances. The sole exceptions to this general rule are for matters where there is *express* statutory authority for an indifferent person to make service, such as subpoenas, service of notices of lis pendens on a property owner, and service of notices to quit.

Authority to specially deputize under Conn. Gen. Stat. §52-53 is extremely narrow. Further, for the reasons explained, an attorney directing service to an indifferent person under Conn. Gen. Stat. §52-50(b) need not give such process to a State Marshal and §52-50(b) provides no authority to a State Marshal to use an indifferent person for serving papers directed "to any proper officer" and in the possession of the State Marshal for service. Both of these statutes include specific detailed requirements for endorsement on the served papers which should aid the State Marshal Commission in gathering relevant facts should it ever be necessary to scrutinize attempted use of such statutes.

IV. CONCLUSION.

In evaluating these questions we have taken into consideration applicable statutes, judicial decisions and prior Opinions of the Attorney General. For the reasons summarized below we conclude as follows:

1. The provisions of Conn. Gen. Stat. § 52-261 do not allow multiple fees for simultaneous service of a lis pendens and the underlying civil action. Multiple fees for a single service of a notice of lis pendens and the underlying lawsuit are not authorized by law and are therefore improper. Further, Conn. Gen. § 52-325(c) does not authorize service of the notice of lis pendens on the property owner in a foreclosure proceeding.

2. Under no circumstances should a State Marshal include language to the effect of "I caused to be filed on the land records" or "I caused to be served" on a return where the State Marshal did not personally record and/or serve the papers involved. The State Marshal (or indifferent person where specifically authorized by law) who actually performed the service must sign the return attesting to the personal actions performed by that individual to effectuate service. If different documents are served or recorded by different people, separate returns are required, each personally signed by the persons performing each service or recording.

3. The laws governing State Marshals are inconsistent with the LLC form of business organization because the statutory authority and responsibilities of State Marshals are personal to each State Marshal as "public officers." A business organization such as an LLC is not authorized to be a "public officer" for the purpose of receiving process to be served, receiving fees for service of such process or performing any of the other statutory duties of a State Marshal. If the Commission believes that a State Marshal LLC should be permitted, legislation would be necessary.

4. Concerns regarding a State Marshal LLC would be severely heightened by an LLC formed by several State Marshals because such an LLC would also raise questions about inappropriate fee sharing.

5. State Marshals may not employ other State Marshals. Neither may State

Marshals be employed by an LLC owned by one or more State Marshals. State Marshals receive statutory fees, not salaries, and their statutory duties and responsibilities may not be performed, directed or controlled by any private entity or other State Marshal. No State Marshal may receive any direct or indirect payment from service of process work performed by another State Marshal.

6. While there are some circumstances where several State Marshals, working collaboratively, could each receive legitimate fees for serving process, current law does not authorize fee sharing or referral fees. State Marshals may share administrative costs, such as the maintenance of an office, as long as each Marshal's share of such costs is clearly apportioned according to work actually performed.

7. State Marshals may not generally use indifferent persons for the service of process. Indifferent persons may only serve process in the few discrete areas where the law *expressly* allows indifferent person service. The same fee schedule applies to service by a State Marshal and service by an indifferent person

Steps should be taken promptly to inform marshals of these legal requirements and rules, and to enforce them when necessary. If individuals have been overcharged, appropriate remedies should be provided.

Very truly yours,

RICHARD BLUMENTHAL

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[1] One practical consequence is that other tasks a State Marshal may be asked to perform on behalf of an attorney or client that are not "legal execution" or "service of process" (such as performing "bring down" searches) are not services performed as a State Marshal and may not be billed as State Marshal fees.

[2] The lis pendens statute authorizes recording of the notice of lis pendens on the land records, but it does not authorize service of the lis pendens on the on the town clerk. Conn. Gen. Stat. § 52-261 does authorize a State Marshal to make service of process generally, but case law also holds that the terms of a statute covering the specific matter at issue typically prevail over the terms of a general statute that might otherwise apply. *Griswold Airport, Inc. v. Town of Madison*, 289 Conn. 723, 728 (2008). Another question is whether a State Marshal can charge a fee for recording a notice of lis pendens as Conn. Gen. Stat. § 52-261 does not contain an express provision for charging a fee for recording a notice of lis pendens on the land records, meaning presumably that none is authorized. These areas may be appropriate for legislative clarification.

[3] The provisions of Conn. Gen. Stat. § 52-261a only apply to papers served for the Judicial Department or Division of Criminal Justice. Since they have no applicability to this opinion they are not addressed any further here.

[4] In mentioning the authorized fee for copies we assume that the copies being charged for were actually made by the State Marshal. We are aware of one Superior Court decision holding: "It is surely unreasonable to claim fees of one dollar per page for copies that the marshal did not make. Implicit in the statutory language related to the copies is that a marshal would need to do something, i.e., make copies, to receive the fees." *Francis v. Fonfara*, 2009 Conn. Super. Lexis 1407 (Conn. Super. May 21, 2009). Nevertheless we are also aware of an unpublished decision holding that State Marshal charges for copies are akin to a "handling" fee and may be charged regardless of whether the Marshal actually made the copies in question. *See Weinberg v. Dupont, Tobin ,et. al.*, No. 50-49-65, J.D. of New London, (Conn. Super. Ct., Feb. 10, 1989).

[5] "If any officer demands and receives on any civil process more than his legal fees, *he shall pay threefold the amount of all of the fees demanded to the defendant in the action* in which the alleged illegal fees were exacted, if such fees have been paid by the defendant, otherwise to the plaintiff in such action...." Conn. Gen. Stat. §52-70 (emphasis added).

[6] In contrast, the federal court system allows a summons initiating a civil action to be served "by any person who is not a party and who is at least 18 years of age." Fed. R. Civ. P. 4(c)(1).

[7] For reasons explained below, the provisions of Conn. Gen. Stat. §52-50(b) have no applicability to process directed to a State

Marshal, are extremely limited in their use, and create significant risk of the process being defective.

[8] Prior to commencing service, a State Marshal may give process to be served to another State Marshal when the first Marshal is unable to serve the papers. The first State Marshal cannot, however, in any way, share in the service fees for service of process by the other State Marshal.

[9] The parameters for the very limited circumstances where indifferent persons may serve certain types of legal papers are discussed below.

[10] This prohibition does not prevent a State Marshal from passing on papers to another State Marshal that the first State Marshal is unable to serve where the State Marshal who actually performs the service bills for and receives all statutory fees associated with the service.

[11] Fees are only authorized for actual service and not for overhead. Any mechanism for allocating administrative expenses would need to allocate such expenses based on some bona fide relation to services actually completed. Fee splitting, referral fees and/or expense sharing arrangements among groups of State Marshals could well raise issues within the jurisdiction of the Office of State Ethics. For example, there is a significant risk that the annual statements of financial interests, pursuant to Conn. Gen. Stat. §1-83, filed by State Marshals who participate in any such arrangements could be false and/or misleading in many respects, including misreporting or undisclosed overlapping reporting of moneys received for service of process, misreporting of other income for marshal services and misreporting or undisclosed overlapping reporting of expenses. Accordingly, the State Marshal Commission should report any such fee splitting, referral fee and/or expense sharing arrangements to the Office of State Ethics in order for the Office of State Ethics to take whatever action it deems appropriate.

[12] The provisions of Conn. Gen. Stat. § 52-325(c) also make clear, as noted herein, that it is not necessary to serve the notice of lis pendens on the property owner in a foreclosure proceeding.

[13] If this statutory provision were utilized by a State Marshal it would be necessary (1) for the State Marshal to endorse the deputation on the process being served, (2) for the person serving the process to take a specific oath before a justice of the peace, and (3) for the justice of the peace to endorse on the process itself that the prescribed oath was administered. Thus, if the State Marshal Commission became aware of any situation where this statute was utilized, the actual endorsements on the process itself would aid the Commission in ascertaining relevant facts to scrutinize in light of the applicable legal standard.

[14] All attorneys at law in the State of Connecticut in good standing are Commissioners of the Superior Court. Conn. Gen. Stat. § 51-85.

[15] There are also a variety of statutory provisions authorizing governmental agencies to issue process.

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Union. Attorney of Choice. No Collective Bargaining

Date: 05/29/2009

Opinion Number: Opinion from OPM Office of Labor Relations

STATE OF CONNECTICUT

OFFICE OF POLICY AND MANAGEMENT

Office of Labor Relations

May 29, 2009

James E. Neil, Esq.
State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Mr. Neil:

This is in response to your May 21, 2009 letter to Linda Yelmini regarding the union representation rights of the state marshals.

Any effort to achieve union collective bargaining rights would require a petition filed by the union with the State Board of Labor Relations. The union would have to submit signed membership cards from 30% of the individuals in the bargaining unit for which representation is being sought. The decision on whether the individuals were covered by the State Collective Bargaining Act and whether the union has submitted sufficient cards to warrant a representation election would be up to the Board (subject to possible court appeal). The Office of Policy and Management has been statutorily designated to serve as the representative of the State employer in "matters involving collective bargaining ... concerning all executive branch employees" and therefore would serve as the State's advocate in response to any such union petition. Based on the state marshal statutes, we would argue that the marshals are independent contractors and not state employees and therefore are not eligible for collective bargaining rights. We would also argue that, even if they were considered employees, they would be exempt from the Collective Bargaining Act as "appointed officials.

The issue of whether an AFSCME attorney or staff member can serve as a marshal's representative at a removal for cause hearing, however, is a separate matter from whether the union can represent the marshals in collective bargaining. I do not have access to the Commission Regulations regarding removal hearings but assume that they allow the marshal to have a representative. If the regulations allow a legal representative and the marshal or attorney has followed the appropriate procedure to notify the Commission of the marshal's desire for a particular attorney, I am not aware of any basis to preclude an attorney who works for a union. Having a attorney from a union does not change the nature of the hearing or give the marshal any greater rights than if he had an attorney from a private law firm. If the regulations specify that a marshal can be represented by an attorney, then the question of whether a marshal can be represented by a non-lawyer (whether an employee of a union or a neighbor, a relative, etc.) is a question of regulation compliance and due process that would more appropriately be addressed by the Office of the Attorney General since that office reviewed the regulations.

Phone: (860) 418-6447 Fax: (860) 418-6491
450 Capitol Avenue-MS# 53OLR, Hartford, Connecticut 06106

On the current situation, I would suggest that you respond to Kevin Murphy and Attorney Anthony Bento that the Commission does not recognize AFSCME or the New Haven Marshals Association as representatives of the marshals but that Marshal Edward Homa will be permitted to be accompanied by an attorney or legal representative of his choosing (using the language of your regulations.)

If you have any further questions about union representation issues, please feel free to contact me at ellen.carter@ct.gov or at 418-6208.

Sincerely,

Ellen M. Carter

Ellen M. Carter, Esq.
Principal Labor Relations Specialist

CC: Linda Yelmini

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Marshal Maximum and Minimum Fees.

Fee Negotiation Between Max and Min Allowed

Date: 10/12/2009

Opinion Number: 2009-010

CT Attorney General

2009-010

Attorney General's Opinion

Attorney General, Richard Blumenthal

October 12, 2009

Herbert J. Shepardson
Chair, State Marshal Commission
765 Asylum Avenue
Hartford, CT 06105

Dear Chairman Shepardson:

You have requested my opinion on whether municipalities may, by town ordinance, dictate the terms under which they will pay for State Marshal work. These questions arise because the City of New Haven on March 23, 2009 enacted an ordinance requiring State Marshals who wish to serve process for the city to agree to receive payment for their services under a fee schedule and with insurance policy limits established by the City. In particular, you have asked the following three questions:

1. Does a municipality have the legal authority to require State Marshals to accept fees lower than those set forth in state statutes when they agree to provide service of process for the municipality?
2. Do the Connecticut statutes regulating State Marshals preempt a municipality from adopting an ordinance which requires State Marshals to obtain higher levels of liability insurance and indemnification than required by state statute?
3. Can a municipality require attorneys employed or hired by the municipality to only use State Marshals who agree to its fee and insurance requirements?

For the reasons explained below, we answer these questions as follows:

1. Municipal ordinances may dictate the terms and conditions under which a municipality will use the services of State Marshals to serve the municipality's civil process as long as the ordinance does not conflict with state law. Although conflicts between state law and municipal ordinance must be resolved in favor of state law, we perceive no conflict between Connecticut's State Marshal statutes or State Marshal Commission regulations and New Haven's ordinance.
2. State statutes establish maximum service fees that may be charged by State Marshals, and the regulations of the State Marshal Commission establish minimum fees for service of process and executions. State statutes also specifically allow negotiation over State Marshal fees. Therefore, municipal

ordinances may require State Marshals wishing to perform a municipality's service work to accept fees established by a municipality as long as the fees are at or below the statutory maximum and at or above the minimum fees established in the State Marshal Commission regulations.

3. The state statute requiring State Marshals to carry liability insurance establishes minimum insurance coverage requirements. Nothing in the state statutory or regulatory scheme prohibits a city from requiring marshals to secure higher insurance coverage limits.

Discussion

The legislature has expressly authorized municipalities to adopt ordinances governing the exercise of municipal powers. Conn. Gen. Stat. §7-148, 7-157. Generally, a local ordinance is preempted by a state statute only when the legislature has demonstrated an intent to occupy the entire field of regulation on the matter; *East Haven* v. *New Haven*, 159 Conn. 453, 469 (1970); or when a local ordinance irreconcilably conflicts with a state statute. *Shelton* v. *City of Shelton*, 111 Conn. 433, 447 (1930). "Whether an ordinance conflicts with a statute or statutes can only be determined by reviewing the policy and purposes behind the statute and measuring the degree to which the ordinance frustrates the achievement of the state's objectives. " *Dwyer* v. *Farrell*, 193 Conn. 7, 14, 475 A.2d 257 (1984)(citations omitted). As we have advised other client agencies in the past, a municipality can impose requirements on professionals that may exceed statutory or regulatory requirements, so long as the municipal requirements do not conflict with agency regulations or frustrate legislative objectives. *Formal Opinion to Hon. Joseph A. Cermola, Chairman, Bd. Of Examiners For Professional Engineers and Land Surveyors*, 85 Op. Atty. Gen 223 (1985).

The statutes governing State Marshals, and the regulations adopted by the State Marshal Commission pursuant to Conn. Gen. Stat. § 6-38b(f), do not demonstrate an intent to occupy the entire field of State Marshal fees and insurance requirements. To the contrary, the statutes contain many provisions that demonstrate the legislature's intent to allow flexibility in the setting of State Marshal fees and insurance policy limits.

Conn. Gen. Stat. § 52-261 sets the *maximum* fees that may be charged by State Marshals for the service of process:

> "[E]ach officer or person who serves process, summons or attachments shall receive a fee *of not more than* thirty dollars for each process served." (emphasis added)

Conversely, Conn. Gen. Stat. § 6-38b(f) specifically delegates to the Commission, in consultation with the State Marshals Advisory Board, the authority to adopt regulations to set "*minimum* fees for execution and service of process," (emphasis added), which the Commission has done. Regs., Conn. State Agencies § 6-38b-10 (2009). Additionally, the legislature has expressly allowed for negotiation of State Marshal fees. Section 6-38a(a) provides that each State Marshal shall provide services as an "independent contractor compensated on a fee for service basis, *determined*, subject to any minimum rate promulgated by the state, *by agreement with an attorney, court or public agency requiring execution or service of process*." (emphasis added)

The legislature did not intend, therefore, to prohibit any entity from negotiating fees to be paid to State Marshals for service of process work. To the contrary, state statutes specifically authorize individual agreements between State Marshals and their customers, both public and private, regarding the fees to be paid for a State Marshal's services. A municipal ordinance such as New Haven's, requiring State Marshals who wish to bid on the municipality's work to accept payment according to a municipal fee schedule, does not conflict with state law and is not preempted as long as the fees established by the municipality are at or below the statutory maximum and at or above the State Marshal Commission minimum.

Similarly, the legislature has only established minimum insurance coverage limits for marshals, but has not limited Marshals' customers from requiring greater insurance coverage. Section 6-30a(a) clearly provides that each State Marshal "shall carry personal liability insurance for damages caused by reason of such marshal's tortious acts *in not less than* the following amounts." (emphasis added). There is nothing in the statutes to suggest that entities entering into contracts with marshals are barred from requiring additional insurance limits. Nor would a municipal ordinance requiring insurance coverage above the statutory minimum conflict with or be preempted by state law.

Moreover, because the attorneys who directly utilize the services of marshals are acting on behalf of their client, a municipal ordinance such as New Haven's does not interfere with any contractual relationship between an attorney and a State Marshal. Courts have consistently held that attorneys act as agents for their clients, who are the principals. Comm'r v. Banks, 543 U.S. 426, 436 (2005); Klotz v. Xerox Corp., 2009 U.S. App. LEXIS 12124 at *4 (2d Cir. N.Y. June 5, 2009); Stone v. Town of Westport, 2007 U.S. Dist. LEXIS 2863 at * 27 (D. Conn. Jan. 12, 2007) Doe v. Odili Techs., 1997 U.S. Dist. LEXIS 23268 at *13 (D. Conn. May 28, 1997) (citing Jenkins v. Gen. Motors Corp., 164 F.R.D. 318, 320 (N.D.N.Y.), aff'd 101 F.3d 1392 (2d Cir. 1996)). Because the attorneys performing work for a municipality have no greater authority than the municipality itself in arranging for State Marshal services, and because those attorneys themselves have chosen to accept work for the municipality under the terms of municipal contracts, there are no contractual concerns presented by a municipal ordinance requiring a municipality's attorneys to use State Marshals who have agreed to the conditions imposed by the municipality on service fees and insurance coverage.

Finally, we see no conflict between the New Haven ordinance and the state's sovereignty. State statutes providing State Marshals with qualified and/or statutory immunity (Conn. Gen. Stat. § 6-30a(b), §6-38a(b)) are not in any way affected by a municipal ordinance, such as New Haven's, which sets fee limits or insurance coverage requirements. The State Marshal Commission fully retains its powers to appoint, discipline or audit State Marshals. Conn. Gen. Stat. §6-38b, § 6-38e.

In summary, there is no legal impediment to the City of New Haven requiring State Marshals to comply with the City's fee schedule or insurance requirements, provided New Haven does not impose any requirement irreconcilable with state statutes or regulations.

I hope this answers your questions.

Very truly yours,

RICHARD BLUMENTHAL

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Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Capias Protocol

Date: 03/22/2012

Opinion Number: 2012-003

2012-03

GEORGE C. JEPSEN
ATTORNEY GENERAL

55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120

Office of The Attorney General
State of Connecticut

March 22, 2012

Peter J. Martin, Esq.,
Chairperson
State Marshal Commission
165 Capitol Avenue, Room 483
Hartford, CT 06106

Dear Atty. Martin:

You have asked for this Office's opinion regarding the application of the Fourth Amendment to the United States Constitution[1] to the work of State Marshals serving civil capias warrants. Specifically, your letter to this office, as amplified by discussions between your office and mine, essentially poses three questions:

1. Whether a state marshal serving a civil capias warrant may enter the home of the subject of the warrant without consent or exigent circumstances to serve the process on that person;
2. Whether and to what extent individuals' Fourth Amendment rights are implicated when a State Marshal wishes to question or seek information from those individuals who are not themselves the subject of a civil capias warrant and who are, presumably, not encountered within the home of the subject of a capias warrant;
3. Whether and under what circumstances a State Marshal is lawfully permitted to detain other individuals on the premises for the purposes

[1] The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis added).

of further investigation, or to await the arrival of the police, while in the process of serving a civil capias warrant.

Your questions are by their nature extremely broad and constitutional law does not often lend itself to bright lines. Rather, most constitutional jurisprudence represents a balance between the government's interests and an individual's rights.

Compounding the difficulty we face in answering such broad questions is the civil nature of both of our agencies. Your questions involve the service of civil capias warrants, which as we have previously concluded are a strictly civil process. Op.Atty.Gen. No. 07-002 (Feb. 2, 2007); Op.Atty.Gen. No. 00-010 (Mar. 7, 2000). Likewise, I am the state's chief civil legal officer; Conn. Gen. Stat. § 3-125; with very limited criminal jurisdiction. To a certain extent, however, your questions could very well cross over the line and involve issues of criminal law, and in those circumstances criminal prosecutorial officers might not agree with advice this office might impart. The reasonableness of any particular search or seizure depends substantially on the facts of a given case as viewed in the light of the constantly evolving law of criminal procedure. Thus, our advice to you on issues concerning search and seizure law as they relate to situations in which a marshal departs from merely serving civil process is that your office should consult criminal authorities in the same way as other police and peace officers might.

Bearing these important caveats in mind, we will try to offer you guidance on the questions you pose, which we address individually below after a general review of a State Marshal's authority to serve capias warrants.

MARSHAL'S AUTHORITY TO SERVE CIVIL CAPIAS WARRANTS

The general statutory authority to serve a civil capias warrant[2] is found in Conn. Gen. Stat. § 52-143 (e) which provides, in relevant part, as follows:

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[2] Conn. Gen. Stat. §§ 54-1h, 54-2a, 54-2e, 54-65a and 54-66 also provide for the issuance of capias warrants under certain circumstances in criminal cases. This opinion does not address the circumstances under which a State Marshal may exercise authority to execute such capias warrants, as your inquiry focuses solely on civil capias warrants.

> If any person summoned by the State, or by the Attorney General or an assistant Attorney General, or by any public defender or assistant public defender acting in his official capacity, by a subpoena containing the statement as provided in subsection (d), or if any other person upon whom a subpoena is served to appear and testify in a cause pending before any court and to whom one day's attendance and fees for traveling to court have been tendered, fails to appear and testify, without reasonable excuse, he shall be fined not more than twenty-five dollars and pay all damages to the party aggrieved; and the court or judge . . . . may issue a capias directed to some proper officer to arrest the witness and bring him before the court to testify.

Additionally, Conn. Gen. Stat § 46b-231(m)(1) authorizes the issuance and service of a civil capias warrant in family support matters under the circumstances set forth in the statute, the relevant portion of which follows:

> A family support magistrate in IV-D support cases may compel the attendance of witnesses or the obligor under a summons issued pursuant to sections 17b-745 [enforcement of parental support orders], 46b-172 [enforceability of parental support agreements] and 46b-215 [enforcement of relatives' support obligations], a subpoena issued pursuant to section 52-143, or a citation for failure to obey an order of a family support magistrate or a judge of the Superior Court. If a person is served with any such summons, subpoena or citation issued by a family support magistrate or the assistant clerk of the Family Support Magistrate Division and fails to appear, a family support magistrate may issue a capias mittimus directed to a proper officer to arrest the obligor or the witness and bring him before a family support magistrate.

See also, Op.Atty.Gen. No. 07-002 (Feb. 2, 2007), 2007 WL 852970 (State marshals are authorized to serve capias warrants).

Further, Conn. Gen. Stat. § 54-148e(e) authorizes the issuance and service of a civil capias warrant to enforce deposition subpoenas during the discovery phase of civil actions under the following circumstances:

> If any person to whom a lawful subpoena is issued under any provision of this section fails without just excuse to comply with any of its terms, the court before which the cause is pending, or any judge thereof, may issue a capias and cause him to be brought before such court or judge, as the case may be, and, if the person subpoenaed refuses to comply with said subpoena, such court or judge may commit him to jail until he signifies his willingness to comply with it.

Finally, several other less commonly used statutes empower courts and administrative tribunals to issue capias warrants for specific purposes apart from those set forth in detail above. *See* Conn. Gen. Stat. § 2-46 (authorizing issuance of a capias to compel testimony of witnesses in certain legislative proceedings); Conn. Gen. Stat. § 46b-133 (authorizing issuance of capias warrant to ensure appearance in court of delinquent child or custodial parent); Conn. Gen. Stat. § 51-81 (authorizing State Bar Examining Committee to secure attendance and testimony of witnesses by capias in proceedings examining fitness of applicants for admission to the bar); Conn. Gen. Stat. § 52-155 (authorizing issuance of capias warrants for enforcement of subpoenas requiring witnesses to testify in foreign proceedings in this state); Conn. Gen. Stat. § 54a-129 (authorizing courts of probate to secure attendance and testimony of witnesses by capias).

Conn. Gen. Stat. § 6-32 empowers State Marshals to "receive each process directed to such marshal when tendered, execute it promptly and make true return thereof." Accordingly, State Marshals have the authority to accept and serve civil capias warrants when lawfully directed to do so. Regardless of the source of their authority to serve a civil capias warrant, however, a State Marshal must do so in a

manner that comports with constitutional requirements.[3] *Milner v. Duncklee,* 460 F.Supp.2d 360, 366 (D.Conn. 2006). We now turn to your specific questions.

> **1.** ***May a State Marshal charged with executing a civil capias warrant enter the home of a subject, absent consent or exigent circumstances, to serve such process on the named individual?***

Our answer is that absent clear consent to enter a home, marshals should be directed not to do so.

The "arrest" of an individual by a State Marshal upon the authority of a civil capias warrant will clearly be considered a "seizure" within the meaning of the Fourth Amendment to the U.S. Constitution. *See Milner v. Dunklee, supra,* at 366-67 (citing *Terry v. Ohio,* 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968)); *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L. Ed. 2d 497 (1980) *Michigan v. Summers,* 452 U.S. 692, 696-97, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981). Interpreting the Fourth Amendment prohibition on unreasonable searches and seizures, the United States Supreme Court has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant or consent. *Payton v. New York,* 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable.").

Subsequent holdings have reiterated this principle and "made clear that any physical invasion of the structure of the home, by even a fraction of an inch, is too much to be tolerated.'" *Loria v. Gorman,* 306 F.3d 1271, 1284 (2d Cir. 2002) (quoting *Kyllo v. United States,* 533 U.S. 27, 37, 121 S.Ct. 2038, 150 L. Ed. 2d 94 (2001)). A pre-seizure judicial determination of probable cause is required for an arrest in the home because of the heightened privacy interests in the home. *See Payton, supra,* at 584-856. Thus, courts have developed a relatively bright-line rule requiring a facially valid warrant to justify the seizure of a person in the home. *Welsh v. Wisconsin,* 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L. Ed. 2d 732 (1984). Accordingly, it is well-settled that "an arrest of an individual in his own

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[3] Courts have held that the Fourth Amendment applies to seizures made in the civil context as well as in the criminal context. *Glass v. Mayas,* 984 F.2d 55, 58 (2d Cir. 1993) (citing *Soldal v. Cook County, Illinois,* 506 U.S. 56, 67 n.11, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992)).

home is reasonable only if it is supported by a valid arrest warrant, exigent circumstances, or consent." *Milner v. Dunklee*, *supra,* at 367; *see also Payton*, *supra,* at 586-87, 590; *Welsh*, *supra,* at 749-55.

A good deal of authority supports the proposition that an intrusion into a home to seize an individual to effect civil process has less justification than an intrusion into a home to effect criminal process. In fact, the court in *Milner v. Dunklee, supra, at 368,* discussed whether the Fourth Amendment imposed a wholesale bar on warrantless home arrests for minor offenses (which would include civil offenses), but ultimately declined to decide the case on this point. Rather, the court in *Milner* focused on whether the capias warrant that supported the in-home seizure in that case met well-established Fourth Amendment requirements. After an exhaustive review of the applicable requirements, it determined that it did not.

Thus, we cannot counsel you that any sort of "exigency" might exist that would permit a marshal to enter a home arrest an individual pursuant to a civil capias.[4] *See Welsh, supra,* at 750 n.1, 751 (suggesting, without deciding, an absolute ban on warrantless home arrests for certain minor offenses). Rather, absent consent, the question of a marshal's authority to enter a subject's home to affect an arrest comes down to whether the civil capias warrant is the functional equivalent of a Fourth Amendment "warrant." Thus, we turn to whether a civil capias warrant is in fact the functional equivalent of a criminal arrest warrant.

The court in *Milner* reasoned that a document purporting to be a warrant – whatever its title – must comply with the strictures of the Fourth Amendment to

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[4] I can say it no more eloquently than Justice Jackson who, in writing about whether exigency could justify a warrantless search of a tenement house where an officer suspected illegal gambling, observed: "Whether there is reasonable necessity for a search without waiting to obtain a warrant certainly depends somewhat upon the gravity of the offense thought to be in progress as well as the hazards of the method of attempting to reach it. . . . It is to me a shocking proposition that private homes, even quarters in a tenement, may be indiscriminately invaded at the discretion of any suspicious police officer engaged in following up offenses that involve no violence or threats of it . . . . While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *McDonald v. United States*, 335 U.S. 451, 459-60 (1948) (*Jackson, J., concurring*).

support an in-home seizure.[5] A warrant that complies with the Fourth Amendment has four essential attributes. It must: (1) be supported by probable cause; (2) be issued upon a probable cause determination based on oath, affirmation, or sworn testimony setting forth the underlying facts and circumstances giving rise to probable cause; (3) describe the persons or things to be seized with particularity; and (4) be issued by a neutral and detached magistrate. *Milner, supra,* at 369. Only a warrant that meets each of the Fourth Amendment requirements will suffice to authorize the seizure of an individual in his home.

The very purpose of the warrant requirement -- especially as it relates to entering a home -- is to take the probable cause decision away from law enforcement officials and put that decision in the hands of a neutral and detached magistrate. *Welsh, supra,* at 749 n.10. Although it is sufficient for a law enforcement official to make a probable cause determination when a person is arrested in public, the Supreme Court has determined that the sanctity of the home

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[5] *See also United States v. Kone*, 591 F. Supp. 2d 593, 609 (S.D.N.Y. 2008)(explaining that, as in Milner, nomenclature is not dispositive and an Order obtained from a federal district judge authorizing the search of the home of an individual on supervised release was insufficient to satisfy the requirements of the Fourth Amendment because it lacked a probable cause determination); *Larrew v. Barnes*, 2006 WL 2354954, *3 (N.D. Tex. 2006) (a civil capias warrant must meet the requirements of Fourth Amendment, which the particular capias did because it stated "name of the state . . . , order[ed] any Texas peace officer to arrest Larrew for failure to appear at a hearing, display[ed] a clerk's certificate, identifie[d] two signatories (including the clerk of court), state[d] that it is certified upon a showing of personal knowledge that the defendant had failed to appear at a hearing, and properly describe[d] the court of issuance and place of return"); *State v. Ruden*, 245 Kan. 95, 774 P.2d 972 (Kan. 1989)(bench warrant issued for failure to appear in a civil case does not allow law enforcement officers, absent consent or exigent circumstances, to enter and search the named individual's home when they believe that the individual is present because the civil warrant did not meet the requirements of the Fourth Amendment); *State v. Vaught*, 256 P.3d 897 (Kan. App. 2011)(same); *Jordan v. State*, 1998 WL 70455 *5 (Tex. App. 1998) ("[A] capias did not have to be signed by a magistrate but may be signed by a clerk at the direction of the court after a determination of probable cause by a detached, neutral magistrate); *State v. Thompson*, 151 Wash. 2d 793, 801-02, 92 P.3d 228 (Wash. 2004) ("In the present case, there was a bench warrant for Thompson's arrest for failure to appear at a show cause hearing regarding his failure to pay child support. This warrant was issued under RCW 26.18.050, which provides that a civil bench warrant may be issued in such circumstances. . . . In light of our holding today, the deputies erred in forcibly opening the trailer door when executing the civil warrant. The 'knock and wait' statute does not encompass the execution of civil arrest warrants.").

necessitates heightened protections, and specifically requires that a neutral and detached magistrate make the probable cause determination to justify such an intrusion. Thus, when a person is arrested in his home, it is not enough that there is probable cause to arrest -- even undisputed probable cause to arrest. Rather, a neutral and detached magistrate must actually make a finding that probable cause exists. *Milner, supra,* at 371.

The Court in *Milner* explained that for a civil capias warrant to meet Fourth Amendment requirements, the face of the warrant itself must manifest an explicit finding of probable cause establishing that the issuing judicial authority either (a) personally witnessed the events recited in the warrant or (b) personally reviewed the official records of the court, thus ensuring that the validity of the data in the court records was adequately scrutinized. *Milner, supra,* at 373-74. The rationale and holding of *Milner* make clear that this is a high threshold. Although we do not have a particular capias warrant to review, the court in *Milner* looked for evidence on the face of the warrant that the issuing judge or magistrate had personal knowledge of the individual's "failure to appear and the events leading up to it," either by personally witnessing the events or by personally reviewing the court records, and thereby personally made an "independent finding of probable cause." *Id.* at 373-74.

In our experience – as in *Milner* – capias warrants are not often that explicit on their face. Nor do we believe it is prudent to expect a marshal to perform the sort of analysis the federal judge undertook in *Milner* to determine the Fourth Amendment sufficiency of the capias warrant. Therefore, bearing in mind the caution necessitated by a review of the authorities discussed above, we believe the better practice is for State Marshals not to undertake to determine the Fourth Amendment sufficiency of the warrant and not to consider entry into a home without consent.[6]

This is not to say that a civil capias that does not, on its face, meet Fourth Amendment requirements is invalid. The court in *Milner* made clear that, armed

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[6] Nor should the marshal under any circumstances – even with a valid warrant that meets Fourth Amendment standards – seek to enter a third party's home to serve the warrant. *Steagald v. United States,* 451 U.S. 204, 101 S.Ct., 68 L. Ed. 2d 38 (1981). *See also United States v. Hill,* 2005 WL 354002, *8 (N.D.W. Va. 2005) ("permitting 'the police, acting alone and in the absence of exigent circumstances' to decide when there is sufficient justification for search the home of a third party for the subject of an arrest warrant – would create a significant potential for abuse.'").

with a civil capias issued by a court of competent jurisdiction, but that fell short of the aforementioned Fourth Amendment requirements, a State Marshal could lawfully seize the subject of the capias in a public place. The *Milner* court further clarified that, armed with such a capias warrant, a State Marshal could knock on a subject's door and obtain the subject's valid consent to execute the capias. However, the *Milner* court cautioned that, what a State Marshal could not do, even with a capias in hand, is enter a subject's home without consent to seize him unless the capias satisfies Fourth Amendment requirements as articulated above. *Id.*, at 375.

It warrants emphasis that State Marshals serving capias warrants under any circumstances may encounter difficult circumstances, including hostile and recalcitrant subjects. Entering a subject's home, even with consent, is obviously one such circumstance, and one in which the conditions a marshal will face are often unknown. I am certain that the Commission appreciates these safety concerns better than I. I therefore urge the Commission to continue providing State Marshals with training for these contingencies and to give close consideration to enlisting the assistance of local law enforcement in situations in which entry into a home could present safety risks.

2. *May State Marshals question or seek information from individuals who are not themselves the subject of a civil capias warrant and who are encountered outside the home of the subject of a capias warrant?*

To the extent your question concerns whether State Marshals may detain, for investigative purposes short of an arrest, individuals who are not subject to the capias warrant but who are encountered on the premises of the subject named in a capias warrant, you present a somewhat difficult question. We assume for purposes of addressing this question that the "investigative purposes" the marshal would be engaged in would involve determining the whereabouts of the subject of the capias warrant.[7]

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Terry v. Ohio*, 392 U.S. 1, 34, 88

[7] To the extent that the "investigative purposes" you refer to concern other "law enforcement" duties, see the answer to question number 3 below.

S.Ct. 1868, 20 L. Ed. 2d 889 (1968) (White J., concurring). For example, in *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L. Ed. 2d 229 (1983), the Supreme Court, referring to a long line of previous opinions, clarified that police officers do not violate the Fourth Amendment "by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions." *Id.* at 497 (plurality) (citations omitted). "Nor would the fact that the officer identifies himself as a police officer, without more, convert an otherwise consensual encounter into a seizure requiring some level of objective justification." *Id; see also State v. Burroughs*, 288 Conn. 836, 853-54 (2008).

"The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Royer, supra,* at 497 (citations omitted). Thus, what may begin as a consensual encounter becomes a Fourth Amendment "seizure" if, on a basis of a show of authority by the officer, a reasonable person in the individual's position would have believed that he was not free to leave. *See, e.g., State* v. *Ostroski*, 186 Conn. 287, 291-92, 440 A.2d 984, *cert. denied,* 459 U.S. 878, 103 S.Ct. 173, 74 L. Ed. 2d 142 (1982). Moreover, even a limited detention must be based on a reasonable suspicion that a crime has occurred, is occurring or is about to occur. *Terry, supra*, at 21-22. Obviously in the situation of attempting to serve a civil capias and seeking the whereabouts of the subject of that capias, such a suspicion would be lacking.

Accordingly, it is our opinion that a State Marshal may freely encounter citizens in public places outside the home of the subject of a capias warrant, and seek information from such individuals on a voluntary basis about the whereabouts of the subject of the capias. In very limited circumstances, a State Marshal engaged in the service of a capias warrant may also, while properly in the home of the subject of the capias, question other persons present in the home on a consensual basis. "If there is no detention -- no seizure within the meaning of the Fourth Amendment -- then no constitutional rights have been infringed." *Royer, supra,* at 498. However, the marshal may not detain individuals if they refuse to answer questions; nor may the marshal indicate in any way that the individuals are not free to leave.

3. *May a State Marshal lawfully detain other individuals on the premises for the purposes of further investigation, or to await the arrival of the police, while in the process of serving a civil capias warrant?*

Your final question appears to contemplate situations in which State Marshals, in the course of their duties, encounter what they believe to be criminal activity. State Marshals are defined as "peace officers" "while exercising authority granted under any provision of the general statutes." Conn. Gen. Stat. § 53a-3(9). Thus, they are imbued with apparent authority to "arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others." Conn. Gen. Stat. § 54-1f.

It is beyond the scope of the purposes of this opinion for us to advise you whether it ought to be the policy of the State Marshal Commission to authorize State Marshals, in light of their training and experience, to make arrests when they believe they have witnessed criminal activity. In this regard, I encourage you to seek and to heed closely the counsel of criminal, prosecutorial authorities as well as other law enforcement officials.

Neither are we well-situated to advise you with any particularity whether the actions of State Marshals in this context will result in valid arrests or investigatory stops. As I mentioned at the beginning of this opinion, my role as the chief civil legal officer of the State does not afford me or my office with this expertise, nor would my advice be controlling. I can offer only the following observations.

First, *Florida v. Royer* clarified that, in certain limited circumstances, a temporary detention based upon reasonable and articulable suspicion that an individual has committed or is about to commit a crime may be constitutionally justified. *Id.* at 498. While the Supreme Court in *Florida v. Royer* readily acknowledged the constitutional validity of certain investigative detentions based upon mere reasonable articulable suspicion, it nonetheless recognized that "[d]etentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause." *Id.* at 499. Of course, the standard of probable cause is stricter than mere reasonable suspicion and, as a result, more difficult to achieve.

However, such constitutional questions are heavily dependent upon the individual facts and circumstances of each incident, including the underlying law

enforcement justification for the questioning or the detention, the location of the incident, the length of the encounter, the degree of coercion involved (whether actual or perceived), and numerous other factors that cannot be adequately addressed within the scope of this opinion. Thus, regardless of whether an investigative detention is justified on the basis of a reasonable and articulable suspicion, or upon the basis of probable cause, the decision regarding whether a detention has in fact occurred, and if so whether such detention is constitutionally justified, will be based upon the totality of the circumstances known to the State Marshal at the inception of the detention, or developed during the course of the detention. *See, e.g., Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417, 136 L .Ed. 2d 347 (1996) ("[T]he touchstone of the Fourth Amendment is reasonableness. Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.").

Finally, it is also important to note that Article First, sections 7 and 9 of the Connecticut Constitution[8] comprise the state constitutional analogs to the Fourth Amendment. The Connecticut Supreme Court has on several occasions determined that, in certain instances, these state constitutional provisions provide the citizens of Connecticut with more protection than does the Fourth Amendment. *See, e.g., State v. Jenkins,* 298 Conn. 209, 261 (2010). Accordingly, the constitutional reasonableness of a particular set of facts and circumstances must be considered from this standpoint as well and further warrants consultation with prosecutors and other law enforcement agencies.

Clearly, the law surrounding the temporary detention or arrest of citizens in a criminal context is complex, rapidly evolving, and of the utmost constitutional importance. As a result, we urge the State Marshal Commission to carefully consider whether and, if so, under what circumstances, it should authorize State Marshals to become engaged in such actions. Where such activities are to be authorized, it is likewise of critical constitutional importance that the State Marshals so authorized receive adequate initial training and regular,

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[8] Article First, § 7,of the Connecticut Constitution provides that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures; and no warrant to search any place, or to seize any person or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation."

Article First, § 9, of the Connecticut Constitution provides that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law.

periodic updated training regarding the laws of arrest, search and seizure so as to ensure that they are equipped to act within the bounds of the law. It should also be noted that a failure to adequately train State Marshals in the laws of arrest, search and seizure related to their duties in serving capias warrants, or to develop and enforce appropriate policies and procedures regarding the execution of such duties, or to otherwise conscientiously execute their supervisory responsibilities with regard to such matters, may expose the State Marshal Commission, and/or its individual members, to substantial civil liability.

I encourage you to seek out the advice and the training resources of prosecutorial and other law enforcement authorities if you are at all considering policies regarding the enforcement of criminal laws by State Marshals.

I trust that this answers your inquiries.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

GJ/srs

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Firearm/Qualified Retired Law Enforcement Officer

Date: 04/24/2012

Opinion Number: 2012-004

AG Formal Opinion 2012-004

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Office of The Attorney General
State of Connecticut

April 24, 2012

Peter J. Martin, Esq., Chairperson
State Marshal Commission
165 Capitol Avenue, Room 483
Hartford, CT 06106

Dear Mr. Martin:

You have asked this Office's opinion about whether the State Marshal Commission may require a State Marshal to comply with the Commission's policies on carrying firearms in the course of his/her official duties if that State Marshal has previously retired from law enforcement and is a "qualified retired law enforcement officer" as that term is defined under the Law Enforcement Officers' Safety Act (LEOSA), codified at 18 U.S.C. § 926C. For the reasons more fully outlined below, it is our opinion that the State Marshal Commission may require compliance with its policies when an individual is acting in his or her official capacity as a State Marshal even if the individual is also a qualified retired law enforcement officer for purposes of the federal law.[1]

The State Marshal Commission's Firearms Policy requires that, before being authorized to carry firearms in the course of their official duties, each Marshal shall successfully complete the following Connecticut Police Officer Standards and Training Council (POSTC) approved basic police recruit or refresher (in-service) training or certification requirements, as appropriate, under the supervision of a Connecticut POSTC certified law enforcement firearms instructor:

- POSTC-approved firearms training course within the preceding year;

[1] A "qualified retired law enforcement officer" is defined in 18 U.S.C. § 926C(c). For purposes of this opinion, we have assumed the State Marshals at issue meet the federal requirements as qualified retired law enforcement officers.

- POSTC-approved practical shooting decision training course within the preceding three years; and

- POSTC-approved use of force training course within the preceding three years.

In addition, the State Marshal Commission requires that, before a State Marshal can be authorized to carry a firearm in the course of his/her official duties, he/she must possess a valid Connecticut permit to carry pistols or revolvers, have successfully completed a law enforcement oriented psychological examination by a licensed psychiatrist or clinical psychologist approved by POSTC for such purposes, and have received from the State Marshal Commission written approval to carry a firearm in the course of his/her official duties. Finally, the State Marshal Commission Firearms Policy requires that only approved firearms and ammunition may be carried, and that each State Marshal, so authorized, must provide proof of liability insurance in the amount of one million dollars ($1,000,000) naming the State of Connecticut, the Department of Administrative services, the State Marshal Commission and their officers, agents and employees as additional insureds. The policy applies only when the State Marshals are acting in their official capacity.

Title 18 U.S.C. § 926C(a) provides "Notwithstanding any other provision of the law of any State or any political subdivision thereof, an individual who is a qualified retired law enforcement officer and who is carrying the identification required by subsection (d) may carry a concealed firearm that has been shipped or transported in interstate or foreign commerce, subject to subsection (b)." Subsection (b) of 18 U.S.C. § 926C provides that the provisions of LEOSA shall "not be construed to supersede or limit the laws of any State that 1) permit private persons or entities to prohibit or restrict the possession of concealed firearms on their property; or 2) prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park."

Notably, LEOSA specifically preserves states' authority to establish eligibility requirements for qualified retired law enforcement officers to carry firearms. *See* 18 U.S.C. § 926C(d). Although case law interpreting the law is limited because of its fairly recent enactment, one district court has noted: "At a minimum, LEOSA provides a federal right for qualified retired law enforcement officers who possess the requisite identification to lawfully carry concealed firearms across state lines." *Johnson v. New York State Dep't of Correctional*

Services., 709 F. Supp. 2d 178, 182 (N.D.N.Y. 2010). The court in *Johnson* interpreted the language of § 926C(a) as demonstrating only "an intent to bar criminal prosecutions of retired law enforcement officers who carry concealed weapon in interstate commerce and not to preempt states' authority to issue identification needed to carry a concealed weapon pursuant to the statute." *Id.* at 188. In addition, courts that have had occasion to examine the issue have unanimously determined that Congress did not intend to create either an explicit or an implicit private cause of action under federal law for enforcement of any right granted under LEOSA. *See, e.g., Moore v. Trent,* 2010 U.S. Dist. LEXIS 133038 (N.D. Ill. 2010); *Toracco v. Port Authority of New York,* 539 F. Supp. 2d 632 (E.D.N.Y. 2008); *Boss v. Kelly,* 2007 U.S. Dist. LEXIS 62348 (S.D.N.Y. 2007).

Beyond this, the question of whether LEOSA was intended to preempt all state laws, policies or practices with regard to the carrying of firearms must be answered in the negative. LEOSA is part of Chapter 44 of Title 18, Firearms. Title 18 U.S.C. § 927 specifically provides:

> No provision of this chapter [18 U.S.C. § 921 et seq.] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

Here, the two provisions are easily reconcilable. Individuals, acting in their official capacity as State Marshals, must comply with the Commission's policies in order to carry a firearm. When off-duty, those same individuals, as qualified retired law enforcement officers, may carry a concealed weapon provided they comply with subsection (d) of 18 U.S.C. § 926C.

An examination of the practices of other agencies with regard to a comparable issue reflects a similar interpretation of LEOSA's intended limitations. Specifically, the Office of the Attorney General, Washington, D.C. has opined, with regard to federal law enforcement personnel employed by the Bureau of Alcohol, Tobacco, Firearms and Explosives Division of the Department of the Treasury, and the Drug Enforcement Administration, the Federal Bureau of Investigation, and the U.S. Marshals Service of the U.S. Department of Justice, that:

> [A]ny component's regulations or procedures with respect to on-duty agents or officers will continue to be in effect. Those requirements, regulations, and procedures separately remain in effect, notwithstanding any provision of the [Law Enforcement Officers Safety Act of 2004].

See Office of the Attorney General, *Memorandum for the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives, the Administrator, Drug Enforcement Administration, The Director, Federal Bureau of Investigation, The Director, Federal Bureau of Prisons, The Inspector General and The Director, United States Marshals Service re Guidance on the Application of the Law Enforcement Officers Safety Act of 2004 to Current and Retired Department of Justice Law Enforcement Officers,* dated January 31, 2005, at p. 3, available online at http://www.handgunlaw.us/documents/USAG-HR218.pdf (last visited on April 23, 2012).

As a result, it is our opinion that the provisions 18 U.S.C. § 926C are not intended by Congress to preclude the State Marshals Commission from establishing and enforcing reasonable qualifications for, and limitations upon, the right of a State Marshal to carry a firearm in the course of his/her official duties. We leave to the State Marshal Commission to determine and express no opinion on whether the LEOSA identification required under 18 U.S.C. §926C(d) should satisfy any of the necessary qualifications for a State Marshal, who is also a qualified retired law enforcement officer, to carry a firearm in the course of his/her official duties.

Please do not hesitate to contact this office should you require further articulation, for any reason.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

GJ/srs

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Fee/Service E-Filing and Lis Pendens

Date: 03/30/2015

Opinion Number: Informal Advice

GEORGE JEPSEN
ATTORNEY GENERAL

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Office of the Attorney General
State of Connecticut

March 27, 2015

W. Martyn Philpot, Jr.,
Chairperson
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Dear Attorney Philpot:

You have requested an opinion on several questions concerning state marshals that apparently were prompted by an e-mail from State Marshal Barbara Coffey that was attached to your request. Specifically, you divide your questions into three categories, Fees/Service, E-Filing and Lis Pendens. In the category of Fees/Service, you ask:

1. How should a return be worded if a state marshal makes service at the usual place of abode, if that can be defined, but also leaves copies at multiple addresses?

2. Are extra copies at multiple addresses to be treated as service and each paid for under a service of process fee in Conn. Gen. Stat. § 52-261?

3. If the extra copies at multiple addresses occurs or if extra time and effort is made by a state marshal at the request of a client, can the state marshal, by agreement with a client under Conn. Gen. Stat. § 6-38a(a), charge a fee for reasonable time and/or travel for service of process related efforts beyond the statutory service of process fee?

In the category of E-Filing, you ask:

4. The State Marshal Commission has concluded that a state marshal cannot use the e-filing codes of an attorney to file a writ into the court. However, does a state marshal's public officer position allow for a state marshal to become a designated filer for an attorney, or are there conflicts of interests? If it is allowed, can any fees be paid to a state marshal for such court filings?

In the category of Lis Pendens, you ask:

5. Is there any particular valuation structure for an individual seeking to be paid for recording a lis pendens, including a state marshal who is filing them? How is a state marshal to bill for such work?

6. Is it appropriate for anyone to charge a civil service fee for the recording of a notice of lis pendens?

7. For a state marshal who records a notice of lis pendens for a client can that state marshal create a corporation to record notices of lis pendens, with staffed employees?

8. If a state marshal is allowed to create a corporation, is there any particular volume of lis pendens recording work before a state marshal is obtaining personal gain off his or her appointment based on his or her foreclosure, or family, work, by taking on such recordings?

9. If a state marshal is allowed to create a corporation, can one or more other state marshals work as an employee of the corporation to record notices of lis pendens?

As will be discussed in more detail below and as discussed in prior opinions of the Attorney General, the applicable laws and regulations compel the conclusions that state marshals: must truthfully word their returns under the circumstances presented, may charge statutory fees for extra copies served pursuant to a valid court order, may not enter into agreements with their clients to override the statutory limits on fees, may not become designated filers for attorneys based on the State Marshal Commission's conclusion that its regulations prevent similar activity on conflict of interests grounds, and may not charge fees for the recording of notices of lis pendens.

I. State Marshals Must Truthfully Word Their Returns Under The Circumstances Presented

Your first question relates to the wording of a return of service. A state marshal directed to serve process is under an obligation to "make true return thereof." Conn. Gen. Stat. § 6-32. Unlike some documents, such as a summons, *see* Conn. Gen. Stat. § 52-45b, there is no statutorily prescribed language for a return of service. Therefore, a state marshal is required to make a judgment as to how to truthfully word a return under the circumstances presented.

It appears that your first question was prompted by State Marshal Coffey's concern about being able to truthfully attest "that proper service was made at THE 'usual place of abode'" where service is made at multiple addresses at a client's request. (capitalization in State Marshal Coffey's e-mail). Although returns commonly refer to "*the* usual place of abode," there is no talismanic effect to that phrase. The Connecticut Supreme Court has long recognized that "[o]ne may have two or more places of residence within a State, or in two or more States, and each may be a 'usual place of abode.' . . . Service of process will be valid if made in either of the usual places of abode." *Clegg v. Bishop*, 105 Conn. 564, 570 (1927); *see also Knutson Mortg. Corp. v. Bernier*, 67 Conn. App. 768, 772 (2002) (same).

II. State Marshals May Charge Statutory Fees For Extra Copies Served Pursuant To A Valid Court Order

The answer to your second question is that a state marshal directed to serve multiple copies of process in a given case pursuant to a valid court order may generally charge a fee for each such copy that the state marshal successfully serves. *See* Conn. Atty. Gen. Op. No. 2008-011, 2008 WL 2466716, at *2 (concluding that fees may only be charged for successful service). Section 52-261(a) provides, in pertinent part, that "each officer . . . who serves process, summons or attachments . . . shall receive a fee . . . for each process served *and an additional fee . . . for the second and each subsequent service of such process*" with exceptions not applicable here. (emphasis added).

III. The Fee Statutes Are Exclusive And State Marshals May Not Use Agreements With Their Clients to Override Them

Nearly two centuries ago, the Connecticut Supreme Court recognized that "[b]y the English common law, the sheriff," the predecessor to the state marshal, was "not entitled to fees for his official services" and that to prevent abuse the General Assembly has long "made laws to reduce the allowance for [sheriffs'] services to a known and absolute certainty." *Preston v. Bacon*, 4 Conn. 471, 477 (1823) (emphasis omitted).

Consistent with that authority and more recent court decisions, this Office has already concluded that the state marshal fee statutes "set caps on fees and are exclusive, meaning that no fees for serving papers may be charged that are not authorized in these statutes." Conn. Atty. Gen. Op. No. 2009-009, 2009 WL 3059049, at *4; *see also Rioux v. State Ethics Comm'n*, 45 Conn. Supp. 242, 247 (1997), *aff'd*, 48 Conn. App. 214 (1998) (holding that the statutory fees are

exclusive). Thus, any fees to compensate "for additional time and/or travel" beyond those the statutes expressly authorize are impermissible. *See, e.g.*, *Rioux*, 45 Conn. Supp. at 247 (holding that the statutes do not permit "an additional service fee or fee for advice, review, advancement of funds or short-term responsiveness").

Your third question raises the issue of whether an agreement under § 6-38a(a) may override the limits the statutes place on state marshal fees. Citing to the provisions of Conn. Gen. Stat. § 52-261, this Office has previously opined that § 6-38a(a) permits state marshals and their clients to enter into fee agreements as long as the fees established by those agreements "are at or below the statutory maximum and at or above the State Marshal Commission minimum." Conn. Atty. Gen. Op. No. 2009-010, 2009 WL 3330561, at *2; *see also Preston*, 4 Conn. at 480 (holding that "a contract to pay more than is due, is unquestionably void"). Given that there has been no further legislative guidance on the issue since our opinion, we see no reason to depart from that advice.

IV. There is no Apparent Basis to Conclude that a State Marshal Using an Attorney's E-Filing Codes Presents a Conflict of Interests that a State Marshal Becoming an Attorney's Designated Filer Does Not

You indicate that "[t]he State Marshal Commission has concluded that a state marshal cannot use the e-filing codes of an attorney to file a writ into the court" but ask whether "a state marshal's public officer position allow[s] for a state marshal to become a designated filer for an attorney, or are there conflicts of interest?" In addition, you ask whether—if such filings are allowed—a state marshal may charge fees for them.

You have advised my staff that the State Marshal Commission does not have a specific conflict of interests policy but that, in advising those who approach the Commission, it has interpreted its regulations to preclude conflicts of interests, apparently including a perceived conflict if state marshals were to use the e-filing code of an attorney to file a writ into the court.

"Conflict of interests is a term that is often used and seldom defined" and whether a conflict of interests exists is highly fact-dependent. *Phillips v. Warden, State Prison*, 220 Conn. 112, 137 (1991) (quotation marks omitted). You advise that the State Marshal Commission has interpreted its regulations to bar state marshals from using the e-filing codes of an attorney. The Commission's

interpretation of its regulations to prohibit state marshals from e-filing on behalf of an attorney does not appear deficient on its face.

There does not appear to be a difference between "us[ing] the e-filing codes of an attorney" and "becom[ing] a designated filer for an attorney" that would meaningfully impact the conflict of interests analysis. According to the Judicial Branch's Designated Filer Quick Reference Guide, "[d]esignated filers are individuals authorized by attorneys and law firms to file case initiation documents on their behalf." Since both the use of an attorney's e-filing codes and becoming a designated filer require the attorney's authorization, there is no apparent reason to conclude that use of e-filing codes would pose a conflict under the regulations but being a designated filer would not.

Again, whether a conflict of interests exists is a fact-intensive inquiry that will vary depending on the laws or regulations being applied. Should the State Marshal Commission be presented with facts that it believes warrant reconsideration of its conclusion that its regulations prohibit state marshals from using the electronic filing system with an attorney's sponsorship and has concerns that there may be other legal impediments to such conduct, it is free to seek this Office's guidance as to how the law applies to the facts as they may then be presented.

V. The Statutes Do Not Permit Fees To Be Charged For Recording Notices of Lis Pendens

Your last set of questions revisit the issue of whether fees may be charged for the recording of a notice of lis pendens. "Recording a notice of lis pendens can be effectuated without a State Marshal by any person or by mail." Conn. Atty. Gen. Op. No. 2009-009, 2009 WL 3059049, at *4. This Office has previously recognized that this raises the question of "whether a State Marshal can charge a fee for recording a notice of lis pendens as Conn. Gen. Stat. § 52-261 does not contain an express provision for charging a fee for recording a notice of lis pendens on the land records." Conn. Atty. Gen. Op. No. 2009-009, 2009 WL 3059049, at *4 n.2. We concluded that the absence of any statutory authority for such a fee "mean[s] presumably that none is authorized" and suggested that legislation would be necessary for state marshals to charge fees for such recordings. *Id.* Although Public Act No. 14-87 recently increased state marshal fees in some instances, no legislation authorizing state marshals to charge fees for recording a notice of lis pendens has been enacted. Consequently, state marshals may not bill for such recordings.

You ask whether it is "appropriate for anyone [other than a state marshal] to charge a civil service fee for the recording of a notice of lis pendens?" You also pose several other questions about fees for the recording of notices of lis pendens undertaken by those not acting as a state marshal, but rather as a separate corporation. We do not believe these are questions this Office can appropriately answer. Specifically, if a state marshal were to create a corporation for the purpose of accepting and charging for work recording notices of lis pendens, any legal or ethical questions that might arise would require reliance on private counsel or the Office of State Ethics, as they would not be legal questions that arise from the work of a state official. Providing advice on such questions, in our view, would not fall within our statutory mandate to provide advice to state officials related to their official duties. *See* Conn. Gen. Stat. § 3-125.

VI. CONCLUSION

I trust this opinion answers your questions.

Very truly yours,

GEORGE JEPSEN
ATTORNEY GENERAL

Connecticut State Marshal Commission

Office of the Attorney General Formal Opinions/Advice

Topic: Application of Unclaimed Property Laws to State Marshals

Date: 08/31/2018

Opinion Number: Informal Advice

MEMORANDUM

To: W. Martyn Philpot, Jr., Esq.
Chairperson
State Marshal Commission

From: Michael K. Skold
Assistant Attorney General

Date: August 31, 2018

Subject: Application of Unclaimed Property Laws to State Marshals

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You have requested informal advice about whether state marshals are subject to the state's Unclaimed Property laws, General Statutes § 3-56a *et seq.*, and if so, what standards apply to determine whether and when property is deemed abandoned, and when and how such property should be transferred to the Office of the State Treasurer ("Treasurer"). I conclude that state marshals are "public officers" who are subject to the state's Unclaimed Property laws. To the extent that it has not already done so, moreover, I advise you that the State Marshal Commission ("Commission") should contact the Treasurer and work with staff there to develop appropriate procedures to assist state marshals in accounting for and maintaining property in their possession, and also to understand the procedures that apply for turning unclaimed property over to the Treasurer when it is deemed abandoned under state law.

Background

You indicate that state marshals maintain client fund/trust accounts where they deposit funds collected for third parties under executions and tax warrants. You further indicate that the accounts contain funds that remain unclaimed by the owner. You seek advice about whether marshals are subject to the Unclaimed Property laws as holders of that unclaimed property.

I have consulted with the Treasurer regarding your request, and have been informed that this same issue arose several years ago. I have been informed that the Treasurer's view at that time was (and remains) that state marshals are subject to the Unclaimed Property laws. I also have been informed that, when this issue previously arose, the Treasurer's Office began working with the Commission to develop procedures for state marshals to maintain and account for property in their possession so that they could properly and timely identify and transfer the property to the Treasurer when it became abandoned under state law, but that the Commission never fully developed or implemented those procedures. You do not indicate otherwise in your letter.

Analysis

The primary question that you pose is whether state marshals are subject to the state's Unclaimed Property laws. In particular, you ask whether state marshals are "public officers" for purposes of General Statutes § 3-62a, which provides in relevant part that "[a]ll property held for the owner by any . . . public officer of this state . . . which has remained unclaimed by the owner for more than three years is presumed abandoned . . . ." The answer is yes.

Although neither the text nor the legislative history of § 3-62a provide insight about the meaning of the term "public officer," guidance can be found in other legal sources including judicial decisions. *See Tomick v. United Parcel Service, Inc.*, 324 Conn. 470, 478 (2017). To that end, the Attorney General previously advised the Commission that, for purposes of determining whether a person other than a state marshal may assist the state marshal in performing his or her duties, state marshals are public officers because they are authorized to provide legal execution and service of process, which is a sovereign function of government that is entrusted only to public officials empowered by law. Attorney General Opinion No. 09-009, 2009 WL 3059049 at *6-7 (Sept. 21, 2009), citing Conn. Gen. Stat § 6-38a and *Kelley v. Kelley*, 83 Conn. 274, 276 (1910). That advice is consistent with numerous cases that have addressed what it means to be a public officer under Connecticut law, including several cases in which the Court squarely held that state marshals in particular are public officers because they: (1) exercise some sovereign functions of government; (2) exercise other duties conferred by law for a public purpose; and (3) are hired and regulated by a state agency (the Commission), and may not be removed from office except by order of the Commission for cause after notice and a hearing. *E.g., McAllister v. Valentino*, 2012 WL 1591990, at *4 (Conn. Super. Ct. Apr. 12, 2012); *Mason v. Barbieri*, 2010 WL 1888711, at *2–3 (Conn. Super. Ct. Apr. 14, 2010); *Int'l Motorcars, LLC v. Sullivan*, 2006 WL 1999377, at *3-4 (Conn. Super. Ct. June 20, 2006).[1] Your letter does not suggest any reason why the foregoing analysis would not apply in the context you describe, and I cannot discern one. I therefore conclude that state marshals are "public officers" for purposes of § 3-62a, and that they are subject to the state's Unclaimed Property laws.

With regard to your questions about the procedures and standards that apply for determining whether and when property is deemed abandoned, the answers to those questions are fact dependent and will vary depending on the type of property involved, the identity of the owner, and the nature of the relationship between the owner and the state marshal. Due to the fact specific nature of that inquiry, and after consulting with the Treasurer, I advise you that the

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[1] *McCallister*, *Barbieri* and *Int'l Motorcars* addressed the question of whether state marshals are public officials for purposes of the analysis set forth in *Spring v. Constantino*, 168 Conn. 563 (1975), such that a claim against them can be deemed a claim against the State to which sovereign immunity applies. Although it is plain that state marshals are ***public*** officials, it does not necessarily follow that state marshals are ***state*** officials to whom sovereign immunity applies, or against whom claims can be brought in the Claims Commission pursuant to General Statutes § 4-141 *et seq.* To the contrary, the Office of the Attorney General previously has taken the position that claims against state marshals do not constitute claims against the State that can be brought in the Claims Commission, and the Claims Commissioner has agreed. *See, e.g., Claim of Lebby*, File No. 22569 (Oct. 17, 2011).

Commission should contact the Treasurer and work with staff there to develop and implement appropriate procedures for state marshals to follow to ensure that they properly account for and maintain property in their possession. Such procedures will help the state marshals to properly and timely identify property when it is deemed abandoned under state law. The Treasurer's Office has indicated that they are ready and willing to assist the Commission in developing and implementing those procedures.

Finally, with regard to your questions about when and how property that has been deemed abandoned should be transferred to the Treasurer, the applicable rules and procedures are set forth in General Statutes § 3-65a, and also are described in detail on the Treasurer's website.[2] To the extent that the Commission has specific questions on any aspect of that process, the Treasurer's Office has again informed me that they are ready and willing to answer any questions and assist the Commission with understanding and complying with the process on a prospective basis.

I trust that this is responsive to your inquiry.

[2] *See, e.g.*, https://www.ott.ct.gov/unclaimed_forms.html and https://www.ott.ct.gov/unclaimed_holderfaqs.html.