



# OLR RESEARCH REPORT

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## SUMMARY OF BYSIEWICZ V. DINARDO

By: Christopher Reinhart, Chief Attorney

You asked for a summary of *Bysiewicz v. DiNardo* (298 Conn. 748 (2010)).

### SUMMARY

In *Bysiewicz v. DiNardo*, the plaintiff sought a declaratory ruling on the statutory requirement that the attorney general be “an attorney at law of at least ten years’ active practice at the bar of this state” ([CGS § 3-124](#)). She argued that she met the eligibility requirement because she engaged in the active practice of law as the secretary of the state. Alternatively, she argued that the statute is unconstitutional because it added qualifications for the office beyond those listed for state offices in the state constitution.

Justice Norcott, joined by Justices Katz, McLachlan, Vertefeuille, and Zarella, ruled that the statutory requirements mean that the attorney general must have some litigation experience and have regularly engaged in the practice of law as a primary means of earning his or her livelihood for at least 10 years. The majority found that representing clients is an essential element of the active practice at the bar of this state. They ruled that the plaintiff was not eligible to be attorney general under the statute because she had no litigation experience; performing duties as secretary of the state did not constitute ten years active practice at the bar of this state; and, as secretary of the state, she was executing duties of the office and not representing clients. The majority also ruled the statutory qualifications constitutional because they are impliedly exempt from the constitutional qualifications for state office.

The court also ruled that the plaintiff had standing and that her claims were ripe but we do not discuss these portions of the opinion.

Judge Bishop, joined by Justice Palmer, concurred in the opinion but did not agree that the statute requires a candidate to have litigation experience and argued it was unnecessary to reach this issue.

## **ISSUES AND PROCEDURAL HISTORY**

The statute requires that the attorney general be “an attorney at law of at least ten years’ active practice at the bar of this state” ([CGS § 3-124](#)). Susan Bysiewicz brought an action against the Connecticut Democratic Party and its chairwoman and the Office of the Secretary of the State for a declaratory ruling that:

1. in carrying out her responsibilities as the secretary of the state, she engaged in the active practice of law to meet the statutory qualifications for attorney general or
2. alternatively, the statutory qualification violates the state constitution.

The Connecticut Republican Party also joined the lawsuit.

The trial court found that Bysiewicz served as secretary of the state since 1999, graduated from law school in 1986, spent six years as an attorney in private practice, spent two years practicing health care and pension law at an insurance company, and served as a state legislator from 1993 to 1999. As secretary of the state, she consulted with staff attorneys on a variety of legal matters including requests for declaratory rulings, instructions, and opinions on administering elections and primaries under state law.

The trial court ruled that the plaintiff’s performance of her responsibilities as the secretary of the state constituted the active practice of law to meet the eligibility requirements under the statute. The Connecticut Republican Party appealed.

## **MAJORITY OPINION**

### ***Interpreting the Eligibility Statute***

The majority found that the statutory requirement that the attorney general be “an attorney at law of at least ten years’ active practice at the bar of this state” was ambiguous. To interpret the statute, the majority considered that:

- statutory limitations on eligibility to run for public office should be liberally construed and ambiguities resolved in favor of a candidate's eligibility;
- the eligibility provisions were part of the same act that created the office of attorney general in 1897, requiring the new office to resolve legal questions for state officers and agencies and represent them in legal proceedings, functions previously performed by private counsel;
- in 1897, non-attorneys could do much of what was commonly understood to be the practice of law but they were prohibited from pleading at the bar of any court;
- the court previously interpreted the phrase "plead at the bar of any court of this state" to mean to appear in court;
- the definition of "attorney at law" in the 1891 edition of *Black's Law Dictionary*, when compared to its definition of "attorney," suggests that the term "attorney-at-law" was understood to mean someone who litigates cases in court; and
- the job of attorney general has changed since 1897, but even if the statute's original meaning could change to reflect these changed duties the legislature has not changed the office's original duties or the qualifications and still expects the attorney general to be legally authorized and practically qualified to perform those duties.

Based on these considerations, the majority reached the following conclusions.

1. The statutory qualification was intended to ensure that the attorney general would have some experience in active practice in court. The legislature wanted to ensure that the attorney general (a) was admitted to the bar so that he or she could appear in court and (b) had the practical experience to litigate effectively.
2. The statute contains a quantitative component because the legislature could not have intended a person with minimal experience in the practice of law to be qualified. The attorney general must have regularly engaged in the practice of law as a primary means of earning his or her livelihood for at least 10 years.

3. Representing clients is an essential element of the active practice at the bar of this state. It is reasonable to conclude that the legislature intended to ensure that the attorney general had an ingrained knowledge of ethical practices and an established record of treating clients with undivided allegiance, faithfulness, disinterestedness, integrity, and renunciation of personal advantage. Both components are equally indispensable to the competent practice of law.

### ***Applying the Statute***

After interpreting the eligibility statute, the majority concluded that the plaintiff did not satisfy the qualifications for attorney general for the following reasons.

- The plaintiff has no experience representing people in court.
- Although her formal training as an attorney may have occasionally been useful in carrying out the statutory duties of the Office of the Secretary of the State, the evidence does not show that performing these duties (1) is commonly understood as the practice of law or (2) requires a high degree of legal skill and great capacity for adapting to difficult and complex situations that characterizes the practice of law.
- To the extent special legal skills may be required for a particular question or ruling, the attorney general is the authority to perform these services for state agencies.
- Even if the plaintiff occasionally engaged in conduct requiring a high degree of legal skill, that occasional practice is not “active practice” under the eligibility statute. “Active practice” means regular practice as the primary means of earning a living.
- In carrying out election duties, like other agency heads, the plaintiff was executing public policy as an agent and officer of the state. She did not have the obligations to the state and public that an attorney has to a client.
- The plaintiff was not engaged in the practice of law when she collaborated with staff attorneys to answer questions from local election officials on conducting elections and issued regulations, declaratory rulings, instructions, and opinions on election law.

- Monitoring federal legislation and keeping the legislature abreast of developments that might require state compliance was not the practice of law. She was executing the duties of the office and not representing a client.

### ***Constitutionality***

The plaintiff also argued that the eligibility statute was unconstitutional because it conflicts with the constitutional provision stating that “[e]very elector who has attained the age of 18 years shall be eligible to any office in the state, but no person who has not attained the age of 18 shall be eligible therefore, except in cases provided for in this constitution” (Article six, § 10, as amended). She argued the constitutional provision was the exclusive qualification for state office and the legislature could not require different or additional qualifications in statute.

The majority used the test laid out in *State v. Geisler* (222 Conn. 672 (1992)) to analyze state constitutional claims. Under *Geisler*, the court looked at:

1. the text of the operative constitutional provisions,
2. related Connecticut precedents,
3. persuasive relevant federal precedents,
4. persuasive precedents in other state courts,
5. historical insights into the intent of our constitutional forbearers, and
6. contemporary understandings of applicable economic and sociological norms or relevant public policies.

Analyzing these factors, the majority found the following.

1. The constitution’s text is not dispositive. Its minimal qualifications have been part of the constitution since 1818 but the office of attorney general did not exist in 1818. The qualification provision is worded broadly and could apply to future offices but it is equally plausible that the drafters had in mind only those offices then in existence.

2. Connecticut cases weigh in the plaintiff's favor. The limited number of cases interpreting the constitutional provisions have not construed it to literally apply to every office but instead held it applicable to state constitutional office—those expressly named in and created by the constitution. The office of attorney general is now a constitutional one.
3. Federal and other state cases involving the legislature setting qualifications for public offices provide little guidance. They are fact sensitive and can be distinguished.
4. The office of attorney general was created by statute and became a constitutional office through a 1970 constitutional amendment. There are no constitutional provisions on the office's powers and duties and this strongly suggests that the legislature intended to retain authority over them. The legislature intended to retain the existing qualifications and by necessary implication exempt the position from the preexisting, generalized qualification provision in the constitution.
5. The attorney general's statutory responsibilities have expanded. The continuing importance of the office and its expanding role weighs in favor of concluding that the legislature intended to retain the statutory eligibility requirements that the office be overseen by an attorney with substantial practice experience.

The majority concluded that the office of attorney general is impliedly exempt from the general qualification requirement for state constitutional officers and the statute, although providing stricter qualifications, is not unconstitutional.

### **CONCURRING OPINION**

Judge Bishop wrote a concurring opinion, joined by Justice Palmer. They did not agree that the eligibility statute requires a candidate to have litigation experience and argued it was unnecessary to reach this issue. They reasoned as follows.

- The majority imports an eligibility restriction that is neither implied nor expressed by the statute's language.
- In a 1879 case, the U.S. Supreme Court defined an "attorney-at-law" as a broad sweeping term and did not imply that a person must be involved in litigation.

- A Connecticut commission of Superior Court judges, when developing the Practice Act of 1879 with the first rules of practice, used the term “attorney-at-law” without distinguishing between attorneys who practiced in court and those involved in transactional work. The judges did not consider the term to relate specifically or exclusively to courtroom practice.
- Even if the legislature intended to require litigation experience for the office of attorney general, it did not articulate it by the term “attorney-at-law.”
- The term “practice at the bar” does not necessarily mean courtroom experience. “At the bar” had different meanings depending on the context in which it was used in the 19<sup>th</sup> century as it does today.
- The office’s responsibilities, enacted in the same public act, provide some support for requiring the attorney general to have some litigation experience. But this implication does not overcome the language which does not require an attorney with 10 years litigation experience.
- The terms “attorney-at-law” and “practice at the bar” refer to membership and active participation in the legal profession of the state.
- Given the statute’s ambiguity, there is no reason to disregard the court’s jurisprudence that favors liberally construing ambiguous election eligibility statutes to give the electorate the broadest choice.

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