



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2010-504

April 5, 2010

Re: Post-Employment / Lawyer

A City employee requested a nonpublic advisory ethics opinion as to the effect of the post-employment restrictions of the ethics laws subsequent to the employee's leaving City employment. The employee is a member of the bar, and advised that his¹ future employment would be with a law firm.

In addition to requesting advice as to any restrictions, and associated time limitations, the requestor inquired about representing a client before a specific City board/commission or with a particular type of City official.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, this advice is predicated on the facts that have been provided to us. We do not conduct an independent inquiry into the facts. Further, we can only issue advice as to future conduct. Although previous opinions of this Board that interpret statutes are guidance to how this Board will likely interpret the same provision in the future, previous opinions do not govern the application of the law to different facts. Ethics opinions are particularly fact-specific, and any official or employee wishing to be assured that his or her conduct falls within the permissible

¹ As a policy matter, and in an effort to be gender nonspecific and further conceal the identity of requestors, Nonpublic Advices of Counsel will occasionally use the feminine pronoun throughout or the masculine pronoun throughout, but will not necessarily use the pronoun appropriate to the actual requestor.

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scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation, prior to acting. In that regard, the requestor was advised that to the extent that this opinion states general principles, and there are particular fact situations that he may be concerned about, the requestor was encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts.

There are three different ethics laws that relate to post-employment restrictions, two in the City Code and one in the State Ethics Act. Each restriction is discussed in turn below, including whether the restriction has a different application to attorneys practicing law, as two of them do.

One-Year Limitation On Representing Others—State Ethics Act

As a former public employee, the requestor is subject to the Public Official and Employee Ethics Law, also known as the State Ethics Act (“Act”).² Section 1103(g) of the Act, 65 Pa.C.S. §1103(g), restricts “post-employment” activities as follows:

No former public official or public employee shall represent a person, with promised or actual compensation, on any matter before the governmental body with which he has been associated for one year after he leaves that body.

The key words in that provision are defined in Section 1102 of the Act, 65 Pa.C.S. §1102. “Represent” is defined as follows:

To act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.

² The Act applies only to a “public employee,” defined in the Act to include: “Any individual employed by the Commonwealth or a political subdivision who is responsible for taking or recommending official action of a nonministerial nature with respect to (1) contracting or procurement; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interests of any person.” 65 Pa.C.S. §1102. The Regulations of the State Ethics Commission specifically include in a list of positions generally considered to be a “public employee”: “Staff attorneys engaged in representing the department, agency or other governmental bodies.” 51 Pa. Code §11.1 (iv)(C)(definition of “public employee”).

“Governmental body with which a public official or employee is or has been associated” is defined as follows:

The governmental body within State government or a political subdivision by which the public official or employee is or has been employed or to which the public official or employee is or has been appointed or elected and subdivisions and offices within that governmental body.

However, the Pennsylvania Supreme Court has ruled that the one-year cooling-off period of Section 1103(g) does not apply to attorneys providing “representation,” as that is a matter for the Supreme Court to govern, through the Rules of Professional Conduct. *Shaulis v. State Ethics Commission*, 833 A.2d 123, 132 (Pa. 2003). The Court held that: “the prohibitions contained in Section 1103(g) of the Ethics Act are unconstitutional because they specifically target attorneys.” The Court went on to explain:

The provision seeks to prevent a former government employee from representing any person before his or her government employer for one year after the termination of their employment relationship. The Ethics Act defines “represent” as “[t]o act on behalf of any other person in any activity which includes, but is not limited to, the following: personal appearances, negotiations, lobbying and submitting bid or contract proposals which are signed by or contain the name of a former public official or public employee.” 65 Pa.C.S. § 1102. While it is conceivable that a non-attorney could engage in such “representation” and, therefore, Section 1103(g) is not strictly limited in scope to attorneys, it nonetheless targets the practice of law.

Id. Accordingly, since the requestor is a member of the bar, the State Act’s one-year post-employment rule does not apply to his practice of law and to representations he provides as an attorney. *Compare* Nonpublic Advice of Counsel GC-2009-502.

Nevertheless, the State Ethics Commission is the ultimate arbiter of interpretations of the Act. Please note that the Act provides that: “A public official of a political subdivision who acts in good faith reliance on a written, nonconfidential opinion of the solicitor of the political subdivision . . . shall not be subject to the penalties provided for in [certain provisions of the Act].” 65 Pa.C.S. §1109(g). *See* Charter §4-1100 (giving Law Department concurrent jurisdiction with the Board

regarding ethics matters under State law). Since the Board of Ethics is not “the solicitor” of the City, requestors have the option to obtain an opinion from the Law Department as to the application of the State Ethics Act, including whether the requestor’s position meets the Act’s definition of “public employee. ” Any such request, to receive the protection, could not be confidential, and will only protect the subject from the criminal penalties in subsections 1109(a) and (b) and from treble damages under subsection 1109(c) of the Act. (A violation of the Ethics Act can still be found, and restitution can still be ordered.) Alternately, the requestor was advised that he may wish to apply directly to the State Ethics Commission for a ruling.

In particular, the State Ethics Commission (subject to review by the courts), may have a particular view of the application of *Shaulis*. It appears to be the position of the Commission that the “one-year rule” applies to attorneys to the extent that they are engaged in activities that do not constitute “the practice of law.” See State Ethics Commission Opinion No. 05-008 at 4 (“Based upon *Shaulis*, [] we conclude that Section 1103(g) of the Ethics Act may not be applied to restrict the Attorney’s conduct as a former public employee insofar as it constitutes the practice of law. . . . To the extent the Attorney would be engaged in other, non-legal representation [], however, Section 1103(g) would apply.”); Advice of Counsel 08-528 (concluding that Section 1103(g) applies except as to activities that constitute the practice of law); Advice of Counsel No. 05-583 (same); Advice of Counsel No. 04-524 (same). Under this interpretation, if, for example, within the first year the requestor were to leave the law firm and obtain a nonlegal position with a business firm, it is possible that would not be considered by the Commission to be “the practice of law.” If the one-year restriction did then apply, there would be a question as to whether, under the applicable facts, it would be possible for him to serve in that position in a local business firm without from time to time “representing” that firm before the City.³

³ This assumes that the requestor’s “former governmental body” is the entire City government. The State Ethics Commission has said many times that the “governmental body with which a public official/public employee is or has been associated” extends to those parts of the government where the public official/employee “had influence or control.” In some cases the Commission has ruled that a former City employee’s “former governmental body” was limited to his department in City government. How the State Ethics Commission would rule in the requestor’s matter is unclear. Since this Advice advises that, as an attorney, Section 1103(a) does not apply to the requestor, this would not be an issue, so long as he is working for that law firm and representing clients. In the event that the requestor should, within the one year, seek other employment of a nonlegal nature, this may then become an issue, and he may wish to seek the advice of the Commission.

Accordingly, the requestor was advised that, so long as he is providing legal services, Section 1103(g) of the Act clearly does not apply to him. To the extent that Section 1103(g) does apply, the requestor may not for one year after the date he left the employ of the City (that is, the date he was off the payroll) represent anyone—including a person or entity for which he consults as an independent contractor—before the City.⁴ Please note the broad definition of “represent,” which includes having your name appear on a bid, contract proposal, or invoice submitted to the former governmental body; personal appearances with officials of the former governmental body or otherwise making known to the former governmental body your work for the new employer. See, e.g., State Ethics Commission Opinion No. 04-016 at 6 (discussing the broad definition of prohibited representation), Advice of Counsel 08-593 at 9-10 (same). This means that until the one year anniversary of his separation date, the requestor may not have any nonlegal involvement in any transaction where a new employer or client contacts the former governmental body regarding any City transactions, unless the requestor’s involvement is purely internal at his new employer and not in any way revealed to the former governmental body.

Permanent Limitation On Assistance With Particular Matters—City Code

Section 20-603(1) of the City Ethics Code, titled “Post-Employment Representation,” states:

No person who has served for compensation as a member of Council, City officer or employee shall assist, at any time subsequent to his City service or employment, another person, with or without compensation, in any transaction involving the City in which he at any time participated during his City service or employment.

The “transactions” to which this provision applies are defined broadly in Section 20-601(4) to include matters (i) which are or will be the subject of City action; (ii) to which the City is or will be a party; or (iii) in which the City has a direct proprietary interest. This provision is not a one-year prohibition, like the State Ethics Act provision, but applies “at any time” after a person leaves City employ. However, it is much narrower in scope than the State Ethics Act provision, since it only applies to matters in which the employee “participated” during City employ. This has been interpreted to mean matters in which the employee exercised discretion (and not merely, for example, responded to a routine request for information) and interpreted to mean only the particular issue or issues on which decisions were made by the City with the former employee’s involvement, not every issue related to that project that

⁴ See note 3.

may arise after separation from City service.

Code Section 20-603(1)'s post-employment representation restriction does not apply to representations made as an attorney. *See* Nonpublic Advice of Counsel GC-2009-502, *citing* Opinions of the City Solicitor. Attorney representations are regulated solely by the Pennsylvania Supreme Court and the Rules of Professional Conduct.

Two-Year Limitation On Financial Interests—City Code

Section 20-607(c) of the Code states:

No member of Council or other City officer or employee shall become financially interested, subsequent to final action, in any legislation including ordinances and resolutions, award, contract, lease, case, claim, decision, decree or judgment made by him in his official capacity, during his term of office or employment and until two (2) years have elapsed since the expiration of service or employment in the term of office of said member of Council or other City officer or employee.

This prohibition shall apply so as to prevent a parent, spouse, child, brother, sister or like relative-in-law or any person, firm, partnership, corporation, business association, trustee or straw party from becoming financially interested for or on behalf of a member of City Council, City officer or employee within said two (2) year period.

In short, this provision prohibits a City employee for two years after leaving City employ from acquiring a financial interest in official matters on which he worked while in City employ.

In contrast to the two provisions discussed above, Code Section 20-607(c) neither clearly restricts representation nor relates exclusively to post-employment activity. Unlike Code Section 20-603, which is captioned "Post-Employment Representation," Code Section 20-607 is captioned "Conflict of Interest." Moreover, subsection (c) applies "during his term of office or employment and until two (2) years have elapsed since the expiration of service . . ." (emphasis added). The provision does not relate to "assisting another" or "representation" but to "becoming financially interested" in an official action.

As to attorneys during their government employment, the Pennsylvania Supreme Court opined, in *Shaulis*, that “this Court retains exclusive authority over the conduct of attorneys generally, but that as an employer, in this case the Commonwealth government, can proscribe conduct of its current employees, including attorneys, provided that the proscription is not targeted specifically at attorneys.” 833 A.2d at 131. Accordingly, ethics laws that apply to current employment do apply to attorneys.

Therefore, a strong argument can be made that Section 20-607(c) of the City Code prohibiting a personal financial interest in official action taken for two years after employment does not target attorneys and is not unconstitutional as it applies to attorneys, even after *Shaulis*. In a previous Advice we quoted a City Solicitor Opinion, issued to a prior Solicitor, stating:

If §20-607(c) is applicable, then, for example, if as City Solicitor you participated in the award of a contract for the rendering of legal services, you may not for two years receive fees under that contract. Of course, you may request a formal opinion on this issue should the occasion arise.

Nonpublic Advice of Counsel GC-2009-502 at 8, (*quoting* Opinion No. 91-47, 1991 *City Solicitor’s Opinions*, 142, 143 n.1).

Applying Section 20-607(c) to the requestor’s situation, the provision would prohibit his having a financial interest, until the two-year anniversary of his separation date, in an official action he took while working for the City. This employee did not award contracts, so the example of the Solicitor Opinion quoted above does not apply. A possible example that might raise an issue would be if the requestor had worked on a City matter that has now become the subject of litigation in which the law firm which he plans to join is involved, and the law firm is hiring the requestor specifically to work on that litigation. Of course, any specific facts should be referred to us for an advisory addressed to the exact situation.

Rules of Professional Conduct

Because of the manner in which the Pennsylvania courts have interpreted the ethics laws as applicable to attorneys’ post-government employment, such laws are inapplicable to “representation” where a former City official who is an attorney undertakes activity with a private entity or for a private client, and the Rules of Professional Conduct for Pennsylvania attorneys control. Advice as to application of the Rules of Professional Conduct is not within the jurisdiction of the Board of Ethics,

so the Rules are mentioned here merely as information. Rule 1.11(a) addresses “Special Conflicts of Interest for Former and Current Government Officers and Employees” and provides in part that a former government lawyer “shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.” Additionally, other parts of Rule 1.11 may impute disqualification to other lawyers in the former employee’s law firm. Again, interpretation of the Rule is beyond the scope of this Advice. Generally, the person to contact to seek any needed consent (or “waiver”) is the First Deputy City Solicitor, if the Law Department is representing the City in the matter.

Summary

In summary, the requestor was advised as to the following conclusions:

(1) Under the State Ethics Act, the requestor may not for one year after he left the employ of the City represent anyone before his former governmental body, unless such representation is in his capacity as an attorney. Please note the broad definition of “represent,” which includes having one’s name appear on a bid, contract proposal, or invoice submitted to one’s former governmental body. So long as the requestor is employed by a law firm, it is likely that the State Ethics Commission would conclude that the provision does not apply to him.

(2) The City Code provides that the requestor may not in the future assist anyone in a transaction involving the City on a particular issue or issues on which decisions were made by the City with his involvement, but this provision also does not apply to representation as an attorney. However, the requestor may wish to refer to the Rules of Professional Conduct.

(3) The requestor may not for two years after he left the employ of the City acquire a financial interest in any action or decision he made in his official capacity during that term of City employment.

(4) As to the requestor’s specific question, his providing legal representation to a client before a City board or commission, or in a meeting with a particular City official—such representation would not be restricted by either the State Ethics Act nor Code Section 20-603(1), since such post-employment restrictions on representation do not apply to lawyers practicing law. If the City matter involved was one on which the requestor previously had official involvement as a City employee, there might

conceivably be an issue within the first two years, under Code Section 20-607(c), as discussed above. Also, as noted above, this advisory does not address the Rules of Professional Conduct. The requestor was advised that he may wish to determine whether the law firm he is joining has a professional conduct committee.

The requestor was advised to feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if he has additional facts to provide. We also noted the option of requesting advice of the City Solicitor, as discussed on page 4 above. Since the requestor requested nonpublic advice from the Board of Ethics, we are making public only this revised version of this Advice, edited to conceal the requestor's identity, as required by Code Section 20-606(1)(d)(iii).

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cc: Richard Glazer, Esq., Chair
J. Shane Creamer, Jr., Esq., Executive Director