



CITY OF PHILADELPHIA

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Philadelphia Board of Ethics Nonpublic Advice of Counsel GC-2009-502

April 16, 2009

Re: Post-Employment / Lawyer/ Consultant / Vendors to Former Office

A former City employee requested a nonpublic advisory opinion as to the effect of post-employment restrictions of the ethics laws. The requestor, an attorney, was employed by the City of Philadelphia in several capacities in multiple departments over the course of several years.

The requestor sought advice as to three factual scenarios, two of which involve companies that have approached the requestor to advise them as a consultant:

1. Company A contracts with the City of Philadelphia for certain services. While a City employee, the requestor signed contracts for Company A's services. Company A now wants to engage the requestor to advise them on a new project they are developing that would not involve the City of Philadelphia, but would involve providing services to neighboring counties. There is some talk of later folding a current City contract into this project, but this is not certain and quite a few months hence. The requestor advised not anticipating being involved in lobbying the City in this regard.
2. Company B does not, and has not, contracted with the City of Philadelphia and wishes to discuss securing the requestor's services to advise it on projects related to its business. At this point the requestor was not sure whether this consulting would involve the City of

Philadelphia or not, or if it did involve the City of Philadelphia whether it would require the requestor's interaction with any City officials.

3. The requestor asked whether there is any prohibition or restriction on providing legal advice to any entity connected to the City.

In keeping with the concept that an ethics advisory opinion is necessarily limited to the facts presented, my advice is predicated on the facts that I have been provided. Although previous opinions of this Board, the City Solicitor's Office, and the State Ethics Commission that interpret statutes are guidance to how this office 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 scope of the ethics laws is well-advised to seek and rely only on an opinion issued as to his or her specific situation. In that regard, to the extent that this opinion states general principles, and there are particular fact situations that the requestor may be concerned about, the requestor was encouraged to contact the Board of Ethics 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").¹ 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.

¹ 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. I conclude that there is no question that in all of the requestor's public positions, the requestor was a "public employee."

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.

“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.

There are a number of considerations here. First, when does the one-year “cooling off period” apply? Clearly, within one year of the requestor’s prior separation from the City he or she would have been prohibited from representing any person in a transaction involving that former department to the extent the restriction could apply to the requestor’s activity given that he or she is an attorney, but the requestor is beyond that one-year period. However, the requestor had subsequent employment as a City employee, and later separated from that subsequent position. Accordingly, a subsequent one-year “cooling off period” started after the subsequent separation. See Advice of Counsel No. 07-570 of the State Ethics Commission at 5 (concluding that each time the requestor ceased providing services as a public employee he would “once again become a former public employee subject to Section 1103(g) of the Ethics Act, and the one-year period of applicability of Section 1103(g) would commence anew.”).

Second, what is the requestor’s “former governmental body” for that last period of employment with the City? Rulings by the Commission on municipalities are inconsistent, and it is possible the Commission would consider the requestor’s “former governmental body” to be no larger than his or her most recent former department. Complicating this matter is the fact that the requestor’s “former governmental body” for prior City employment clearly includes multiple other City departments. Although a number of State Ethics Commission rulings concern employees who leave government service and are later reemployed by the very same governmental unit, we have not been able to find a ruling similar to the requestor’s situation, where a government employee, after a break in service, was hired by a different branch of the same political subdivision. Moreover, putting aside the requestor’s prior employment, it is not certain that the State Ethics Commission would consider the requestor’s “former government body” to be

limited to his or her most recent former department. 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.” An employee in the Department of Licenses & Inspections may have influence or control only in that Department. See Advice of Counsel 02-596 of the State Ethics Commission at 4 (concluding that for the Chief of L&I’s Mechanical Services Unit the former governmental body was Philadelphia’s Department of L&I in its entirety); State Ethics Commission Order 1061 at 3 (Antico 96-035-C2) (finding that for Philadelphia L&I’s Business Regulatory Enforcement Director the former governmental body was Department of L&I and all boards/commissions under L&I). Yet, it can be argued that the requestor in his or her former department had influence and/or control that reached to other City departments. How the State Ethics Commission would rule in such a matter is not clear, and this is a reason to seek a ruling directly from that body as is discussed below.

A third complicating factor is the fact that the requestor is a member of the bar. 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. On October 1, 2003, the Pennsylvania Supreme Court ruled that Section 1103(g) was an unconstitutional infringement on the Court’s authority to regulate the conduct of attorneys, in violation of Article V, Section 10 of the Pennsylvania Constitution. 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 the requestor’s practice of law and to representations the requestor makes as an attorney.

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. 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 or she 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* 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, it is possible that some employment the requestor may contemplate, such as a nonlegal position with a business firm, 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 it would be possible for the requestor to serve in that position in a local business firm without from time to time “representing” that firm before the City.

Accordingly, so long as the requestor is providing legal services, Section 1103(g) of the Act clearly does not apply to the requestor. To the extent that Section 1103(g) does apply, the requestor may not for one year after the date of leaving the employ of the City (that is, the date off the payroll) represent anyone—including a company for which the requestor consults as an independent contractor—before the requestor’s former governmental body. 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 one year after separating from City employment, the requestor may not have any nonlegal involvement in any transaction where a new employer or entity with which the requestor has a contract contacts the former governmental body regarding any City transactions such as contracts, unless the requestor's involvement is purely internal at the new employer and not in any way revealed to the former governmental body.

Now addressed are the three particular fact scenarios the requestor provided, as applied to Section 1103(g) of the State Ethics Act.

1. Company A. The requestor advises not anticipating being involved in lobbying the City for this Company. However, lobbying is not the only activity prohibited by Section 1103(g). Nor is it clear exactly what would be involved in the requestor advising the company on a new project. If the requestor represents the Company as an attorney, the State Act provision would not apply. Also, if the requestor advises them in some other way (as an expert on certain services, for example), but the requestor's advice is completely internal, and no document is provided to the former governmental body with the requestor's name on it, and the requestor does not contact any City officials, the requestor would likely not be "representing" as the term is defined and would not violate the State Act's one-year post-employment restriction.
2. Company B. If this company works exclusively in other jurisdictions and not for the City of Philadelphia, there would be no issue under the State Act. However, any work for or contact with the City would raise the same issues as Company A above.
3. Legal representation. As noted above, Section 1103(g) does not apply to attorneys practicing law. Attorneys practicing law, however, are bound by the Pennsylvania Rules of Professional Conduct.

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 employee’s involvement, not every issue related to that project that 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. Solicitor’s Opinion 97-16 (advising that the requestor’s activities as an attorney after separation from the City will not be subject to Code Section 20-603(1) based on a Commonwealth Court opinion pre-dating Shaulis, which also held the State Act’s post-employment provisions cannot restrict an attorney’s representation of a client); Solicitor’s Opinion 91-47 (same). 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 decisions he made 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. However, no opinion has been issued on this specific question to our knowledge. In a 1991 opinion, Deputy City Solicitor Eric H. Auerbach noted that, under the predecessor to Shaulis (an opinion that also held the State Ethics Act unconstitutional, PUC Bar Association v. Thornburgh), out-going City Solicitor Charisse Lillie would not be subject to Code Section 20-603(1) and discussed 20-607(c) in a footnote as follows:

However, it is not clear whether you will be subject to §20-607(c) of the Code, quoted above, which would forbid you for two years from acquiring a financial interest in various official actions you might have taken as City Solicitor. This provision may survive the holding of *PUC Bar Association* since it is not a direct prohibition against representation; however, no opinion has been issued on that question. 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.

Opinion No. 91-47, 1991 City Solicitor's Opinions, 142, 143 n.1; see also Solicitor's Opinion 97-16 ("[I]t is not totally clear whether or not you [an attorney] still could be subject to Section 20-607(c) [A]n argument can be made that this provision survives the holding of PUC Bar Association since it is not a direct prohibition against representation.").

Applying Section 20-607(c) to the requestor's situation, since the requestor signed certain contracts that Company A had with the City, if any of those contracts are still in force, the requestor could not within two years of separation from that term of employment be employed by and receive any compensation from Company A, if such compensation was derived from revenue received under a City contract signed by the requestor. In a follow-up email, the requestor advised that the City contracts with Company A are subject to annual renewals, and any current contract would not have been signed by the requestor. On these facts, the requestor was advised that there would be no issue under Section 20-607(c).

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." Generally, the person to contact to seek such consent (or "waiver") is the First Deputy City Solicitor.

Summary

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

(1) You may not for one year after you left the employ of the City, represent anyone, including Company A or Company B, before your former governmental body, unless such representation is in your capacity as an attorney. Please note the broad definition of "represent," which includes having your name appear on a bid, contract

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proposal, or invoice submitted to your former governmental body. Given your previous employment by multiple offices in City government, there is a significant issue as to whether that "former governmental body" would be interpreted to be limited to your most recent former department, or would include other departments of the City.

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

(3) You may not for two years after you left the employ of the City in the past acquire a financial interest in any official decision you made during that prior term of City employment. You may not for two years after you left the employ of the City most recently acquire a financial interest in any official decision you made during that subsequent term of City employment.

We advised the requestor to please feel free to request further advice from the Board of Ethics, or the State Ethics Commission, if he or she has additional facts to provide. We also noted the option of requesting advice of the City Solicitor, as discussed on page 5 above. Since the requestor asked for nonpublic advice from the Board of Ethics, we are making public only this revised version, 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