



CITY OF PHILADELPHIA

BOARD OF ETHICS
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Philadelphia Board of Ethics Board Opinion 2013-004

March 20, 2013

Steve Masters, Esq.
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Via electronic mail

Re: Lobbying / Contingent Fees / Attorney

Dear Mr. Masters:

You have requested a public advisory opinion as to whether the Philadelphia Code Lobbying Chapter prohibition against lobbyists accepting contingent fees applies to certain representation by you. You state your question as follows:

I have been approached by a potential client who is seeking to win a procurement contract from the city and wishes to pay me on a contingent fee basis. I am a licensed attorney and the work to be performed would constitute the provision of legal services for this client.

The city has not yet issued an RFP and the legal services I would provide would include persuading the City to issue the RFP. I anticipate that in addition to direct contacts with city officials directed [sic] responsible for issuing the RFP, I would engage in direct contacts with employees and elected officials in other city agencies, including City Council.

As an attorney performing legal service, am I bound by the restrictions on contingent fees contained in Section 9.26 Prohibited Activities (F) Contingent Compensation or do I have the legal authority to directly lobby any city employee for a contingent fee, so long as the Pennsylvania Supreme Court permits those legal services to be paid for by contingent fee?

You provided copies of two court opinions that, you argued, “seem to suggest that practicing lawyers may be exempt from the provisions of the city's lobbying code as it relates to contingent fees.”

Summary of Conclusions

This Board concludes that for you to agree with a client to receive a contingent fee for you to contact a City officer or employee other than those officials normally responsible for receiving inquiries about issuing an RFP would be prohibited under Code Section 20-1205(7). Entering into such an agreement would constitute a violation by both you (under subsection 20-1205(7)(b)) and your client (under subsection 20-1205(7)(a)). There is no applicable exception arising out of the fact that you are a member of the bar.

Analysis

Requirements and restrictions on lobbyists and their principals are stated in the Lobbying Chapter of the Philadelphia Code, Chapter 20-1200. Code Section 20-1205(7) prohibits certain contingent fees for lobbying (see also Para. 9.26(F) of Board of Ethics Regulation 9), as follows:

- (7) Contingent Compensation.
 - (a) A person may not compensate or incur an obligation to compensate a person to engage in lobbying for compensation contingent in whole or in part upon any of the following:
 - (i) Occurrence, nonoccurrence or amendment of legislative action.
 - (ii) Occurrence, nonoccurrence or amendment of an administrative action.
 - (b) A person may not engage in or agree to engage in lobbying for compensation contingent in whole or in part upon any:
 - (i) Occurrence, nonoccurrence or amendment of legislative action.
 - (ii) Occurrence, nonoccurrence or amendment of an administrative action.

Note that the above provision applies to “any person” and is therefore not limited to registered lobbyists. Nevertheless, it is instructive to note that Code Section 20-1201(20) defines “Lobbyist” as follows:

- (20) “Lobbyist.” Any individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration, including an attorney at law while engaged in lobbying provided, however, that attorneys engaged in lobbying are subject to the requirements and restrictions of this Chapter only to the extent permissible under the Pennsylvania Rules of Professional Conduct. (See also Para. 9.1(Z) of Reg 9).

Code Section 20-1201(18) defines "Lobbying" and includes this exception:

For purposes of this Chapter, it is not lobbying when a principal, or a consultant or professional (e.g., an accountant, architect, attorney, doctor, or engineer), acting as the representative or agent of a principal or client, communicates with a City agency in a matter in which the principal or client is subject to or seeking a specific City agency action in which the principal's or client's interests, rights, or privileges are at issue, provided that such communication is in an effort to address those interests, rights, or privileges and is in the normal course for such matters. This exception shall not apply to efforts to influence general policy on behalf of an interest group, nor to direct communications with City officials or employees who the principal, representative, or agent knows or should know are not those who would ordinarily make determinations in the matter at issue. (See also Para. 9.1(X) of Reg 9).

Code Section 20-1204 lists exemptions from registration and reporting (but not from the prohibitions of Sect. 20-1205) and subsection (13) includes this exemption:

(13) For purposes of this Chapter, it is not lobbying when a principal, or a consultant or professional (e.g., an accountant, architect, attorney, doctor, or engineer), acting as the representative or agent of a principal or client, communicates with a City agency in a matter in which the principal or client is subject to or seeking a specific City agency action in which the principal's or client's interests, rights, or privileges are at issue, provided that such communication is in an effort to address those interests, rights, or privileges and is in the normal course for such matters. This exception shall not apply to efforts to influence general policy on behalf of an interest group, nor to direct communications with City officials or employees who the principal, representative, or agent knows or should know are not those who would ordinarily make determinations in the matter at issue. 86.4 (See also Para. 9.24(O) of Reg 9).

Code Section 20-1205(5) prohibits conflicts of interest, but subsection 20-1205(5)(g) provides an exception for attorneys:

Complaints regarding violations of this subsection involving a lobbyist or principal who is an attorney at law shall be referred to the Disciplinary Board to be investigated, considered and resolved in a manner consistent with the Rules of Professional Conduct. (See also Para. 9.26(D)(7) of Reg 9.)

However, the above exception applies only to the conflict of interest provision; there is no similar exception to the contingent fees provision.

Finally, returning to the provision in Section 20-1201(20) that the Lobbying Chapter applies to attorneys only to the extent permissible under the Pennsylvania Rules of Professional Conduct, it is noted that on May 17, 2012, the Penna. Supreme Court amended Rule 1.19 of the Rules of Professional Conduct to make clear that the Rule requires lawyers to abide by lobbying

laws, including those adopted by municipal governments. The full Rule provides as follows:

1.19 Lawyers Acting as Lobbyists

(a) A lawyer acting as lobbyist, as defined in any statute, resolution passed or adopted by either house of the Legislature, regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania, or ordinance enacted by a local government unit, shall comply with all regulation, disclosure, or other requirements of such statute, resolution, regulation or ordinance which are consistent with the Rules of Professional Conduct.

(b) Any disclosure of information relating to representation of a client made by the Lawyer-lobbyist in order to comply with such statute, resolution, regulation or ordinance is a disclosure explicitly authorized to carry out the representation and does not violate Rule 1.6.

Comment:

[1] A "local government unit" includes county and municipal or local authorities in the Commonwealth.

Moreover, Rule 1.5(c) of the Rules of Professional Conduct provides: "A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." In this case, the "other law" would be Code Section 20-1205(7).

The result of all of the above discussion is that an attorney is not exempt from the prohibitions in Section 20-1205 merely because he or she happens to be a member of the bar and is representing a client in contacting the City in an attempt to influence a decision as to whether to issue an RFP.

You cite *Shaulis v. Penna. State Ethics Commn*, 833 A.2d 1241 (Pa. 2003), in support of your position that attorneys are exempted from application of Code Section 20-1205(7). However, *Shaulis* involved an entirely different statute, a state law governing post-employment restrictions on former government employees representing others before their former government bodies. There was no Rule of Professional Conduct that applied. In contrast, as noted above, Pennsylvania Rule 1.19 as amended May 17, 2012, explicitly requires lawyers to abide by lobbying laws, including those adopted by municipal governments.

Also, you cite *Gmerek v. Penna. State Ethics Commn*, 751 A.2d 123 (Pa. Commw. 2000), *aff'd* 569 Pa. 579, 807 A.2d 812 (Pa. 2002) in support of your position that attorneys are exempted from application of Code Section 20-1205(7). However, the Supreme Court has noted that pursuant to its constitutional authority, this Court adopted the Rules of Professional Conduct and the Rules of Disciplinary Enforcement, which govern the conduct and discipline of attorneys. *Beyers v. Richmond*, 937 A.2d 1082, 1091 (Pa. 2007)(citing *Commonwealth v. Stern*, 549 Pa. 505, 701 A.2d 568, 571 (Pa. 1997)). Thus, the promulgation of Rule 1.19 in 2003, along with the above-referenced amendment in 2012, removes any constitutional infirmity. Moreover, the statute is presumed constitutional. *Salters v. Pa. State Police Mun. Police Officers' Educ. & Training Comm'n*, 912 A.2d 347, 354 (Pa. Comm. Ct. 2006). In any case, the statute challenged in *Gmerek* was a state statute, not the Philadelphia Lobbying Code.¹

Accordingly, Code Section 20-1205(7) applies to you.

Conclusion

Based upon all the facts presented in this matter, this Board concludes that for you to agree with a client to receive a contingent fee for you to contact a City officer or employee other than those officials normally responsible for receiving inquiries about issuing an RFP would be prohibited under Code Section 20-1205(7). Entering into such an agreement would constitute a violation by both you (under subsection 20-1205(7)(b)) and your client (under subsection 20-1205(7)(a)). There is no applicable exception arising out of the fact that you are a member of the bar. The Lobbying Chapter recognizes the primacy of the Rules of Professional Conduct, in Code Section 20-1201(20). However, Rule 1.19 makes it clear that those rules do not provide, for attorneys, a blanket exemption from a municipal lobbying statute. Moreover, Rule 1.5(c) in particular requires attorneys to comply with statutes restricting contingent fees.

In keeping with the concept that an advisory opinion of this Board is necessarily limited to the facts presented, this Opinion has been predicated on the facts that were provided to the Board of Ethics. 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 office that interpret statutes are guidance as to how this office will likely interpret the same provision in

¹ It is notable that the State Lobbying Disclosure Act that was struck down in *Gmerek* has been replaced by a new Lobbying Disclosure Law, Act 134 of 2006, codified at 65 Pa.C.S.A. § 13A01 *et seq.* The Act includes a prohibition on contingent fees that is similar to Code Section 20-1205(7). *See* 65 Pa. C.S.A. § 13A07(e).

the future, previous opinions do not govern the application of the law to different facts. Ethics and lobbying 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 laws under our jurisdiction 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, to the extent that this opinion states general principles, and there are particular fact situations that you may be concerned about, you are encouraged to contact the Board for specific advice on the application of the ethics laws to those particular facts. For information on requesting reconsideration of an Advisory Opinion, see Regulation No. 4 at Subpart H.

Since you have not requested nonpublic advice from the Board of Ethics, we will make this letter public, as required by Code Section 20-606(1)(d)(iii) and Board Regulation No. 4.

BY THE PHILADELPHIA BOARD OF ETHICS

Michael H. Reed, Esq., Chair
Judge Phyllis W. Beck (Ret.), Vice-Chair
Sanjuanita González, Esq., Member
Brian J. McCormick, Jr., Esq., Member

[There is a vacancy on the Board, due to the resignation of William H. Brown III, Esq.]