International Municipal Lawyers Association
2022 Virtual Employment Law

Government Ethics and Post-Employment Restrictions

June 6, 2022 Presented by:
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Roadmap

Guiding principles

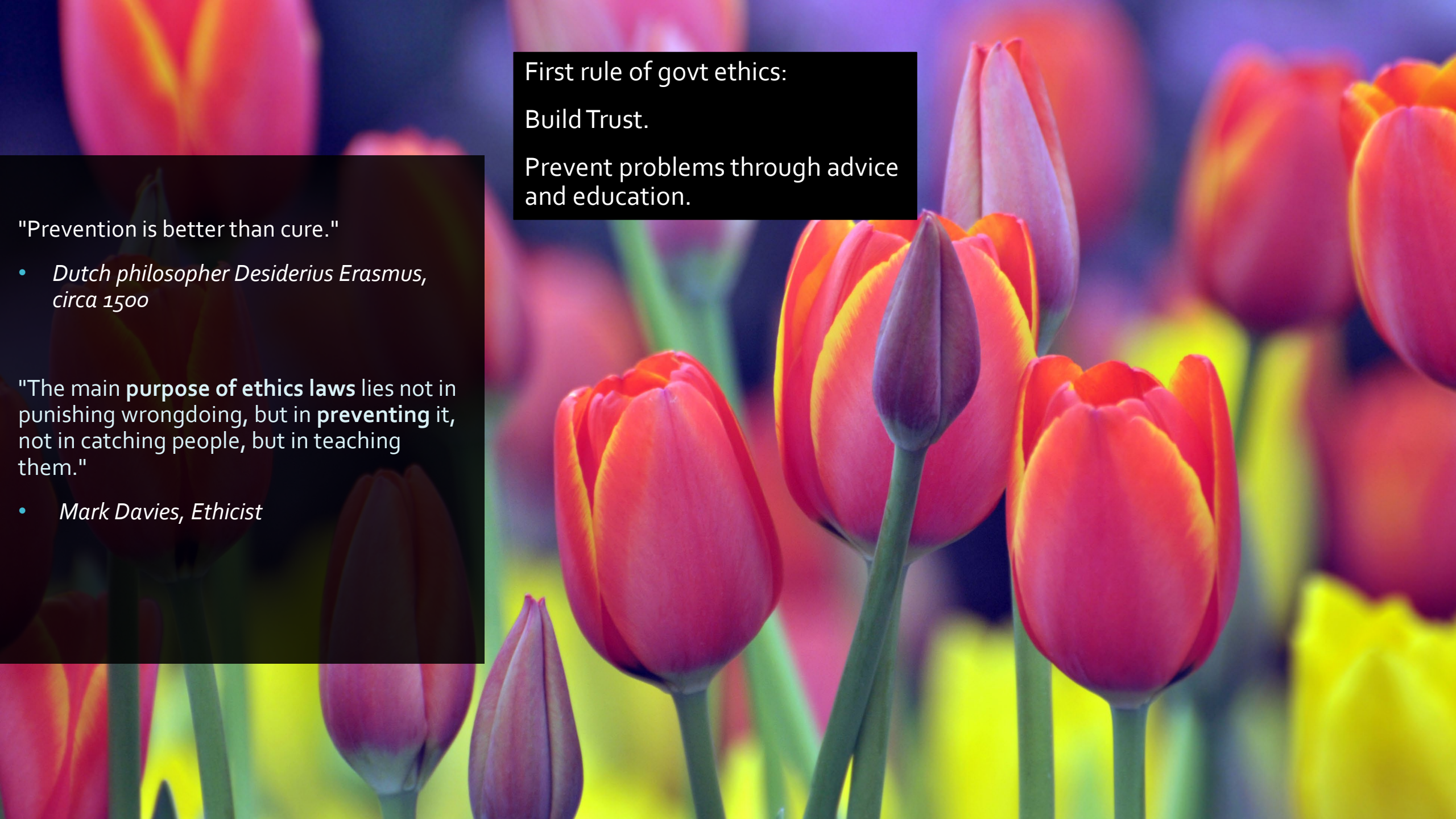
National overview & resources

Chicago

Los Angeles

Pennsylvania





First rule of govt ethics:

Build Trust.

Prevent problems through advice and education.

"Prevention is better than cure."

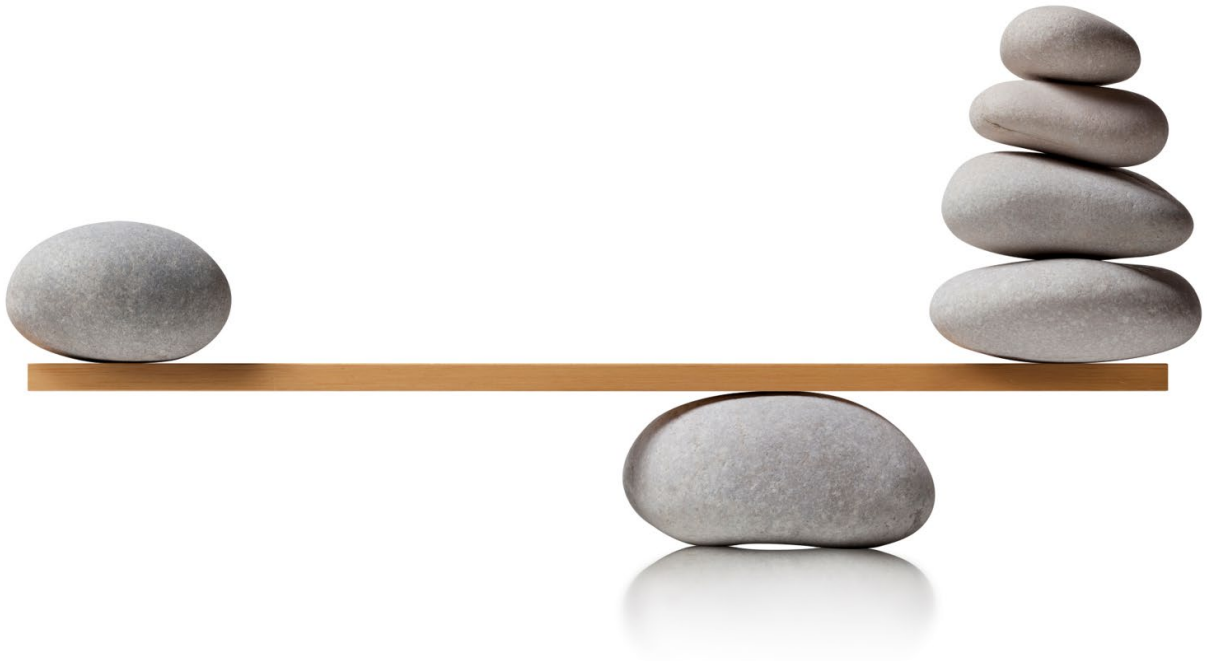
- *Dutch philosopher Desiderius Erasmus, circa 1500*

"The main **purpose of ethics laws** lies not in punishing wrongdoing, but in **preventing** it, not in catching people, but in teaching them."

- *Mark Davies, Ethicist*

Second rule of govt ethics:
Build Trust.

Ethics rules often extend coverage over the appearance of a conflict.



The purpose is as much to prevent giving the appearance of conflict as to suppress all tendency to wrongdoing. [Govt ethics is] concerned with the appearance of a conflict of interest as viewed by the reasonable person.

> *Scaccia v. State Ethics Comm'n*, 431 Mass. 351, 359, 727 N.E.2d 824, 830 (2000)

"Favoritism and the potential for conflicts of interest, as well as the mere appearance of such, serve to weaken and erode the public's trust and confidence in government."

> *Sen. Warren Anderson, 1987 N.Y. St. Legis. Ann. at 277-278.*

Third rule of govt ethics:

Based on the remedial nature of ethics legislation, ambiguities often resolved in favor of coverage.

"Coverage of the Ethics Act must be construed broadly, and its exclusions must be construed narrowly."

Quaglia v. State Ethics Comm'n, 986 A.2d 974, 979 (Pa. Cmwlth. 2010) (citing *Phillips v. State Ethics Comm'n*, 79 Pa. Commw. 491, 470 A.2d 659 (Pa. Cmwlth. 1984))



National Overview

Various post-employment restrictions over time.

- "… appear or practice before [one's former] state agency … on behalf of any person, firm, corporation or association … before such agency."

  NY Ethics in Government Act, Public Officers Law § 73 (8)

  Kelly v. N.Y. State Ethics Comm'n, 161 Misc. 2d 706, 713, 614 N.Y.S.2d 996, 1000 (Sup. Ct. 1994)

Can a former Director of Conciliation serve as a fact finder on the Mediation/Fact-Finding (M/FF) and Grievance Arbitration (GA) panels of the NY Public Employment Relations Board (PERB)?

- "the 'revolving door' statute … prevents even the *appearance* of impropriety--that petitioner is receiving special or favored treatment…. and that when petitioner speaks, it is not with the voice of an independent panel member, but with the voice of PERB."

- "On behalf of" does not facially mandate advocacy but is readily susceptible to be interpreted to refer to a mere nexus between petitioner as a panel member and the parties to the dispute--whether "neutral" or "adversarial."



NY Hotline - Press "2" to speak to the attorney of the day 800-87-ETHICS (800-873-8442)



DILUGLIO v. R.I. ETHICS Comm'n, C.A. No. 85-4556, 1996 R.I. Super. LEXIS 32, at *13-14 (Super. Ct. Feb. 14, 1996)

The purpose of § 36-14-4(e)(2) was to prevent former government employees from improperly utilizing the benefits of their past work experience. This purpose is not effectuated by perceiving a distinction between testifying or appearing before the General Assembly and working on another's behalf behind the scenes. Both forms of conduct allow former legislators to unfairly exercise influence over their former colleagues.

RI Ethics Commission

(401) 222-3790 ethics.email@ethics.ri.gov.

Pittsburgh City Code of Ordinances

"to preserve the trust placed in the public servants of the City, to promote public confidence in government, to protect the integrity of government decision making, and to enhance government efficiency."



PA State Ethics Act

"In order to strengthen the faith and confidence [in government,] … the people have a right to be assured that the financial interests of holders of or nominees or candidates for public office do not conflict with the public trust."

- PA State Ethics Commission
- Finance Building, Harrisburg
- 1-800-932-0936

https://www.ethics.pa.gov



Pittsburgh

§ 197.06 - POST-EMPLOYMENT RESTRICTIONS.

(a) For a period of 12 months from the time employment or service is terminated, no person who has served as a public official or public employee shall represent a person, with or without compensation, on any matter before the governmental body with which he has been associated.

(b) For a period of 12 months from the time employment or service is terminated, no person who has served as a public official or public employee, shall personally act in a representative capacity, with or without compensation, on behalf of any person with respect to any case, proceeding, approval, contract or other matter with respect to which the person had substantial participation, of a nonministerial nature, during the period of his service or employment.

(Ord. 28-1990, eff. 11-28-90)

Pennsylvania

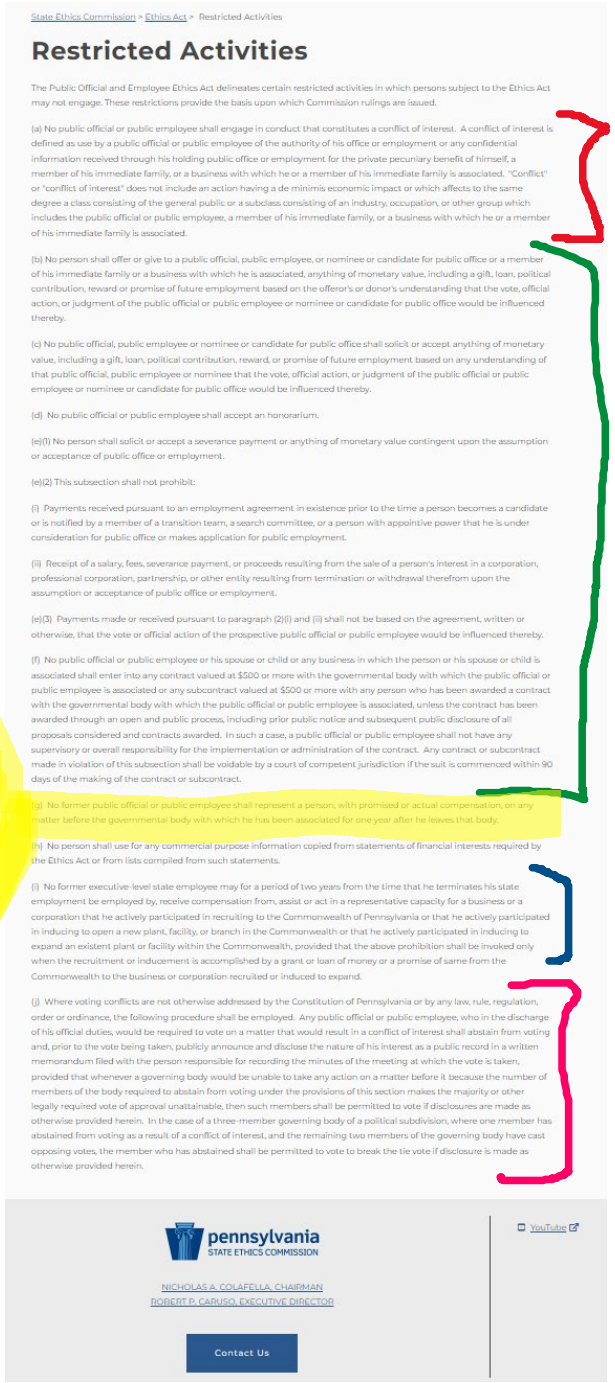
65 Pa.C.S. § 1103(g) of the Ethics Act

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.

State Ethics Commission

65 Pa.C.S. § 1103

(g) 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.



State Ethics Commission > Ethics Act > Restricted Activities

Restricted Activities

The Public Official and Employee Ethics Act delineates certain restricted activities in which persons subject to the Ethics Act may not engage. These restrictions provide the basis upon which Commission rulings are issued.

(a) No public official or public employee shall engage in conduct that constitutes a conflict of interest. A conflict of interest is defined as use by a public official or public employee of the authority of his office or employment or any confidential information received through his holding public office or employment for the private pecuniary benefit of himself, a member of his immediate family, or a business with which he or a member of his immediate family is associated. "Conflict" or "conflict of interest" does not include an action having a de minimis economic impact or which affects to the same degree a class consisting of the general public or a subclass consisting of an industry, occupation, or other group which includes the public official or public employee, a member of his immediate family, or a business with which he or a member of his immediate family is associated.

(b) No person shall offer or give to a public official, public employee, or nominee or candidate for public office or a member of his immediate family or a business with which he is associated, anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment based on the offeror's or donor's understanding that the vote, official action, or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby.

(c) No public official, public employee or nominee or candidate for public office shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward, or promise of future employment based on any understanding of that public official, public employee or nominee that the vote, official action, or judgment of the public official or public employee or nominee or candidate for public office would be influenced thereby.

(d) No public official or public employee shall accept an honorarium.

(e)(1) No person shall solicit or accept a severance payment or anything of monetary value contingent upon the assumption or acceptance of public office or employment.

(e)(2) This subsection shall not prohibit:

(i) Payments received pursuant to an employment agreement in existence prior to the time a person becomes a candidate or is notified by a member of a transition team, a search committee, or a person with appointive power that he is under consideration for public office or makes application for public employment.

(ii) Receipt of a salary, fees, severance payment, or proceeds resulting from the sale of a person's interest in a corporation, professional corporation, partnership, or other entity resulting from termination or withdrawal therefrom upon the assumption or acceptance of public office or employment.

(e)(3) Payments made or received pursuant to paragraph (2)(i) and (ii) shall not be based on the agreement, written or otherwise, that the vote or official action of the prospective public official or public employee would be influenced thereby.

(f) No public official or public employee or his spouse or child or any business in which the person or his spouse or child is associated shall enter into any contract valued at $500 or more with the governmental body with which the public official or public employee is associated or any subcontract valued at $500 or more with any person who has been awarded a contract with the governmental body with which the public official or public employee is associated, unless the contract has been awarded through an open and public process, including prior public notice and subsequent public disclosure of all proposals considered and contracts awarded. In such a case, a public official or public employee shall not have any supervisory or overall responsibility for the implementation or administration of the contract. Any contract or subcontract made in violation of this subsection shall be voidable by a court of competent jurisdiction if the suit is commenced within 90 days of the making of the contract or subcontract.

(g) 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.

(h) No person shall use for any commercial purpose information copied from statements of financial interests required by the Ethics Act or from lists compiled from such statements.

(i) No former executive-level state employee may for a period of two years from the time that he terminates his state employment be employed by, receive compensation from, assist or act in a representative capacity for a business or a corporation that he actively participated in recruiting to the Commonwealth of Pennsylvania or that he actively participated in inducing to open a new plant, facility, or branch in the Commonwealth or that he actively participated in inducing to expand an existent plant or facility within the Commonwealth, provided that the above prohibition shall be invoked only when the recruitment or inducement is accomplished by a grant or loan of money or a promise of same from the Commonwealth to the business or corporation recruited or induced to expand.

(j) Where voting conflicts are not otherwise addressed by the Constitution of Pennsylvania or by any law, rule, regulation, order or ordinance, the following procedure shall be employed. Any public official or public employee, who in the discharge of his official duties, would be required to vote on a matter that would result in a conflict of interest shall abstain from voting and, prior to the vote being taken, publicly announce and disclose the nature of his interest as a public record in a written memorandum filed with the person responsible for recording the minutes of the meeting at which the vote is taken, provided that whenever a governing body would be unable to take any action on a matter before it because the number of members of the body required to abstain from voting under the provisions of this section makes the majority or other legally required vote of approval unattainable, then such members shall be permitted to vote if disclosures are made as otherwise provided herein. In the case of a three-member governing body of a political subdivision, where one member has abstained from voting as a result of a conflict of interest, and the remaining two members of the governing body have cast opposing votes, the member who has abstained shall be permitted to vote to break the tie vote if disclosure is made as otherwise provided herein.

pennsylvania STATE ETHICS COMMISSION

NICHOLAS A. COLAFELLA, CHAIRMAN
ROBERT P. CARUSO, EXECUTIVE DIRECTOR

Contact Us

YouTube

Conflict of Interest

Gifts, honorarium and contracts

Wrongful use, 2 yr ban for state execs & company recruited to PA w/ state grant/loan

Voting Conflicts and Recusal Procedure

The Supreme Court has been given the authority to regulate the courts.

Article V, Section 10 of the Pennsylvania Constitution

- (a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts and justices of the peace . . .
- (c) The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.

Who is covered under the Ethics Act?

"Public employee."

Any individual employed by the Commonwealth or a political subdivision who is responsible for

taking or recommending official action of a nonministerial nature with regard 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.

"Public official."

- Any person elected by the public or elected or appointed by a governmental body or an appointed official in the executive, legislative or judicial branch of this Commonwealth or any political subdivision thereof,
- provided that it shall not include members of advisory boards that
  - have no authority to expend public funds other than reimbursement for personal expense or
  - to otherwise exercise the power of the State or any political subdivision thereof.

"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."

"Represent."

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.





"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."



"Person."

A *business*, governmental body, individual, corporation, union, association, firm, partnership, committee, club or other organization or group of persons.

This includes

- the new governmental employer Ledebur, Opinion 95-007
- The former employee/official themselves Confidential Opinion, 93-005

"Business."

Any corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, organization, self-employed individual, holding company, joint stock company, receivership, trust or any legal entity organized for profit.

"when we consider the 'organized for profit' limitation in context of the definitional language as a whole and in light of the legislative objectives of the statute pertaining to the avoidance of impropriety or the appearance of impropriety, we ultimately conclude that the term 'business,' as defined by Section 1102 of the Ethics Act, should be interpreted to include non-profit entities."

Rendell v. Pa. State Ethics Comm'n, 603 Pa. 292, 306, 983 A.2d 708, 716-17 (2009)

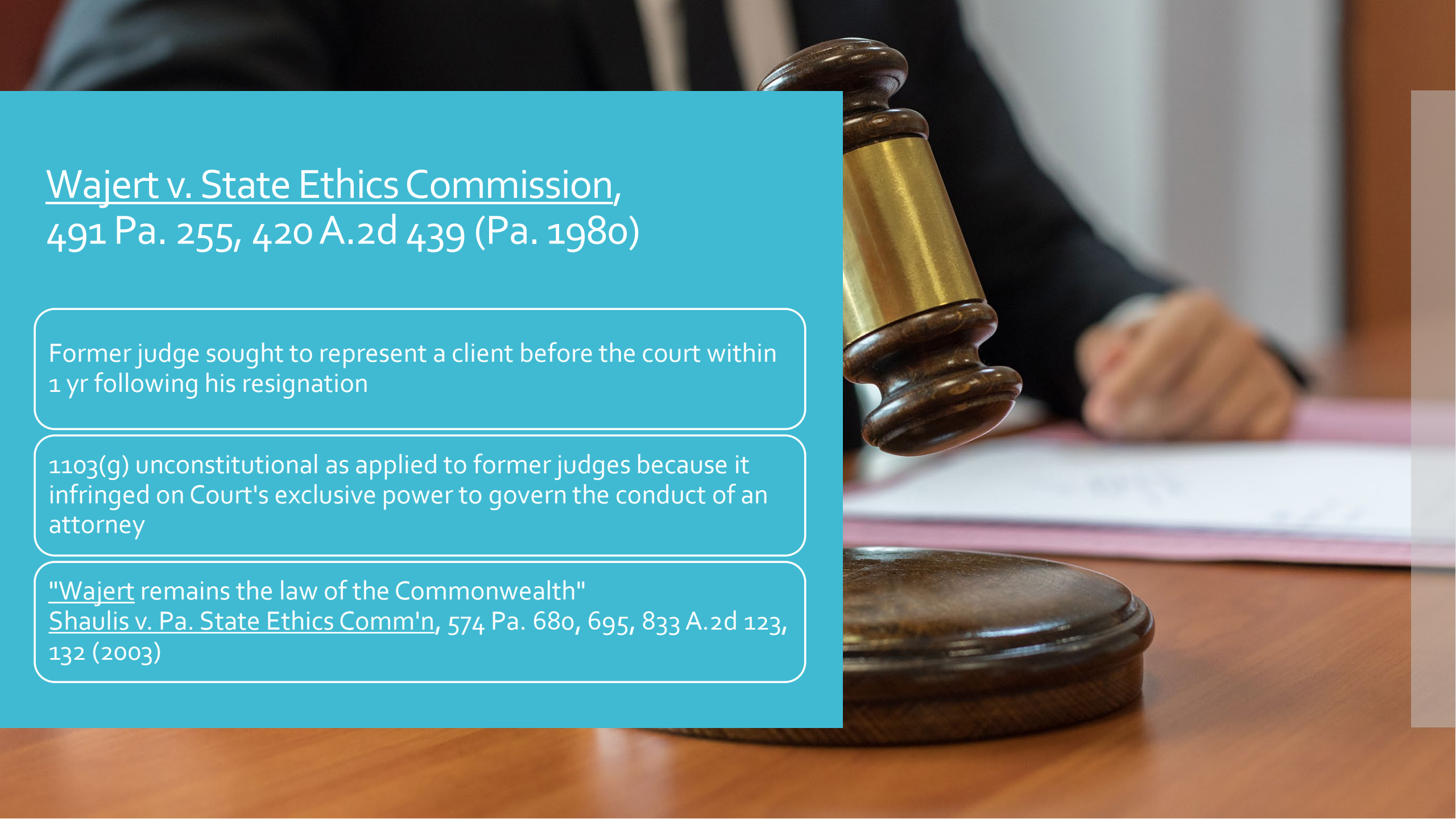


"Business" version 1

- Any
  - corporation,
  - partnership,
  - sole proprietorship,
  - firm,
  - enterprise,
  - franchise,
  - association,
  - organization,
  - self-employed individual,
  - holding company,
  - joint stock company,
  - receivership,
  - trust or
  - any legal entity organized for profit.

"Business" version 2; requires entity organized for profit

- Any
  - corporation,
  - partnership,
  - sole proprietorship,
  - firm,
  - enterprise,
  - franchise,
  - association,
  - organization,
  - self-employed individual,
  - holding company,
  - joint stock company,
  - receivership,
  - trust or
  - any legal entity
- organized for profit.



Wajert v. State Ethics Commission, 491 Pa. 255, 420 A.2d 439 (Pa. 1980)

Former judge sought to represent a client before the court within 1 yr following his resignation

1103(g) unconstitutional as applied to former judges because it infringed on Court's exclusive power to govern the conduct of an attorney

"Wajert remains the law of the Commonwealth"
Shaulis v. Pa. State Ethics Comm'n, 574 Pa. 680, 695, 833 A.2d 123, 132 (2003)

Ballou v. State Ethics Com, 496 Pa. 127, 436 A.2d 186 (1981)

Ballou, a private practitioner with multiple municipal clients, not required to file financial disclosures. No longer good law.

Rationale:

- Compared role to "state consultants" & advisory board members to find attorney serving as solicitor not an appointed public official
- Because the municipal client is directly accountable to the public, the advising attorney isn't:
  - *"the exclusion of the attorney from the scope of the Ethics Act is compatible with the act's purpose. That purpose, as expressed by the Legislature, is to assure 'public confidence in government' by preventing either actual or apparent realization of 'personal financial gain through public office.'"* 65 P.S. § 401.

Dissent:

- Ballou "clearly is responsible for recommending and advising a wide variety of official actions of a nonministerial nature"
- Clear language of Act requires disclosure by those who make recommendations on official actions

Kremer v. State Ethics Commission, 503 Pa. 358, 469 A.2d 593 (1983)

Financial disclosure requirements contained in the Ethics Act are unconstitutional as applied to the judiciary

Disclosure requirement infringes on the Court's constitutional mandate to regulate and supervise the Pennsylvania courts. *Kremer*, 503 Pa. at 363, 469 A.2d at 595.

Confirmed by *Maunus v. Commonwealth*, 518 Pa. 592, 595-96, 544 A.2d 1324, 1326 (1988)

Maunus v. State Ethics Commission, 518 Pa. 592, 544 A.2d 1324 (Pa. 1988)

Liquor Control Board employees, who are attorneys, are not exempt from the financial disclosure requirements of the Ethics Act

- Appellees' argument: Supreme Court's exclusive jurisdiction to regulate attorneys eliminates any basis upon which the legislature may constitutionally regulate the professional and ethical conduct of attorneys. Maunus v. Commonwealth, 518 Pa. 592, 595, 544 A.2d 1324, 1325 (1988).

- Holding: "notwithstanding our substantial authority in this area, it is ludicrous to suggest that employers are constitutionally precluded from imposing ethical and professional requirements on their employees, some or all of whom may be attorneys. This is equally true where the employer is the Commonwealth or one of its subdivisions." Maunus v. Commonwealth, 518 Pa. 592, 597, 544 A.2d 1324, 1326 (1988).

The law grows…

In response to Ballou, Ethics Act amended and reenacted in 1989. Codified in 1998, and amended in 2006.

65 P.S. §§ 402 and 404(a) of the Ethics Act amended:

- added definition for Solicitor

- added both full-time and part-time solicitors as subject to the financial disclosure provisions



P.J.S. v. State Ethics Commission, 555 Pa. 149, 723 A.2d 174 (Pa. 1999)

PJS was full-time solicitor for Erie and maintained private practice

Sought declaratory judgment to stop the Ethics Commission from investigating him for conflict of interest when he represented the city's public officials in his private practice

Arguments:

- Can't be investigated for ethics violations due to status as attorney
- Only §§ 402 and 404 revised, not § 403
- Because "solicitor" was added, solicitors aren't public employees
- Alleged wrongdoing occurred in his private practice, not in his public employment
- Legislature not permitted to infringe on Court's exclusive right to regulate legal profession



"although members of the Bar of Pennsylvania are uniformly subject to the professional and ethical standards imposed and regulated by this court, they are not, by virtue of that membership exempt from all other professional and ethical regulations." P.J.S., 723 A.2d at 178.

PJS confirms Maunus:

"**it is ludicrous to suggest t**hat employers are constitutionally precluded from imposing ethical and professional requirements on their employees, some or all of whom may be attorneys. This is equally true where the employer is the Commonwealth or one of its subdivisions." Maunus v. Commonwealth, 518 Pa. 592, 597, 544 A.2d 1324, 1326 (1988)

"the jurisdiction of this court is not infringed when a regulation aimed at conduct is applied to all persons, and some of those persons happen to be attorneys." P.J.S. v. State Ethics Commission, 5 55 Pa. 149, 723 A.2d 174 (Pa. 1999)



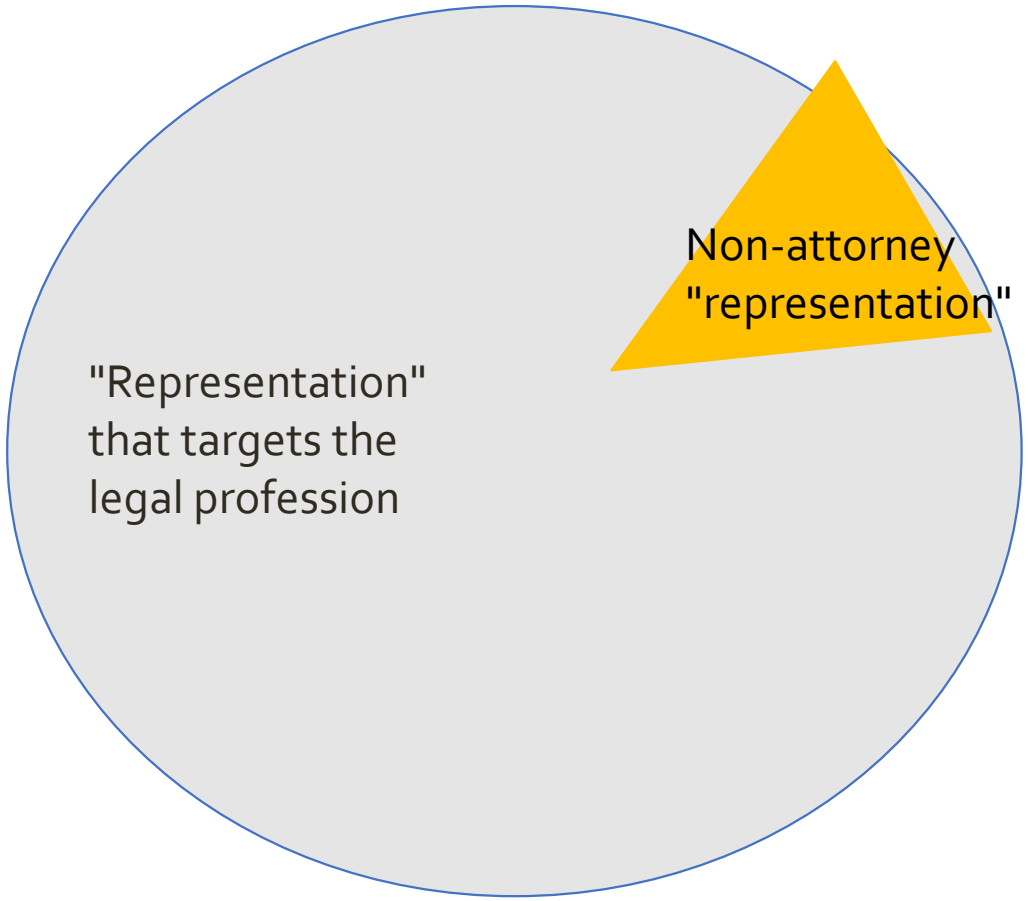
Shaulis v. Pa. State Ethics Comm'n, 574 Pa. 680, 833 A.2d 123 (2003)

- Shaulis was an attorney working for the PA Dept of Revenue.
- Submitted requests for formal advice re: 1103(g) post-employment restrictions, wanted approval to write a book on tax code.
- Around this time, PJS decided, finding that attorneys are subject to 1103 generally, not just 1104.
- Writing a book is not prohibited conduct under 1103(g)
- However, State's advice referenced PJS, so it didn't end there.
- 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.

Shaulis v. Pa. State Ethics Comm'n, 574 Pa. 680, 833 A.2d 123 (2003)

Attorneys continue to be subject to the financial disclosure requirements

However, 1103(g) was held unconstitutional because prohibiting "representation" targets attorneys.



the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101-1904 (the Gaming Act).

- **h) Qualifications and restrictions.--**
- * * * *
- (8) No member, employee or independent contractor of the board may directly or indirectly solicit, request, suggest or recommend to any applicant, licensed entity, or an affiliate, intermediary, subsidiary or holding company thereof or to any principal, employee, independent contractor or agent thereof, the appointment or employment of any person in any capacity by the applicant, licensed entity, or an affiliate, intermediary, subsidiary or holding company thereof **for a period of two years from the termination of term of office, employment or contract with the board**.
- * * * *
- (13) The following shall apply to an employee of the board whose duties substantially involve licensing, enforcement, development of law, promulgation of regulations or development of policy, relating to gaming under this part or who has other discretionary authority which may affect or influence the outcome of an action, proceeding or decision under this part, **including the executive director, bureau directors and attorneys**:
  - (i) The individual **may not, for a period of two years following termination of employment, accept employment** with or be retained by an applicant or a licensed entity or by an affiliate, intermediary, subsidiary or holding company of an applicant or a licensed entity.
  - (ii) The individual **may not, for a period of two years following termination of employment, appear before the board** in a hearing or proceeding or participate in activity on behalf of any applicant, licensee, permittee or licensed entity or on behalf of an affiliate, intermediary, subsidiary or holding company of any applicant, licensee, permittee or licensed entity.
  - (iii) An applicant or a licensed entity or an affiliate, intermediary, subsidiary or holding company of an applicant or a licensed entity **may not, until the expiration of two years following termination of employment, employ or retain the individual**. Violation of this subparagraph shall result in termination of the individual's employment and subject the violator to section 1518(c) (relating to prohibited acts; penalties).

Yocum v. Commonwealth, 639 Pa. 521, 161 A.3d 228 (2017)

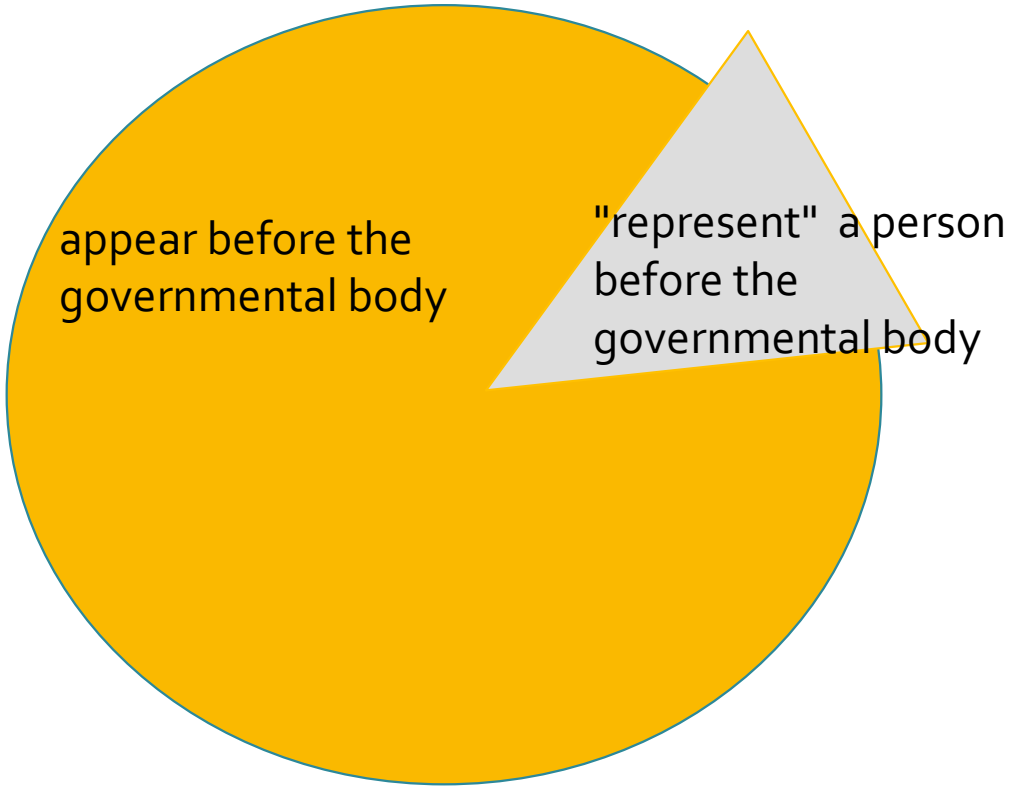


- Procedurally, a matter of exclusive original jurisdiction
- Argument:
  - (1) regulating petitioner's practice of law for two years as it relates to her representation of Pennsylvania's gaming entities and their affiliates before the Gaming Board, as well as before any tribunal in any jurisdiction;
  - (2) regulating petitioner's practice of law for two years as it relates to her ability to obtain employment with any law firm that represents gaming entities, both inside and outside the Commonwealth; and
  - (3) inhibiting the ability of gaming entities to employ the legal talent of their choice.
    Yocum v. Commonwealth, 639 Pa. 521, 540, 161 A.3d 228, 239 (2017)

"...the Gaming Board restrictions are broader, prohibiting all former employees from, in part, 'appear[ing] before the board in a hearing or proceeding or participat[ing] in activity on behalf of any applicant, licensee, permittee. . .'"

4 Pa.C.S. §1201(h)(13)(ii).

Yocum v. Commonwealth, 639 Pa. 521, 550, 161 A.3d 228, 245 (2017)



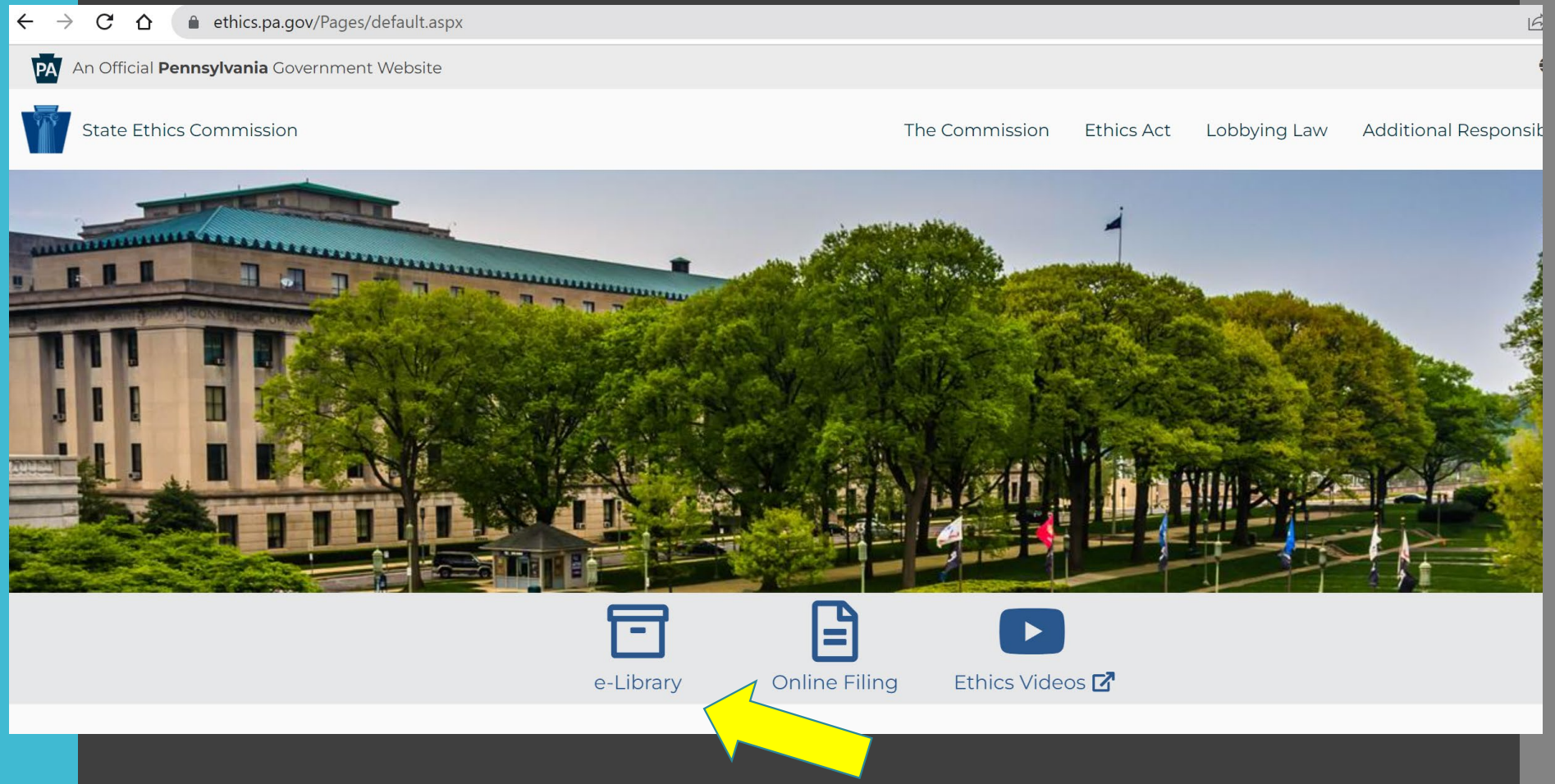
Unlike a restriction on "representing," a restriction on "appear[ing]" does not necessarily implicate the acts of an attorney taken on behalf of a client, and therefore does not specifically target attorneys.

...for example, applying for licenses or permits from the Board, or appearing as a lay witness on behalf of an applicant before the Board.

Yocum v. Commonwealth, 639 Pa. 521, 550, 161 A.3d 228, 245 (2017)



Current Application



Shay, Advice 91-582 Representation

- Prohibited, as considered an attempt to influence:
  - listing former employee/official as party who will provide technical assistance
  - submitting name on invoices
  - even if contract was pre-existing separation

- Permitted:
  - working on preparing bids and other documents, as long as not identified as preparer.





Kovacs, Advice 21-542 Representation

Former employee/official may coach any person on their appearance before the former government body, however that coaching cannot be revealed

General inquiries for publicly available information are permitted; however, this cannot be done to indirectly influence or to make known to the government of the new employer.

Governmental body is entire organization, all of PennDOT, not one division or office.



Resources

Ask for advice. Free, confidential resources:

- PA State Ethics Commission – (717) 783-1610
- Philadelphia Bd. of Ethics – **(215) 686-9450**
- Pittsburgh Ethics Hearing Bd. – (412) 255-2122