
by Lawrence G. Feinberg

The Joint State Government Commission of the Pennsylvania General Assembly released a report on the criminal justice system of Philadelphia. The report was mandated by 2010 Senate Resolution 344, whose prime sponsor was Sen. Stewart J. Greenleaf. The study was prompted by a series of articles that appeared in the Philadelphia Inquirer from December 13 to 16, 2010, which presented a scathing indictment of the system. The principal deficiencies were found to be high violent crime rates, low conviction rates, a dysfunctional bail system and witness intimidation. The Commission was directed to arrive at recommendations to address these problems.

The initial results of this reform initiative have been very positive. A great deal of progress has been made in the last three years.

Findings

- Since the publication of the Inquirer’s critique, the Pennsylvania Supreme Court, the 1st Judicial District, the district attorney, the city administration, the Defender Association and private stakeholders have come together to formulate and implement a wide variety of measures to address the system’s deficiencies. The initial results of this reform initiative have been very positive. A great deal of progress has been made in the last three years.

The principal deficiencies were found to be high violent crime rates, low conviction rates, a dysfunctional bail system and witness intimidation.

Recommendations

At the same time, further measures are needed to further reform the system. The advisory committee made recommendations under four topics: pre-trial services and bail, witness intimidation, court procedure and technology.

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Three Perspectives on Legal Ethics

I. by Richard Gmerek

I am a lawyer who also lobbies. Article V, Section 10 of our State Constitution states that the Pennsylvania Supreme Court has exclusive jurisdiction over the practice of law and the conduct of attorneys in Pennsylvania. In 1998, I filed a lawsuit with the Commonwealth Court contending that the prior Lobbying Disclosure Act enacted in 1998 violated Article V because it infringed on the Supreme Court’s authority in this regard. In other words, was I to follow the Pennsylvania Constitution and the Rules of Professional Conduct or the Lobbying Disclosure Act or both?

The Commonwealth Court ruled that the Lobbying Disclosure Act was unconstitutional as many of the provisions regulated the practice of law:

where an attorney purports to render professional services to a client, whether or not those services relate to activities which in and of themselves may not constitute the practice of law, the attorney's conduct is regulated by the Supreme Court. Gmerek v. State Ethics Commission, 751 A.2d 1241, 1258 (Pa. Comm. 1999).

On appeal, the Supreme Court agreed and ruled that “[T]he Act in effect regulates the conduct of attorneys engaging in the practice of law and thereby infringes on the Court’s exclusive jurisdiction to regulate the conduct of attorneys” Gmerek v. State Ethics Commission, 807 A.2d 812, 819 (Pa. 2002).

On Dec. 3, 2003, a new Rule of Professional Conduct, Rule 1.19, and a new comment to Rule 1.6 to address lawyer-lobbyist conduct were approved to allow attorneys to register their clients and file reports under any state lobby law without violating Rules 1.19 or 1.6. In 2006, Gov. Rendell issued an executive order stating that attorneys are not lobbying when providing legal representation of their clients before the state agencies that are adjudicative in nature (one of the many questionable provisions of the initial act). Rendell signed the new Pennsylvania Lobbying Disclosure Act, an act remarkably similar to the 1998 act, on Nov. 1, 2006.

Thereafter, I decided to use my lawyer/lobbying skills to affect the implementation of the new law rather than file another lawsuit. I was appointed by Gov. Rendell to the Lobbying Disclosure Committee on Nov. 30, 2006. Our committee developed regulations and a lobbying manual. The regulations took effect Feb. 26, 2009.

Another decision I made was to start to occasionally speak regarding the interactions of lobbying and the practice of law/ethics. I even met with and discussed these issues with the Disciplinary Board.

Since the enactment of the new lobbying statute, no challenges or lawsuits have developed. But this is not to say that there is not another Gmerek case out there waiting to happen, as many provisions of the statute and related laws still conflict with the Rules of Professional Conduct. That is a major part of my presentation. Hopefully the discussion will cause you to consider the following questions:

• Why should lawyers have to comply with lobbying and other related laws when the constitution is clear as to who regulates us?
• What is the practice of law?
• Where do the Rules of Professional Conduct conflict with the 2006 act?
• Is every lawyer who walks into the capitol registering as a lobbyist?
• What does the absence of another Gmerek case mean?
• If a lawyer who is not registered is to be sanctioned would Gmerek be upheld?

Richard Gmerek is the president and chief executive officer of Gmerek Government Relations Inc. He will be a speaker for the ethics portion of the upcoming Legislative Process CLE course at the Pennsylvania Bar Institute.

II. by J. Andrew Crompton

On May 26, 1999, Dick Gmerek and Charles Artz challenged the Pennsylvania Lobbying Disclosure Act of 1998. The lobbying law was difficult to pass and logically the lawsuit was not well received by those who pushed the measure in the General Assembly. At the time, I thought the lawsuit posed hypothetical problems rather than documentable ones.

Gmerek’s primary complaint was that the 1998 law improperly attempted to regulate the practice of law. Ultimately a divided Supreme Court of Pennsylvania upheld a split Commonwealth Court and invalidated the law. And due to the fact that the 1998 law had a nonseverability clause triggered to this very issue, the entire law was invalidated.

Fast forward to 2006. The General Assembly passed a significantly similar act relating to lobbying that was signed by Gov. Rendell. The Disciplinary Board initiated a rule change that stated that lawyers acting in the capacity as a lobbyist in Pennsylvania as defined by the 2006 act are required to follow the registering and reporting rules under any state lobbying law.

I never believed that the Gmerek lawsuit was preposterous or without any merit. I simply thought the case was significantly premature. It was credible that someday a lawyer may encounter a discrepancy with the Rules of Professional Conduct and the statutory requirements addressing lobbying (either the 1998 or 2006 acts). But just to assume there would be a morass of ethical conflicts as the Gmerek lawsuit did, presumed problems that have simply not materialized.

Audits of lawyer/lobbyists have, to date, been judicious. The paperwork required to be turned over has been solely related to lawyers in their lobbying capacities. Yes, I believe the Supreme Court rule change for lawyer/lobbyists has helped paper the way to a fair and balanced law. But even with-
out the change, the practice of law was not going to be decimated because of the requirements under either the 1998 or 2006 lobbying law.

My presentation will attempt to quiet the storm that some seem intent on brewing. There is no constitutional crisis. Lawyers who are lobbyists — and there are many in Pennsylvania — are treated, rightly so, like non-lawyer lobbyists. The nonseverability clause referenced above was savvy. Imagine that if in Pennsylvania lawyer lobbyists were only regulated by the state Supreme Court and all other non-lawyer lobbyists had to register and report under a statewide lobbying law. If you were a client, who would you select for representation: the one that had significant disclosure requirements or the one who could operate almost entirely without public oversight?

We are now, in my opinion, in a good place with lobbyist regulation in Pennsylvania. I look forward to a lively debate in September on the ethical issues that may or may not confront lawyer lobbyists.

J. Andrew Crompton is chief counsel to Sen. Joseph Scarnati, the president pro tempore of the Senate. He will be a speaker for the ethics portion of the upcoming Legislative Process CLE course at the Pennsylvania Bar Institute.

III. by Eric Fillman

In this age of transparency, most people (nonlobbyists, at least) would agree that reporting is decidedly a good thing. Lobbying regulations that were published in the Pennsylvania Bulletin in April 2009, including Chapter 55 on Reporting, walk the lobbyist through the quarterly expense reports thoroughly and with great detail and specificity recount what should be included therein (See Section 55.1(g).) What they do not do, however, is specify how lobbyists are to valuate their services. That is, there seems to be no standard defined or even suggested as to how lobbyists should go about apportioning their time — or their staff’s time — for reporting purposes. Thus, in this regulated industry, a great deal of subjectivity still abounds.

Pursuant to state law, audits are carried out with regularity. Yet without a valuation standard, can audits ever fully identify and assess what reporting irregularities might look like? I fully believe that most lobbyists make every effort to logically disclose what they believe should be disclosed on quarterly reports. But in the absence of valuation standards, even routine reports can vary so much among lobbyists that there is still ample room for potential abuse. Recall that the abuse of valuation standards (accounting irregularities) was the precise legal and ethical problem at the heart of company downfalls for Arthur Andersen, Enron, WorldCom and, much closer to home, Adelphia, the now-defunct cable company in our own backyard in Coudersport, Potter County. These companies were subject to significant federal regulation as well as stockholder reporting requirements, yet abuses still occurred. Even significant public oversight was not enough to prevent legal and ethical violations, which toppled these multi-billion-dollar corporations.

Centuries ago, William Penn suggested that “Men side with their Passions against their Reason; and their Sinister Interests have so strong a Byass upon their minds, that they lean to them against the good of things they know.” In a portion of our ethics hour, we’ll explore some of that bias, particularly as it relates to cheating and “de minimis” behavior issues on the ethical spectrum.

Eric Fillman is ethics counsel to the House Democratic Caucus. He will be a speaker for the ethics portion of the upcoming Legislative Process CLE course at the Pennsylvania Bar Institute.

Joint State Government Commission Issues Report

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- Update the guidelines for setting bail
- Expand use of nonfinancial pre-trial release conditions
- The committee was split over whether to encourage the participation of private bail sureties
- Create a witness intimidation investigation and prosecution unit under the district attorney
- Commence criminal proceedings before an indicting grand jury if witness intimidation is taking place or appears to be a serious threat
- Try felony cases in absentia (outside the defendant’s presence) if the defendant deliberately fails to attend the trial.

Lawrence G. Feinberg is a senior attorney with the Joint State Government Commission, the central research agency of the Pennsylvania General Assembly. He is a former chair of the Statutory Law Committee.
Human Trafficking in Pennsylvania

by Yvonne Llewellyn Hursh

On April 20, 2010, the Pennsylvania Senate passed Senate Resolution 253, which directed the Joint State Government Commission (JSGC) to establish an advisory committee to study the problem of human trafficking; propose policies and procedures to assist in the prevention and prosecution of human trafficking and make recommendations on how to strengthen state and local efforts to prevent human trafficking, protect and assist trafficking victims and prosecute offenders.

Following the adoption of SR 253, the JSGC formed an advisory committee of experts to guide and assist in the study of human trafficking. This advisory committee was composed of a diverse group of 29 individuals from across Pennsylvania, representing federal, state and local government agencies, victim service providers, law enforcement, prosecutors, academics and advocates.

The advisory committee held its first meeting on Oct. 15, 2010, at which time three subcommittees were formed: Prevention and Awareness, Investigations and Prosecution, and Protection and Support. This organization is consistent with the manner most widely accepted in organizing anti-human trafficking campaigns or government responses and is commonly known as the “3Ps.” Each subcommittee met over the next year, primarily by teleconference, to make recommendations in each area of study. Those recommendations were presented to the full advisory committee at its Jan. 5, 2012 meeting and were approved after discussion and revisions, and the final report, Human Trafficking in Pennsylvania: Policy Recommendations and Proposed Legislation was released in June 2012.

The advisory committee believed that the current state law found in Chapter 30 of Title 18 of the Pennsylvania Consolidated Statutes should be improved as it contains vague definitions and lacks the teeth necessary for law enforcement to effectively arrest and prosecute criminals for trafficking offenses. Identification of victims and trafficking situations are crucial to combating human trafficking, and the current law does not address any prevention methods. The advisory committee further believed that once human trafficking victims are identified and rescued from their abusers, they need access to secure shelter, medical treatment and counseling services.

The bulk of the statutory recommendations found in the report were introduced as Senate Bill 75, Printer’s Number 41, by Sen. Stewart Greenleaf on Jan. 9, 2013. The bill was reported out of the Judiciary Committee and received first consideration. No further action has yet been taken on the bill, and it is anticipated that the JSGC will continue to work with various stakeholders to address any concerns and make recommendations as to potential amendments to the legislation.

Findings
- The two most common forms of human trafficking — sex trafficking and labor trafficking — obtained through the use of force, fraud or coercion exist in Pennsylvania.
- Human trafficking is the second largest form of organized crime in the world, behind the illegal drug trade.
- 12.3 million people worldwide are victims of trafficking.
- Pennsylvania is a source, destination and pass-through state for trafficking.
- Trafficking victims may be hard to identify and are sometimes treated as criminals.
- Public awareness and professional training, increased penalties and access to victim services are crucial for combating human trafficking.
- Success in combating human trafficking requires concerted efforts of organizations and agencies on the regional, national and international levels.

Recommendations
SB 75 contains several of the more significant recommendations of the Advisory committee. Globally, Chapter 30 of Title 18 of the Pennsylvania Consolidated Statutes is repealed and replaced with a more comprehensive approach to human trafficking that encompasses the three-fold approach of prosecution, prevention and protection.

- Labor servitude and sexual servitude induced by force, fraud or coercion are entwined in the offense of human trafficking. Under existing law, there is some concern that the law applies only to instances of sex trafficking and the amendment makes it clear that labor trafficking is also prohibited. Detailed descriptions of coercive behavior are included. Sexual servitude of a minor is a strict liability offense and any sexual conduct or performance involving sexual conduct that is induced or obtained from a minor meets the standard without force, fraud or coercion.
- Human trafficking is divided into two separate offenses: trafficking in individuals and involuntary servitude, to ensure that both the persons who arrange for an individual to be subject to involuntary servitude (a procurer, “coyote” or other person recruiting and transporting individuals) and the persons who then maintain that individual in a state of involuntary servitude are subject to the Pennsylvania Human Trafficking Act.
- Business entities that aid or participate in human trafficking are subject to fines, revocation of licenses and permits, revocation of charter or certificate to do business in Pennsylvania and any other equitable relief, including asset forfeiture or restitution. The state professional license of an individual who knowingly employs or permits the employment of a human trafficking victim is revoked for one year under this provision. Additionally, public works contractors who knowingly employ or permit the employment of human trafficking victims are subject to contract termination and ultimately debarment for one year under the Commonwealth Procurement Code.

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• An individual who has prior prostitution charges may have those charges vacated on the grounds that the person was a victim of human trafficking at the time the offenses were committed. District attorneys are required to communicate from county to county information regarding a person’s status as a human trafficking victim when the victim faces similar prostitution charges in another county.

• Persons found guilty of violating any portion of the Pennsylvania Human Trafficking Act may be ordered by the court to pay restitution to the victim or the victim’s survivors. Medical and psychological treatment, transportation, temporary housing, child care, attorney’s fees, the return of any property of the victim, relocation expenses and lost wages are all potential amounts in a restitution order. Victims of sexual servitude are not entitled to lost wages, on the theory that a person should not profit from illegal behavior, but instead may receive financial assistance to advance their education.

• The Pennsylvania Council for the Prevention of Human Trafficking is composed of representatives of state and federal agencies affected by human trafficking, law enforcement personnel, victim’s advocates and representatives of non-governmental organizations that provide aid and assistance to trafficking victims. The council is attached to the Pennsylvania Commission on Crime and Delinquency (PCCD) and is charged with enhancing and supporting local and regional efforts to combat trafficking, coordinating and implementing the state plan called for in the act, coordinating the sharing of information among agencies, and reviewing existing services and facilities with the goal of recommending a delivery system that will coordinate health, housing, education, job training, interpretation services, legal and immigration services, victim compensation and victim protection procedures. Additionally, PCCD will develop screening protocols for emergency responders, publish a statewide directory of service agencies, suggest ways to increase public awareness and develop guidelines for public display information materials. A grant program is established to be administered by the council to provide financial assistance to units of local government and non-governmental victims’ service organizations to provide services to human trafficking victims. The grant program is funded by fines and asset forfeitures.

• Criminal penalties are generally increased, and many violations are classified as second-class felonies. Additionally, victims are authorized to bring a private cause-of-action against the person who subjected them to trafficking and involuntary servitude. Relief may include actual damages, compensatory damages, punitive damages or injunctive or other appropriate relief. Attorney’s fees and costs may be awarded and treble damages may be incurred in cases of willful and malicious conduct. The statute of limitations may be tolled for a variety of reasons.

• A model informational form is to be developed to inform victims of their rights with regard to the prosecution of their traffickers, repatriation or immigration procedures. A directory of local victim services agencies, including those that can assist in obtaining legal immigrant status is to be included on the form. Victims are eligible for benefits and compensation under the Crime Victims Act. Refugee benefits are also available. Law enforcement cooperation in providing certifications needed to obtain legal immigrant status is also authorized.

1 The National Conference of State Legislatures recently selected the report for its 2013 Notable Document Award.

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New Member Benefit: PBA Resource Guide Goes Online

The PBA Resource Guide, a longtime, printed publication available to PBA leadership, and committee and section members, is now available to all members online. The online guide provides contact information for PBA members in the following groups:

- Board of Governors
- House of Delegates
- Committees and Sections
- Young Lawyers Division
- Board of Governors Alumni
- Pennsylvania Bar Institute
- Local Bar Association Leadership
- Conference of County Bar Leaders
- Disciplinary Board

Links to the Resource Guide are on the Committee and Section Web pages and in the Publications area of the PBA website.
Case Law on Pension Reform

by Andrew J. Butash


In Association of Pa. State College & Univ. Faculties, appellees challenged an amendment to the State Employees’ Retirement Code, 71 Pa.C.S § 5101 et seq., mandating that each member of the State Employees’ Retirement System (System) contribute an additional 1.25 percent of the member’s wages to the State Employees’ Retirement Fund (fund). 505 Pa. at 371. The appellees only challenged the constitutionality of the amendment as it relates to employees who were members contributing to the fund prior to the amendment’s effective date. *Id.* The appellees asserted in their challenge that the amendment impaired their contract rights under Article 1, Section 10, of the U.S. Constitution and Article 1, Section 17, of the Pennsylvania Constitution. *Id.* at 372. The court concluded that the amendment did not add to the amount of the employees’ pension benefits or maintain the actuarial soundness of the fund because its only effects were to increase the contribution rate and save the commonwealth 1 percent of its budgeted payroll. *Id.* at 374. Therefore, the court stated that the amendment was “clearly detrimental” to employees who were members of the System. *Id.* at 374-75.

The court went on to clarify the contractual rights pertaining to vested members, who are members who have met retirement eligibility requirements, and non-vested members of the System. *Id.* at 375. The court stated that “unilateral modifications in the retirement system, after retirement eligibility requirements have been met, may not be adverse to the member.” *Id.* As the amendment related to vested employees, the court held it was unconstitutional because it was “unquestionably a unilateral modification in the System adverse to its members.” *Id.* at 376.

As the amendment pertained to non-vested members, the court sought to clarify the split viewpoint in *Catania.* *Id.* In *Catania,* three justices stated that unilateral and detrimental changes to a member’s retirement contract whose rights have not vested were permissible to enhance the actuarial soundness of the fund or offset comparable new advantages. *Id.* at 687. The other three justices stated that such changes were an unconstitutional impairment, regardless of whether or not a member was vested or non-vested. *Id.* at 376-77; 498 Pa. at 705. The court held that the amendment was an unconstitutional impairment under either view in *Catania.* *Id.* at 377. Furthermore, the court adopted the view in *Catania* that any “unilateral devaluation of the retirement benefits of non-vested members would be prohibited absolutely without regard to the commonwealth’s claim of actuarial enhancement.” *Id.* In *Pa. Federation of Teachers v. Sch. Dist. Of Philadelphia,* the court reaffirmed its decision in Association of Pa. State College & Univ. Faculties. 506 Pa. at 202.

As Pennsylvania law currently stands, a law may not unilaterally and detrimentally alter the retirement benefits of a vested or non-vested Pennsylvania public employee, even if the changes enhance the actuarial soundness of the fund.

Andrew Butash is an attorney in the Legislative Reference Bureau.

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Statutory Research Enhancements on the General Assembly’s Website

The General Assembly has added a “statutes” tab to its main web page at www.legis.state.pa.us/cfdocs/legis/li/public. Using the statutes tab, it is possible to:

- Search for acts by keyword, act number, name or year. Appropriation acts may also be browsed from 1975 to present.
- Find the chronological history of the statutes. The chronological history analyzes a consolidated title of law or an unconsolidated statute by identifying:
  - The provision affected, how it was affected (e.g. added, amended, repealed, constitutional, etc.) and what law, court decision or rule affected it.
  - The title of the unconsolidated statutes as specified by the Legislative Reference Bureau.
- Obtain the full text of the Pennsylvania Constitution, the consolidated titles of statutory law or unconsolidated statutes. The text is available in PDF, Word and HTML formats.

Technical and other comments, questions and suggestions regarding the General Assembly’s home page may be sent to webmaster@legis.state.pa.us.
The Effect of a Court Ruling a Law Unconstitutional on the Previous Use of that Law

By Alec Imel and Samantha Smith

The general rule is that a law once ruled unconstitutional is as it never existed, but it is an operational fact that the law did exist. This means that in certain cases equity requires that the law's prior validity be accepted. The largest example of this is in litigation that has been finally decided by two parties. Res judicata will prevent the same cause of action from being reargued if the constitutional issue was never raised in the first case. The same is not true in cases of different causes of action between the same parties. In those cases, a party will not be estopped from raising a constitutional challenge to the law in the second case if the first case did not directly deal with the issue of constitutionality.


This case involved a question of federal law arising out of a case in Arkansas. (372). “The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.” (374) The opportunity existed at the original trial to raise the question of constitutionality and yet the question was not raised, thus res judicata prevents the decree from being reexamined even if the statute was later found to be unconstitutional. (375).

City Deposit Bank & Trust Co. v. Zoppa, 9 A.2d 361 (Pa. 1939).

Equitable considerations necessitated that a judicial order granted using a statute that was later declared unconstitutional should be upheld. (363). The plaintiff had not appealed the initial order, which meant that a final judgment had been granted on the issue. (362). Since a significant amount of time had passed since the original decision, the defendant would have had to place other properties not tied to the original cause of action into a lien in order to satisfy a new time limit created by the fiscal code to file a petition for refund with the Board of Finance and Revenue. (660-661). Moreover, the fees were paid in exchange for a service rendered by the Censorship Board, and the fees had likely been passed directly onto the consumer. (660) Thus, to force the commonwealth to repay the fees would necessitate the creation of a fiction that the Censorship Board never existed. (660).


The commonwealth was entitled to retain fees paid under an unconstitutional statute because the plaintiffs never protested paying the fees when the law was constitutional and waited until after the five-year time limit created by the fiscal code to file a petition for refund with the Board of Finance and Revenue. (660-661). Moreover, the Bank, City of Phila. v. Ridge-Ave Pass. Ry. Co., 21 A. 982 (Pa. 1891).

Two parties are not estopped from raising the question of constitutionality in a new cause of action even if another cause of action between the two parties had relied on a statute being constitutional without deciding the issue explicitly. (983). The parties would be barred from raising the issue of constitutionality under the same cause of action if that cause of action had already reached final judgment. (983). When a city collects a tax on the presumption of the validity of a law that is less than it would otherwise receive, a subsequent ruling of unconstitutionality will not entitle the city to recover the full amount of taxes that should have been owed. (984).


When the bank decided not to appeal the trial court decision and a final judgment was entered for the case, that decision became the law of the case and bars future consideration of the case even though a statute that was used to determine the case became unconstitutional. (908)


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Alec Imel and Samantha Smith are law students at Columbia Law School and Widener School of Law respectively, who recently interned with the Legislative Reference Bureau.

Important Changes Regarding PBA Website and InCite® Access

Due to ongoing security upgrades to the PBA website, the following changes have been made affecting access to the site and to PBA members-only material.

- You must now include “www” when typing the URL for the website (www.pabar.org); this ensures member access to secure areas of the website, including the InCite free legal research program and the PBA Store.

- Your username and password for member login are now case-sensitive.

- If you click on the InCite free legal research program icon at the right of the home page before you log in to the members-only area of the website, you will be prompted to log in. Upon successful login you will then go to an InCite landing page where you can click through to enter InCite as usual or, if you wish, update your member profile and/or change your password.