CONFIDENTIAL

ADVISORY OPINION

Case No. 11045.A
The Honorable [John Doe]
Alderman, 51st Ward

October 19, 2011

Dear Alderman [Doe],

Facts. You are Alderman of the City's 51st Ward, and an attorney licensed to practice law in Illinois. You currently maintain a solo law practice, and are considering joining a Chicago law firm (the "Firm") on an "of counsel" basis. You said that you would become an independent contractor of the Firm, and would not become an employee/associate or an owner or shareholder/partner of the Firm. On September 23, you asked our office for an opinion explaining the restrictions the City's Governmental Ethics Ordinance would place on your law practice. This opinion describes them.

Law and Analysis. As an initial matter, the Board notes that nothing in the Ordinance prohibits City elected officials or employees from engaging in "outside" or dual employment, including the outside practice of law. We have long recognized that aldermen and other elected City officials (like you) have, and are not prohibited from maintaining, outside law practices. But they remain subject to the requirements and restrictions of the Ordinance, and various state laws and rules, such as the Illinois Rules of Professional Conduct for attorneys (Article VIII of the Rules of the Illinois Supreme Court, revised July 2010; see specifically Rules 1.7, 1.9 and 1.11(d)); elected officials are also subject to the Public Officer Prohibited Activities Act (50 ILCS 105/1 et seq.), and the Illinois Municipal Code 65 ILCS 5/3.1-55-10, et seq.). See, e.g. Case Nos. 89103.A; 90035.A; 93048.A; 95011.A; 03027.A.[1]

The key restrictions imposed on you--and, in certain circumstances, the Firm--are:

1. Representation of Other Persons. This section has two relevant subsections. First, under § 2-156-090(a), you are, as an elected City official, prohibited from "representing" or having an economic interest in the representation of any person other than the City in

1. Some additional City-imposed restrictions may apply to City employees. For example, we note that any department may adopt rules that are more restrictive than those in the Ordinance, and may, for example, prohibit its attorney-employees from engaging the outside practice of law. See § 2-156-450. The City's Personnel Rules require employees to receive written authorization for outside employment from their department heads (see Rule XX). We advise you to contact your own private counsel for specific advice as to the applicability of the state laws cited.

any formal or informal transaction before any City agency where the action is non-ministerial (that is, where the action involves discretion on the City's part).[2] This subsection does not prohibit you from representing or appearing on behalf of your constituents before a City agency in the course of your duties as an alderman official, however. It means that you may not represent either the Firm or any of its or your clients in any transaction before any City department, agency or commission (such as, for example, the City Council, Department of Administrative Hearings or Zoning Board of Appeals), even without pay, unless that person is your constituent. But, in such a case, you would not, and could not, represent the constituent as an attorney, but, rather, would need to represent the constituent as alderman, without compensation. The Ordinance does not preclude you from doing that. Please keep in mind that, were you to sign an appearance or in effect represent the constituent in a manner that would be construed as practicing law, or receive any compensation from the client, Firm or constituent directly for this representation, you would violate this provision.

Second, under § 2-156-090(b), you are, as an elected City official, prohibited from having an "economic interest" in the representation of any person in any judicial or quasi-judicial proceeding before any administrative agency or court in which the City is a party and that person's interest is adverse to the City's. An "economic interest" means, under § 2-156-010(i), "any monetary interest valued or capable of valuation in monetary terms"(there are some exceptions, not relevant here). That is, this subsection prohibits you from receiving any compensation or, indeed, *anything* of value, from your own or any other person's (such as the Firm's) representation of clients in court cases or administrative proceedings, such as matters pending in Cook County Circuit Court, or U.S. District Court, or before the Illinois Industrial Commission, or before an arbitrator or mediator, *where the City is an adverse party*. See Case No. 95011.A. Read literally, this provision, and the Ordinance generally, for that matter, would not prohibit you from representing clients in such proceedings or cases on a pro bono basis (from which you do not derive even indirect compensation from the Firm). However, we have held that an alderman's fiduciary duty to the City prohibits even the uncompensated representation of clients in judicial or administrative proceedings against the City. See Case Nos. 90035.A; 03027.A. Thus, we advise you that the Ordinance requires you to forego such pro bono representations.[3]

Do note, though, that this prohibition is personal to you, and prohibits you from receiving compensation or anything of value from such matters (and, as noted above, your fiduciary duty to the City prohibits you from representing clients pro bono in these matters). But it does not prohibit the Firm from representing or receiving compensation

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2. The Board has interpreted the term "represent" to include a broad range of activities in which one person acts as a spokesperson for someone other than the City, and seeks to communicate or promote the interests of that party, such as attending or speaking at face-to-face meetings, making telephone calls or signing documents submitted to a City department or agency. See, e.g. Case Nos. 90035.A; 97061.A.

3. Further, as explained below in our discussion of §§ 2-156-030(b) and -080(b)(2), and consistent with advice we have given to other elected officials, you are best advised to steer clear in your position as alderman of any dealings that the Firm has with the City and its departments, commissions and agencies on its own or its clients' matters. Neither the Firm nor certain of its clients would be prohibited from having dealings with the City. Rather, this restriction against representing the firm or its clients falls on you: you may not represent them (or "lobby" on their behalf) in these dealings, whether the matter is pending before Council or one of its committees, or any other City department.

from clients in such matters, provided you and the Firm implement a proper and effective screening arrangement, so that you: i) personally do not represent the clients in these matters; and ii) receive no compensation or anything of value, including end-of-year bonuses, replacement payments, etc. from such matters. See Case Nos. 93048.A; 95011.A. Were you to receive compensation deriving from such matters, you would violate this provision.

2. Fiduciary Duty. Under § 2-156-020, you owe a fiduciary duty to the City. This duty obligates you to discharge your public duties as an alderman at all times in the City's best interests. See Case Nos. 90035.A; 03027.A; see also *Chicago Park District v. Kenroy*, 78 Ill. 2d 555, 402 N.E.2d 181 (1980); *In re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840 (1990); and *U.S. v. Bloom*, 149 F.3d 649 (7th Cir. 1998). We have determined that this provision of the Ordinance requires an alderman to avoid taking on legal representations that would compromise her ability to exercise her aldermanic responsibilities free from any outside influences or duties (such as the fiduciary duty owed to a law client). In our earlier opinions, we determined that an alderman's fiduciary duty to the City prohibited him or her from representing, with or without compensation, any clients in judicial or administrative proceedings against the City, or against City employees or officials for damages allegedly suffered from acts committed by City employees or officials within the scope of their City duties. This prohibition stands regardless whether the City is itself a named party, or, as in that case, the City is contractually obligated to defend against these claims and liable to pay from its treasury any judgment or settlement amounts, or approve any settlement agreements. See Case Nos. 90035.A; 03027.A.

3. Money for Advice. This provision, § 2-156-050, prohibits you from accepting compensation from anyone other than the City, such as the Firm or any client, for giving advice or assistance on matters concerning City business, if the matters are in any way related to your aldermanic responsibilities, or matters that would come before City Council. The prohibition includes receiving compensation or anything else of value for giving even "behind the scenes" advice. As we stated in a 1988 case, it prohibits an alderman:

> **"from accepting any monetary benefit or service of any kind, including campaign funds or voluntary fundraising services, in return for the assistance [given] to persons seeking City contracts. Moreover, this prohibition applies to gifts, favors, or promises made either prior or subsequent to any assistance [the alderman] offer[s] the donor. In other words, the Ordinance would prohibit [an alderman] from accepting any 'thing of value' in exchange for assistance on a matter of City business, whether [the alderman accepts] such gifts prior to [the] assistance or in a deferred fashion."** Case No. 88022.A (emphasis in original.)

4.1 Conflicts of Interest; Improper Influence. These are two related and relevant sections of the Ordinance, §§ 2-156-030 and -080. Each has relevant subsections. Sections 2-156-030(a), -080(a) and -080(b)(1) are *in rem* prohibitions. They forbid a City official, such as you, from making, participating in, or in any attempting to use her position to influence any City governmental decision or action "in which [s]he knows or has reason to know that [s]he has any economic interest distinguishable from its effect on the public

generally," or "with respect to any matter in which [s]he has any economic interest distinguishable from that of the general public." These sections also require an alderman with such an interest to disclose the interest to the Board within 3 days of discovering it, and then again on the record of Council or committee proceedings, and finally to abstain from voting on it (but be counted present for quorum purposes).

We have long recognized that City employees or officials with secondary employment with a firm thereby have an economic interest in that firm. In your proposed of counsel relationship, you will enter into a contract with the Firm by which revenues from certain matters will be shared. You expect to receive compensation or payment from the Firm for your work on various legal matters. Once you perform work for which you expect compensation, you will have an economic interest in the Firm. This is not *per se* prohibited, as discussed above. These two provisions, strictly read, would prohibit you from participating in or voting only on *matters* in which you have an economic interest, but not necessarily in and on all matters *involving persons* in which you have an economic interest, such as the Firm (it is expected that there will be matters from which the Firm derives compensation, but from which you are prohibited from receiving any compensation, for example, court cases in which the Firm represents clients against the City). Would you have an economic interest in *those matters*—those court proceedings? No, not as a contractor of the Firm, who is prohibited from receiving compensation from that matter. Nonetheless, the Board has interpreted these sections broadly in outside employment situations. Especially in light of the sections discussed below, we advise you to recuse yourself—take a "Rule 14"—from *any matters before the City Council involving the Firm*, and, further, that you disclose to our office and then on the record of the Council or committee proceedings that you are an independent contractor serving of counsel to the Firm, and will not participate in or vote on the matter. See Case No. 95011.A, where an alderman asked whether these two sections prohibited him from participating in or voting on any City decision involving his law client, even though he was not representing the client in any City matters. We advised him that, if he abstained from voting on these matters in City Council or any committee and publicly disclosed the nature and extent of his interests on the record, then he "will clearly be in a position to avoid violating" these sections.[4]

4.2 Improper Influence/Conflicts of Interests; Appearance of Impropriety. These two prohibitions are found in §§ 2-156-030(b) and -080(b)(2). They are *in personam*--they prohibit you, as an alderman, from participating in any way in or voting on any City matter that involves any person or business with which you have a "business relationship." But would you have a business relationship with the Firm? With its clients? All of its clients? Or only those from which your compensation from the Firm stems?

4. We decided this 1995 case three years before the City Council amended the Ordinance and enacted § 2-156-111(b), discussed below. Under that provision, an alderman's private law client would effectively be prohibited from being retained as a City contractor, if the alderman is entitled to receive at least $2,500 in compensation from that client in a calendar year.

A. Business relationship with the Firm. First, based on the facts you have provided, we conclude that you *would* have a "business relationship" with the Firm, provided your compensation or payments from it total at least $2,500 in a calendar year. The term "business relationship" is defined in § 2-156-080(b)(2)(ii) as

> **any contractual or other private business dealing of an alderman ... or of any entity in which an alderman ... has a financial interest, with a person or entity which entitles an alderman to compensation or payment in the amount of $2,500 or more in a calendar year ...**

Thus, if you earn or receive $2,500 or more in compensation or payments from the Firm in 2011, 2012 or beyond, then you have a "business relationship" with it. This would mean that:

(i) The Firm will be effectively disqualified from becoming a "City contractor," pursuant to § 2-156-111(b). That subsection provides that "no elected official, or the head of any City department or agency, shall retain or hire as a City employee or City contractor any person with whom any elected official has a business relationship." The term "City contractor" is itself defined in § 2-156-010(e) as "any person (including his agents or employees acting within the scope of their employment) who is paid from the City treasury or pursuant to City ordinance, for services to any City agency ..." Thus, by virtue of your "of counsel" relationship to the Firm, the Firm will be effectively disqualified from being paid by the City to perform legal or other services for the Corporation Counsel (or any other City department);

(ii) Should the Firm itself have any other matter pending before any City department, you would be prohibited, under § 2-156-030(b), from contacting or directing anyone else to contact any other City employee or official with respect to that matter[5]; and

(iii) Upon discovering that the Firm has any matter pending before Council, you would need to disclose in writing to our office that you have a business relationship with the Firm, and recuse yourself ("take a Rule 14") with respect to any discussion or votes on the matter. More specifically, § 2-156-080(b)(2) provides, in relevant part, that

> **To avoid even an appearance of impropriety, any member of the City Council who has a business relationship with a person or entity with a matter pending before the City Council or any Council Committee shall publicly disclose the nature of such business relationship on the records of proceedings of the City Council, and shall also notify the Board of Ethics of such relationship within 72 hours of delivery by the clerk to the member, of the introduction of any ordinance, resolution, order or other matter in the City Council, or as soon thereafter as the member is or should be aware of such potential conflict of interest. The Board of Ethics shall make such disclosures available for public inspection and copying immediately upon receipt. He or she shall abstain from voting on the matter but shall be counted present for purposes of a quorum. The obligation to report a potential conflict of interest under this subsection arises as soon as the member of the City Council is or should be aware of such potential conflict.**
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> **For purposes of this subsection (2) only: (i) "matter pending before the City Council or any Council Committee" shall refer to Council action involving the award of loan funds, grant funds or bond proceeds, bond inducement ordinances, leases, land sales, zoning matters, the creation of tax increment financing districts, concession agreements or the establishment of a Class 6(b) Cook County property tax classification ... and (ii) "business relationship" shall refer to any contractual or other private business dealing of an alderman ... or of any entity in which an alderman ... has a financial interest, with a person or entity which entitles an alderman to compensation or payment in the amount of $2,500 or more in a calendar year ..."**

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5. This subsection provides that "no elected official, or any person acting at the direction of such official, shall contact either orally or in writing any other City official or employee with respect to any matter involving any person with whom the elected official has a business relationship ... In addition, no elected official may participate in any discussion in any City Council committee hearing or in any City Council meeting or vote on any matter involving the person with whom the elected official has a business relationship."

B. Business relationship with the Firm's clients. But would you have a business relationship with the Firm's clients? All or some of them? Must you recuse yourself from matters involving these clients that may arise in the City Council or in other City departments? Would you be prohibited from contacting or directing others to
contact fellow City officials or employees on these matters? Will the Firm's clients be effectively precluded from becoming "City contractors?" These are questions of first impression for the Board. You would not be an owner or employee of the Firm; you would be, rather, a contractor of the Firm. Your compensation will come ultimately from client matters on which you work, but it will be apportioned by and come directly from the Firm itself, per your contract. It will not come from the clients directly.

"Business relationship" is defined, in relevant part, as a contractual or other private business dealing of an alderman, or of any entity in which an alderman has a financial interest, with another person or entity which "**entitles the alderman** to compensation or payment in the amount of $2,500 ..." (emphasis added). Therefore, you would not have a business relationship with any Firm client unless:

> (1) you have a contract to provide legal services with that particular client that entitles you to receive at least $2,500 from that client in a calendar year; or
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> (2) you have a financial interest in the Firm *and*, through the Firm's fee arrangement with a particular client and your arrangement with the Firm, you are entitled personally to at least $2,500 in compensation in a calendar year for legal services rendered provided to or for that client.

For and with those clients described in (1), in the paragraph above, namely, those with whom you yourself have a contract or have signed a letter of retention (even if the Firm is also a signatory), you would have a business relationship, assuming that your compensation earned from work done for that client equals at least $2,500 per year. As to these clients, then: i) you would be prohibited, under § 2-156-030(b), from contacting or directing anyone else to contact any other City employee or official with respect to any matter involving that client; ii) **upon discovering that this client has any matter pending before Council, you would need to disclose in writing to our office that you have a business relationship with it, and recuse yourself ("take a Rule 14") with respect to any discussion or votes on the matter; and iii) that client will effectively be disqualified from becoming a "City contractor," pursuant to § 2-156-111(b).**

For and with those clients described in (2), two paragraphs above, namely those from whom or which the Firm earns fees, your personal share of those fees being apportionable to an amount that is $2,500 or more in a year, the analysis is more subtle. Because you would be an independent contractor of the Firm, not an owner (or even employee), you would not have a "financial interest" in the Firm.[6] Hence, you would not have a business relationship with any of

6. See, e.g., Board Case Nos. 89103.A; 04049.A 97015.A;98006.Q. In contrast to your of counsel relationship to the Firm, each of these cases involved City employees who were either (part) owners or employees of outside businesses. The Board determined that they had a financial interest in those businesses (though not in the businesses' City contracts, unless they were also owners and their ownership share of the contract met the monetary threshold). However, a mere contractual relationship does not give rise to a financial interest, the definition of which, in § 2-156-010(l), refers to "any interest as a result of which the owner currently receives or is entitled to receive more than $2,500 per year." This definition cannot be the equivalent of a "business relationship"–the difference must be that, to have a financial interest, one must "own" something. This is clear in an instance in which a City employee owns all or part

these Firm clients, and these clients would not be effectively disqualified from being City contractors under § 2-156-111(b). Nonetheless, we have advised other aldermen to go above and beyond the law in order to avoid even any perception of favoritism or conflict of interests. Thus, consistently, *we likewise advise you to treat such Firm clients as though you did have a business relationship with them, and to disclose to us and on the record of City Council committee and meeting records your relationship and recuse yourself from participating in and abstain from voting on any matters involving known Firm clients, even though you would not have a business relationship with them.* See, e.g. Case Nos. 11044.CNS; 07018.Q; 09007.Q.

5. City-owned Property; Confidential Information. Finally, we advise that, as in all cases in which City employees or officials wish to pursue outside employment, business activity or professional practice, you are prohibited from engaging in or permitting the unauthorized use of City-owned property, and from using or disclosing confidential information gained in the course of or by reason of your position as an alderman. See §§ 2-156-060; -070.

Determinations. As described in detail above, you are not prohibited by the City's Governmental Ethics Ordinance from joining a law firm in an of counsel capacity. But you are subject to the following sections: §§ 2-156-030; -050; -060; -070; -080; -090; and your Firm and some of it clients will be effectively disqualified from being City employees or contractors, pursuant to § 2-156-1110(b). In general, we advise you to represent and perform legal work only for clients of yours or your firm's who do not seek City contracts, and to avoid taking on any representation or matters that involve litigation in which the City is a party.

The Board's opinion does not necessarily dispose of all the issues relevant to this case, but is based solely on the application of the City's Governmental Ethics Ordinance to the facts stated in the opinion. If those facts are inaccurate, please notify us, as a change in facts may change our advice or recommendations. As stated above, we also note that other state or City rules, regulations or laws may apply to this case, and advise you to seek private counsel to ensure your compliance with them.

RELIANCE: This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

John L. Wilhelm, M.D.
Chair Pro-tem

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of a business, and equally clear when a City employee or official has merely a contractual relationship with an outside business. It is not so clear when a City employee or official has an employment relationship or employee status with an outside business--but whether such outside employment actually does constitute a "financial interest" in the outside employer is not at issue in this case, and thus we do not address or decide it in this case.