CONFIDENTIAL
2012

The Honorable
Alderman

Chicago, IL

Re: Case No. 12049.Q

Dear Alderman :

You are the Alderman of the City's Ward, and an attorney licensed to practice law in Illinois. You currently maintain a law practice. You delivered a letter to me explaining that you are considering joining a Chicago law firm (the "Firm"). You would join either on an "of counsel" basis (where you would be paid a retainer against which you would bill for those matters on which you work), or on a full-time equivalent basis (where you would draw a regular salary plus a percentage of the work you bring in). The firm, you said, specializes in law, and has several matters pending against the City. Aside from these cases, its business and clients have nothing to do with the City. You also said that, of course, you have had nothing to do with these cases, and have not and would not receive any referral fees from them. You requested advice on how the City's Governmental Ethics Ordinance would restrict you both as an attorney affiliated with the Firm, and as an alderman. You and I met to discuss these restrictions on , and this letter explains them in greater depth.

As an initial matter, please note that, as our Board has long recognized, nothing in the Ordinance prohibits City elected officials (or employees, for that matter) from engaging in "outside" or dual employment (and nothing will after October 31, 2012, when changes to the Ordinance, approved July 25, 2012, take effect). The Board has also long recognized that aldermen (and other elected City officials) and employees have, and are not prohibited from maintaining, outside law practices. They do, however, remain subject to the Ordinance and to 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)), the State's 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.).[1] *See, e.g.* Case Nos. 89103.A; 90035.A; 93048.A; 95011.A; 03027.A; 11045.A.

Under the Ordinance, the restrictions imposed on you, and, in certain circumstances, the Firm, are:

1. Representation of Other Persons, § 2-156-090 . 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 any formal or informal transaction before any City agency, where the City's action is non-ministerial (that is, where the action involves discretion on the City's part).[2] Note that this does not prohibit you from representing or appearing on behalf of your

[1] Board staff advises you to consult with your own private counsel for advice as to how these statutes and rules apply here.
[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 of signing documents submitted to a City department. See Case Nos. 90035.A; 97061.A. I note here that, on November 1, 2012, amendments to the Ordinance will take effect. But my advice and conclusions with respect to § 2-156-090 will not change.

constituents before a City agency in the course of your duties as an alderman. But it does mean that you may not represent either the Firm or any of its (or your own) 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, and you are representing the person in your capacity as alderman, without compensation. 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. Please also be aware that this prohibition is personal to you: other attorneys from the Firm may take on and receive compensation for such representation, provided you do neither.

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." That is, this subsection prohibits you from receiving any compensation or, indeed, *anything* of value (such as replacement payments), from your own or 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 Cases Nos. 11045.A; 95011.A. Read literally, this provision would not prohibit you from representing clients in such proceedings or cases on a *pro bono* basis (from which you do not derive any direct or indirect compensation from the client or the Firm). However, as discussed below, our Board has 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, the Ordinance requires you to forego even such *pro bono* representations.

Do note again, though, that the prohibition in§ 2-156-090(b) is personal to you, and prohibits *you* from receiving compensation or anything of value from such matters (and, as noted above and discussed below, 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 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 or work on these matters; and ii) receive no compensation or anything of value, including 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. For this reason, I advise you that, if you join the Firm, you do so in an Of Counsel role in the manner you described: you would be paid a retainer against which you would bill for only those matters on which you work. As you and I discussed, the other alternative you contemplate, a full time equivalency in which you would draw a regular salary and a percentage of the work you bring into the Firm, presents a much greater accounting and "ethical screening" challenge than the Of Counsel relationship, because you and the Firm would need to ensure that none of your compensation comes from matters in which the Firm represents parties with interests adverse to the City's.

2. Fiduciary Duty. Under § 2-156-020, you owe a fiduciary duty to the City. As our Board and Illinois courts have recognized, this obligates you to discharge your public duties as an alderman at all times in the City's best interests, free from and uninfluenced by duties you owe to others, such as private law clients or partners. See Case Nos. 90035.A; 03027.A; 11045.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). Our Board has held that this provision requires an alderman to avoid taking on legal representations that would compromise his ability to exercise his aldermanic responsibilities free from any outside influences or duties (such as the fiduciary duty owed to a law client). In Case No. 03027.A, the Board determined that an alderman could not represent 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—whether for compensation or *pro bono*. 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]

3. Money for Advice. Section § 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 are matters that, in your judgment, would come before City Council. The prohibition includes receiving compensation or anything else of value for giving advice even "behind the scenes." As the Board 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]

4.1 Conflicts of Interest; Improper Influence. These are two related 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*. They forbid you, as a City official, from making, participating in, or in any attempting to use your position to influence any City governmental decisions or actions "in which [you] know or [have] reason to know that [you have] any economic interest distinguishable from its effect on the public generally," or "with respect to any matter in which [you have] any economic interest distinguishable from that of the general public." These sections also require an alderman with such an interest to disclose that interest to the Board within 3 days of discovering it, and then again on the record of Council or committee proceedings, and to abstain from voting on it (but be counted present for quorum purposes).

The Board has long recognized that City employees or officials with secondary employment with a company thereby have an economic interest in that company. In your proposed relationship with the Firm, you will enter into a contract by which you expect to receive compensation or payment from it for your work on various legal matters. Once you enter that contract and begin working on any matters from which you expect to earn compensation from the Firm, you will have an economic interest in the Firm. This, of course, is not prohibited. 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 from or 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, workers' comp court cases in which the Firm represents clients against the City). Would you have an economic interest in *those matters*—those court proceedings, in which you expect to receive no compensation (or cannot)? No. Nonetheless, the Board has interpreted these sections broadly in outside employment situations. Especially in light of the sections discussed below, Board staff advises you to recuse yourself—take a "Rule 14"—from *any matters before the City Council or Council committee 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.

4.2 Improper Influence/Conflicts of Interests; Appearance of Impropriety. These two prohibitions are 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 matters (including, of course, City Council matters) that involve any person (or business) with which or whom you have a "business relationship." 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?

[3] The advice given under this section of the Ordinance will not change on and after November 1, 2012.
[4] Similarly, the advice given under this section of the Ordinance will not change on and after November 1, 2012, though the section will be renumbered as § 2-156-142(f).

A. Business relationship with the Firm. From the facts you have provided, Board staff concludes that you *would* have a "business relationship" with the Firm, provided your compensation or payments from your arrangement with it total at least $2,500 in a calendar year.[5] This means 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); and

(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; and

(iii) Upon discovering that the Firm has any matter pending before Council, you would (pursuant to § 2-156-080(b)(2)) 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.

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 City matters involving these clients that may arise in the City Council or in other City departments, even if the matters are other than those in which the Firm represents these clients? 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" or City employees? Our Board addressed these issues last year in Case No. 11045.A. Like your colleague in that case, you would not be an owner or employee of the Firm, but would be a contractor. Your compensation will come ultimately from client matters on which you work, from the Firm, per your contractual arrangement. It will not come from the clients directly. Based on the Board's reasoning in that case, you would have a business relationship *only* with clients (if any) with whom you personally have a contract to provide legal services entitling you to receive at least $2,500 in a calendar year, i.e. those with whom you yourself have signed a letter of retention (even if the Firm is also a signatory). 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 any such 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) these clients will effectively be disqualified from becoming "City contractors" or City employees, pursuant to § 2-156-111(b); and, iv) as in Case 11045.A, and consistent with how our Board has advised your colleagues in the past, *Board staff likewise advises you to treat all 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 or contacting other City officials or employees on matters involving known Firm clients, even though you may not have a business relationship with them. See, e.g.* Case Nos. 11045.A; 11044.CNS; 07018.Q; 09007.Q.[6]

[5] 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 through October 31, 2012, then you have a "business relationship" with it.

[6] On November 1, 2012, when the amendments take effect, the law will become more strict: you will be required to disclose and recuse yourself from any City Council or committee matter involving a person from whom you derive or expect to derive *any* compensation, regardless of amount (the $2,500 per year threshold will disappear). *See* new § 2-156-080(b)(2).

5. City-owned Property; Confidential Information. Finally, I advise you 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 your City title to benefit purely a private interest (such as the Firm's or its clients), 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. To avoid even the appearance of impropriety, Board staff advises you to refrain from mentioning your aldermanic position when courting potential clients (including on your Firm business cards, of course), or when dealing with Firm colleagues or opposing counsel.

Conclusions. 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 § 2-156-111(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.

Our conclusions do not necessarily dispose of all the issues relevant to this case, but are 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 conclusions. Board staff also notes 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.

I appreciate your conscientiousness—as always. Please contact me with any questions or follow-up requests for guidance.

Yours very truly,

Steven I. Berlin
Executive Director