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Advisory Opinion  
Case No. 97026.A  
Economic Interest in Representation

To: [REDACTED]

Date: October 15, 1997

You are an attorney who was until recently in private practice as [REDACTED]. On Oct. 1 you became position [REDACTED] in the City department [REDACTED]. On September 5 you called to seek staff advice on a matter you needed to resolve before you became a City employee, involving payment for representation. Because there was no clear Board precedent that governed, staff was unable to provide definitive advice; therefore you sought a Board opinion. The Board made a determination at its meeting September 10, and staff informed you of the result. The Board's determination, and the facts and reasoning on which it is based, are set forth in this opinion.

You said in September that you were representing a client in a case before the [REDACTED]; a City agency. You had a contingency fee agreement with your client. The agreement provided that you would be paid a percentage of any award or settlement amount resulting from the claim. You said your client has a very strong case, and you had spent hundreds of hours on it.

The Governmental Ethics Ordinance, as staff advised you, provides in relevant part that no employee

... may represent, or have an economic interest in the representation of, any person other than the City in any formal or informal proceeding or transaction before any City agency in which the agency's action or non-action is of a non-ministerial nature ...

Section 2-156-090(a).

You stated you understood that when you became a City employee, you could not continue to represent the client before the City agency [REDACTED], as that would be representing a person other than the City in a non-ministerial proceeding

NEIGHBORHOODS



LMS

Case No. 97026.A  
October 15, 1997  
Page 2

before a City agency, in violation of § 2-156-090(a). You intended to refer the case to another lawyer. You asked whether the Ordinance prohibited you from contracting for payment for the work you had put in on the case. You would receive no payment for your work if the case resulted in no award or amount in settlement (although you would be reimbursed for costs). You explained that the agreement in which you refer the case to another lawyer and split the fee would be approved by the client, as required by the Illinois Rules of Professional Conduct.

You asked specifically (1) if the Ordinance would permit you to contract for a percentage of the award or settlement amount, the percentage based on the proportion of the work you had put in; or (2) if the Ordinance would permit you to contract to receive payment for the reasonable value of your services, based primarily but not necessarily exclusively on the number of hours you had worked on the case and your hourly rate.

The question is whether either of those two arrangements would violate the prohibition against an employee having an "economic interest" in the representation. Earlier cases do not answer this question. Case No. 88054.A also involved an attorney in private practice who was taking a job with the City, and was required by the Ordinance to cease representation on a case; he represented an underwriter on an upcoming City bond issue. The Board in its opinion expressly stated, without discussion, that he was entitled to full compensation for representation that was undertaken prior to the date he became a City employee. However, that case did not involve a contingency fee.<sup>1</sup> No prior cases have dealt with a situation in which an attorney who represented a client for a contingency fee ceases representation prior to becoming a City employee, refers the case to another attorney, and seeks payment for prior services -- but seeks no payment for those services in the event there is no award or settlement amount.

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<sup>1</sup> The Board did not inquire about the fee arrangement in that case. However, according to an attorney who has experience as underwriter's counsel, typically an underwriter's counsel's fee is fixed at the outset. The fee varies significantly with complexity and risk assumed, and the risk, in turn, has a relationship to the amount of the bond issued. If a deal is not consummated, the underwriter's attorney may be paid by the hour for the time spent. On occasion, our source explained, there may be contingent elements (e.g., counsel may be paid on an hourly basis, with a premium if the deal goes through), but this is not characterized as a contingency fee by those in the practice; further, she said, it is not so unusual for a deal to fail, and for the attorneys (and others involved) to receive no pay.

EMIS

Case No. 97026.A  
October 15, 1997  
Page 3

With respect to your question (2), the Board believes that it was not the intended meaning of the Ordinance, § 2-156-090(a), that an attorney in this situation be precluded from receiving payment for work the attorney completed, as long as the payment is based on the reasonable value of the attorney's completed services, as measured primarily by hours spent on the case and the attorney's hourly rate. Other factors that might enter into the calculation of the reasonable value of an attorney's services in this circumstance are the skill requisite to perform the legal services properly; the novelty and difficulty of the questions; the attorney's experience, reputation and ability; the value of the expected award and the likelihood of an award (as of the date the case is referred); and the reasonableness of the number of hours expended, considering all these factors.

It is fair that an attorney receive payment for work she completed when she was not a City employee, and it does not serve the purposes of the Ordinance to require that when she enters City service, she lose the value of all the time and effort she has already expended, any more than an attorney who represents an underwriter in a bond issue, as in Case No. 88054.A. That she might not receive payment, in the event her former client receives no award or amount in settlement, does not change our conclusion.

However, the Board also believes that it was not the intended meaning of § 2-156-090(a) to allow all arrangements for payment for an attorney in this situation. As to your alternative (1), for example, if the attorney were to be paid purely a percentage of the award, her payment might be significantly larger than the value of her work, depending on the representation by the attorney to whom she referred the case. It is the Board's belief that payment of a percentage of a final award or settlement amount would be prohibited by § 2-156-090(a) as an economic interest in representation.

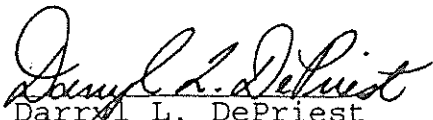
DETERMINATION: The Board determines, on the basis of the facts presented, that as respects the case in which you have been representing a client before the city agency [redacted], the Ordinance does not prohibit you from contracting to receive payment for the reasonable value of your work, your payment based primarily on the hours you have expended on the case and your hourly rate. You may take into account in determining the reasonable value of your work factors other than your actual hours and hourly rate, such as those factors set forth above. Based on the facts presented, the Board also determines that a contract for payment of a percentage of the final award in this case would be prohibited as an economic interest in representation under § 2-156-090(a).

EMUS

Case No. 97026.A  
October 15, 1997  
Page 4

Our determination in this case is based on the application of the Ethics Ordinance to the facts stated in this opinion. If the facts presented are incorrect or incomplete, please notify the Board immediately, as any change in the facts may alter our opinion. Other rules or laws may apply. In particular, the Illinois Rules of Professional Conduct, Rule 1.5 relating to fees, appears to apply to this situation, and our opinion does not address the application of that rule.

RELIANCE: This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity that is indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

  
Darryl L. DePriest  
Chair

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