BOARD OF ETHICS

CITY OF CHICAGO

CONFIDENTIAL ADVISORY OPINION

Re: Case No. 21010.A, Post-Employment

Date: April 12, 2021

FACTS. You are [a former Law Department attorney]; you left this position effective [date]. You are now a partner in the Chicago law firm [A, B and C]. On March 29, you emailed our Executive Director and stated that the Department of Law ("DOL") reached out to you to see whether you can take City cases, that is, represent the City in administrative or judicial proceedings, and you asked whether this is permissible under the City's Governmental Ethics Ordinance (the" Ordinance").[1]

EXECUTIVE SUMMARY. For the reasons explained in this opinion, we determine that:

1. A former City attorney, like you, is not prohibited by the Ordinance from representing the City in judicial or administrative proceedings once they leave City service, even in proceedings in which they participated personally and substantially or were counsel of record;

2. As to City legal matters that are *not* administrative or judicial proceedings (which, for purposes of this opinion we call "a transaction," or "transactional work," such as contracts, grants, City, State or Federal regulatory matters, registrations and permitting, etc.), we have long recognized that, despite the Ordinance's one-year "subject matter" prohibition, which would, on its face, prohibit a former City employee or official, including an attorney, from assisting or representing even the City with respect to business transactions in which they were personally and substantially involved, the City may contract with that former City employee, official, or attorney at any time, even during the attorney's first post-City first year, for the attorney to assist or represent it in business transactions, subject to conditions the Board has set out.[2] This is true even if the attorney "participated personally and substantially" in the "subject matter" of the "transaction involving the City."[3]

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[1] . You also recognize that you cannot represent a client in matters in which the client opposes the City for one year but ask whether it is permissible for you to represent the City itself.

[2] These conditions are explained in two earlier Board opinions: there must be: (i) a showing that the City seeks the services of its former attorney; (ii) a written contract obligating the attorney or other former employee or official to act at all times in the City's best interests; and (iii) and the arrangement must be approved by the Mayor's Office, Law Department, and Office of Budget and Management. Thus, in practice, retention agreements between the City and its former lawyer would occur in each setting, both proceeding- and transaction-based. *See* https://www.chicago.gov/dam/city/depts/ethics/general/AO_PostEmploy/93018.A.pdf and https://www.chicago.gov/dam/city/depts/ethics/general/AO_PostEmploy/99010.A.pdf. Note that, if the former City attorney was neither counsel of record nor participated personally and substantially in a proceeding or the subject matter of a transaction, the Ordinance imposes no prohibitions on that attorney assisting or representing the City at any time. Moreover, we note, if the City contracts with the former attorney's firm, specifying that the former attorney will work on the proceeding or transaction, there is no conflict between fiduciary duties the former attorney owes, as Illinois attorneys owe their client a fiduciary duty as a matter of law. *See* the Illinois Rules of Professional Conduct promulgated by the Illinois Supreme Court ("RPC"), specifically Rules 1.6, comment 11; and 13; Rule 1.8, comment 17; Rule 1.5 comment 1. Because our earlier cases do not involve former City attorneys, we continue to require that a non-attorney must enter into a personal services contract with the City as an individual, not as the agent of another employer, though we need not address here whether there is such a requirement in other professional situations in which the law already imposes fiduciary duties on the former City employee or official as to the City, as a client. http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#1.1

[3] As the Board has recognized in many cases, the "subject matter" of a transaction typically encompasses not only the particular transaction on which a former City employee wishes to work, but also others, even if the former had not participated in those *specific* transactions during

3. In contrast, the answers are quite different for a departing City attorney who wishes to assist or represent a client whose interests are *adverse* to the City. There, the former City attorney is: (i) *permanently* prohibited from assisting or representing clients in administrative or judicial proceedings if their client's interest is *adverse* to the City *and* they were counsel of record or participated personally and substantially in the proceedings or litigation; (ii) prohibited for one year from their last date of City service from assisting or representing clients in a "transaction involving the City" *if* they participated personally and substantially in the "subject matter" of the "transaction" during their City service; and (iii) *not* restricted from assisting or representing clients whose interests are adverse to the City in proceedings or transactions provided: (a) they were not were counsel of record, and (b) did not participate personally or substantially in those proceedings or transactions, nor (c) in the subject matter of those proceedings or transactions, (d) provided the City grants a waiver to the departing City attorney per the RPC promulgated by the Illinois Supreme Court.[4]

ANALYSIS. This is a case of first impression for the Board. The answer to your specific question is straightforward: under the plain language of §2-156-100(a) of the Ordinance, you at any time may assist or represent the City in administrative or judicial proceedings, regardless whether you were counsel of record or participated personally and substantially in the proceeding during your time as [with the DOL]. This subsection provides:

> **2-156-100. Post-employment restrictions on assistance and representation.**
> **(a) No former official or employee shall assist or represent any person other than the city in any judicial or administrative proceeding involving the city or any of its agencies, if the official or employee was counsel of record or participated personally and substantially in the proceeding during his term of office or employment. [emphasis added.]**

Former City Attorneys Assisting or Representing the City. Under the plain language of this subsection, you would be able to assist or represent the City in a new proceeding that arose after your left City employment, in which you could not have participated or served as counsel of record, *or* in any proceeding that was pending when you were [with the DOL], *even* proceedings in which you participated personally and substantially or were counsel of record. Either way, you are not prohibited from such assistance or representation because you and your firm would be representing the City. That you would be assisting or representing the City is the critical fact: what would be prohibited under -100(a) is you or any other ex-City attorney assisting or representing a client with an *adverse* position to the City in proceedings in which you or the other ex-City attorney were counsel of record or participated personally and substantially. This is consistent with RPC 1.11(a)(2).[5]

Note, however, that subsection §2-156-100(a) addresses only judicial or administrative proceedings, not transactions or transactional work. As to transactional work, the Board has long advised that departing City attorneys are *also* subject to the one-year "subject matter" prohibition in §2-156-100(b). This subsection provides:

> **(b) No former official or employee shall, for a period of one year after the termination of the official's or employee's term of office or employment, assist or represent any person in any business transaction involving the city or any of its agencies, if the official or employee participated personally and**

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their City service. Put another way, subject matter is like a genus; a particular transaction is like a species. All formal Board opinions issued discussing subject matter, what it means to participate personally and substantially, and what "transaction involving the City" means, are posted here:
https://www.chicago.gov/city/en/depts/ethics/supp_info/ao_-_postemploy.html

[4] *See* RPC 1.9 http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#1.9

[5] **RULE 1.11: SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES**
(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
…
(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent to the representation.

substantially in the subject matter of the transaction during his term of office or employment; provided, that if the official or employee exercised contract management authority with respect to a contract this prohibition shall be permanent as to that contract.

This is because, unlike -100(a), -100(b) has no "carve-out" for assisting or representing the City. However, even though a departing City attorney remains subject to the Ordinance's one-year subject matter prohibition (*if* he or she participated personally and substantially in the subject matter of the transaction), we have long recognized that the City may contract with that former City attorney at any time, even during the attorney's first post-City first year, to enable the attorney to assist or represent the City in such transactional matters, provided: (i) the City seeks the services of the former attorney, (ii) there is a written contract that obligates the former City attorney to act at all times in the City's best interests while performing this work, and (iii) the Mayor's Office, Department of Law, and Office of Budget and Management approve. *See* the cases cited above, in fn. 1.

Former City Attorneys Assisting or Representing Clients Whose Interests are Adverse to the City. Attorneys who leave their City employment and wish to assist or represent clients in proceedings or "transactional work" where their client's (or employer's) interests are *adverse* to the City, are, by the very way the Ordinance's post-employment provisions are constructed, subject to a different analysis.

There are no statutory or Board-created exemptions from the Ordinance's post-employment prohibitions for such attorneys. They would be assisting or representing clients with positions adverse to the City. The Ordinance's post-employment provisions prohibit that for one year if they were personally and substantially involved in the transaction's or proceeding's subject matter, and permanently, as to specific proceedings in which the former City attorney was counsel of record or participated personally and substantially, or contracts over which the attorney exercised contract management authority while in City service.

In other words, given that a former City attorney may assist or represent the City under 100(a), then the attorney necessarily must be allowed to do so under 100(b) -- it would make no sense as a public policy matter to allow former City litigators to represent the City in proceedings but not for City transactional attorneys to do so in other legal settings that do not involve proceedings. Given the language of 100(a), and the way the Board has construed -100(b), this would occur *only* where the ex-City lawyer *is assisting or representing the City*.

On the other hand, if a former City attorney wishes to represent clients whose interests are *adverse* to the City, whether in proceedings or transactions, then they remain subject to a permanent prohibition on judicial and administrative proceedings in which they were counsel or record of participated personally and substantially, per 100(a), and on contracts over which they exercised management authority, per -100(b), and for one year, from other proceedings or transactional work if they participated personally and substantially in the subject matter of the proceeding or transaction during their City employment. After that one-year period expires, they may take on any matters against the City, provided that, if they are proceedings, they were not counsel or record or did not participate personally and substantially in them during their City employment, and if they are transactions, that they did not exercise contract management authority, subject to the City granting a waiver per Rule 1.11 of the RPC. Finally, they may take on clients in proceedings or transactions in which their client's interest are adverse to the City's once they leave their City employment, provided that, during their City employment, they were not counsel or record in the proceeding *and* did not participate personally and substantially in the proceeding or in any proceeding or transaction that involves the same subject matter.

DETERMINATIONS: For the reasons explained above, we determine that:

1) A former City attorney is not prohibited by the Ordinance from representing the City in judicial or administrative proceedings once they leave City service, even in proceedings in which they participated personally and substantially or were counsel of record;

2) On legal matters involving the City that are *not* administrative or judicial proceedings, i.e., "transactions," the Ordinance's one-year "subject matter" prohibition applies, meaning that a former City attorney would typically be

prohibited for one year after leaving the City from working on a transaction involving the City if the attorney participated personally and substantially in the subject matter of the transaction. However, in practice, this is no different from the City retaining its former City in judicial or administrative proceedings, because, as we have long recognized, the City *may* contract with that former City attorney at any time, even during the attorney's first post-City first year, for the attorney to assist or represent it in even in transactions in whose subject matter they participated personally and substantially, or as to contracts over which they exercised management authority, subject to conditions the Board has set out in a series of prior advisory opinions; and

3) In contrast, a departing City attorney who wishes to assist or represent a client whose interests are *adverse* to the City is: (i) *permanently* prohibited from assisting or representing clients in administrative or judicial proceedings if they were counsel of record or participated personally and substantially in the proceedings or exercised management authority over a City contract at issue; (ii) prohibited for one year from their last date of City service from assisting or representing clients in any proceeding or transaction involving the City *if* they participated personally and substantially in the "subject matter" of that proceeding or transaction during their City service; and (iii) *not* restricted from assisting or representing clients whose interests are adverse to the City in proceedings or transactions if they *neither* participated personally or substantially in or were counsel of record in those proceedings or transactions *nor* in the subject matter of those proceedings or transactions, provided the City grants a waiver to the departing City attorney as provided in the RPC.

RELIANCE AND RECONSIDERATION. Our determinations are based solely on the application of the City's Governmental Ethics Ordinance to the facts summarized in this letter. If these facts are incorrect or incomplete – or if they change in the future – please notify our office immediately, as any change may alter our determinations or advice. Our opinion does not and is not intended to offer advice on other rules or statutes that may apply, including but not limited to the RPC. This opinion may be relied upon by any person involved in the specific transaction or activity with respect to which this opinion is rendered.

If there are additional material facts and circumstances that were not available to the Board when it considered this case, you may request reconsideration of the opinion. As provided in Section 3-8 of the Board's Rules and Regulations, a request for reconsideration must: 1) be in writing; 2) explain the material facts and circumstances that are the basis for the request; and 3) be received by the Board within fourteen (14) City business days of the date of this opinion, that is, by the close of business on April 30, 2021.

We appreciate your conscientiousness in bringing this matter to our attention.

Sincerely,

William F. Conlon, Chair