



BOARD OF ETHICS
CITY OF CHICAGO

**ADVISORY OPINION
CONFIDENTIAL**

To: The Honorable Alderman, Ward

Date: June 15, 2018

Re: **Case No. 18007.A; Conflict of Interests, Fiduciary Duty, Representation**

I. Executive Summary. You are the alderman of the Ward. On January 25, 2018, you emailed our Executive Director, Steve Berlin, citing a media story, and writing, in part, as follows:

“I write to request a formal opinion on what, if any, ordinance or ethics decisions address [potential aldermanic] conflicts of interest [arising out of an alderman’s practice of law]. I wish to clarify the confusion surrounding fiduciary and other conflicts of interest as they apply to members of the Chicago City Council and what the Ethics recommendations are regarding this and future questions of conflicts.

“Thank you for your time and attention to this matter, I look forward to your opinion.”

We appreciate your request, and issue this opinion in response to it.

In it, we summarize 28 years of jurisprudence in which the Board of Ethics has applied the City’s Governmental Ethics Ordinance (the “Ordinance”) to City Council members with outside law practices – and make our recommendations to you. We have issued dozens of advisory opinions addressing City Council members’ outside law practices, paid employment, business ownership, and volunteer Board service.¹

However, we wish to keep this opinion reasonable in length. And, per your request, we focus on City Council members engaged in private law practice. Our goal is to clarify how the Ordinance applies to: (i) City Council members who practice law; (ii) Council member-attorneys whose outside law firms represent clients in matters pending before City Council or other City departments; and (iii) City Council members who themselves or whose firms represent clients in

¹ Most restrictions pertinent to aldermen-attorneys also apply to aldermen with other non-City employment or volunteer service, but we are not directly addressing those other types of non-City activity in this opinion. You can read all formal Board opinions applying to aldermen’s outside employment and volunteer service on our website, including those cited or discussed in this opinion. All are redacted in accordance with the Ordinance’s strict confidentiality provision, §2-156-380(l), and Rule 3-10(1). See: https://www.cityofchicago.org/city/en/depts/ethics/supp_info/ao- elecuff.html

judicial or administrative proceedings before courts or administrative agencies, in which the City may be a party.

Our review is, of course, limited to the reach of the City's Governmental Ethics Ordinance. Other laws, rules or regulations over which we have no jurisdiction, and on which the Board notes, but does not comment, may also apply.²

II. Pertinent Ordinance Sections. Four (4) Ordinance sections pertain to your request. We have been interpreting these provisions as originally enacted and as amended since the Ordinance's and Board's inception in 1987.

For ease of understanding, we discuss these sections in the following order: first §2-156-090, "Representation of other persons."³ Second and third: §2-156-030, "Improper Influence,"⁴ and §2-

² See below, footnote 28, and the accompanying text. We refer to the Illinois Rules of Professional Conduct, promulgated by the Illinois Supreme Court. These Rules govern the conduct of Illinois attorneys.

³ Since its enactment in 1987, it was amended once, in November 2012. Its current version states:

(a) No elected official or employee may represent, or derive any income or compensation from 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 nonministerial nature; provided that nothing in this subsection shall preclude any employee from performing the duties of his employment, or any elected official from appearing without compensation before any city agency on behalf of his constituents in the course of his duties as an elected official.

(b) No elected official or employee may derive any income or compensation from 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 that of the city.

(c) No appointed official may represent any person in the circumstances described in subsection (a) or (b) unless the matter is wholly unrelated to the official's city duties and responsibilities.

⁴ This section has been amended numerous times since 1987. Its current version, effective November 1, 2012, states:

(a) No official or employee shall make, participate in making or in any way attempt to use his position to influence any city governmental decision or action in which he knows or has reason to know that he has any "financial interest" distinguishable from its effect on the public generally, or from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months.

(b) 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 any business relationship that creates a financial interest on the part of the official, or the domestic partner or spouse of the official, or from whom or which he has derived any income or compensation during the preceding twelve months or from whom or which he reasonably expects to derive any income or compensation in the following twelve months. 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 any business relationship that creates a financial interest on the part of the official, or the domestic partner or spouse of the official, or from whom or which he has derived any income or compensation during the preceding twelve months or from whom or which he reasonably expects to derive any income or compensation in the following twelve months.

Note also: "Financial interest" is defined in §2-156-010(l) in pertinent part as "an interest held by an official or employee that is valued or capable of valuation in monetary terms with a current value of more than \$1,000 ..."

156-080, "Conflicts of interests; appearance of impropriety."⁵ Fourth: §2-156-020, "Fiduciary Duty."⁶

Other Ordinance sections also restrict City Council members in their private law practice (and in fact restrict all City employees and officials with non-City jobs, whether law practices or other positions), but are not pertinent here.⁷

⁵ Like §2-156-030, §2-156-080 has been amended numerous times since 1987. Its current version, effective November 1, 2012, states:

(a) No official or employee shall make or participate in the making of any governmental decision with respect to any matter in which he has any financial interest distinguishable from that of the general public, or from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months.

(b)(1) With regard to any matter pending before the city council or any council committee, any member of the city council who has any financial interest that is either (1) distinguishable from that of the general public or all aldermen, or (2) from which he has derived any income or compensation during the preceding twelve months or from which he reasonably expects to derive any income or compensation in the following twelve months shall publicly disclose the nature and extent of such interest on the records of proceedings of the city council, and shall also notify the board of ethics of such interest within 96 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 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.

(2) To avoid even an appearance of impropriety, any member of the city council who has any business relationship with a person or entity with a matter pending before the city council or any committee: (1) that creates a financial interest on the part of such member, or the domestic partner or spouse of such member, or (2) from whom or which he has derived any income or compensation during the preceding twelve months or from whom or which he reasonably expects to derive any income or compensation in the following twelve months, shall publicly disclose the nature of such business relationship or income or compensation on the records of proceedings of the city council, and shall also notify the board of ethics of such relationship within 96 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 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. For purposes of this subsection (2) only: "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.

(c) Any official or employee who has a financial interest in any matter pending before any city agency shall disclose the nature of such interest to the board of ethics and, if the matter is pending in his own agency, to the head of the agency, except as provided by subsection (b). The obligation to report under this subsection arises as soon as the official or employee is or should be aware of the pendency of the matter. This subsection does not apply to applications for health, disability or worker's compensation benefits.

⁶ It provides that "Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City." This section has not been amended since the Ordinance was first enacted in 1987.

⁷ These are §2-156-060, entitled "City-owned property," which prohibits all City officials and employees from using or permitting the use of City-owned property in an unauthorized manner; §2-156-070, entitled "Use or disclosure of confidential information," which prohibits all current and former City employees and officials from using or disclosing confidential or non-public information gained by reason of their City position, other than in the course of performing official duties or as may be required by law; §2-156-110, entitled "Interest in City business," which prohibits City employees and elected officials from having a "financial interest" in any work, contract, or business of the City in their own name or in another's name, like a company or firm in which they have an ownership interest; §2-156-111(b), entitled "Prohibited Conduct," which prohibits elected officials or department heads from

III. Summary of Board Precedent. A distillation of Board opinions addressing City Council members' private law practices follows.

A. Can Aldermen Also Practice Law?

We start with a basic point: like many other jurisdictions nationwide, Chicago does not prohibit aldermen – or other City officials or employees for that matter – from having secondary employment with outside, non-City entities, or from maintaining outside, private law practices (whether as sole practitioners, partner-owners, in an employment-associate, or in “of counsel”-contractual capacities with a law firm), or from volunteering for non-profit organizations, or from owning a business located in the City, or from owning real estate in addition to their home.⁸

Rather, the Ordinance imposes layers of restrictions on these aldermen in both their aldermanic and attorney (or other non-City) capacities, and requires them to disclose this activity on their annual Statement of Financial Interests (per Article III of the Ordinance), and, in certain circumstances, to the full City Council and Board of Ethics.⁹ The restrictions are each variations of

retaining as a City employee or City contractor any person in whom an elected official has an ownership interest worth more than \$1,000 in a calendar year; and §2-156-142(f), entitled “Offering, receiving and soliciting of gifts and favors,” which prohibits all City officials and employees from soliciting or accepting anything of value in return for advice or assistance on City business, unless that advice or assistance is wholly unrelated to their City duties and responsibilities.

⁸ See Henry, Dennis Mitchell, *Lawyer-Legislator Conflicts of Interests*, 17 J. Legal Prof. 261 (1992); National Conference of State Legislators, *Dual Employment: Regulating Public Jobs for Legislators*, February 8, 2018, <http://www.ncsl.org/research/ethics/50-state-table-dual-employment.aspx>, which summarizes state laws governing their legislators from having second public and private jobs. This Board is aware that some commentators have called for making the office of Chicago alderman “full-time,” thereby eliminating the possibility for outside law practices or other paid employment. Such a fundamental change would need to come from the City Council itself. For Board cases discussing City Council members' outside employment, see Case Nos. 87031.A (we advised an alderman that the Ordinance would not prohibit him from receiving compensation for consulting services rendered to a congressional candidate, but would prohibit him from: (i) making or participating in City decisions or actions with regard to the person paying him; (ii) receiving compensation in exchange for advice or assistance on matters concerning City business; and (iii) using or disclosing confidential information to benefit his client); and 88022.A (we determined that aldermen are not prohibited from assisting private firms in obtaining City business or contracts as long as they derive or receive no income or compensation from the activity and the alderman was not seeking some kind of personal benefit or advantage in return for such assistance. We construed the phrase “nothing ... shall preclude any elected official from appearing without compensation before any City agency on behalf of his constituents in the course of his duties as an elected official” to include contacting City personnel on behalf of persons seeking the alderman's assistance in obtaining City business or who seek a remedy for what they perceive to be unfair treatment by a City agency. This also means that gifts, favors, contributions, or other things of value, such as political contributions, could not be accepted either prior or subsequent to any assistance provided, if offered in return for the assistance); 90035.A (discussed below, where we advised an alderman that the Board must construe the Ordinance consistent with state law, thus an alderman violates his or her fiduciary duty to the City by representing City employees in workers' compensation matters in which the City is an adverse party, even if he or she receives or derives no income or compensation from that representation; 11045.A; 12049.Q; 15032.Q (we advised aldermen-attorneys of relevant restrictions and prohibitions were they to join a law firm on a contractual basis, in an “of counsel” relationship); 16005.Q (alderman-attorney who had performed legal work for a client in a *qui tam* suit prior to becoming an alderman was advised that the Ordinance allows him to receive the full portion of any recovery from claims involving laws of other government entities, provided such recoveries are segregable from claims involving the City. But as to claims involving the City, he could recover only the reasonable value of legal services provided prior to becoming a City elected official). See also Case No. 92030.A (discussing hypotheticals related to a real estate firm owned by an alderman); and Case Nos. 93048.A and 95011.A (note, however: these opinions were issued before amendments to §§2-156-030 and -080 became effective).

⁹ Per §2-156-080(b), City Council members must disclose to the Board and then abstain from voting on a matter pending before the City Council or any of its committees if: (i) they or a law firm in which they have an ownership interest have derived or expect to derive income or compensation from the matter in the preceding or following twelve-month period; or (ii) they or a law firm in which they have an ownership interest have derived any income or compensation from the person with the matter – even if the pending matter before City Council is unrelated to the work they or their firm did for that person, and even if the person is being represented by an entirely different law firm in the pending City Council matter. We post all these disclosures here: <https://www.cityofchicago.org/city/en/depts/ethics/provdrs/reg/svcs/alderrecusals.html>

the fundamental conflict of interest principle: City officials may have outside monetary interests, but cannot use their City positions, titles, or authority to benefit their outside business interests.

B. Can Aldermen Represent Clients Before City Agencies or Departments?

Pursuant to §2-156-090(a), an alderman may not represent (as an attorney) or derive any income or compensation from the representation of (such as payment from a law firm with which the alderman is contractually affiliated, or in which he or she has an ownership interest as a partner, or by which he or she is employed) any person other than the City in any formal or informal transaction before a City agency if the agency's action is non-ministerial. This restriction applies whether the alderman is an owner-partner-shareholder or an employee (associate) of or has a contractual or "of counsel" relationship with the law firm.¹⁰ However, per §2-156-090(a), an alderman, or an alderman's aides or staffers, *may* appear, in their official City capacities, *without* compensation, before a City agency on behalf of constituents, in the course of their City duties.¹¹

Put another way: an alderman-attorney *cannot* him- or herself represent (or in any way be compensated for representing) a law client as an attorney before any City agency or department, such as the Police Board, Zoning Board of Appeals, Plan Commission, Human Resources Board, Board of Ethics, Office of Inspector General, or the Department of Administrative Hearings, Procurement Services, Buildings, etc., but *can* appear – but not represent as an attorney – for a constituent in a matter before any City agency but may *not* receive any income or compensation or anything of monetary value for such constituent service.

We have postulated that this hypothetical alderman is affiliated with a law firm (either as a partner-owner or in a contractual, "of counsel" position). That firm's other attorneys *may* represent and be paid for representing clients before City agencies. However, if that happens, this alderman: i) may not derive any compensation or income from the firm's representation in these matters¹²; ii) must recuse him- or herself from any participation in, and cannot take any role in or try to influence the City's decision on the matter (and, per footnote 9, must disclose this potential conflict of interest publicly to our Board and on the record of the City Council proceedings and then abstain from the matter);¹³ and iii) cannot contact other City employees or officials regarding

¹⁰ See Cases 11045.A; 12049.Q; 15032.Q. For this reason, we have advised attorney-aldermen who wish to affiliate with a law firm to negotiate a contractual or "of counsel" relationship with it, to ensure none of their compensation or income comes from matters in which the firm represents clients before City agencies or departments. Being an associate (read: an employee) of a law firm that represents clients before City agencies is problematic for the same reason. *Id.*

¹¹ See Case 15032.Q.

¹² Per §2-156-090(a).

¹³ Per §2-156-080(b)(2); *see also* Cases 11045.A; 12049.Q; 15032.Q. If the alderman-attorney is "of counsel" to the firm, he or she would not (strictly read) be required to recuse from voting on or participating in discussions or contacting other City employees or officials on these matters, because the alderman-attorney would have no ownership interest in the law firm. But, we have consistently advised that they so refrain in order to avoid the appearance of impropriety. *See* Case Nos. 93048.A; 95011.A (superseded in part by 1997 and 1998 amendments to §§2-156-030 and -080); 11045.A; 12049.Q; 15032.Q. *Cf.* Case No. 151688.Q, where a non-attorney alderman was advised that the Ordinance did not prohibit his volunteer service to or paid employment with a non-profit entity in the ward that had and would continue to receive City funding, but it imposed severe restrictions on him both as an employee of the organization and as alderman: he would effectively be prohibited from acting as its alderman and would need to recuse from any City Council or other City matters involving the organization.

this matter or decision, or regarding *any* City governmental matter involving *any* firm client from which the firm has received compensation in the previous twelve-month period or expects to receive compensation in the following twelve-month period, even if the alderman-attorney has done no work for this client – provided, as we decided in a recent case, the alderman knows or should reasonably know that a firm client is involved in the matter.¹⁴

Moreover, an alderman is subject to restrictions even when a recent past client of the alderman or his or her law firm has a matter pending before City Council, and is being represented in the matter by an *entirely different law firm*. To illustrate, say an alderman-partner in a law firm personally represented (or other attorneys in the alderman’s firm represented) ABC, Inc. in a real estate transaction in suburban Cook County in December 2017.¹⁵ Now, in June 2018, within the twelve-month period following that work, ABC, Inc. has a matter pending in the City Council and/or its Zoning Committee, and is being represented by a different law firm altogether in this matter. *This alderman, if he or she knows or reasonably should know that ABC, Inc. is involved in the matter and that it was his law firm’s client in December 2017, may not participate in any City Council decisions, discussions, votes or actions (including committee meetings and informal discussions) involving ABC in June 2018 if he or the firm have received compensation for this work in the preceding twelve months, or reasonably expects to receive compensation for it in the next twelve months, or reasonably expect to receive compensation in the next twelve months for any other work the firm has done for ABC even after December 2017.*¹⁶

C. Can Aldermen Represent Clients in Judicial, Quasi-Judicial, or Administrative Proceedings Where the City Is or May Opt to be a Party?

We are still discussing an alderman who is an owner-partner-shareholder in or has a contractual, of counsel relationship with a law firm. Pursuant to §2-156-090(b), the Ordinance prohibits this alderman (and all City employees and the other three (3) City elected officials as well) from deriving income or compensation from the representation of any person in a judicial, quasi-judicial, or administrative proceeding before an administrative agency or court *in which the City of Chicago is an adverse party*, such as a worker’s compensation proceeding before the Illinois

¹⁴ Per §2-156-030(b). See Case 18006.A, where we held that an alderman-attorney who was an owner of a law firm would be prohibited from participating in a City Council action that involved referring a matter in which two clients of the law firm were named (the law firm had represented the clients in administrative proceedings pending in non-City tribunals in the previous year, even though the City was not a party to those proceedings), *if the alderman-attorney knew in advance or reasonably should have known that the firm’s clients were involved in the matter up for discussion*.

¹⁵ If the alderman-attorney is “of counsel” to the firm and has not received and expects not to receive income or compensation for work for this client or received in the preceding or following twelve-month period, he or she would not (strictly read) be required to recuse from voting on or participating in discussions or contacting other City employees or officials on these matters, because the alderman-attorney would have no ownership interest in the law firm. However, we have consistently advised that aldermen-attorneys in this situation still adhere to these restrictions, in order to avoid the appearance of impropriety. See Case Nos. 93048.A; 95011.A (superseded in part by 1997 and 1998 amendments to §§2-156-030 and -080); 11045.A; 12049.Q; 15032.Q.

¹⁶ This is because §§2-156-030(b) and -080(b)(2) are *in personam* prohibitions, meaning that the restrictions are triggered if the alderman-attorney or his or her firm have received compensation from the client or the person – even if neither the alderman nor the law firm would benefit from an unrelated matter pending before City Council, in which their client is being represented by a different law firm, and even if the alderman’s or his or her law firm’s representation of this client or person was on a matter that had nothing to do with City government (such as a real estate transaction in suburban Cook or DuPage County, or a private lawsuit in Cook County Circuit Court). In contrast, §§2-156-030(a) and -080(a) and (b)(1) are *in rem* prohibitions, triggering recusal restrictions when the alderman’s law firm is representing the client in the City transaction.

Industrial Commission, litigation in Cook County Circuit Court or U.S. District Court or proceedings before other County or State courts or administrative agencies, like the Illinois Industrial Commission or National Labor Relations Board.

In 1990, the Illinois Supreme Court issued a seminal opinion in which it censured then-Alderman Edward Vrdolyak for representing City employees as their attorney in proceedings before the Illinois Industrial Commission ("IIC"), in which the City was the adverse party. *See In Re Vrdolyak*, 137 Ill.2d 407, 560 N.E.2d 840 (1990), attached as Exhibit 1. The Supreme Court censured him for violating then effective Disciplinary Rule 5-101(a).¹⁷ The opinion is based on a fiduciary duty theory.¹⁸ (The City's own Governmental Ethics Ordinance, of course, contains a fiduciary duty provision, §2-156-020, which binds City officials and employees at all times in the performance of their public duties.) The Court wrote:

"[The Alderman] occupied a position of public trust. He violated that trust by representing clients against the City, to whom he also owed his undivided loyalty. The public trust cannot be compromised in this or any other fashion: if a lawyer-legislator undertakes the private representation of a client against his governmental unit either the client or the public must necessarily suffer; neither should. Rather, attorneys should act to instill public confidence in the legal profession and our governmental institutions. Public exposure of attorneys holding public positions accentuates this need. The public has become alert and sensitive to the impropriety of conflicts of interests."

Soon after the Supreme Court issued its decision, another City elected official requested that this Board, in light of this decision, issue an opinion addressing the propriety of both City elected and appointed officials representing City employees in workers' compensation proceedings (where, of

¹⁷ This Rule, later superseded that year, provided, in relevant part, that "a lawyer shall not, [e]xcept with the consent of his client after full disclosure ... accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests." Because the *Vrdolyak* opinion still governs our interpretation of the Ordinance, we attach it to this opinion.

¹⁸ The concept of fiduciary duty is one of the most storied and dissected in American law. While Chief Judge of the New York State Court of Appeals, Justice Benjamin N. Cardozo famously wrote, in the 1928 case *Meinhard v. Salmon*, 249 N.Y. 458, at 463-464:

"Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions [citation omitted]. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

See also Clark, Kathleen, *Do We Have Enough Ethics in Government Yet? An Answer from Fiduciary Theory*, 1996 U. Ill. Law Review 57: "Although the standards of defining a lawyer-legislator's obligation with regard to private representation of clients are by no means universal, some courts have found that a legislator violates her fiduciary duty if she represents a private party before a government agency." Professor Clark's footnote to this text cites *Vrdolyak* and other cases. In each case, however, the legislators represented clients before or were suing the *same* government to which they were elected members. We have found no statute or case from any jurisdiction or fellow ethics commission in which an elected official would violate or was held to have violated the law by representing clients in tribunals that are part of government entities other than the one to which he or she was elected.

course, the City is the adverse party). We then issued our opinion in Case No. 90035.A (attached as Exhibit 2). In it, we recognized:

“§2-156-090(b) was intended to permit elected official and employees to represent persons in cases against the City as long as they had no economic interest in [that is, derived no income or compensation from] the representation, such as compensation in any manner by the client. However, the Illinois Supreme Court’s decision in *Vrdolyak* prohibits an alderman who is a lawyer from representing a City employee in a Worker’s Compensation case. The Board is required to follow the law as set forth by the Illinois Supreme Court, and the Ethics Ordinance may be applied only to the extent it does not conflict with that Court’s decisions. Therefore, in light of *Vrdolyak*, City Council members who are lawyers, as lawyer-legislators, may not represent City employees in Worker’s Compensation actions against the City.”

Because we could not read §2-156-090(b) to prohibit aldermen-attorneys from representing City employees *pro bono* before the IIC, given the *Vrdolyak* opinion, we applied the Ordinance’s fiduciary duty section to conform the Ordinance to the Supreme Court’s opinion. We determined that the Ordinance’s fiduciary duty provision:

“[e]stablishes an obligation for aldermen and members of boards and commissions to give, within lawful limits, undivided loyalty to the City of Chicago in the discharge of their public duties. In these public duties, they must be able to exercise professional judgments free from outside influence or conflicting duties to another entity. This duty is based upon the position of the person as an alderman or commission or board member, and is distinct from the fiduciary duty owed by attorneys to their clients... City Council members legislate on all areas of City government. Therefore, they owe a very broad fiduciary duty to the City. In addition, because City Council members are elected officials, chosen by the public, they are accountable to the public’s trust in a way much more expansive than are members of boards and commissions. When a City Council member, who is a lawyer, represents a client in a Worker’s Compensation case against the City, he or she faces an irresolvable conflict between competing fiduciary duties. Consequently, [§2-156-020] prohibits aldermen who are lawyers from representing City employees in Worker’s Compensation actions.”

Thus, an alderman-attorney may not personally represent clients in cases pending in any court or administrative agency if the City is an adverse party, even on a *pro bono* basis. And, per §2-156-090(b), this alderman-attorney may not derive any income or compensation, or anything of value, from the representation of any person in such cases. This prohibition is personal to the alderman-attorney, and does not prohibit other attorneys in the firm from representing clients in these matters.¹⁹ So, if he or she is a partner-owner or employee-associate of, or of counsel to, a law firm, the firm’s *other* attorneys may take on this representation, but the alderman-attorney must have a

¹⁹ *Id.*

fee-screening arrangement with the firm so that he or she derives no compensation from such matters.²⁰

The *Vrdolyak* opinion, and, consequently, our Case No. 90035.A, both address instances where the alderman-attorney represents a person in a proceeding *in which the City is an adverse party*.

However, in its *Vrdolyak* opinion, the Supreme Court made another critical holding:

“We hold that a lawyer-legislator may engage in the private practice of law including representing governmental employees, unless the governmental unit of which he is a member is an adverse party – regardless of the forum ... [citations omitted] ... If another governmental unit is an adverse party, the lawyer-legislator must carefully examine the circumstances to determine whether a conflict of interests exists; if so, he should decline employment in that case.”²¹

Put plainly: under Illinois law, as articulated by the Illinois Supreme Court in 1990, an alderman-attorney *may* represent private clients before State, Federal, or other local governmental courts, administrative agencies, or tribunals *so long as the City is not an adverse party*.²² If and once the City becomes an adverse party, perhaps by intervening or by being the subject of a third-party complaint, the alderman-attorney (and possibly his or her law firm, if the alderman-attorney is a partner-owner-shareholder in it) must withdraw from the representation and/or the alderman-attorney may not derive any compensation or income from the matter from that point forward.²³

The Board has addressed one case in which an alderman-attorney wished to represent clients in litigation in which the City was not, technically, a party, though the City’s interests were adverse to the alderman-attorney’s clients. However, the type of litigation involved in that case put the conduct of City employees (and of the City Council) into a position of central importance. With the Supreme Court’s *Vrdolyak* decision in mind, the Board issued Case No. 03027.A in 2003. There, an

²⁰ This fee screening arrangement would need to be complete so as to forego the possibility of substitute payments, like year-end bonuses, replacement bonuses, etc. from such matters. See Case No. 11045.A; cf. Case No. 95004.A.

²¹ 560 N.E.2d at 846-847. We have found only one legal scholar-commentator who has argued that the law (specifically, California law) should prohibit lawyer-legislators from representing clients before not only their own government branch, but others as well. Reeves, Robert, *Legislators As Private Attorneys: The Need For Legislative Reform*, 30 UCLA Law Review 1052 (1983). See also Simpson, Dick, et al., *Continuing Corruption in Illinois, Anti-Corruption Report #10*, May 15, 2018, at 13, <http://dig.abclocal.go.com/wls/documents/051518-Corruption-Illinois.pdf>

²² Such courts or agencies could include U.S. District Court, the Securities and Exchange Commission, Cook County Circuit Court, the Illinois Industrial Commission, the Illinois Department of Financial & Professional Regulation, the Office of the Cook County Assessor or the Cook County Board of Review, to name but a few.

²³ Cf. Case Nos. 16005.Q; 97026.A. In Case No. 16005.Q, an alderman-attorney who had performed legal work for plaintiff in a *qui tam* suit prior to becoming an alderman was advised that the Ordinance allows the alderman to receive the full portion of any recovery from claims involving laws of other government entities, provided such recoveries are segregable from claims involving City law. But as to claims involving City law, should the City intervene, the alderman-attorney could recover only the reasonable value of legal services (*quantum meruit*) provided prior to becoming a City elected official. We came to a similar conclusion in Case No. 97026.A, which did not involve an alderman, but, rather, an attorney in private practice who became a City employee while she had a pending case before a City agency on in which she represented her client on a contingent fee basis. We determined that she could receive compensation per *quantum meruit* for work she had performed up to the beginning of her City employment.

alderman-attorney requested an advisory opinion addressing whether he could represent clients in federal police brutality cases brought against individual Chicago Police Department (“CPD”) members under 42 U.S.C. 1983, where the City was neither a named defendant nor a third-party defendant (that is, not technically a party – only the individual CPD members and the alderman’s clients were parties). We nonetheless determined that the Ordinance’s *fiduciary duty* provision prohibited the alderman-attorney from this representation, because: (i) the City was contractually obligated (through its collective bargaining agreement with the Fraternal Order of Police) to pay for the defense of and indemnify all compensatory damages assessed against CPD members, and, in fact, the City’s Law Department routinely administers the defense for these members, thus the alderman-attorney might have conducted or defended depositions where City lawyers would represent the other side; (ii) the City Council had to approve settlements of any such cases in excess of \$100,000; and (iii) the City Council regularly considers policies or ordinances designed to minimize police officers’ and the City’s own liability for §1983 damages. Therefore, we concluded, the alderman-attorney’s continued representation in these cases would put him in an untenable breach of fiduciary duty situation.²⁴

Still, the Ordinance does not prohibit aldermen from practicing law, nor, as state law, announced in the Illinois Supreme Court’s *Vrdolyak* opinion makes clear, from personally representing clients in proceedings before Federal, State, or *non-City* local governmental courts or administrative agencies (nor prohibit other lawyers from his or her law firm from doing so), *as long as the City is not an adverse party*. Once the City becomes an adverse party, however, the alderman-attorney must withdraw, and may not derive or receive further income or compensation from the matter (meaning that, if the alderman-attorney is a partner-owner of the firm, the firm may need to withdraw from the case).²⁵

²⁴ We attach this opinion as Exhibit 3. In it, we wrote:

“The question here is whether an alderman who represents clients in litigation against City agents—litigation that arises from acts committed by those agents in the course of their City employment, where the City must pay any amounts agreed to in settlement or awarded by judgment, and approve any settlement—thereby compromises his or her ability to devote his or her undivided loyalty to the City and its best interests. We believe it does ... [an] alderman’s fiduciary duty, *qua* alderman, is (among other things) to consider and approve agreements, budget allocations, ordinances and policies that are in the City’s best interests, including, in general, promoting policies that minimize the City’s liability in §1983 cases and the amounts expended by the City and its taxpayers to settle suits or claims or satisfy awards in which the City is liable financially for its agents’ actions. We believe that these simultaneous fiduciary duties [the other being an attorney’s fiduciary duty, *qua* attorney, to prosecute cases as zealously as possible in his or her clients’ interests, including whether to sue, to settle, to name the City as a defendant, etc.] inherently pull an alderman-attorney in opposite directions. They are, in the language of Case No. 90035.A, irresolvable... Here, the issue is whether the fiduciary duty that an alderman, *qua* alderman, owes in the performance of his public duties under the [Ethics Ordinance] prohibits the alderman, *qua* attorney, from representing clients in judicial proceedings brought against Chicago police personnel where the City, although not a named defendant, is obligated, by law and contract, to provide the defense for these police personnel (and is in fact doing so), and to indemnify these personnel from any judgments awarded [not punitive damages, but compensatory damages only] and pay any settlement amounts agreed upon. That is, the City’s treasury is at risk in these matters, and in them the plaintiff’s attorney is duty-bound to obtain [for his/her private client] the most favorable settlement from the City’s treasury as his or her legal ability (and justice) allows. If that attorney is, at the same time, an alderman of the City, who is elected and duty-bound to use his or her best judgment in ... considering and approving ... budgets ... and police that minimize the City’s exposure and liability in §1983 ... cases, then, we conclude, that alderman cannot give undivided loyalty to the City in the exercise of his or her official duties.”

²⁵ See Note 23, above. We also note here that the Board has never addressed whether an appropriate fee-screening arrangement, under which an alderman-partner-owner-shareholder in a law firm would receive no income or compensation from such matters, but other lawyers in the firm to continue representing the client in the matter, would satisfy the Ordinance. However, based on an opinion we received from the City’s Law Department, we did countenance such an arrangement with one of our own Board members (per §2-156-310(c)(iii) of the Ordinance, Board members are prohibited from having a financial interest in any work,

IV. Conclusion. Neither the City's Governmental Ethics Ordinance, nor State law (as announced by the Illinois Supreme Court in 1990), to which the Board and the Ordinance must conform, is designed to prohibit City officials or employees from maintaining outside law practices (or other kinds of outside, non-City work), but, instead, to regulate this activity. Under the Ordinance, as informed by applicable state law, aldermen-attorneys may, with some exceptions, maintain outside law practices and represent clients in suits or proceedings against government entities other than the unit of government to which they were elected: here, the City of Chicago.²⁶

The Board is aware of recent public discourse²⁷ concerning elected officials representing clients in property tax assessment proceedings against the County Assessor in which a reduction would result in lower tax revenues for the City and other taxing bodies than revenues it would have received from the original, unchallenged assessment. However, under current state law, and the Ordinance, City employees or officials, including City Council members, are not prohibited from representing or deriving income or compensation from the representation of property owners seeking such reductions, *provided the City is not a party in the proceeding.*

Whether laws governing these representations by City employees and elected officials should be amended to prohibit this outright is first and foremost a question for the City Council. Given that the fairness of Cook County property tax assessment processes has been publicly questioned, this Board recommends to the City Council that it consider what steps it can take to bolster confidence in those practices and processes. Additionally, when public officials-attorneys find themselves presented with the potential representation of clients in proceedings before government agencies that are not part of the government unit to which they were elected, and in which their own governmental unit are not but may become parties or have their treasuries affected, we trust they have and will continue to seek professional, expert advice to ensure continued compliance with the *Illinois Rules of Professional Conduct*.²⁸

business or official action by the City or any other governmental agency within Cook County). Our Board member was a partner in a firm that served as bond counsel to a non-City governmental entity in Cook County. But, rather than requiring this member to resign, we recognized that a true financial screen would suffice, however difficult it may be to implement. See Case No. 95004.A. To avoid asking an alderman-attorney to even consider such an agreement, we simply advised an alderman who was formerly a partner in a law firm to relinquish his partnership-ownership interest in the firm (and adhere to the other restrictions discussed above) once he became an alderman, and enter into a contractual-of counsel relationship with the firm (and of course recuse from any such matters as an alderman), so that the client would not need to give up the lawyers of its choice. See Case No. 15032.Q. Moreover, we would advise any alderman-attorney not to do any "behind-the-scenes" work on any matter pending before a City agency, or in a judicial or administrative proceeding where the City is an adverse party, even for no compensation or income, that is, to "recuse at both ends," as both legislator and attorney.

²⁶ As discussed above in footnote 23 and the accompanying text, however, we *did* hold in a 2003 case that an alderman could not represent clients in lawsuits in federal court alleging civil rights violations against Chicago Police Officers, even though the City was *not* a named defendant, because: (i) those suits were brought directly against City employees acting in the scope of their City employment (ii) the City was contractually obligated to provide for their defense; and (iii) the City Council must approve settlements of such suits in excess of \$100,000, and also considers measures designed precisely to *limit* the City's liability in such lawsuits. Thus, even though the City would not be a named party in such suits, we concluded that representing clients in such cases would put the alderman in an untenable conflict of interests, and constitute a violation of his fiduciary duty to the City.

²⁷ See, e.g., the Chicago Tribune's stories collected under the rubric *The Tax Divide*: <http://www.chicagotribune.com/news/watchdog/taxdivide/>

²⁸ [http://www.illinoiscourts.gov/SupremeCourt/Rules/Art VIII/default NEW.asp](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art%20VIII/default%20NEW.asp)

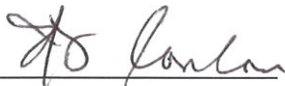
Until the governing law changes, however, City employees or officials (including elected officials) are not prohibited from representing persons in legal proceedings where the City is not a party, although, as the Illinois Supreme Court, addressing such situations, recognized: they should always consider whether any contemplated representation might appear to involve a conflict of interest before accepting it. As the Court wrote eloquently in its 1990 *Vrdolyak* decision:²⁹

“[i]f we are to maintain public confidence in our system of government and the legal profession, attorneys who serve as public officials must avoid not only direct conflicts of interests, but also any situation which might appear to involve a conflict of interest [citations omitted]. That reasoning remains compelling.”

Reliance. The Board’s opinion is based solely on the application of the Governmental Ethics Ordinance to the facts summarized in this opinion. Other laws, such as those covering the conduct of Illinois attorneys, may apply. If the facts stated are incorrect or incomplete, please notify our office immediately, as any change may alter our opinion.

Reconsideration. You may request that the Board reconsider this opinion by sending written notice to our Executive Director within 14 City business days, that is, on or before July 6, 2018. The Board can reconsider its opinion only if the request contains an explanation of material facts or circumstances that were not before the Board in its deliberations on the opinion. *See* Board Rule 3-8(1).

Our office appreciates the opportunity to advise you. If there are further questions about this opinion, please contact our Executive Director.



William F. Conlon, Chair

Attachments: *In Re Vrdolyak*
Board Case No. 90035.A [redacted]
Board Case No. 03027.A [redacted]

²⁹ 560 N.E.2d at 847.

560 N.E.2d 840 (1990)

137 Ill.2d 407

148 Ill.Dec. 243

In re Edward Robert VRDOLYAK, Attorney, Respondent.No. 68665.**Supreme Court of Illinois.**

May 30, 1990.

As Modified on Denial of Rehearing October 1, 1990.

841 *841 James J. Grogan, Chicago, for the Administrator of the Attorney Registration and Disciplinary Com'n.

William J. Harte, Ltd., Chicago (William J. Harte and David J. Walker, of counsel), for respondent.

PER CURIAM:

On March 17, 1987, the Administrator (Administrator) of the Attorney Registration and Disciplinary Commission (ARDC) filed a two-count complaint charging respondent, Edward Robert Vrdolyak, with various infractions of the Code of Professional Responsibility (Code) (107 Ill.2d R. 1-101 *et seq.*). The two counts involve wholly unrelated activities. Count I pertains to respondent's representation of city employees in workers' compensation claims against the City of Chicago (City) while simultaneously serving as an alderman in the Chicago city council (council). Count II concerns the commingling and conversion of a client's funds and respondent's failure to enter into a written contingent fee agreement with that client.

On count I, the Hearing Board found that respondent's dual roles—alderman and attorney—created a conflict of interest which gave rise to an "inference of impropriety." The Hearing Board reasoned that the public could have been misled into believing that respondent, because of his position as an alderman, had a "competitive advantage" in representing city employees before the Industrial Commission. With respect to count II, the Hearing Board found that respondent had failed to properly handle the client's funds, but that failure was due to an "honest mistake of fact." The Hearing Board found, however, that there was no justification for respondent's failure to execute a written contingent fee agreement with that client. The Hearing Board recommended that respondent be censured on the charges contained in count I and reprimanded for failing to have a written contingent fee contract under count II, and that the remaining charges in count II be dismissed.

Respondent filed exceptions to the Hearing Board's report with the Review Board. (107 Ill.2d R. 753(e)(1).) The Review Board agreed with parts of the Hearing Board report, but rejected its recommendations and concluded that all of the charges against respondent should be dismissed. The Administrator petitioned this court for leave to file exceptions to the Review Board's report and recommendations (107 Ill.2d R. 753(e)(6)).

The issues raised in this appeal are: (1) whether respondent engaged in unethical conduct by representing city employees in workers' compensation claims against the City while he was a city alderman; and (2) whether respondent should be sanctioned for the unintentional commingling and conversion of client funds and for failing to enter into a written contingent fee agreement with the client.

FACTS

The stipulated facts reveal that respondent was admitted to the Illinois bar in May 1963. He started as a sole practitioner, but in 1966 or 1967 began hiring associates to assist him in his general practice, which included an emphasis in personal injury, workers' compensation and criminal cases. Around 1987, he incorporated his law business under the firm name of "Edward R. Vrdolyak, Ltd., P.C.," in which he was the sole shareholder. (See 107 Ill.2d R. 721.) At the time of the ARDC complaint, the firm had three offices in Cook County and 12 associates. Since his admission to the bar, respondent had never before been the subject of any disciplinary proceedings.

The facts relating to count I are as follows. Respondent served as the elected Tenth Ward alderman in the council from February 1971 through April 1987, for which he was compensated with public funds. Respondent was a member of various

0.12 council committees, including the committee on finance. The committee on finance had responsibility for municipal legislation involving the City's financial and budgetary affairs. Respondent was also a member of the committee on claims and liabilities, originally a subcommittee of the *842 finance committee. The claims committee authorized the payment of money damages awards resulting from civil tort or contract claims against the City, but its jurisdiction did not extend to authorizing payment of workers' compensation benefits. Instead, a separate body, the bureau of workmen's compensation (Bureau), was responsible for recommending the payment of workers' compensation benefits to employees who were entitled to them under the Workers' Compensation Act. The Bureau's members were appointed by the chairman of the committee on finance, to whom the Bureau made its recommendations. According to the stipulated facts, however, respondent believed that workers' compensation claims required the approval of the council after a review by the committee on claims and liabilities. Relying on this belief, respondent sent letters to the corporation counsel, city clerk, and chairman of the committee on finance stating that he did not want to be recorded as voting on any workers' compensation or personal injury claims.

Funding for municipal operations, including council bureaus and committees, payment of claims and employee salaries, is appropriated from the City's budget. That budget is prepared by the City's executive branch and adopted by the council, as the City's legislative branch.

Respondent, as an alderman, participated in the annual budget process—from hearings to voting on the adoption of the budget. As an alderman, he was also involved in approving mayoral appointments, including city department heads and commissioners of various independent and autonomous municipal corporations.

From January 1977 through January 1986, respondent or associates employed by his firm appeared as counsel of record in 35 workers' compensation cases against the City. These were matters pending before the Industrial Commission, a State agency. If a city employee filed a workers' compensation petition with the Industrial Commission, an assistant corporation counsel from the City's department of law would be assigned to file an appearance on behalf of the City. Each case would result either in a settlement or arbitration, and the majority of cases handled by respondent resulted in settlement. The proposed settlement or arbitration award was then submitted to the Industrial Commission for its approval.

The parties also agree that: respondent did not vote on personal injury or workers' compensation claims against the City; respondent was never the chairman of the committee on finance; and from 1977 through 1985, respondent or associates employed by his firm appeared as counsel of record in 44 workers' compensation cases filed against other independent municipal corporations—such as the Chicago Park District, Chicago Transit Authority and Chicago Board of Education.

The facts relating to count II are as follows. In April 1981, respondent's firm was retained by a private party to act as his attorney in an action against a former roommate. The firm was given \$300 as a retainer. A suit was filed and, in August 1981, a \$5,000 default judgment was entered in favor of the client. In June 1982, another associate employed by the firm entered into an oral fee agreement with the client wherein the client agreed to pay the firm one-third of any money recovered on the judgment. No contingent fee agreement was executed. The associate obtained a wage-deduction order against the roommate's employer and, in December 1982, the employer sent respondent's firm a check in conformance with the wage-deduction order. That check was deposited into the firm's client trust fund account. During 1983, the employer sent other checks in varying amounts to the firm, some of which were deposited into the firm's operating account. Of the 10 checks sent by the employer, two were deposited into the firm's client trust fund account while eight were deposited into its general operating account. The firm's operating account was occasionally overdrawn during this time period.

843 Some time later, the client filed a complaint with the ARDC. When the respondent received the complaint he had his staff reconstruct the events. It was determined that the funds had been deposited into the *843 firm's operating account because the firm's office manager, upon receiving the funds, contacted the secretary of the associate assigned the case and was told the funds were "for costs." The office manager then deposited the funds in the operating account, not the escrow account.

Respondent had delegated bookkeeping functions and clerical supervision to the office manager, a nonlawyer. This is the only known occurrence of client funds being deposited into the firm's operating account, and respondent has repeatedly instructed his staff to guard against such future errors. Moreover, respondent had no personal or independent knowledge of the misapplication of the client's funds or the lack of a written contingent fee agreement. Additionally, respondent immediately made full restitution to the client.

COUNT I

Did respondent engage in unethical conduct by representing city employees in workers' compensation claims against the City while serving as an alderman?

The Administrator maintains that respondent violated Disciplinary Rule (DR) 1-102(a)(5) (engaging in conduct prejudicial to the administration of justice); DR 5-101(a) (accepting employment where the exercise of his professional judgment on behalf of a client may be affected by his own interests); DR 8-101(a)(1) (using his public position to obtain a special advantage in a legislative matter for a client); DR 8-101(a)(2) (using his public position to influence a tribunal to act in favor of his client); DR 8-101(a)(4) (representing a client in matters pending before the public body of which he is a member); and Canon 9 (failing to avoid even the appearance of impropriety) (107 Ill.2d Rules 1-102(a)(5); 5-101(a); 8-101(a)(1), (a)(2), (a)(4); Canon 9). The Administrator argues that when an attorney accepts public office he assumes not only the rights and privileges but also the duties and burdens of office, including the obligation of representing the governmental unit with "undivided fidelity." As a result, a lawyer-legislator's actions should be free from temptation and suspicion when accepting employment where interests may conflict. Representation should be eschewed if the public would be led to conclude that the attorney was using his public position for personal gain. The Administrator also contends that, by representing city employees against the City, respondent divided his loyalties between client and governmental unit, and engaged in a conflict of interest. Even if his intentions and motives were honest, respondent's conduct was improper because workers' compensation claims are subject to review by the city council. The Administrator stresses the fact that the city council approved the budget which provided for the salaries of the assistant corporation counsels who opposed the respondent in the workers' compensation cases. Furthermore, the city council also approved the appointment of the corporation counsel. These factors are alleged to have created a situation, intended or not, which was ready for the exercise of undue influence and gave rise to the appearance of impropriety.

Respondent asserts that he did nothing unethical. He argues that the claims in which he appeared against the City were before the Industrial Commission, not the body of which he was a member. The Industrial Commission is a State agency and its decisions are reviewable in the courts, not the city council. Neither the council nor the Bureau has the ability or authority to "review" a determination of the Industrial Commission, and city employees who receive workers' compensation benefits are entitled to them as a matter of State statute, not municipal ordinance. Moreover, any action taken by either the council or the Bureau to process the payment of those claims is purely ministerial.

In addressing the issue, both parties have relied heavily upon *In re Becker* (1959), 16 Ill.2d 488, 158 N.E.2d 753. There, respondent, a lawyer and Chicago alderman, was charged with, *inter alia*, representing conflicting interests and failing to represent the public with "undivided fidelity." He allegedly litigated three declaratory actions against the City, was co-counsel in an appeal from the City's zoning *844 board of appeals to the courts, and also personally appeared on behalf of a client before the zoning board of appeals on a zoning matter. At the time, that board was authorized to hear applications for zoning variances and to make recommendations to the city council. The zoning board of appeals approved the variance. Afterwards, the respondent talked with the alderman of the ward where the property was located about the variance. The council unanimously passed the variance request. The respondent also voted in favor of the proposal. He received a \$350 fee for his services.

In ruling on the allegations of misconduct, this court found "nothing unethical in a [lawyer-legislator] appearing in litigation wherein his governmental unit is a party." (*Becker*, 16 Ill.2d at 491, 158 N.E.2d 753.) It reasoned that a court would not be swayed by the "desires" of the legislative body or any of its members. Accordingly, there was nothing unethical about the respondent's appearance in the three declaratory actions against the City.

This court reached a similar conclusion with respect to a lawyer-legislator appearing before a subordinate board or tribunal created by the legislative body of which he is a member. (*Becker*, 16 Ill.2d at 494, 158 N.E.2d 753.) It reasoned that any decision made by those entities would be subject to administrative review in the courts. This type of representation was subject to an important caveat: "[the lawyer-legislator] should not appear as counsel where the matter is subject to review by the legislative body of which he is a member"; to do so would raise conflicting interests between his duty to his client and his obligation to his governmental unit. *Becker*, 16 Ill.2d at 494-95, 158 N.E.2d 753.

The respondent's appearance as co-counsel in the appeal from the zoning board of appeals to the court was deemed acceptable, because it fell "within the prohibitory exception." (*Becker*, 16 Ill.2d at 496, 158 N.E.2d 753.) His representation of the client before the zoning board of appeals, however, created a conflict of interest which brought the legal profession into disrepute (*Becker*, 16 Ill.2d at 496, 158 N.E.2d 753), and the respondent was censured for doing so.

A few observations are in order. Respondent was not a city employee; rather, he was a public official elected to serve in a legislative capacity, not a legal one. (See, *LaPinska*, e.g., 63 A.M.Jur.2d *Public Officers & Employoos* 666-81 (1984).) Consequently, this case is not one of "dual representation." (Cf. *In re LaPinska* (1978), 72 Ill.2d 461, 21 Ill.Dec. 373, 381 N.E.2d 700.) As an alderman, he could not represent the City in suits or other actions against it. (Ill.Rev.Stat.1985, ch. 24, pars. 21-11, 21-14.) Nevertheless, it is beyond dispute that respondent owed his undivided loyalty and a fiduciary duty to the City. See, e.g., *Chicago Park District v. Kenroy, Inc.* (1980), 78 Ill.2d 555, 562, 37 Ill.Dec. 291, 402 N.E.2d 181.

The Administrator takes exception to the Review Board's finding that "[r]espondent's conduct fell within a general rule which allows a lawyer-legislator to represent parties in certain litigation wherein the governmental unit is a party." He asserts, in light of the facts of this case, that conclusion was error. In the alternative, he argues that *Becker* has implicitly been overruled by the formal adoption of the Code, and under the Code respondent is *per se* prohibited from "representing clients in adversarial actions against the city." Respondent claims that his conduct falls "squarely within the holding of *Becker*."

To begin, the Administrator conceded in proceedings before the Hearing Board that the council does not review workers' compensation awards. Accordingly, respondent's conduct would be acceptable under the *Becker* standard. That, however, does not end the inquiry.

845 *Becker* was a pre-Code case, decided in 1959. At that time, this court had not adopted any comprehensive scheme for regulating attorney conduct. Relevant guidance was to be found in court opinions, and unofficially in the canons of ethics which had been promulgated by the various bar associations (e.g., American (ABA), Illinois ⁸⁴⁵ State (ISBA) and Chicago (CBA)). Those canons, however, were not binding obligations or enforceable in court as such, but they did provide a safe guide for attorneys confronted with an ethical dilemma; indeed, a lawyer could be disciplined for failing to follow them. (See, e.g., *In re Broverman* (1968), 40 Ill.2d 302, 306, 239 N.E.2d 816; *Hunter v. Troup* (1924), 315 Ill. 293, 302, 146 N.E. 321.) Nevertheless, they were of interest to the court and helpful in reaching determinations in particular cases. *Illinois State Bar Association v. United Mine Workers* (1966), 35 Ill.2d 112, 119, 219 N.E.2d 503, *vacated on other grounds* (1967), 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426.

In response to changing conditions, the canons of ethics were displaced in 1970 when the bar associations adopted model codes of professional responsibility. (See, e.g., Model Code of Professional Responsibility (ABA 1970); Illinois Code of Professional Responsibility (ISBA 1970); Code of Professional Ethics (CBA 1970).) These "new" models altered the landscape of legal ethics, as they differed in form and substance from the canons. (See generally R. Wise, *Legal Ethics* 3-16 (2d ed. 1970).) Yet, like their predecessors, they were merely advisory to the courts. This court, as always, remains the final authority in formulating, defining and enforcing standards governing the practice of law. See, e.g., *In re D'Angelo* (1988), 126 Ill.2d 45, 52, 127 Ill.Dec. 779, 533 N.E.2d 861; *In re Phelps* (1973), 55 Ill.2d 319, 322, 303 N.E.2d 13; *In re Brotherhood of R.R. Trainmen* (1958), 13 Ill.2d 391, 392, 150 N.E.2d 163.

In 1980, this court embarked on a new course when it formally adopted the Code. The Code established an organized scheme for regulating professional conduct. (*People ex rel. Brazen v. Finley* (1988), 119 Ill.2d 485, 492-94, 116 Ill.Dec. 683, 519 N.E.2d 898.) The Code also enunciated mandatory, minimum rules to which attorneys are expected to conform. (*In re Cheronis* (1986), 114 Ill.2d 527, 535, 104 Ill.Dec. 225, 502 N.E.2d 722 ("It is a paramount obligation of each member of the bar to study the [Code] and abide by its terms and principles"). See also 79 Ill.2d R. 1-101 *et seq.*, Committee Commentary.) The standards articulated by the Code serve "as a beacon to [attorneys] in navigating an ethical course through the sometimes murky waters of professional conduct" (*Reardon v. Marlayne, Inc.* (1980), 83 N.J. 460, 469, 416 A.2d 852, 857), and ignorance of the Code is no excuse for attorney misconduct (*Cheronis*, 114 Ill.2d at 535, 104 Ill.Dec. 225, 502 N.E.2d 722). Respondent, as a lawyer-legislator, is, nonetheless, "subject to the ethical standards of his profession, even though there is no attorney-client relationship involved in the public office." *Higgins v. Advisory Committee on Professional Ethics* (1977), 73 N.J. 123, 125, 373 A.2d 372, 373.

As an exercise of this court's inherent power over the bar and as rules of court, the Code operates with the force of law. Accordingly, the Code, as a binding body of disciplinary rules, has, *sub silentio*, overruled prior judicial decisions which conflict with its mandates and proscriptions.

With this as a background, we conclude that respondent engaged in a conflict of interest when he represented city employees in their workers' compensation cases against the City, while serving as an alderman. (107 Ill.2d R. 5-101(a).) Respondent, as an alderman, owed his undivided fidelity and a fiduciary duty to the City. He also owed his undivided fidelity and a fiduciary duty to his clients. By representing clients against the City, the competing fiduciary duties collided, and

respondent became embroiled in a conflict of "diverging interests" and divided loyalties, which even full disclosure could not avoid. In re LaPinska (1978), 72 Ill.2d 461, 469-72, 21 Ill.Dec. 373, 381 N.E.2d 700.

846 In reaching this result, we find instructive several ethics opinions of the ISBA. (See In re Samuels (1989), 126 Ill.2d 509, 524, 129 Ill.Dec. 43, 535 N.E.2d 808 ("the [ISBA] Code of Professional Responsibility constituted a safe guide for professional conduct".) After adopting its version of the Code in 1970, the ISBA found that it would be "professionally improper for a *846 lawyer, who is a member of the County Board, to represent a party suing an agency of the County." (ISBA Op. 544 (July 2, 1976). See also Becker, 16 Ill.2d at 510-11, 158 N.E.2d 753 (Klingbiel, J., concurring); ISBA Op. 175 (February 6, 1959); ISBA Op. 298 (July 1, 1968); ISBA Revised Canon 49 (approved December 10, 1965) ("A lawyer who holds public office * * * shall not represent clients before a body or office in any matter in which * * * the [governmental unit] is an interested party".) Similarly, after the formal adoption of the Code by this court, the ISBA opined that "[i]t is not *per se* improper" for a lawyer-county board member to practice law, even to represent county employees, but such representation should be avoided where it would conflict with his duties as a legislator. (ISBA Op. 699 (April 20, 1981).) It was also determined that an attorney could serve on a county board if he did not appear before county officials or agencies who were "required to exercise discretionary functions." (ISBA Op. 737 (August 25, 1981).) Moreover, an attorney-county board member could be employed as a part-time special assistant Attorney General in condemnation cases, as long as the county was not a party to the proceedings. ISBA Op. 84-3 (October 29, 1984). See also ISBA Op. 84-11 (January 25, 1985) (citing to instances where a lawyer-public official would be involved in an "actual conflict" when representing private clients and thus precluded from undertaking such representation).

As a practical matter, a lawyer-legislator should anticipate possible conflicts of interest when accepting employment and guard against them. (See, e.g., Eisenberg, *Conflicts of Interest Situations and Remedies*, 13 Rutgers L.Rev. 666 (1959).) Here, respondent argues that "the rule relative to conflicts of interest in 1957 for aldermen-legislators [*sic*] was the same as it is today." This is an inaccurate depiction of the Code. Among other reasons, DR 5-105(a) adopted a new test to determine whether a conflict exists: the "independent professional judgment" test. (79 Ill.2d R. 5-105(a). See also O. Maru, *Annotated Code of Professional Responsibility 225-41* (ABA Foundation 1979).) By not taking that "test" respondent failed to uncover the ethical problems confronting those in public office. (See, e.g., Braverman, *Ethics Problems for Those Going In or Out of Some Public Offices*, 71 Ill.B.J. 98 (1982) (describing ISBA opinions pertaining to professional ethics and public officials).) Instead, respondent, at his peril, chose to ignore the Code and operate under a false premise. Respondent occupied a position of public trust. He violated that trust by representing clients against the City, to whom he also owed his undivided loyalty. The public trust cannot be compromised in this or any other fashion: if a lawyer-legislator undertakes the private representation of a client against his governmental unit either the client or the public must necessarily suffer; neither should. Rather, attorneys should act to instill public confidence in the integrity of the legal profession and our governmental institutions. "Public exposure of attorneys holding public positions accentuates this need. The public has become alert and sensitive to the impropriety of conflicts of interests." In re Opinion No. 415 (1979), 81 N.J. 318, 324, 407 A.2d 1197, 1200.

847 Therefore, we hold that a lawyer-legislator may engage in the private practice of law including representing governmental employees, unless the governmental unit of which he is a member is an adverse party—regardless of the forum. (See, e.g., Gomez v. Superior Court (1986), 149 Ariz. 223, 226, 717 P.2d 902, 905 (where officeholder removes himself and his firm from cases against the city "the danger of actual conflict appears minimal"); Georgia State Board of Pharmacy v. Lovvorn (1985), 255 Ga. 259, 336 S.E.2d 238 (Georgia constitution prevents lawyer-legislator from appearing before a State body on behalf of a fee-paying client); Georgia Department of Human Resources v. Sistrunk (1982), 249 Ga. 543, 291 S.E.2d 524; Or. Const., art. XV, § 7 (prohibiting lawyer-legislator from prosecuting any claim against the State); N.J.Stat. Ann. § 52:13D-16 (West 1986) (prohibiting appearance of lawyer-legislator before State agencies); In re Ethics Opinion *847 No. 74-28 (1975), 111 Ariz. 519, 533 P.2d 1154; Note, *Legislators as Private Attorneys*, 30 UCLA L.Rev. 1052, 1075 n. 128 (1983).) If another governmental unit is an adverse party, the lawyer-legislator must carefully examine the circumstances to determine whether a conflict of interests exists; if so, he should decline employment in that case.

It has been said that when dealing with ethical principles one should not "paint with broad strokes." (See Board of Education of the City of New York v. Nyquist (2d Cir.1979), 590 F.2d 1241, 1246.) Yet, "[i]f we are to maintain public confidence in our system of government and the legal profession, attorneys who serve as public officials must avoid not only direct conflicts of interests, but also any situation which might appear to involve a conflict of interest." (Higgins v. Advisory Committee on Professional Ethics, 73 N.J. at 125, 373 A.2d at 373, citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 49 (1931).) That reasoning remains compelling.

Regarding the other alleged Code violations, we find that DR 1-102(a)(5) was not violated. Although respondent's presence in the workers' compensation cases against the City might have had a "chilling effect" on opposing counsel's exercise of discretion as to whether or not to settle a case, a bare assertion of prejudice is insufficient to sustain the charge. There must be clear and convincing evidence that the administration of justice was, indeed, prejudiced. Here, that quantum of proof is lacking.

After reviewing the record and in light of the Administrator's admission in arguments before the Hearing Board, we find that Disciplinary Rules 8-101(a)(1), (a)(2), and (a)(4) were not violated. The workers' compensation cases did not involve legislative matters; there is no evidence that respondent attempted to influence the Industrial Commission, nor does the Administrator argue that an assistant corporation counsel is a "tribunal"; and respondent did not represent a client in a "proposal" pending before the council.

Respondent was also initially charged with violating Canon 9 (107 Ill.2d Canon 9), but he was not charged with a substantive violation of one of the disciplinary rules under that Canon. Consequently, there could be no violation of Canon 9. *In re Powell* (1988), 126 Ill.2d 15, 29-30, 127 Ill.Dec. 749, 533 N.E.2d 831.

As we have held that respondent engaged in a conflict of interest, we must determine the appropriate sanction. Although we strive for consistency in the sanctions ultimately imposed, we recognize that each case of attorney misconduct is unique and requires an independent evaluation of its relevant circumstances. (*In re Cheronis* (1986), 114 Ill.2d 527, 535, 104 Ill.Dec. 225, 502 N.E.2d 722.) In determining the appropriate sanction, we will consider the relevant factors in aggravation and mitigation. *In re Weinstein* (1989), 131 Ill.2d 261, 270-71, 137 Ill.Dec. 72, 545 N.E.2d 725.

In aggravation, the Administrator emphasizes that respondent's activities constituted a serious breach of the fiduciary duties he owed to both the citizens of Chicago and his clients.

In mitigation, we recognize that respondent has an unblemished record as attorney since 1963 and has been active in community and social organizations since that time. Respondent also has performed *pro bono* services throughout his professional career.

More significantly, although his conduct was violative of the Code, respondent acted in good faith by adhering to the dictates of *Becker*. As evidence of his good faith, respondent refrained from voting on workers' compensation or personal injury claims as an alderman.

Having considered these factors, we deem censure to be the appropriate sanction.

COUNT II

848 The next issue presented for review is whether respondent is subject to discipline for commingling and converting a client's *848 funds and for failing to enter into a written contingent fee agreement with that client.

The Administrator asserts that, "as a matter of law," respondent's unintentional commingling and conversion of the client's funds constitutes misconduct and warrants discipline. The Administrator further asserts that respondent failed to enter into a written contingent fee agreement with that client in violation of DR 2-106(c) (107 Ill.2d R. 2-106(c)). The Administrator contends that respondent should not be shielded from discipline simply because he delegated work to others in his firm. Respondent admits that his firm unintentionally commingled and converted the client's funds. However, respondent emphasizes that he had no personal knowledge of the office manager's error. In addition, respondent stresses that his firm made full and immediate restitution to the client once the error was brought to his attention and that he took steps to ensure that this type of error would not reoccur in the future. Respondent also argues that he should not be vicariously subject to discipline for his associate's failure to enter into a written contingent fee agreement.

It is well settled that an attorney must not commingle or convert a client's funds. (*In re Kitsos* (1989), 127 Ill.2d 1, 10, 129 Ill.Dec. 27, 535 N.E.2d 792.) In fact, a single act of commingling and conversion may justify disbarment. (*In re Pass* (1985), 105 Ill.2d 366, 370, 86 Ill.Dec. 311, 475 N.E.2d 525.) Even if the act was unintentional or technical, an attorney who commingles or converts a client's funds is subject to discipline. (*In re Ushijima* (1987), 119 Ill.2d 51, 57-59, 115 Ill.Dec. 548, 518 N.E.2d 73.) The motive or intent of the attorney is not relevant in determining whether the attorney violated the Code of

Professional Responsibility, but may properly be considered as a mitigating factor in determining the degree of discipline. *In re Clayter* (1980), 78 Ill.2d 276, 283, 35 Ill. Dec. 790, 399 N.E.2d 1318.

In the case at bar, the office manager of respondent's firm deposited the funds in the firm's operating account *after she was told by the secretary of the associate assigned to the case* that the funds were "for costs." While there is authority for the proposition that an attorney, who is the sole shareholder of a professional partnership, is personally responsible for the acts of a nonprofessional in the administration of the corporation (see, e.g., 107 Ill.2d R. 5-107(d), Committee Commentary), respondent's connection to the office manager's error was, at most, tenuous.

The associate, not respondent, was fully responsible for the handling of the case. The associate's secretary, not respondent's secretary, misinformed the office manager that the funds were "for costs." In fact, the Administrator agrees that respondent had no knowledge that the funds were placed in the firm's operating account. Furthermore, as respondent was not at all involved in the handling of the case, it does not appear that respondent could have learned of the misplaced funds. Moreover, as the amount of the misplaced funds totalled only \$594.82, it was reasonable for the office manager to accept the secretary's statement that the funds were "for costs." Finally, the fact that respondent made full restitution to the client once the error was brought to his attention provides further support that respondent did not have knowledge of the misplaced funds and that he dealt with the client in good faith.

An attorney cannot avoid his professional obligations to a client by the simple device of delegating work to others. (*In re Weinberg* (1988), 119 Ill.2d 309, 116 Ill. Dec. 216, 518 N.E.2d 1037.) However, an attorney who delegates work to others can only be subject to discipline for conduct he authorized, had knowledge of, or had reason to know. (*In re Weston* (1982), 92 Ill.2d 431, 437, 65 Ill. Dec. 925, 442 N.E.2d 236; *In re Ashbach* (1958), 13 Ill.2d 411, 415, 150 N.E.2d 119.) Here, it is agreed upon by all parties that respondent did not possess any knowledge of the misplaced funds. While the mismanagement of client funds remains a serious violation of the Code of Professional Responsibility (*In re Holz* (1988), 125 Ill.2d 546, 555-59, 127 Ill. Dec. 736, 533 N.E.2d 818), respondent, under *849 the facts of this case, is not guilty of professional misconduct.

Likewise, respondent is not guilty of professional misconduct for his associate's failure to enter into a written contingent fee agreement with the client. Although DR 2-106(c) admits to no exception to the rule that contingent fee agreements be in writing (see *Warner v. Basten* (1969), 118 Ill.App.2d 419, 431, 255 N.E.2d 72), respondent, under the facts of this case, cannot be vicariously subject to discipline for his associate's conduct. Respondent neither knew nor had reason to know of his associate's failure to enter into a written agreement. Furthermore, it is impractical and unreasonable to expect respondent to review the associate's files to ensure that he entered into a written contingent fee agreement when there was no reason for respondent to know that the associate would fail to do so.

For the foregoing reasons, the charges contained in count II are dismissed, and the respondent is censured on count I.

Respondent censured.

WARD, CLARK, and STAMOS, JJ., took no part in the consideration or decision of this case.

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11-025

August 13, 1990

C O N F I D E N T I A L

Chicago, Illinois

ADVISORY OPINION

Re: Representation of Other Persons
Case No. 90035.A

Dear [REDACTED]

On June 28, the Board received your request for an advisory opinion regarding the propriety of City officials representing City of Chicago employees in Worker's Compensation claims. You requested: "In light of the recent Illinois Supreme Court decision in the case of Alderman Edward R. Vrdolyak, could you kindly advise me of the propriety of the following persons undertaking to represent City of Chicago employees with Worker's Compensation Claims [sic]: (A) Member of City Council; (B) Member of advisory boards or commissions of the City of Chicago; and (C) Member of any decision making board or commission of the City of Chicago."

First, we wish to clarify that the Board of Ethics may render an opinion as to the applicability of the Ethics Ordinance, Chapter 26.2 of the Municipal Code of Chicago, to City employees, elected officials and appointed officials. The Board does not have the ability to rule on the application of the Disciplinary Rules as did the Illinois Supreme Court in In re Vrdolyak, Docket No. 68665 (1990).

Second, please note that while your request distinguishes between City boards and commissions on the basis of whether or not they are "advisory" or "decision-making," the Ethics Ordinance does not make a distinction between advisory and decision-making boards and commissions. In this regard, the Board considered the issue concerning who may represent City employees in Worker's Compensation cases in relation to (1) members of City Council, and (2) members of any City board or



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commission (most of whom are appointed¹), whether or not the board or commission has authority to make binding decisions.

APPLICATION OF THE ETHICS ORDINANCE:

I. Representation of Other Persons

Section 26.2-9 sets forth the standards with which aldermen and appointed officials must comply with regard to the representation of others.

Subsection (a) is inapplicable to the issue at hand because it limits "the representation of any person other than the City in any formal or informal proceeding or transaction before any City agency . . ." The Industrial Commission, the administrative agency that hears Worker's Compensation claims, is not a City agency, but a State agency.

Subsection (b) states:

No elected official or employee may have 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 that of the City.

As the Board has interpreted it, the term "representation" applies to any activity in which a person acts as a spokesperson for some party or seeks to communicate and promote the interests of one party to another. Since the Industrial Commission is an administrative agency of the State which conducts hearings, evaluates evidence, and renders opinions, hearings before the Commission are quasi-judicial proceedings. Moreover, when one represents a City employee in an Industrial Commission hearing, the adversary is necessarily the employer, the City.

Section 26.2-9(b) was intended to permit elected officials and employees to represent persons in cases against the City as long as they had no economic interest in the representation, such as compensation in any manner by the client. However, the Illinois Supreme Court's decision in Vrdolyak prohibits an alderman who is a lawyer from representing a City employee in a Worker's Compensation case.

¹ There may be some members of boards or commissions who may be employees as defined by the Ethics Ordinance. To the extent this may be the case, a different analysis may be applied.

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The Board is required to follow the law as set forth by the Illinois Supreme Court, and the Ethics Ordinance may be applied only to the extent it does not conflict with that Court's decisions. Therefore, in light of Vrdolyak, City Council members who are lawyers, as lawyer-legislators, may not represent City employees in Worker's Compensation actions against the City.

Subsection (c) applies to appointed officials:

No appointed official may represent any person in the circumstances described in subsection ... (b) unless the matter is wholly unrelated to the official's City duties and responsibilities.

In the case of appointed officials - such as those appointed to City boards or commissions - this provision of the Ordinance permits representation of City employees in Worker's Compensation cases as long as matters involved in that representation are wholly unrelated to that official's City duties and responsibilities. Therefore, under the Ethics Ordinance, the determination that an appointed official may represent a City employee before the Industrial Commission must be made on a case-by-case basis focusing on whether or not the matter is in fact wholly unrelated to the official's City responsibilities.

II. Fiduciary Duty

Section 26.2-2 of the Ethics Ordinance imposes a fiduciary duty on all officials and employees. It states:

Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.

This section establishes an obligation for aldermen and members of boards and commissions to give, within lawful limits, undivided loyalty to the City of Chicago in the discharge of their public duties. In these public duties, they must be able to exercise professional judgments free from outside influence or conflicting duties to another entity. This duty is based upon the position of the person as an alderman or commission or board member, and is distinct from the fiduciary duty owed by attorneys to their clients.

Although under the Ethics Ordinance both aldermen and members of boards and commissions are "officials," the scope of their respective public responsibilities and therefore their duties to the City are different. City Council members legislate on all

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areas of City government. Therefore, they owe a very broad fiduciary duty to the City. In addition, because City Council members are elected officials, chosen by the public, they are accountable to the public's trust in a way much more expansive than are members of boards and commissions. When a City Council member, who is a lawyer, represents a client in a Worker's Compensation case against the City, he or she faces an irresolvable conflict between competing fiduciary duties. Consequently, Section 26.2-2 prohibits aldermen who are lawyers from representing City employees in Worker's Compensation actions.

In contrast to the responsibilities of aldermen, the public responsibilities of members of boards and commissions are limited to a narrow range of interests and purposes which are defined by the functions of their boards and commissions. The fiduciary duty owed to the City by these members is limited to their City responsibilities. Thus, Section 26.2-2 could permit appointed officials to represent City employees in Worker's Compensation matters as long their representation would not affect or impair the judgment they must exercise as City officials. Determinations in these situations would have to be made on a case-by-case basis.

III. Conclusion

City Council Members:

(1) In light of the Supreme Court's holding in Vrdolyak and Section 26.2-9(b) of the Ethics Ordinance, City Council members who are lawyers are prohibited from representing clients in Worker's Compensation cases against the City.

(2) Section 26.2-2 of the Ethics Ordinance prohibits aldermen-lawyers from representing clients in Worker's Compensation cases against the City. Such representation would involve them in an irresolvable conflict between competing fiduciary duties to the City and to their clients.

Members of City Boards and Commissions:

(3) Under Section 26.2-9(c) of the Ethics Ordinance, members of boards and commissions who are lawyers are not prohibited from representing clients in Worker's Compensation cases against the City as long as the representation is wholly unrelated to their City duties and responsibilities. Determinations must be made on a case-by-case basis.

(4) Section 26.2-2 of the Ethics Ordinance could permit members

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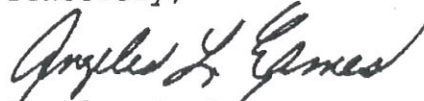
of boards and commissions who are lawyers to represent clients in Worker's Compensation cases as long as their representation would not affect or impair the judgment they must exercise as City officials. Determinations must be made on a case-by-case basis.

RECONSIDERATION: This advisory opinion is based upon the facts which are outlined in this letter. If there are additional material facts or circumstances that were not available to the Board when it considered your case, you may request reconsideration of the opinion. A request for reconsideration must (1) be submitted in writing, (2) explain the material facts or circumstances which are the basis of the request, and (3) be received by the Board of Ethics within fifteen days of the date of this letter.

RELIANCE: This advisory 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 which is indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

If you have any questions, please contact the staff of the Board of Ethics at 744-9660.

Sincerely,


Angeles L. Eames
Vice Chair

jjg/tl:90035.L

ADVISORY OPINION
Case No. 03027.A, Fiduciary Duty

To: Alderman [John Smith]
From: Board of Ethics
Date: September 10, 2003

You are the Alderman of the City's xxst Ward, and an attorney licensed to practice law in Illinois. On May 2, 2003, you called the Board and asked, and then on June 13, 2003, formally requested an advisory opinion addressing, whether the City's Governmental Ethics Ordinance restricts you from representing individuals in litigation arising out of allegations of misconduct by officers employed by the Chicago Police Department. After carefully considering the facts you have presented under the relevant provisions of the Ordinance, we have determined that the fiduciary duty section of the Ordinance prohibits you from representing, or having an economic interest in the representation of, clients in proceedings against Chicago police personnel—proceedings in which the City is obligated, by law and contract, to defend these personnel at its expense, and, from its treasury, indemnify them from judgments awarded by the court or pay any settlement amounts, and to approve any settlement agreements. Our analysis follows.

Facts: You first contacted the Board on May 2, 2003¹, and then again, via a letter dated June 10, faxed to our office June 13. You explained that your law firm, [Doe & Smith], is a partnership of two professional corporations, one of which, [John Smith], P.C., is 100% owned by you. [Doe & Smith], you said, currently is counsel of record in five lawsuits pending in United States District Court, in which it represents individuals suing employees of the Chicago Police Department. These five cases, you said, [James Doe], P.C., the other partner in [Doe & Smith], although [Doe & Smith] is the attorney of record in these matters (i.e., neither [John Smith], P.C. nor [Doe & Smith] has filed a withdrawal of appearance, nor has [James Doe], P.C., filed a substitution of appearance for [Doe & Smith]). Each suit, you said, alleges that employees or officers of the Chicago Police Department used excessive force or committed other misconduct (including violations of the plaintiffs' civil rights, and seeks money damages from them pursuant to

1. You were advised orally that date, and then by letter on June 2, 2003, that, among other things, under City law, it is clear that you cannot represent clients in cases where the City is a party and your client's interests are adverse to the City's, but that it is not clear whether your continued representation of clients in court cases where the City "is an interested party but not a named party" would be prohibited, and that you may wish to request an advisory opinion from the Board on this issue. Otherwise, it was recommended, that, in these cases, you send a letter of recusal to the firm, present billing statements for your work in each case to date, set up procedures in your firm to screen yourself from these matters, and seek advice about how the Illinois Rules of Professional Conduct apply to you and your firm.

42 U.S.C. 1983.² You said that the City of Chicago is neither a named defendant nor third-party defendant in these lawsuits. You have requested a Board advisory opinion addressing whether this situation “present[s] an ethical violation pursuant to the City’s ethics ordinances/rules.”

Pursuant to § 2-60-020 of the City’s Municipal Code³, Article 22 of the contract between the City and the Fraternal Order of Police Chicago Lodge 7⁴, and two Illinois statutes, the Local Governmental and Governmental Employees Tort Immunity Act and Illinois Municipal Code⁵, the City is obligated to appear for, defend, hold harmless from, and pay any judgments or damages assessed or otherwise levied against Police department personnel, so long as the City has properly determined that these actions were committed within the scope of City employment. Thus, you said, the City does not, and cannot, as a matter of public policy, pay any punitive damages assessed. Any police officer sued for alleged violations of §1983 is entitled, by the terms of the FOP Agreement, to have the City provide legal representation, at the City’s cost, assuming that the City has properly determined that the conduct alleged in the lawsuit occurred in the scope of employment. Generally, you said, most defendants in these matters do request that attorneys from the Individual Litigation Defense Division of the Corporation Counsel’s Office represent them. In fact, the individual police defendants in each of the five lawsuits in which [Doe & Smith] is counsel of record are represented by attorneys from the City’s Law Department. Were the City itself to be named as a defendant, it too would be represented by attorneys from a different division of the Corporation Counsel’s office.

When a claim or lawsuit against individual police personnel is settled, you explained, the City, by operation of the FOP Agreement, pays the settlement award and, through the Corporation Counsel, enters into a Settlement and Release Agreement that is also signed by the plaintiff(s), the individual defendant(s) and their attorneys. These agreements provide, among other things, that the City shall pay the settlement amounts, that the plaintiffs agree to look only to the City for payment of these amounts, not to the individual defendants (thereby removing those defendants from any further liability for damages or settlements arising from the claim or suit) and that the plaintiffs release the defendants and the City and the City’s future, former or current officers, agents and

2. This section states, in pertinent part: “Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...”

3. This section, entitled “Corporation Counsel–Appointment–Powers and duties,” states in pertinent part: “The corporation counsel shall perform the following duties ... (c) appear for and defend any member, officer or employee of the board of health, police department or fire department who is sued personally for damages claimed in consequence of any act or omission or neglect of his official duties or in consequence of any act under color of authority or in consequence of any alleged negligence while engaged in the performance of such duties.”

4. This Article, entitled “Indemnification,” states, in pertinent part: “Section 22.1–Employer Responsibility. The Employer [i.e. the City of Chicago] shall be responsible for, hold officers harmless from and pay for damages or monies which may be adjudged, assessed or otherwise levied against any officer covered by this Agreement ...Section 22.2–Legal Representation. Officers shall have legal representation by the Employer in any civil cause of action brought against an officer resulting from or arising out of the performance of duties...Section 22.4–Applicability. The Employer will provide the protections set forth in Sections 22.1 and 22.2 above so long as the officer is acting within the scope of his/her employment and where the officer cooperates ... with the City of Chicago in defense of the action or actions or claims.”

5. 745 ILCS 9-102 and 65 ILCS 5/1-4-5, respectively.

employees from any claims they or their successors have or may have arising from the incident(s) on which the suits were based. The agreements also provide that the lawsuits shall be dismissed upon entry of an order by the Court that it has reviewed and approved the agreements. You said that, in such cases, the City does not typically become a party to the lawsuits, though it is a signatory to the settlement agreements that dismiss these lawsuits (upon Court approval).

For all settlements of \$100,000 or more in these cases, you explained, the Corporation Counsel must receive approval from both the City Council's Finance Committee and the full City Council to enter into agreements settling these claims or suits and pay the settlement awards. In these instances, the City Council passes an Ordinance at the request of the Law Department authorizing the Corporation Counsel to settle and pay these awards on behalf of the City. Plaintiffs' counsel is not required to appear before the Council or the Finance Committee, or to sign any documents to be submitted to the either body. On the other hand, agreements to settle these cases for amounts under \$100,000 can be and are made by the Corporation Counsel's Office without explicit approval from, or Ordinance adopted by, the City Council. Likewise, satisfaction of any judgment assessed by the Court (or affirmed on appeal) against the City in these cases, regardless of amount, requires no City Council action.

You said that you are compensated for your efforts in these suits through the salary you receive from [John Smith], P.C., which itself receives compensation from [Doe & Smith]. [Doe & Smith] receives its fees in these cases by contingency fee agreement with its clients; those fees represent a percentage of any judgments or settlement awards.

Law and Analysis: Although several Ordinance provisions may be relevant to your situation, namely § 2-156-020, entitled "Fiduciary Duty"; § 2-156-030, entitled "Improper Influence"; § 2-156-090(b), entitled "Representation of Other Persons"; §2-156-080(b), entitled "Conflict of Interests; Appearance of Impropriety"; and § 2-156-110, entitled "Interest in City Business," we find it necessary to address only the first of these, "Fiduciary Duty." That section provides:

Officials and employees shall at all times in the performance of their public duties owe a fiduciary duty to the City.

As this Board has long recognized, the fiduciary duty provision obligates City employees and officials, including aldermen, to discharge their public duties at all times in the City's best interests. Illinois Courts and federal courts in Illinois have also recognized that aldermen owe a fiduciary duty to the City. See, e.g. *Chicago Park District v. Kenroy, Inc.*, 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 previously had occasion to discuss the particular nature of the fiduciary duty that aldermen owe the City of Chicago under the Ordinance. In Case No. 90035.A, we were asked to advise on "the propriety of" members of City Council and appointed members of City boards and commissions "undertaking to represent City of Chicago employees with Worker's Compensation Claims [sic]" in light of the Illinois Supreme Court's opinion in *In Re Vrdolyak*. As discussed below, the Illinois Supreme Court held in *Vrdolyak* that a Chicago alderman "engaged in a conflict of interest when he represented city employees in their workers' compensation cases against the City, while serving as an alderman" under then-applicable Rule 5-101(a) of the Illinois Code of

Professional Responsibility (analogous to the current Illinois Rule of Professional Conduct 1.7(b)).⁶ We analyzed the question (brought to us after the Illinois Supreme Court rendered its decision) under two Ordinance provisions, namely §-090(b) (Representation of Other Persons) and § -020 (Fiduciary Duty). We recognized, on pp. 3-4 of our opinion, that, in contrast to appointed City officials, aldermen owe the City a broad fiduciary responsibility, and that this section:

establishes an obligation for aldermen to give, within lawful limits, undivided loyalty to the City of Chicago in the discharge of their public duties. In these public duties, they must be able to exercise professional judgments free from outside influence or conflicting duties to another entity. This duty is based upon the position of the person as an alderman ... and is distinct from the fiduciary duty owed by attorneys to their clients...City Council members legislate on all areas of City government. Therefore, they owe a very broad fiduciary duty to the City. In addition, because City Council members are elected officials, chosen by the public, they are accountable to the public's trust in a way much more expansive than are members of boards and commissions.

Thus, we said, a City Council member who is a lawyer "faces an irresolvable conflict between competing fiduciary duties" when he or she represents a client in a Worker's Compensation case against the City. Id. at 4. We went on to determine that the fiduciary duty provision prohibits aldermen who are lawyers from representing clients in Worker's Compensation actions against the City. Id. This prohibition applies regardless whether the alderman has an economic interest in the representation. By contrast, we held, the public responsibilities of City Board and Commission members are limited to a "narrow range of interests and purposes which are defined by the functions of their boards and commissions." Id. Thus, the fiduciary duty appointed officials owe to the City is "limited to their City responsibilities," and the Ordinance permits them to represent (or have an economic interest in the representation of), City employees in Worker's Compensation matters "so long as their representation would not affect or impair the judgment they must exercise as City officials." Determinations in such situations, we said, must be made on a case-by-case basis. Id.

Aldermen, then, owe the City a broad fiduciary duty, by virtue of the fact that they legislate and are asked to use their best judgment as to a variety of matters much greater than that seen by appointed officials. The Ordinance presumes that any given representation that aldermen (unlike appointed City officials) may undertake (regardless whether that representation is paid or pro bono) of clients in matters in which the City is an adverse party would affect or impair their judgment as City officials.

As we recognized in Case No. 90035.A, an essential feature of the fiduciary duty employees and officials owe to the City is that it is indivisible—aldermen (like any other City officials or employees) owe 100% of their allegiance to the City and its taxpayers. However, as the Illinois Supreme Court (in Vrdolyak) and this Board have also acknowledged, this does not preclude aldermen from engaging in the outside practice of law. It does, though, per Case No. 90035.A, require aldermen to avoid taking on legal representations that would compromise their ability to exercise their

6. Rule 1.7(b) states: "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after disclosure."

aldermanic responsibilities free from any outside influences or duties (such as those owed to law clients). The question here is whether an alderman who represents clients in litigation against City agents—litigation that arises from acts committed by those agents in the course of their City employment, where the City must pay any amounts agreed to in settlement or awarded by judgment, and approve any settlement—thereby compromises his or her ability to devote his or her undivided loyalty to the City and its best interests. We believe it does.

An alderman's fiduciary duty, *qua attorney*, is, above all, in these (and all) cases, to prosecute them against the defendants (in these cases, City agents) as zealously as possible in his or her clients' interests. This includes deciding whether to sue at all, and if so, then deciding whether to name the City or and/or its agents as defendants, and if so, then deciding how to maximize the clients' recovery of money damages (in these cases, of course, those damages will be paid from the City treasury). This latter task the alderman *qua attorney* accomplishes by using his or her best legal judgment to decide whether to try the case against, or aggressively negotiate a settlement with, City attorneys, who are representing other City employees or officials for actions committed in the scope of City employment. All the while, the alderman *qua attorney* takes on the role and obligation of advocating for his or her client, as the legal opponent of the City. Accordingly, the alderman, *qua attorney*, knowing that the City is the "deep pocket" in the case, is obligated (to carry that metaphor through) to dig as deeply and directly into that pocket as his or her legal ability (and justice) allows. While it is true that an attorney who is not an alderman would be obligated to do the same for a client, such a private attorney would owe a fiduciary duty only to the client—he or she would not simultaneously owe a fiduciary duty to the City. But an alderman's fiduciary duty, *qua alderman*, is (among other things) to consider and approve agreements, budget allocations, Ordinances and policies that are in the City's best interests, including, in general, promoting policies that minimize the City's liability in §1983 cases and the amounts expended by the City and its taxpayers to settle suits or claims or satisfy awards in which the City is liable financially for its agents' actions. We believe that these simultaneous fiduciary duties inherently pull an alderman-attorney in opposite directions. They are, in the language of Case No. 90035.A, "irresolvable."

In *Vrdolyak*, the Illinois Supreme Court held that a Chicago alderman had a conflict of interest and violated his fiduciary duty to the City by representing City employees in their workers' compensation cases against the City, while serving as an alderman. In the Court's words, he

[A]s an alderman, owed his undivided fidelity and a fiduciary duty to the City. He also owed his undivided fidelity and a fiduciary duty to his clients. By representing clients against the City, the competing fiduciary duties collided, and respondent became embroiled in a conflict of 'diverging interests' and divided loyalties, which even full disclosure could not avoid.

560 N.E.2d at 845. In reaching this result, the Illinois Supreme Court relied partly on former ISBA Revised Canon 49 (approved in 1965; now replaced by the Supreme Court's Rules of Professional Conduct, approved August 1, 1990) ("A lawyer who holds public office ... shall not represent clients before a body or office in any matter in which ... the governmental unit is an interested party") and on several ISBA ethics opinions involving lawyers elected to public office. These opinions, however (aside from the facts that: 1) they were issued before the Rules of Professional Conduct took effect, and thus we do not know whether the advice would be the same if issued today; and 2) that the government entity for which the lawyers-officials served were directly involved in litigation),

focus on the fiduciary duty that an attorney who is a public official owes to his or her clients.⁷ Our focus, i.e. the focus of the City's Governmental Ethics Ordinance, is, rather, on the duty that a public official (to wit: an alderman), who may be an attorney, owes to the City and its taxpayers. The Illinois Supreme Court also spoke to that issue in its Vrdolyak decision. It said that, by virtue of being an alderman, the respondent:

[O]ccupied a position of public trust. He violated that trust by representing clients against the City, to whom he also owed his undivided loyalty. The public trust cannot be compromised in this or any other fashion: if a lawyer-legislator undertakes the private representation of a client against his governmental unit either the client or the public must necessarily suffer; neither should.

560 N.E.2d at 846. The salient difference between the facts in Vrdolyak (and in Board Case No. 90035.A) and the facts here are that in workers' compensation cases, the City is the named defendant; in these cases it is not. But we find that difference to be irrelevant to the issue of fiduciary duty. (Cf. U.S. v. Bloom, 149 F.3d 649 (7th Cir. 1998), where the Seventh Circuit noted that, per Vrdolyak, an alderman violated his fiduciary duty to the City simply by advising a client on how to avoid a tax that the City would have collected, even in the absence of any litigation involving the City or its agents, although, it concluded, this violation did not itself amount to an allegation that the alderman committed federal mail fraud.) Here, the issue is whether the fiduciary duty that an alderman, *qua alderman*, owes in the performance of his public duties under the City's Governmental Ethics Ordinance, prohibits the alderman, *qua attorney*, from representing clients in judicial proceedings brought against Chicago police personnel where the City, although not a named defendant, is obligated, by law and contract, to provide the defense for these police personnel at its own expense (and is in fact doing so), and to indemnify these personnel from any judgments awarded, or to approve and pay any settlement amounts agreed upon. That is, the City's treasury is at risk in these matters, and in them the plaintiff's attorney is duty-bound to obtain the most favorable settlement from the City's treasury as his or her legal ability (and justice) allows. If that attorney is, at the same time, an alderman of the City, who is elected and duty-bound to use his or her best judgment in (among other things) considering and approving agreements, budgets, Ordinances and policies that promote the City's best interests, including, generally, policies that minimize the City's exposure and liability in §1983 and other cases, then, we conclude, that alderman cannot give undivided loyalty to the City in the exercise of his or her official duties.

DETERMINATION: Therefore, we determine, based on our analysis of the facts presented, that the fiduciary duty provision of the City's Governmental Ethics Ordinance prohibits an alderman from representing, or having an economic interest in the representation of, clients in judicial proceedings against City employees or officials for damages allegedly suffered from acts committed by those employees or officials within the scope of their City duties, where the City is obligated by law and

7. The opinions the Court relied on were all issued before the Illinois Supreme Court's current Code of Professional Conduct took effect. One of them, however, is pertinent to your question: in ISBA Op. 544, dated July 2, 1976, an attorney who was a candidate for a County Board was advised that if he was elected, both he and his law firm would engage in a prohibited conflict of interest by prosecuting a civil action against the County Regional Planning Commission (which was partially funded by the County Board, and had 3 of its members elected by the County Board) based on alleged discriminatory employment practices. The ISBA's opinion was based on former Disciplinary Rule 8-101(A) (5), which stated: "A lawyer who holds public office shall not ...accept private employment with respect to any matter in which he might or could have responsibility as a public official" and Canon 8-6, which provided "A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." These have been replaced by Rule 1.7(b), cited above, and Rule 8.4 (b). It is unknown whether the advice under the current rules would be the same.

contract to defend against these claims at its own expense, and is liable to pay from its treasury any judgment awarded or settlement amounts, and to approve any settlement agreements.

Our determination does not necessarily dispose of all the issues relevant to your situation, but is based solely on the application of the fiduciary duty provision of the Ordinance to the facts stated in this opinion. The Board has not addressed whether other sections of the Ordinance, or any provisions of Illinois law, would further restrict your conduct, or whether Illinois law might restrict your firm, [Doe & Smith], from representing clients in these matters. Other laws or rules, including the Illinois Rules of Professional Conduct (Article VIII of the Rules of the Supreme Court of Illinois), may also apply to your or your firm's situation, and we advise you to seek legal counsel as to their applicability. If the facts presented are incomplete or incorrect, please notify us immediately, as any change may alter our opinion.

RECOMMENDATIONS: In light of our determination, we recommend that, as soon as is practicable, you: 1) on behalf of [John Smith], P.C., send to [Doe & Smith] a letter of recusal from these cases; 2) establish procedures in your firm to screen yourself completely from participating in or receiving any compensation from these matters (except as provided in #3, as follows); 3) at your option, present billing statements to [Doe & Smith] for the work you and/or [John Smith], P.C. have done on these cases prior to xxxxx, xxxx—the date you were sworn in as XXst Ward Alderman⁸; and 4) seek legal counsel as to whether any provisions of Illinois law would impose restrictions on your or your firm's representation of clients in these matters.

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 this opinion is rendered.

Darryl L. DePriest,
Chair

8. We point out that, as this Board recognized in Case No. 97026.A, it is not the intended meaning of the Ordinance that an attorney (such as you) be precluded from receiving payment for work completed prior to entering City service, provided that the payment is based on the reasonable value of the attorney's completed services. This is true, we stated, even though, if the attorney were otherwise to be paid by contingency in the matter, he or she might ultimately receive no payment for services rendered (in the event, e.g., that the case is not settled for money or there is no damage award). However, we also determined there that the Ordinance prohibits a City employee or elected official, who is also an attorney, from receiving compensation in such matters if that compensation is calculated purely as a percentage of any final award to or settlement with the plaintiff, because such compensation might be larger than the value of the actual work performed, and thus constitute a prohibited economic interest in the representation.