

**CONFIDENTIAL**

**ADVISORY OPINION**

Jurisdiction of Ethics Ordinance  
Case No. 14032.A

TO: Mr. \_\_\_\_\_  
Department X  
City of Chicago

DATE: August 20, 2014

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OPINION SUMMARY

A law firm retained by the City on a contingency fee basis is not in violation of §2-156-030(a) [Improper Influence] of the Governmental Ethics Ordinance as its attorneys are not employees or officials of the City for purposes of the Ordinance. Having established that the firm and its attorneys are not employees or officials for purposes of the Ordinance, the Board need not reach the question of whether the retainer agreement between the City and the law firm is invalid under §2-156-510 [Invalid Actions] of the Ordinance.

I. INTRODUCTION / FACTS

On July 22, 2014, \_\_\_\_\_ of the City's Department X requested a written opinion from the Board addressing whether members of a law firm with which the City has contracted to represent it on a contingency fee basis in an action filed against several \_\_\_\_\_ companies could be in violation of §§2-156-030 [Improper Influence] and -510 [Invalid Actions] of the Governmental Ethics Ordinance ["Ethics Ordinance" or "Ordinance"].<sup>1</sup> The question arises out of discussions involving counsel \_\_\_\_\_

<sup>1</sup> Department X provided our office with several documents, including two letters. The first, dated \_\_\_\_\_, is signed by \_\_\_\_\_, [on behalf of the City] and \_\_\_\_\_, on behalf of law firm ABC and is a letter agreement pursuant to which the City "has retained law firm ABC as Special Assistant Corporation Counsel for the City to represent it in \_\_\_\_\_... The representation is on the terms and conditions [cited in the letter.]" It then sets forth the rates at which the firm will be compensated, as a stated percentage of any net recovery. Paragraph 4 of this letter also states that "A list of all law firm ABC attorneys, investigators, and paralegals who are assigned to this matter and their hourly rates is attached. Law firm ABC will

representing the parties in litigation captioned\_\_\_\_\_. The City originally filed the case in the Circuit Court of Cook County, and it was subsequently removed to the United States District Court for the Northern District of Illinois, where it is now pending.

Attorneys for [one of the defendants] have expressed a belief that outside counsel retained by the City (a partner and likely various associates in the law firm ABC are in violation of the Ordinance because of the contingency fee arrangement of the retention. Specifically, the Department X has explained, one of the defendant's attorneys have asserted that the law firm ABC attorneys working on the case have a financial interest in the outcome of the litigation by virtue of having been retained on a contingency basis, and thus are in violation of §2-156-030 and, in turn, §2-156-510.

The foregoing issue -- which, as explained below, hinges on whether, and, if so how, law firm ABC is subject to the provisions of the Ordinance -- is one of first impression for the Board of Ethics.

## II. ANALYSIS UNDER THE GOVERNMENTAL ETHICS ORDINANCE

### A. RELEVANT LAW

The arguments propounded by [one of the defendant's] attorneys are premised on §§2-156-030(a) and - 510 of the Ethics Ordinance. Section 2-156-030(a), entitled "Improper Influence," states:

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. [emphasis added]

Section 2-156-510, in turn, provides:

All city contracts shall include a provision requiring compliance with this chapter. Any contracts negotiated, entered into, or performed in violation of any of the provisions of this chapter shall be voidable as to the city, including any contract entered into with any person who has retained or employed a non-registered lobbyist in violation of Section 2-156-305 for purpose of, negotiating, soliciting or otherwise seeking the contract. Any permit, license, ruling determination or other official action of a City agency applied for or in any manner sought, obtained or undertaken in violation of any the provisions of this chapter shall be invalid and without any force or effect whatsoever.

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inform the City if additional lawyers or other staff from law firm ABC are added." The second is in effect an amendment to this [date] letter agreement, and is dated \_\_\_\_\_, and signed by \_\_\_\_\_ and \_\_\_\_\_; it amends the termination provisions of the [date]letter.

As this Board has held in dozens of cases dating back to the late 1980's, recognizing the plain language of the Ordinance, this provision is a kind of "conflict of interests" prohibition: it prohibits an "official" or "employee" (as those terms are defined in the Ordinance) from making, or attempting to use his or her City position to influence, any City decision or action in which he or she has a monetary or ownership interest that can be distinguished from that of the general public in the decision or action, or from which he or she has derived income or compensation during the preceding twelve months, or from which he or she reasonably expects to derive compensation or income. It is a "conflict of interest" provision, that, for example, prohibits City employees and officials from directing or recommending (through their City positions) that City contracts be steered or awarded to a business in which they have an ownership stake or from which they have derived income or compensation as an employee or consultant to that business, or from voting in their City positions on matters, like real estate transactions, that directly benefit property they own within the City. See, e.g., Case Nos. 11045.A, 04009.A, 02041.A, 02011.A and 00008.A.

#### B. "EMPLOYEE" OR "OFFICIAL"

The argument propounded by one of the defendant's attorneys -- that law firm ABC and/or its individual partners or associates are in violation of this section because they and the City have agreed to a contingent compensation arrangement (which, of course, these law firm ABC attorneys did influence, and will advise the City on whether to settle the case, and for how much, or go to trial (these are the precise reasons why they *would* be compensated)--is premised on the assumption that law firms like firm ABC (and other firms retained by Department X) are subject to the prohibitions in §2-156-030(a). However, the language of this provision—and the ambit of its prohibitions—applies only to City employees and officials. It does *not* extend to persons who are not "officials" or "employees." Thus, it follows from the plain language reading of this section that, for attorneys retained by Department X on a contractual basis to handle specified matters (like the law firm ABC attorneys here) to be subject to the prohibitions in §2-156-030(a), they would have to be "employees" or "officials." We now address that issue.

##### 1. Plain Language of the Ordinance

The term "employee" is defined in §2-156-010(j) of the Ordinance as "an individual employed by the City of Chicago, whether part-time or full-time, but excludes elected officials and City contractors." "Official" is defined in §2-156-010(q) of the Ordinance as "any person holding any elected office of the City or any appointed, non-employee member of any City agency."<sup>2</sup> The term "City contractor" is defined in §2-156-010(e) of the Ordinance as "any person (including his agents or employees acting within the scope of their employment) who is paid from the City treasury or pursuant to City ordinance, for services to any City agency, regardless of the nature of the relationship of such individual to the City for purposes other than this chapter. A 'city contractor' shall not include officials and employees."

The contractual arrangement between the City and law firm ABC and its attorneys fits squarely within the definition of "City contractor." The firm is being "paid out of the City treasury or pursuant to City ordinance" for services to the Department X.

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<sup>2</sup> We note that: i) law firm ABC and its attorneys are clearly not elected officials; ii) their work for the City, and the only "positions" they hold, are defined solely by the terms of their contract and not by any appointment or enabling ordinance; and iii) unlike appointed officials, they are not appointed by the Mayor and/or confirmed by the City Council. Accordingly, they do not fall within the meaning of "official" as defined by the Ordinance.

“It is well established that when a statute defines the term [or terms] it uses, those terms must be construed according to the definitions contained in the act.” (Gruchow v. White, 375 Ill.App.3d 480, 485, 874 N.E.2d 921, 925 (2007), *quoting State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 244, 695 N.E.2d 848, 850 (1998)).

We conclude that the law firm ABC attorneys (as well as the firm itself) retained by the letter agreement signed by \_\_\_\_\_ on behalf of the firm, and by \_\_\_\_\_ on behalf of the City dated \_\_\_\_\_, as amended by them on [date] are City contractors for the purposes of the Governmental Ethics Ordinance. This conclusion is fully supported by Board precedent as explained below.

## 2. Board Precedent

Over the years, the Board, has had occasion to consider whether individuals are “employees” or “officials” of the City, and thus subject to those provisions of the Ordinance that apply only to employees and officials, like §2-156-020(a). The Board has examined the following factors, in addressing whether an individual is a City employee or contractor: i) the individual holds a classified City position<sup>3</sup>; ii) the individual is paid from the City payroll; iii) the individual receives employee benefits, such as health insurance and a right to inclusion in the City’s pension fund; and iv) there is federal income tax withholding. *See, e.g.,* Case Nos. 90056.A (a hearing officer for the Department of Revenue was a City contractor and not an employee for purposes of the Ethics Ordinance) and 06031.CNS (an employee working for an alderman under a “City of Chicago Professional Services Contract” was found to be a City contractor and not an employee).

In the matter before us, attorneys at law firm ABC who work on the litigation in question on behalf of the City: i) do not hold classified City positions; ii) are not paid from the City payroll, rather they are paid from the net recovery in the litigation, if any (unless the agreement is terminated for stated reasons, in which case they may be paid their hourly rates, not to exceed \$\_\_\_ per hour per attorney); iii) do not receive employee health benefits such as health insurance and a right to inclusion in the City’s pension fund; and iv) any payment will not include federal income tax withholding. In short, not one of the relevant factors that establish that an individual is an “employee” for purposes of the Ordinance is present here. Rather, the nature of the work being done by law firm ABC and the manner in which the firm is to be compensated establish that its attorneys are independent contractors working under a personal services contract.<sup>4</sup>

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<sup>3</sup> In a memorandum to the Board dated \_\_\_\_\_, the City’s Law Department stated: “While not defined by authoritative City ordinance or rules, the term ‘position’ has historically been linked to the existence of a title created by the Commissioner of Personnel, duties associated with that title, appropriated funds which may be lawfully expended for such employment and appointment of an individual to the position, in accordance with the relevant ordinances and Rules of the City.”

<sup>4</sup> This is not to say that City contractors, such as law firm ABC or its attorneys or employees, are not subject to the Governmental Ethics Ordinance at all—they are in fact and in law subject to all of the various provisions in the Ordinance that apply to City contractors. These include: §§2-156-018(b), which requires contractors to report certain corrupt activity to the City’s Inspector General; -142(e), which prohibits any City contractor from accepting a gift or other thing of value based on a mutual understanding that the contractor’s decisions concerning City business would be affected thereby; and -445, which limits at \$1,500 per calendar year the amount that a contractor may contribute to the political committee of an elected City official or candidate for elected City office; the Ordinance also prohibits City employees and officials from retaining as a City contractor any person if the City employee or official has a financial interest in that contractor (-110(b)) and requires City employees and officials

Having concluded that law firm ABC and its attorneys, employees and agents are not City employees or officials, but are City contractors, we conclude that they do not fall under the ambit of §2-156-030(a) of the Ordinance, and thus that there is no violation of the section on the facts stated in this opinion. Accordingly, the Board need not reach the issue of whether, under §2-156-510 of the Ordinance, the City's retainer agreement with law firm ABC is invalid, as such a finding would require a violation of the Ordinance as a condition precedent.

### III. DETERMINATIONS

A. We determine that law firm ABC, is a City contractor, and thus is not subject to the prohibitions in §2-156-030(a) of the Ordinance which applies only to City employees and officials and thus, there is no violation of this section.

B. Having determined that law firm ABC is not subject to §2-156-030(a) of the Ordinance, the question of whether there is a potential violation of §2-156-510 is moot.

The Board's conclusions and determinations are not necessarily dispositive of all issues relevant to this situation, but are based solely on the application of the City's Governmental Ethics Ordinance to the information provided and the facts stated in this opinion. If the information or the facts are incorrect or incomplete, please notify the Board immediately, as any change may alter our conclusions or determinations.

### IV. RELIANCE

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

Sincerely,

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Stephen W. Beard  
Chair, City of Chicago Board of Ethics