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, 2003[1], 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], PC., 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

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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 Code[3], Article 22 of the contract between the City and the Fraternal Order of Police Chicago Lodge 7[4], and two Illinois statutes, the Local Governmental and Governmental Employees Tort Immunity Act and Illinois Municipal Code[5], 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

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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

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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

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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 Alderman[8]; 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.

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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.