CONFIDENTIAL

October 29, 2019

[Attorney]

Chicago, IL 606

Re: Petition for Reconsideration, Case No. 19027.A

Dear [Attorney]:

Our office received your letter dated September 27, 2019 in the matter captioned above, requesting that the Board reconsider the Advisory Opinion issued to your client on September 13. After discussing this request at our meeting today, the Board voted unanimously, 4-0, to deny it and reaffirm our opinion. Specifically,

1. Your petition raises no material facts or circumstances not already considered by the Board at its September 13 meeting, when it voted unanimously to issue its opinion. Board Rule 3-8, which addresses requests for reconsideration, provides that a person requesting reconsideration of an advisory opinion must include "an explanation of material facts or circumstances that were not before the Board in its deliberations."

2. You argue that your client did not seek a formal Board advisory opinion and that:

> "The Ethics Board overstepped is [sic] properly delegated authority by twisting informal inquiries meant to aid the legislative deliberative process ... [and] … not only did this conduct violate the Board's own rules, it is a usurpation of legislative authority."

However, first, §2-156-380(l) of the Governmental Ethics Ordinance is clear that the Board may issue a formal advisory opinion "when requested in writing by an official or employee." On July 17, your client asked our Executive Director in person whether proposed amendments to §2-156-090 of the Governmental Ethics Ordinance would affect his ability to practice criminal defense law, *not* whether your client should vote for or against it. Our Executive Director explained to your client that he could not answer this question then and there and, in order to answer the question properly, he would need to take the matter up through a formal advisory opinion issued by the full Board. He then wrote to and spoke with me, and I directed that, because of the matter's significance, it be handled in a formal written opinion to be issued by the Board at its September 13 meeting. He then explained the same thing via email a few days later in response to the same question posed in writing by your client's colleague, identified as Alderman Y in the formal opinion.

Even if we concede that your client did not seek a formal Board opinion by submitting a written request, our Executive Director, who, as your client knows, is a City employee, immediately and in writing explained your client's request for advice to me, as Board Chair (and City official). I directed that the matter be taken up in a formal Board opinion. This satisfies the Ordinance's requirement that a request for a formal opinion be in writing. Moreover, this Board has inherent authority to issue opinions without a formal request by another (it can do so at the urging of a Board member or in response to its staff's request for an opinion). Even if a person who has requested a formal opinion withdraws that request before the Board issues an opinion, the Board may nonetheless issue an opinion or take other appropriate

action in the matter consistent with the Governmental Ethics Ordinance. *See* Board Rule 3-3. Advisory opinions are not just for the individual(s) involved, but form a body of guidance for all other elected and appointed City officials and City employees.[1]

Second, your argument is disingenuous: your client's statement to the media, as reported in a July 26, 2019 Chicago Tribune article (this was already two days *after* the City Council voted unanimously to pass this Ordinance amendment and more than a week after he posed the question to our Executive Director), shows he anticipated and was waiting for a ruling from this Board on this very question:

> "Already, some aldermen with side jobs expressed concerns about how the ordinance might be enforced. South Side Ald. [A], practices criminal defense law. His clients don't win financial awards from the city, and he said administration officials told him the outside employment provision isn't meant to address his kind of work. Nonetheless, he's preparing for the possibility. 'You never know if you'll get an overzealous ethics officer who wants to make it apply,' [A] said. If there is a ruling from the Ethics Board that says his law practice runs afoul of the ordinance, the alderman said he would sue the city."

This Board then issued that ruling on September 13, in the form of a formal advisory opinion (albeit based on a different provision in the Governmental Ethics Ordinance, so the Board did not need to reach the particular provision to which your client referred).

Third, I, three (3) other Board members, our Executive Director, and three (3) other Board staff members are Illinois attorneys. Your letter argues in effect that our Executive Director and we seven (7) other attorneys should have ignored your client's question and the follow-up from your client's colleague. That would arguably constitute a failure of our duty as members and staff of the Board of Ethics to answer him professionally and expeditiously. This remains so even though your client is displeased with our answer.

Last, you appear to be arguing that your client's question to our Executive Director was privileged under "legislative deliberative process" or perhaps the "speech and debate" or "legislative immunity clause" of the Illinois Constitution (Article IV, Section 12), and thus the Board had no authority to issue its advisory opinion. These arguments also fail.

First, the "deliberative process" privilege can be found in various statutory enactments. For example, that "privilege" is an exemption to the Illinois Freedom of Information Act ("FOIA"), 5 ILCS 170/7(1)(f), which exempts from FOIA production "preliminary drafts, notes, recommendations, memoranda, and other records in which opinions are expressed or policies or actions are formulated." This privilege protects – *from disclosure to the public under the FOIA* – "the opinions that public officials form while creating governmental policy … thus, in order to qualify for the privilege, a document must be both predecisional in the sense that *** it is actually *** related to the process by which policies are formulated."[2] We are not in a FOIA request posture here. Our advisory opinion is not a FOIA request nor is it issued pursuant to one, and your client's question to our Executive Director was not a FOIA request, and this Board has treated your client's request and its opinion in accordance with the confidentiality provisions in §2-156-380(l) of the Governmental Ethics Ordinance and Board Rules 3-9 and 3-10. There was no "usurpation of legislative authority" here. This Board does not vote on legislation. It is charged with interpreting the provisions of the Governmental Ethics Ordinance. This is exactly what we did here, and exactly what your client expected us to do.

Second, your claim that the Board's advisory opinion somehow violates the "legislative immunity clause" of the Illinois Constitution is meritless. That clause protects legislators from libel or slander suits for claims or statements they make while engaging in the legislative process. *See Geick v. Kay*, 236 Ill. App. 3d 868, 603 N.E.2d 121, 127 (2nd Div. 1992) ("[A]n official of the executive branch of the Federal, State or local governments cannot be held liable for statements made within the scope of his official duties ... Absolute privilege regarding communications made within the scope of

[1] Every formal opinion issued by this Board and by its predecessor Board (established by a 1986 Executive Order issued by Mayor Washington) is posted on our website, with a search index: https://www.chicago.gov/city/en/depts/ethics/auto_generated/reg_archives.html.

[2] *See* Public Access Opinion 18-001, Office of the Attorney General, January 23, 2018, http://foia.ilattorneygeneral.net/pdf/opinions/2018/18-001.pdf.

official duties has been extended to mayors of Illinois municipalities or chief administrators"); and Black's Law Dictionary, 8th Ed., 1999 ("***legislative immunity***: the immunity of a legislator from civil liability arising from the performance of legislative duties"). The doctrine is irrelevant here: the Board is not attempting to bring a civil action for defamation, libel, or slander or any other cause of action against your client. Rather, we are answering the question he *voluntarily* put to our Executive Director, *expecting an answer*. Were your apparent reading of this privilege correct, a member of the City Council or the Mayor could request an opinion from the Board of Ethics but then in effect quash and invalidate that opinion just because he or she claims to have made the request in the course of performing legislative duties. Such a reading would render nugatory the power and duty of the Board of Ethics delegated to it by the City Council in §2-156-380(l) of the Municipal Code of Chicago "to render advisory opinions with respect to the provisions of this chapter based upon a real or hypothetical set of circumstances."

3. You and [B] argue that your client's fiduciary duty as an alderman allows, or, perhaps, even *requires*, that, *as a private attorney*, he represent clients in litigation where members of the Chicago Police Department ("CPD") were arresting officers, witnesses, etc. This argument fundamentally misunderstands the nature of the two competing, separate fiduciary duties your client owes: one to the City, as an alderman; the other, to his clients, as a private attorney. [B] writes:

> "In my opinion, the assumptions under [the Board's fiduciary duty analysis] are themselves antithetical to an appropriate understanding of the duties of any fiduciary, which never include supporting or even tolerating illegal conduct directed at the beneficiaries of the fiduciary's duties, which in this case, includes [sic] the populace of the City of Chicago, including and in particular, the residents of the Ward represented by the alderman … [and] the fiduciary duties of a lawyer who represents an entity run to the entity as a whole, and those duties require the lawyer to address, not ignore, illegal conduct by the entity's employee's and officers if that conduct threatens the well-being of the entity, even to the extent of disclosing confidential information."

First, *of course* an alderman's fiduciary duty in his role *as an alderman* is to call out illegal or abusive conduct by other municipal employees or officers, including CPD members, appropriately advocate for his or her constituents against such conduct and advocate and vote for City policies that minimize such conduct and protect the treasury of the City. Our opinion does not assert otherwise. In fact, our opinion stands for the proposition, consistent with prior Board advisory opinions and the Illinois Supreme Court's decision in *In re Vrdolyak,*[3] that, by representing private clients in cases in which CPD members are the arresting officers, etc., which would require him to vigorously seek to impugn the conduct, integrity, and legality of actions by CPD members on behalf of his private law clients, *he is inherently compromising his fiduciary duty to act as an alderman on such issues because he is confusing his professional responsibilities as a licensed Illinois attorney and his personal pecuniary interest as a private attorney with his fiduciary duty to the public as an alderman, thereby improperly allowing the former to taint the latter*. Advising your client he can no longer represent criminal defendants in cases where the CPD has been involved in no way lessens or impairs his fiduciary duty or his ability *as an alderman* to advocate for his constituents against, for example, abusive police behavior. It seems both you and [B] elide over or altogether miss this essential point, and the related point that, by representing private clients (regardless whether paying or *pro bono*) in cases where the credibility and conduct of CPD personnel is at issue, your client is engaging in an archetypical breach of his fiduciary duty to the City, because his judgments *qua* alderman on matters involving CPD, by way of example, approving its budget, voting on appointees to become Police Superintendent or members of the Police Board, approving settlements in civil litigation (which often implicate CPD members' conduct), etc., are inherently compromised by his judgments *qua* private criminal defense attorney. This is what our opinion states, and what our jurisprudence since Case No. 90035.A from 1990 stands for.

Second, we are unable to find any case issued by a court or administrative agency standing for the proposition that an alderman's fiduciary duty to the city that elected him – which is the concern of §2-156-020 of the Governmental Ethics Ordinance – is consistent with representing private clients in litigation (for compensation, or even *pro bono*) where he might need to impugn the conduct of that city's police officers. The decision in *In re Cahnman* (discussed below) makes clear that *the mere potential* that he might need to do so is problematic and unacceptable, and that a violation of the

[3] 137 Ill.2d 407; 560 N.E.2d 840 (1990).

Rules of Professional Conduct does *not* require a showing that a lawyer's judgment *was in fact* compromised, only that the lawyer put himself in a position where it *could be* compromised.[4]

4. Last, [B] argues that this Board improperly relies on the Attorney Registration and Disciplinary Commission's ("ARDC") Review Board's 2016 *in Re Cahnman* decision. She writes that:

> "The Board's reliance on Cahnman for the proposition that an alderman necessarily violates his fiduciary duties to the City by undertaking representation in criminal cases where the City's police officers are involved misses the whole point of that case, where the Review Board explicitly focused its concerns on the lawyer's violation of duties to the private client and not the City."

The argument misses the point. The Review Board, citing *in Re Vrdolyak*, states:

> "*As both an attorney and an alderman, Respondent 'owed his undivided fidelity and a fiduciary duty' to both his clients and the City of Springfield* … We agree with the Administrator that Respondent had a concurrent conflict, in that he operated under two divided and conflicting loyalties – one to the City for which he was alderman, and one to his client … in the cases in which he was arrested or issued citations by Springfield police officers … *it seems inescapable that, when an alderman represents defendants in cases where police officers from the city he serves are the arresting officers, there is always a potential for diverging interests*. For example, if a city police officer is a witness for the prosecution, the alderman-attorney, as defense counsel, must cross-examine the police officer. *He thus has a choice to make – assail the police officer's actions or credibility and thereby potentially do harm to the city, or go easy on the police officer and thereby fail to be an uncompromising advocate for his client. That is an untenable situation for an attorney-alderman to place himself in vis a vis his client*…" [Emphasis added][5]

That is, under the principle announced in *Cahnman*, an alderman who represents clients in cases in which CPD members are the arresting officers, etc. is inherently compromising his fiduciary duty to act vigorously on behalf of his clients because of the concurrent fiduciary duty he owes to the City as an alderman. Further, it is *also*, in *our* opinion, an untenable situation for an attorney-alderman to place himself in *vis a vis the City of Chicago under §2-156-020 of the Governmental Ethics Ordinance*. This conclusion is fully consistent with our prior advisory opinions since Case No. 90035.A, and with the Illinois Supreme Court's *In re Vrdolyak* decision. It is also consistent with the *Cahnman* opinion: there the Review Board had to recognize the alderman's fiduciary responsibility to the City when it found he had violated his professional duty to his client.

For these reasons, your client's petition for reconsideration of our advisory opinion in Case No. 19027.A is denied. Should we have credible evidence that your client continues to represent clients in criminal matters in which members of the CPD are witnesses, arresting officers, etc., we will be required to commence enforcement actions against him. If we determine he violated the Ordinance, he will be subject to fines of up to $5,000 per violation (for violations occurring on or after September 28, 2019) and we will be required to make our determinations and fines public. Such an outcome may well invite enforcement action from the ARDC with the ensuing risk to your client's law license.

Yours very truly,

[signed]
William F. Conlon, Chair

[4] A.R.D.C. Review Board Case 2014PR00102, pp. 10, 15 (2016).

[5] *Id. See* https://www.iard.org/rd_database/rulesdecisions.html, pp. 10, 13, 15,16.