**Confidential**

To: The Honorable Alderman, 11th Ward

From: Steven I. Berlin, Executive Director

Date: March 4, 2016

Re: Case No. 16005.Q, Representation

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Dear Alderman Thompso n:

You are the alderman of the City’s 11th Ward, and an attorney licensed to practice law in Illinois. In addition to serving as an alderman, you also practice law in an of counsel capacity with the firm of Burke, Warren, MacKay & Serritella, PC (the “Firm”), and were formerly a partner in the Firm before being sworn in as alderman. On February 22, 2016, you requested an advisory opinion that addresses how the City’s Governmental Ethics Ordinance (the “Ordinance”), affects the compensation you may receive for legal services you rendered to a plaintiff in a *qui tam* lawsuit now pending in the Law Division of the Cook County Circuit Court.

As explained in this letter, Board staff advises you that you are *prohibited*, by §2-156-090(b) and §2-156-020 of the Ordinance, from: (i) receiving, on a contingency fee basis, compensation based on a percentage of the amount the plaintiff recovers from any settlement or judgment as to the counts in the suit that allege violations of the City’s False Claims Ordinance; *or* (ii) being paid more than the reasonable value of the legal services you provided to the plaintiff-relator in the lawsuit, prior to becoming an alderman, as to the counts in the suit that allege violations of the City’s False Claims Ordinance. However, the Ordinance does *not prohibit* you from being paid for the reasonable value of the legal services you provided in the lawsuit as to the City’s False Claims Ordinance prior to becoming an alderman, based on a *quantum meruit* theory and valuation. Moreover, to the extent that such monies are segregable, the Ordinance does not prohibit you from being paid the percentage of the plaintiff’s recovery for which you have contracted, on a contingent basis, from any settlement of or award solely from the counts in the lawsuit that allege violations of State law or the laws or rules of either Cook or Kane Counties.

**Facts.** As an attorney in the Firm, you have done legal work for Phone Recovery Services of Illinois, LLC (“Client”) with respect to a lawsuit now pending in Cook County Circuit Court. You sent our office copies of various pleadings in Case No. 2014L005238, filed on September 4, 2014, in the Circuit Court of Cook County, captioned [Client] *, bringing this action on behalf of the State of Illinois, C\_\_\_\_\_\_ook and K\_\_\_\_ane Counties, and the City of Chicago v. meritech Illinois Metro, Inc., d/b/a AT&T, et al*.[[1]](#footnote-1) (the “Case”). [Client] is the plaintiff-relator in the Case, and it has filed a *qui tam* action on behalf of the named public authorities, including the City of Chicago, alleging that the defendants, all telecommunications service providers, have violated the State’s, counties’, and City’s False Claims laws, and praying for the court to award monetary penalties and damages as provided for in these false claims laws.[[2]](#footnote-2)

Briefly stated, [Client’s] complaint alleges that: (i) the State, the two counties, and the City each passed laws requiring telecommunications providers, including the defendants, to charge and collect from their customers a surcharge to fund emergency 9-1-1 telephone systems, and remit that to the respective government entity; (ii) the defendants knowingly and fraudulently failed to do this; and (iii) the defendants submitted false reports to each of the government entities, in violation of these laws.

[Client] prays that the court: (i) declare that each defendant has violated the relevant sections of State law, the two counties’ laws, and City law; (ii) enter an order to stop these violations; (iii) order each defendant to comply with these laws by submitting an accurate accounting of the charges they should have assessed and collected; and (iv) order each defendant to pay the statutory civil fines for these violations (which range from $5,500 to $11,000 per violation, with each customer to whom these charges were not assessed or from whom they were not collected constituting separate violations), plus three times the amount of damages sustained by each government unit. By operation of law, [Client] would stand to receive on average 30% of the entire amount agreed to by the parties in a settlement, or awarded by the court.

You said that neither you nor the Firm represents [Client] in the case. The attorneys representing [Client] in the action are from the Chicago firm ofPowers, Rogers & Smith, P.C. (the “Litigation Firm”). You explained that, in the Summer of 2014,[prior to becoming an alderman] you met with representatives of [Client] and, with your then-partners at the Firm, worked on preparing the legal theory behind the Case, and then made an official referral of the matter to the Litigation Firm. The referral was made in August 2014, nine (9) months before you were sworn in as the 11th Ward alderman. You also explained that, since the date that you were inaugurated as alderman, you have performed no work on this Case.

The Litigation Firm has undertaken the Case on a pure contingency basis. In other words, if and only if there is money received by [Client] through settlement or judgment, confirmed by an appellate court with jurisdiction, if necessary, would the Litigation Firm, and thus, in turn, your Firm and you, be compensated for legal services rendered. The Litigation Firm would receive 1/3 of the total settlement or judgment amount that [Client] receives, which amount would include attorneys’ fees. Your Firm and the Litigation Firm have entered into an agreement with each other under which your Firm would receive 1/3 of the Litigation Firm’s total recovery, and, pursuant to a separate agreement, you then would receive 1/3 of your Firm’s recovery (thereby giving you, in effect, a share of 1/9 of the amount paid to counsel for [Client], the plaintiff-relator, and a 1/27 share in the total amount awarded to [Client]). This amount would be your fee to compensate you for your legal work. You said that these agreements were all finalized in 2014.

The Case pleadings show that, on [a date after you became an alderman] April 15, 2015, the City filed an amended motion to dismiss the entire matter as to the City’s False Claims Ordinance. The City argued among other things, that its False Claims Ordinance does not authorize a private action to enforce a revenue measure, and the City’s 911 surcharge ordinance states that the surcharge “shall be deemed a revenue measure.” However, on January 5, 2016, the court (Judge James E. Snyder, presiding) denied the City’s motion and ordered the City to answer the complaint or otherwise plead by January 26, 2016.

On January 27, the City filed a “Notice of Intent Not to Pursue Action” (“Notice of Intent”). In this Notice of Intent, the City states that it does not intend to pursue “this action,” but instead will pursue its own “normal enforcement procedures” to collect amounts due and owing to it by the defendants. These procedures include having the City’s Department of Finance audit the defendants’ books, then file a field collection report with them, then allow the defendants an opportunity to settle the matter by paying tax and interest, or send the matter to a hearing in the City’s Department of Administrative Hearings. The City would and will be represented at all times by the Corporation Counsel in that process.

Moreover, in ¶¶ 6, 7 and 8 of this Notice of Intent, the City states:

“The City does not wish to pursue the Relator’s [Client’s] proposed false claims action, and it does not wish to have the Relator purporting to act on its behalf.

“The City reserves, and does not waive, its position that the Relator has no authority to pursue a private action to enforce the 911 surcharge, for the reasons discussed in connection with [the City’s] motion to dismiss. The City therefore reserves the right to challenge any settlement or judgment obtained by the Relator as lacking authority.

“The City also reserves the right to seek appropriate relief in the event that the Relator’s activities in this case interfere with audits or other functions of the Department [in the City] or other City officials.”

That is, although [Client’s] First Amended Complaint alleges that it is filing the case “on behalf of” the City, the City clearly pleads in its Notice of Intent that it does *not* wish the case to be pursued as to the City’s False Claims Ordinance by [Client] (or, presumably, any person other than the City itself, through the process described above). Moreover, the City reserves certain rights to itself that are adverse to [Client], specifically, the right to challenge any settlement or judgment in the Case by [Client], “as lacking authority,” and to seek relief based upon [Client] actions in the case.

To your knowledge, neither the State nor the two counties (Cook and Kane) have filed any similar objections or notices with respect to [Client] authority to pursue this action.

**Law, Analysis, and Conclusions.** Your question arises under §2-156-090(b), entitled “Representation of other persons.” It prohibits a City elected official (like you) or a City employee from deriving income or compensation from the representation of any person in a judicial proceeding (like the Case) in which: (i) the City is a party, and (ii) that person’s interest is adverse to the City’s. It states:

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.

You do not *currently* represent [Client] in the case. However, you *did* represent [Client] when you referred it to the Litigation Firm, which does currently represent [Client] in the Case. Critical to this analysis, though, is that any compensation you would receive stems from your prior representation of [Client] in the Case. That compensation would be a percentage of whatever monies [Client] receives through a settlement or judgment in the Case. You have, in effect (if not directly) a financial arrangement with [Client], which you represented prior to becoming an alderman. It is through that arrangement that you would derive your compensation from a judicial proceeding that is still ongoing, even though the Case is being prosecuted by a law firm other than your own, and by attorneys other than you.

Additionally, the City is a named party in the Case (albeit an unwilling one). Moreover, [Client’s] interests are adverse to the City’s, as the City has pled that it: (i) does not wish [Client] to continue prosecuting the case; (ii) will challenge any monetary award by [Client]; and (iii) will seek relief to the extent that the award or settlement causes harm to the City.

The Board has previously issued two opinions addressing situations similar to but not directly on “all fours” with yours. Nonetheless, these prior Board cases enable us to provide you with conclusive advice.

In Board Case No. 97026.A, a City employee (also an attorney) was representing a client in an ongoing proceeding before a City agency (the City’s Commission on Human Relations) prior to starting her City employment.[[3]](#footnote-3) Like you, she would have earned her legal fees solely through a contingency arrangement—only if her client won a monetary judgment or achieved a monetary settlement. At the time she began her City employment, the case was still pending. As required by the Ordinance, she had to give up her representation of her client in the proceeding and refer it to another attorney, before receiving any compensation. Having put hundreds of hours of work into the matter, she requested an advisory opinion from the Board addressing whether and how she could be compensated. She asked, specifically, whether the Ordinance would have permitted her to contract: (i) for a percentage of the award or settlement amount, the percentage being based on the proportion of the work she had put in; or (ii) to receive payment for the reasonable value of her services, based primarily but not necessarily exclusively on the number of hours she had worked on the case, and her hourly rate.

The Board determined that it is not the intended meaning of the Ordinance to preclude an attorney from receiving payment for the reasonable value of his or her services prior to becoming a City employee or official, the amount to be based on factors such as the likelihood of an award or settlement, the novelty and difficulty of the questions, the attorney’s experience, etc. That the attorney *might* receive *no* compensation from the matter, given that compensation is contingent, the Board decided, did not change this determination. However, the Board also held that it was *not* the intended meaning of the Ordinance to allow all payment arrangements—for example, if the attorney were to be paid purely a percentage of the award, her payment might be significantly larger than the value of her work, and would depend on the representation provided by the attorney to whom she referred the case, and that work would be performed *after* she became a City employee. Thus, the Board also held, the attorney’s compensation in the matter was limited to the reasonable value of the legal services she rendered *prior* to becoming a City employee, but no more. She could not recover the same amount that she would have been recovered via the original contingent fee agreement, as that would have constituted a prohibited “economic interest in the representation.”[[4]](#footnote-4)

Several years later, the Board addressed a similar issue with respect to an alderman/attorney, although this latter case arose under the Ordinance’s fiduciary duty section, because the City was not directly a party in lawsuits in which that alderman/attorney represented plaintiffs, and because the Illinois Supreme Court has issued opinions that specifically address Chicago aldermen/attorneys, and those opinions supersede the City’s Governmental Ethics Ordinance or the Board’s interpretation of it. *See* Case No. 03027.A.[[5]](#footnote-5) The Board came to an analogous determination in this 2003 case.

Applying the principles announced in these two Board opinions, Board staff concludes that *you are prohibited*, by §2-156-090(b) and §2-156-020, from: (i) being paid more than the reasonable value of the legal services you provided to [Client] in the Case, prior to becoming an alderman, as to claims based on alleged violations of the City’s False Claims Ordinance; or (ii) receiving a percentage of whatever monies are paid to [Client] (then the Litigation Firm and your Firm) pursuant to the agreements previously entered, as to claims based on alleged violations of the City’s False Claims Ordinance. Consistent with these opinions, however, we conclude that the Ordinance *does not prohibit* you from being paid for the reasonable value of the legal services you provided to [Client] in the Case, as to claims alleging violations of the City’s False Claims Ordinance, based on a *quantum meruit* theory and valuation. Moreover, the City’s Governmental Ethics Ordinance *does not prohibit or limit* you from receiving your full, agreed-upon contingent compensation amount based on a percentage of any settlement or judgment by or in favor of [Client] *solely* from alleged violations of the State’s False Claims Act or laws or rules of Cook or Kane Counties—assuming, of course, that such monies are segregable from any award of settlement arising out of the claims involving alleging violations of the City’s False Claims Ordinance.

The conclusions in this letter are based solely on the application of the City’s Governmental Ethics Ordinance to the facts stated in it. If those facts are incorrect or incomplete, please notify us immediately, as any change may alter the conclusions. Other rules, such as the Illinois Rules of Professional Conduct for Attorneys of the Illinois Supreme Court, may also apply here.

We sincerely appreciate your conscientiousness and desire to abide by the standards embodied in the Governmental Ethics Ordinance, and the fact that you brought this matter to us. If you have any questions about this letter, please contact me.

**Reliance.** This opinion may be relied upon by only a person involved in the specific transaction or activity with respect to which the opinion is rendered.

Very truly yours,

Steven I. Berlin

Executive Director

1. In addition to Ameritech, the other named defendants are: Bandwidth.com, CLEC; Broadwing Communications, LLC; Level 3 Communications, LLC; and Comcast Phone of Illinois, LLC. [↑](#footnote-ref-1)
2. A *qui tam* action is a whistleblower lawsuit filed by a private party (often called the plaintiff-relator) in the name of a state or other government agency to enforce a law that ordinarily would be enforced by the government—usually the Attorney General. Statutes enable private parties to bring such lawsuits and be awarded a percentage of any settlement or recovery if certain conditions are met. The government entity must consent to the action. The plaintiff-relator is entitled to a percentage, at least 25% in Illinois, of what is recovered for the State, plus reasonable attorneys’ fees (*see* the Illinois False Claims Act, 740 ILCS 175/4, et seq.), and between 25% and 30% of what is recovered under the City’s own False Claims Act, §1-22-030 of the Municipal Code. Both laws allow a private party to bring a claim on behalf of the State or City. The term *qui tam* is short for *qui tam pro domingo rege quam pro se ipso in hac parte sequitur*, meaning “who as well for the king as for himself sues in this matter.” *Black’s Law Dictionary*, 8th Ed., 2004. [↑](#footnote-ref-2)
3. That case arose out of §2-156-090(a), not -090(b), which applies here. Section 2-156-090(a) prohibits a City employee or elected official from representing, or deriving any income or compensation from the representation of, any person in any formal or informal proceeding or transaction before a City agency, in which the agency’s action or non-action is nonministerial. For purposes of analyzing your case, these distinctions are immaterial. [↑](#footnote-ref-3)
4. Prior to the Ordinance’s amendment in November 2012, “economic interest” was defined in the Ordinance as meaning “any interest valued or capable of valuation in monetary terms.” In November 2012, the phrase “economic interest in the representation” was replaced by “derive any income or compensation from the representation.” [↑](#footnote-ref-4)
5. In Case No. 03027.A, the Board applied the Ordinance’s fiduciary duty provision, §2-156-020, to an alderman/attorney who, prior to being sworn in as an alderman, represented clients in lawsuits against individual City employees, not against the City *per se*, which was not a party in these suits. (Hence, §2-156-090 was not the operative Ordinance provision.) However, by contract, the City *was* bound to defend and indemnify the defendants for acts committed in the course of their City employment. The alderman’s compensation in such matters was, like yours, contingent, based upon a percentage of any settlement or judicial recovery. Following the Illinois Supreme Court’s decisions in *In re Vrdolyak*, 137 Ill.2d 407 (1990), and *Chicago Park District v. Kenroy, Inc.,* 78 Ill.2d 555 (1980), the Board determined that, given an alderman’s broad fiduciary duty to the City, and the City’s contractual obligations to defend and indemnify the defendants (even though it was not named party in these suits), that duty prohibited him from representing clients in such matters or receiving compensation from such matters once he became an alderman. However, the Board explicitly noted, following Case No. 97026.A, that the Ordinance did not prohibit the alderman/attorney from receiving the reasonable value of his completed legal services prior to becoming an alderman. That was true even though, if he were otherwise to be have been paid solely by contingency in the matters, he might ultimately have received no payment at all, if there were no settlement or no damage award. [↑](#footnote-ref-5)