CONFIDENTIAL

[Date], 2011

[Sam Smith]
[Big Law Firm]
[One South West Street]
Chicago, IL 60600

Re: Board Case No. 10058.A

Dear Mr. [Smith]:

You are an attorney in the Office of the General Counsel of [Big Law Firm] ("the Firm"). On [Date], 2010, you wrote the Board and asked for an opinion on whether the attorneys of your Firm are "lobbyists" within the meaning of the City's Governmental Ethics Ordinance ("Ordinance") when they are: 1) providing legal representation to one of the Firm's clients in a "contractually-required, formal mediation" with the City of Chicago ("City") administered by the American Arbitration Association ("AAA") under its Commercial Mediation Procedures ("Procedures")[1], in which the City is represented by the Department of Law ("Law"); or, 2) if the dispute cannot be settled in mediation, in "a formal, binding arbitration with the City" undertaken in accordance with the AAA's Commercial Arbitration Rules ("Rules")[2], in which the City is represented by Law. After careful review of the facts provided, the Board has determined that neither activity constitutes lobbying under the Ordinance. Our analysis and reasoning follow.

FACTS

In your letter to Board staff, you said that the Firm's client entered into a contract ("Agreement") with the City, executed by the Mayor and administered by the [City] Department. The Agreement provides that, in the case of a dispute between the parties, the parties must first attempt to directly resolve their disagreement in good faith.

Mediation. Your letter said that if good faith negotiations fail, "the parties must attempt to resolve the dispute through a mediation

[1] The Commercial Mediation Procedures of the AAA may be found at: http://www.adr.org/sp.asp?id=22440#A6. Section M-5 of the Procedures states that AAA mediators are "required to abide by the Model Standards of Conduct for Mediators in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern."

[2] The Commercial Arbitration Rules of the AAA may be found at: http://www.adr.org/sp.asp?id=22440#A7.

administered by the AAA under its Procedures." The mediator is a neutral party selected by agreement of the attorneys and the City. The AAA stipulates that the parties will be billed equally for all costs unless they agree otherwise. In accordance

with the Procedures, the parties set forth their positions in written submissions that are provided to the mediator in advance of the mediation. Your letter said, "Thereafter, the appointed mediator holds a formal meeting at which both parties and their attorneys are present. During the mediation, the parties present their adversarial positions to the mediator (but in the presence of each other) and the mediator then holds private sessions with each party to discuss their adversarial positions and possible resolutions to the dispute." Section M-7(ii) of the Procedures authorizes the mediator "to conduct separate or ex-parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference."

Section M-7(i) of the Procedures states that mediations are "conducted based on the principle of 'party self-determination.'" Self-determination is defined therein as "the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." In a phone call with Board staff, you confirmed that the parties agree by consensus; there is a joint hiring of the mediator, and a joint agreement. This mirrors Section M-7(iv) of the Procedures: "the mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly."

In the context of mediation, your Firm's attorneys may ask for the City to pay your client a higher amount of contractual damages than the City initially offered to pay and/or for the City to accept certain positions with respect to specified Municipal Code provisions that are different from the provisions that the City initially adopted (collectively, "Remedies"). Your letter said, and the Procedures provide, that, during the course of mediation, negotiations may occur through the mediator or directly with the City, either at the initiative of a party or at the request of the mediator.[3] If the parties come to a settlement outside the presence of the mediator, they inform the mediator, who then executes the settlement agreement reached by the parties, thus ending the AAA-administered mediation.[4]

According to Section M-12 of the AAA's Commercial Mediation Procedures, mediation is terminated:

> i) By execution of a settlement agreement by the parties; or ii) By a written or verbal declaration of the mediator that further efforts at mediation would not contribute to a resolution of the parties' dispute; or iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are

[3] Board staff, with your approval, contacted Gerry Strathmann, Vice President of the American Arbitration Association, to gain a better understanding of the AAA's procedure with respect to attorneys settling outside the presence of the mediator. Mr. Strathmann explained to staff that if the parties settle prior to conducting the mediation session, they report it to the AAA as settled or tell them that the request for mediation is withdrawn.

[4] Mr. Strathmann also said, "Mediators do not have the authority to impose a settlement or declare that a matter has been settled- only the parties can do that."

> terminated; or iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

Section M-17 of the Procedures states that, "If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is $250 plus any mediator time and charges incurred."[5]

Arbitration. Your letter states that, if the dispute cannot be settled in mediation, the Agreement requires that the contractual dispute be exclusively and finally settled by arbitration undertaken in accordance with the Commercial Arbitration Rules of the AAA. The Agreement requires the arbitration to be conducted by a neutral three-party arbitral panel. Each party appoints one arbitrator. The arbitrators selected by the parties appoint the third arbitrator.[6] Once all three arbitrators are appointed, they serve as neutrals and not as party arbitrators, and neither the City nor your client is allowed to engage in any *ex parte* communication with any member of the arbitral panel. The arbitral award is stated to be final and binding on both parties. Either party may choose to seek a judgment on the arbitral award in a court of competent jurisdiction.

In your letter, you said that:

> An arbitration such as that envisioned by the Agreement, undertaken in accordance with the Rules, typically consists of the following activities: preliminary adversarial hearings with the arbitral panel;[7] adversarial discovery activities (including negotiations over document productions and depositions) including activities that are supervised by the arbitral panel and activities that are not supervised in the presence of the arbitral panel (as would occur in a matter litigated in court);[8] written submissions detailing the adversarial positions of the parties to the arbitral panel; and final adversarial hearings before the arbitral panel at which evidence, including testimony, would be presented.[9]

Your letter also said that, "during the course of an arbitration, the Attorneys may: 1) present arguments to the arbitral panel in support of the Remedies in accordance with the Rules, which would result in a decision and/or award that is fully binding on the City,

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[5] Section M-17 provides that the cost of the mediation is based on the hourly mediation rate published on the mediator's AAA profile. There is a four-hour minimum charge for a mediation conference.

[6] Section R-15 of the Rules states that "a party may request three arbitrators in the demand or answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute."

[7] Section R-21 (b) states that during the preliminary hearing, the parties and the arbitrator should discuss the future conduct of the case, including clarification of issues and claims, a schedule for the hearings and any other preliminary matters.

[8] Section R-21(a) & (b) of the Rules.

[9] Section R-30(a) of the Rules.

and which would require the City to implement the decision or award; or 2) discuss the Remedies or other "settlement" alternatives directly with the City, but outside the presence of the arbitral panel."[10]

According to Section R-35 of the Rules, when the arbitrator is satisfied that the record is complete, the arbitrator shall declare the hearing closed. The award shall be made, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing the hearing, or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator.[11]

If the parties settle their dispute during the course of the arbitration, the arbitrator may "set forth the terms of the settlement in a 'consent award.' A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.[12]" The AAA's fee structure provides that above the minimum fee,[13] 100% of the filing fee will be refunded if the case is settled or withdrawn within five calendar days of filing; 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing; and 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

LAW AND ANALYSIS

Section 2-156-010(p) of the Ordinance defines "Lobbyist" as:

> any person who, on behalf of any person other than himself, or as any part of his duties as an employee of another, undertakes to influence any legislative or administrative action[14]....*The term "lobbyist" shall include, but not be limited to, any attorney, accountant, or consultant engaged in the [activities listed in the definition]; provided, however, that an attorney shall not be considered a lobbyist while representing clients in a formal adversarial hearing* (italics added).

[10] Section R-8 provides that, "At any stage of the proceedings, the parties may agree to conduct a mediation conference under the Commercial Mediation Procedures in order to facilitate settlement. The mediator shall not be an arbitrator appointed to the case."

[11] Section R-41 of the Rules.

[12] Section R-44 of the Rules.

[13] For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded.

[14] Section 2-156-010(a) of the Ordinance defines "administrative action" as "any decision on, or any proposal, consideration, enactment, or making of any rule, regulation, or any other official nonministerial action or non-action by any executive department, or by any official or employee of an executive department, or any matter which is in the official jurisdiction of the executive branch."

This italicized language became effective on May 17, 2000. It effectively codified earlier Board jurisprudence. [15] Although the Ordinance does not define the term "formal adversarial hearing," Black's Law Dictionary, provides guidance. It defines "adversary proceeding" as: "a hearing involving a dispute between opposing parties," [16] and defines "formal" as: "pertaining to or following established procedural rules, customs, and practices."[17]

Thus, the Firm's attorneys' actions will not be considered "lobbying" under the Ordinance if they constitute "representing clients in a formal adversarial hearing."

Mediation. During the mediations contemplated, the parties select a neutral person by agreement to act as mediator. The mediation is then conducted according to the Procedures of the AAA. In accordance with the Procedures, the parties set forth their positions in written submissions that are provided to the mediator in advance of the mediation session. Thereafter, the mediator holds a formal meeting at which both parties and their attorneys are present. During the meeting, the parties present their positions to the mediator (but in the presence of each other) and the mediator then holds private sessions with each party to discuss their positions and possible resolutions to the dispute. The mediator attempts to forge a settlement. If the parties come to an agreement, they inform the mediator, who then closes the mediation and executes a formal settlement agreement.

The mediation: i) involves a dispute between opposing parties; and ii) is conducted in a session according to established procedural rules. Regardless whether settlement occurs in or outside the presence of the mediator, the Procedures, fee structure, and posture of the parties remains the same. If the parties tell the mediator that they have reached an agreement, even if it is reached outside the presence of the mediator, the mediator then closes out the mediation and executes a formal settlement agreement. Your Firm's attorneys are, in the context of mediation, representing clients, and

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[15] In pre-2000 cases, the Board, classified attorneys as "lobbyists" whenever they accepted compensation to influence either legislative action or administrative action. *See, e.g., Board Case No. 88013.A*. At the time, the Ordinance focused upon the nature of the governmental activity sought to be influenced and the City agency which was involved. However, in Board Case No. 89022.A, the Board set a precedent by ruling that "attempts to influence a governmental decision in the context of the established procedures of a judicial or quasi-judicial proceeding" do not constitute lobbying. (attorney representing client before Zoning Board of Appeals was representation in a quasi-judicial setting, and therefore, not lobbying). In Case No. 90058.A, the Board determined that lobbyist registration and reporting requirements have been directed towards efforts by individuals to influence government actions which have a broad impact (such as the formulation of laws, rules, regulations, and rate-making), not towards attempts to influence government actions whose application is limited to specific individuals (such as contracts or administrative adjudications). Later Board cases following this jurisprudence include Board Case No. 91033.A (representation of client in tax assessment protest, an administrative process in a quasi-judicial setting, did not constitute lobbying); and Board Case No. 97055.A (expeditor appealing to or appearing before Building Board of Appeals or Committee on Standards and Tests on behalf of client, in the context of the established hearing procedures, was not thereby attempting to influence administrative action within the intended meaning of the Ordinance). In *97055.A,* in concluding that the expeditor was "not attempting to influence administrative action within the intended meaning of the Ordinance definition of lobbying," the Board reasoned that the examiner's actions were "highly circumscribed."

[16] Black's Law Dictionary: Eighth Edition, 2007, p. 58.

[17] *Ibid*, p. 678.

attempting to come to an agreement "within" the strictures of a formal mediation process, the closure of which is performed by the mediator, regardless of whether the settlement was reached in the mediator's presence. For these reasons, in the Board's judgment, your Firm's attorneys, when participating in a mediation contemplated by the Agreement between your Firm's clients and the City, are representing clients in a formal adversarial hearing, and, therefore, would not be lobbyists as defined by the Ordinance while representing clients in these mediations.

Arbitration. You said that arbitrations, such as those envisioned by the Agreement, undertaken in accordance with the Rules, typically consist of the following activities:

> preliminary adversarial hearings with the arbitral panel; adversarial discovery activities (including negotiations over document productions and depositions) including activities that are supervised by the arbitral panel and activities that are not supervised in the presence of the arbitral panel (as would occur in a matter litigated in court); written submissions detailing the adversarial positions of the parties to the arbitral panel; and final adversarial hearings before the arbitral panel at which evidence, including testimony, would be presented.

During the course of an arbitration, your Firm's attorneys may: 1) present arguments to the arbitral panel in support of the Remedies in accordance with the Rules, which would result in a decision and/or award that is fully binding on the City, and which would require the City to implement the decision or award; or 2) discuss the Remedies or other "settlement" alternatives directly with the City, but outside the presence of the arbitral panel. The Rules of the AAA provide that an arbitrator completes a "consent award" if the parties settle during the course of the arbitration, and provide guidance as to the parties' responsibilities regarding payment to the AAA if such settlement occurs. The findings of the arbitral panel are final and binding.

Based on the fact that arbitrations, such as those contemplated by the Agreement, i) involve a dispute between opposing parties; and ii) are conducted in sessions according to established procedural rules, we conclude that such sessions are formal adversarial hearings, and your Firm's attorneys would not be lobbyists as defined by our Ordinance while representing clients in these arbitrations.

DETERMINATIONS: Based on the facts presented in this opinion, the Board determines that your Firm's attorneys are not acting as lobbyists when they: 1) represent the Firm's clients in contractually-required, formal mediation with the City administered by the AAA under the Procedures of the AAA; and 2) when they participate in formal, binding arbitration with the City undertaken in accordance with the Rules of the AAA.[18]

[18] By way of comparison, the Deputy Director of the Lobbyist Division of the Illinois Secretary of State, said that the State does not consider an attorney who is representing a client in a mediation or arbitration in a contract dispute with the State to be engaged in lobbying, because they are not attempting to influence any executive, legislative, or administrative action within the meaning of the Illinois Lobbyist Registration Act. 25 ILCS 170/1(e) defines: "Lobby" and "lobbying" as "any communication with an official of the executive or legislative branch of State government as defined in subsection (c) for the ultimate purpose of influencing any executive, legislative, or administrative action."

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

Our determination and recommendations are based upon the facts as stated in this letter. If these facts are incorrect or incomplete, please notify us immediately, as any change may alter our decision. We do not apply any other law, rule, or authority; we apply only our Ordinance to your request. We appreciate your effort to comply with the ethical standards embodied in the Ordinance. If you have any questions, please do not hesitate to contact us.

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Miguel A. Ruiz
Chair