

**ILLINOIS INDEPENDENT TAX TRIBUNAL
CHICAGO, ILLINOIS**

NOTTUS, INC.,)	
Petitioner,)	
)	
v.)	Case No. 14-TT-167
)	
THE ILLINOIS DEPARTMENT OF REVENUE,)	Judge Brian F. Barov
Respondent.)	

DEPARTMENT’S MEMORANDUM OF LAW

Background

The Illinois Department of Revenue (“Department”) issued Nottus, Inc. (“Petitioner”) a Collection Action Notice (“Notice”) on or about July 1, 2014, assessing personal liability for the unpaid withholding taxes, plus penalties and interest, of Cardinal EMS Ltd in the amount of \$216,517.16. In protest of the Notice, Petitioner filed a Petition in the Illinois Independent Tax Tribunal (“Tax Tribunal”) against the Department.

Petitioner was initially represented by Jason A. Barickman, a Principal attorney at the law firm Meyer Capel P.C. In addition to his duties at Meyer Capel, Barickman is a member of the Illinois General Assembly, having formerly served in the House of Representatives during 2011-2012 and currently serving in the Senate.

On September 3, 2014, prior to the Department filing an Answer to the Petition, the presiding Tax Tribunal Administrative Law Judge issued an order directing the parties to file legal memoranda addressing whether “counsel’s position as a lawyer-legislator affects counsel’s, and his law firm’s, ability to appear before the Tribunal, an agency of the State of Illinois as well as an administrative court, in a matter brought against the Illinois Department of Revenue, another agency of the State of Illinois.”

Senator Barickman filed a memorandum on September 30, 2014, taking the position that there was no ethical impediment to his acting personally as counsel in this matter and no imputed ethical impediment to other members of his law firm serving as counsel. The day after filing that memorandum, Senator Barickman signed a motion seeking permission to withdraw and substituting the appearance of Matthew Lee, another attorney at the Meyer Capel firm. Although the presiding judge granted the motion to substitute, he added that his earlier order directing the parties to address the issues he had identified still stood. Thus, the Department provides this memorandum in compliance with that order.

Discussion

Although there is no attorney-client relationship involved in an elected representative's public office, a "lawyer-legislator" is subject to the ethical standards of his or her profession. *In re Vrdolyak*, 137 Ill. 2d 407, 421, 560 N.E.2d 840, 845 (1990); citing *Higgins v. Advisory Committee on Professional Ethics* (1977), 73 N.J. 123, 125, 373 A.2d 372, 373. Senator Barickman, as a licensed Illinois attorney, and as an elected member of the Illinois General Assembly, is a "lawyer-legislator" and is subject to the ethical rules that govern the practice of law in Illinois, including the rules relating to conflicts of interest.

The Illinois Rules of Professional Conduct of 2010 (the "Rules") set forth the ethical standards applied to the practice of law in Illinois, and they are codified in the Illinois Supreme Court Rules, Article VIII (consisting of Rules 1.0 through 8.5). The "rules of legal ethics are aimed at protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings." *SK Handtool Corp. v. Dresser Indus., Inc.*, 246 Ill. App. 3d 979, 989 (Ill. App. Ct. 1st Dist. 1993).

Generally, and subject to certain exceptions, Rule 1.7(a) provides that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Rule 8.4 identifies various acts that may constitute professional misconduct, and Rule 8.4(k) addresses potential misconduct where "the lawyer holds public office." Subsection (k)(2) provides that it would be professional misconduct for a lawyer to "use that office to influence, or attempt to influence, a tribunal to act in favor of a client." The Comments to Rule 8.4 note that "[l]awyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers" Rule 8.4, Comment 5.

The seminal Illinois case that addresses the professional obligations of a lawyer-legislator is *In re Vrdolyak*. The case arose out of an attorney disciplinary proceeding, where the issue was whether a City of Chicago ("City") alderman could ethically represent City employees in their workers' compensation cases against the City before the Illinois Industrial Commission (the "Commission"), now known as the Illinois Workers' Compensation Commission. The Court concluded that Vrdolyak was engaged in a conflict of interest. He owed an undivided duty of loyalty and a fiduciary duty to the City as a public official. His representation of a client in a matter adverse to the City created "competing fiduciary duties" and "a conflict of diverging interests and divided loyalties, which even full disclosure could not avoid." *Id.*, at 422. The Court held that "a lawyer-legislator may engage in the private practice of law unless the

governmental unit of which he or she is a member is an adverse party, regardless of the forum.” *In re Vrdolyak*, 137 Ill. 2d at 424. The Court reasoned that Vrdolyak, as a member of the City Council, was a member of the same governmental unit as the adverse party in the workers’ compensation proceedings, and that he therefore had a conflict of interest. The Court determined that censure was a sufficient level of discipline, because it noted that there was no evidence that Vrdolyak had tried to use his office to influence the Commission. The Court also noted that he had shown his good faith by consistently refraining from voting on workers’ compensation or personal injury claims in his role as alderman. *Id.*, at 426-427.

If a lawyer-legislator undertakes the private representation of a client against his or her governmental unit, “either the client or the public must necessarily suffer; neither should.” *Id.*, at 424. If however a different governmental unit is an adverse party, “the lawyer-legislator must carefully examine the circumstances to determine whether a conflict of interest exists; if so he or she should decline employment in that case.” *Id.*, at 425. Thus, the *Vrdolyak* opinion suggests a two-part inquiry. First, to which governmental units do the adverse parties belong? If it is the same, the lawyer-legislator should decline the representation. Second, even if there are different units of government, are there particular circumstances that pose a potential conflict of interest?

The rules and comments do not define the term “governmental unit.” One way of interpreting “governmental unit” might be to distinguish between the legislative branch and the executive branch and conclude that they are different governmental units. However, that interpretation cannot be reconciled with the *Vrdolyak* holding or the Court’s reasoning in that case, which treated a City departmental employee and a City alderman—members respectively of the City’s executive and legislative branches—as being part of the same, single “governmental unit,” the City. Instead, the most logical interpretation of the *Vrdolyak* opinion is that the term “governmental unit” describes distinct tiers of government, such as a municipality, a county, a state, or the federal government. That is to say, a lawyer-legislator of a municipality might be able to undertake to represent a party adverse to a county or state government, but may not undertake the representation of a party whose interests are adverse to the municipality.

This understanding of what constitutes a governmental unit is bolstered by an Illinois State Bar Association opinion, IL Adv. Op. 91-04, 1991 WL 735061. The inquiry in that matter was whether an attorney, who was also a member of the county board, could represent criminal defendants being prosecuted by the state’s attorney of that county. The opinion concludes that “as a general proposition, the inquiring [attorney] county board member cannot, under the principles enunciated in *Vrdolyak*, represent defendants in actions being prosecuted by the state’s attorney’s office of the county in which he is an official.”¹

¹ There is an Illinois Attorney General opinion that addressed a similar set of facts but used a more nuanced interpretation in the context of a county board member’s potential representation of a defendant in a criminal law matter. “It is noteworthy, however, that neither the county nor any other unit of government is ordinarily a party to a criminal prosecution. Crimes are considered to be offenses against the peace and dignity of the sovereign; in Illinois, the sovereign power is vested in the people of the State. (Citation omitted.) Therefore, criminal prosecutions are brought in the name of the People of the State of Illinois, not the State of Illinois in its corporate capacity. Moreover, notwithstanding that the State’s Attorneys exercise prosecutorial authority only within the boundaries of a single county, they are State, rather than county, officers.” IL Atty. Genl. Op. 92-009, p.3-4. Thus, “it is my opinion that the reasoning of the court in *In re Vrdolyak* does not require a per se prohibition against a county-board member-lawyer representing a criminal defendant in these circumstances.” *Id.*, at 6.

This interpretation of “governmental unit” is consistent with the *Vrdolyak* opinion and would seem to prohibit Senator Barickman’s representation of the Petitioner in this matter. Here, Mr. Barickman, a State of Illinois Senator, undertook the representation of a client whose interests are adverse to the Department, a State agency. Both the Senate and the Department are sub-units of a single unit of government – the State of Illinois. The present matter is similar to the facts in *Vrdolyak*: “Respondent [Senator Barickman], as an alderman [State Senator], owed his undivided fidelity and fiduciary duty to the City [State]. He also owed his undivided fidelity and a fiduciary duty to his clients [Petitioner]. By representing clients [Petitioner] against the City [State], the competing fiduciary duties collided and respondent became embroiled in a conflict of ‘diverging interests’ and divided loyalties” *Id.*, at 422.

Moreover, the intertwining relationship between the General Assembly, the Department, and the Tax Tribunal, in the context of the existing circumstances, supports the reasoning of the Court’s ruling in *Vrdolyak*. The General Assembly passed legislation in 2012 that created the Tax Tribunal as an independent state agency to resolve disputes between taxpayers and the Department. P.A. 97-1129, codified at 35 ILCS 1010. One provision of the statute requires that the Tax Tribunal report to the General Assembly annually regarding its operations during the prior fiscal year. 35 ILCS 1010/1-85(e). The intent of the reporting requirement is “to apprise the General Assembly of whether the Tax Tribunal has successfully accomplished its mission to fairly and efficiently adjudicate tax disputes.” *Id.*

In addition, the General Assembly must adopt on an annual basis a budget for each state agency, and then appropriate funds for that purpose. Thus, the operational budgets for both the Tax Tribunal and the Department are set each year by members of the General Assembly who vote on such matters. Moreover, the Illinois Senate exercises power over the appointment process. The judges of the Tax Tribunal are appointed by the Governor, subject to the advice and consent of the Illinois Senate. 35 ILCS 1010/1-25(a), (b). Similarly, the Director of the Department of Revenue is appointed by the Governor, subject to the advice and consent of the Senate.

The Department recognizes that Senator Barickman has now withdrawn as counsel of record in this matter and substituted another lawyer from his firm. The Tribunal’s September 3 order directed the parties to address both the propriety of Senator Barickman’s representation and also that of his law firm. Rule 1.10(a) addresses how a conflict affects other lawyers in the same firm. It provides, in relevant part:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

Thus, if Senator Barickman is prohibited from the representation by Rule 1.7, as the Department believes he is, Rule 1.10 presumes from the outset that other Meyer Capel attorneys are as well, unless the circumstances demonstrate otherwise.

Here, on the record presently before the Tribunal, there is nothing currently to demonstrate otherwise. For example, in the motion to withdraw and substitute, neither Senator Barickman nor Lee made any representation about putting any safeguards in place, such as an ethical screen to wall off Senator Barickman from any further involvement in this matter. On the state of the current record, Senator Barickman will no longer appear on the pleadings or in person before the Tribunal, but he could continue to work on this matter, consult with Lee, and otherwise represent the interests of the Petitioner.

Furthermore, Senator Barickman may currently have a continuing financial interest in this matter. He has described himself as a Principal of Meyer Capel, while Lee has not. Being a Principal presumably means that Senator Barickman has an ownership interest in the firm and benefits financially by being entitled to a proportionate share of the fees paid by its clients. In other words, under the current facts before the Tribunal, Senator Barickman may still be actively involved in the matter behind the scenes and may still be in a position to benefit financially from a case brought against the State.

The relevance is, in part, that Senator Barickman represents clients in a related case currently in the Department's Office of Administrative Hearings, which raises its own, separate conflict of interest concerns. Even if Senator Barickman does not have a financial stake in the outcome of this case before the Tribunal, due to his direct involvement in a related case in the Department's Office of Administrative Hearings, it could be a significant challenge for him to avoid materially limiting Mr. Lee's autonomous representation before the Tribunal.

Conclusion

Based on the Illinois Supreme Court's opinion in *Vrdolyak*, had Senator Barickman continued to represent the Petitioner against the Department in the Tax Tribunal, rather than withdraw, it would have been an actual conflict of interest. That issue has since been mooted by Senator Barickman's withdrawal and the substitution of counsel. Whether that conflict of interest should be imputed to the entire Meyer Capel law firm under Rule 1.10(a) is less clear. The Department is not alleging that Senator Barickman or Lee or Meyer Capel have any misguided intentions. But the record currently before the Tax Tribunal does not provide any assurance that any ethical screens or other safeguards are in place. Therefore, at present, without further preventive action by Meyer Capel or Senator Barickman, his individual conflict should be imputed to the entire firm.

Respectfully Submitted,

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