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September 29, 2014

SENT VIA E-MAIL AND U.S. POST OFFICE TO:

Brian.Barov@illinois.gov

Honorable Brian F. Barov
Administrative Law Judge
Illinois Independent Tax Tribunal
160 N. LaSalle Street
Suite N506
Chicago, IL 60601

**Re: 14-TT167
Nottus, Inc. v. IDOR**

Dear Judge Barov:

Enclosed herewith is an original and two copies of a Petitioner's Memorandum of Law. I look forward to hearing from you soon on this matter.

Very truly yours,

Jason A. Barickman

JAB:ka

Enclosure

Cc: Illinois Department of Revenue
Jonathan M. Pope, via e-mail

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

NOTTUS, INC.,)	
Petitioner,)	
)	
v.)	14 TT 167
)	Judge Brian F. Barov
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

PETITIONER'S MEMORANDUM OF LAW

The issue is whether Jason Barickman's ("Barickman") position in the Illinois State Senate affects his ability, or the ability of Meyer Capel, a Professional Corporation ("Meyer Capel P.C."), to represent Nottus, Inc. ("Nottus" or "Petitioner") before the Illinois Independent Tax Tribunal ("Tribunal") in a tax liability suit brought against the Illinois Department of Revenue. For the reasons set forth below, there is no actual or implied conflict of interest created by Barickman's role in the state legislature.

I. The Illinois Rules of Professional Conduct Do Not Prohibit a State Legislator from Representing a Client in a Tax Liability Case Against the Illinois Department of Revenue.

1. The Tribunal cites the Illinois Rules of Professional Conduct ("IRPC") as possible authority for the position that Barickman's representation of Nottus "raises the issue of whether his representation . . . creates an actual or implied conflict of interest." However, Barickman's representation of Nottus before the Tribunal does not implicate any conflict of interest under the IRPC.

2. First, the Illinois Department of Revenue is not actually represented by Barickman in his capacity as a state legislator. Under IRPC Rule 1.7, 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.” IRPC 1.7(a)(1)-(2). To the extent that the representation of Nottus causes any direct conflict of interests would turn on the implication that Barickman’s position in the state legislature puts him in an attorney-client relationship with the Department of Revenue. This is not the case.¹ By statute, the Illinois Department of Revenue is represented by the Attorney General in all proceedings before the Tribunal. 35 ILCS § 1010/1-80(b). Under the second condition, where Barickman’s representation of Nottus might be materially limited due to his loyalty to the Department of Revenue, the finding of a direct conflict is also unlikely, given the attenuated relationship between the Barickman (a state legislator) and an executive branch agency. No objective analysis could conclude that there exists any “significant risk” that Barickman’s “ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests” – in this case, as a result of Barickman’s “responsibilities [to] or interests [in]” the Department of Revenue. IRPC 1.7 [Comment 8]. Barickman’s interests to the Department of Revenue are constitutionally remote, owing to the separation of powers doctrine defined within the Illinois Constitution. Ill. Const. art. II, § 1 (“The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.”).

3. In interpreting the Illinois Rules for Professional Conduct, the Illinois State Bar Association (“ISBA”) has explored conflict of interest issues involving public officials in various Advisory Opinions on Professional Conduct. ISBA’s findings of a conflict of interests focuses on “direct” conflicts involving the membership of an official in a particular public body and the representation of a client bringing suit against that

¹ The Illinois Supreme Court favorably quoted a New Jersey Supreme Court case in *In re Vrdolyak*, 137 Ill.2d 407 (1990), to the following effect: “Respondent, as a lawyer-legislator, is, nonetheless, ‘subject to the ethical standards of his profession, even though there is no attorney-client relationship involved in the public office.’” *In Re Vrdolyak*, 137 Ill.2d 407, 421 (1990) (quoting *Higgins v. Advisory Committee on Professional Ethics*, 73 N.J. 123, 125 (1977)). The *Vrdolyak* case is explored at length in section II, *infra*, but is mentioned here for the purpose of noting that the Illinois Supreme Court, though holding *Vrdolyak* to the state bar association’s ethical standards, did not infer any explicit attorney-client relationship between the respondent-alderman and the City Council, nor between the respondent-alderman and the separate branches of municipal government that constitute the city government.

very body. *See, e.g.*, ISBA Opinion 12-12 (May 2012) (in an imputation proceeding, ISBA found that a lawyer may not continue to represent a school district against which the lawyer's partner has initiated an adverse proceeding); ISBA Opinion 90-17 (Jan. 1991) (finding that a lawyer who is a city council member and the lawyer's firm generally should not represent clients before city council, even if the city councilman-attorney is screened) (affirmed by the Board of Governors in May 2010). Other cases have found a conflict where there was a direct supervisory relationship between the public body and the attorney in conflict. *See, e.g.*, ISBA Opinion 94-20 (Mar. 1995) (finding that the partner of lawyer who is also a full-time municipal police officer could not represent a client with respect to a claim against the same municipality) (affirmed by the Board of Governors in May 2010).

4. The present case is readily distinguishable. The State Senate (or more generally, the state legislature) does not have direct supervisory control over the Illinois Department of Revenue, an executive agency run by the Governor. Even further, Barickman does not sit on the Senate Revenue Committee, or any subcommittee therein. To be sure, the Illinois Senate does perform the advice and consent function for gubernatorial appointments. Ill. Const. art. V, §9(a) ("The Governor shall nominate and, by and with the advice and consent of the Senate, a majority of the members elected concurring by record vote, shall appoint all officers whose election or appointment is not otherwise provided for.") To that end, the Senate approved the appointment of the director of the Department of Revenue.² The Illinois Senate performs a similar function in approving the Governor's appointments of a Chief Administrative Law Judge and the other Administrative Law Judges that constitute the Tribunal. 35 ILCS § 1010/1-25 ("The Governor shall, with the advice and consent of the Senate, appoint a Chief Administrative Law Judge to be the executive of the Tax Tribunal The Governor may appoint additional administrative law judges, with the advice and consent of the Senate, as necessary to carry out the provisions of this Act[.]"). But that limited advisory role is distinguishable from the aforementioned ISBA advisory opinions, which found conflict where the conflicted attorney enjoyed some

² It bears mentioning that Barickman did not have any role in that vote, as he was not in the Illinois Senate at the time the current Illinois Department of Revenue director was appointed.

supervisory control over the governmental entity being sued. The role performed by Barickman is significantly more attenuated, if not entirely unrelated, to those instances where ISBA has found a conflict of interests under the Illinois Rules of Professional Conduct.

II. The Illinois Supreme Court Has Not Decided That a Legislator's Representation of a Client in a Tax Claim Is Inconsistent with the Illinois Rules of Professional Conduct.

5. The Tribunal cites the Illinois Supreme Court decision *In re Vrdolyak*, 137 Ill. 2d 407 (1990), as possible authority for the position that Barickman's representation of Nottus "raises the issue of whether his representation . . . creates an actual or implied conflict of interest." A close reading of *Vrdolyak* suggests that there is no conflict of interests in Barickman's representing a party in a collection action against the Illinois Department of Revenue at the Tribunal.

6. The facts of *In re Vrdolyak* are as follows. Edward Vrdolyak was an alderman for the City of Chicago who maintained a law practice alongside his role on the city council. Over a nine year period, Vrdolyak (individually or through associates at his firm) brought 35 workers' compensation claims against the city. Workers' compensation cases against the city were brought before the Industrial Commission, a state agency, typically to approve settlement agreements reached between the parties. Within the city, workers' compensation claims were reviewed by the bureau of workmen's compensation, a group appointed by the chairman of the committee on finance. Vrdolyak was a member of the committee on finance. He did not, however, believe there to be a conflict of interests, because he had submitted letters stating that he did not wish to vote to approve any workers' compensation claims before the city council in his role as an alderman. However, workers' compensation claims were only reviewed by the bureau, which made settlement recommendations to the chairman of the committee on finance, and no final vote went to the council. The Attorney Registration and Disciplinary Commission eventually filed a complaint charging Vrdolyak with violations of the Illinois Code of Professional Responsibility.

7. Vrdolyak was ultimately censured for his engagement in conflicting interests. The Illinois Supreme Court held in *Vrdolyak* that "[a] lawyer-legislator may engage in

the private practice of law including representing governmental employees, unless the governmental unit of which he is a member is an adverse party – regardless of the forum.” *In re Vrdolyak*, 137 Ill.2d at 424.

8. The holding is ambiguous since the court did not specify what is meant by “governmental unit,” which can alternatively mean either a tier of government (e.g. individual municipalities; or the state; or the federal government) or subsidiary units within a tier of government (e.g. the Chicago City Council committee on finance; or the Illinois State Senate; or the Illinois Department of Revenue). *See, e.g.*, the Illinois Pension Code, 40 ILCS § 5/20-107 (defining “governmental units” in the context of retirement systems legislation as “The State of Illinois or any agency or instrumentality thereof, or any political subdivision or municipal corporation in the State, which maintains a retirement system for the benefit of its employees.”).

9. But the *Vrdolyak* court suggested that this ambiguity serves a purpose consistent with the ethical discretion found in the (predecessor) Illinois Rules of Professional Conduct, which articulated an “independent professional judgment” test for attorneys to use in determining the scope of conflicts. *Vrdolyak*, 137 Ill.2d at 423-24. To be clear, *Vrdolyak* does not create a *per se* prohibition against a lawyer-legislator bringing a case on behalf of a fee-paying client. To that point, the court in *Vrdolyak* said: “If another governmental unit is an adverse party, the lawyer-legislator must carefully examine the circumstances *to determine whether* a conflict of interests exists; if so, he should decline employment in that case.” *Id.* at 425 (emphasis added). The court found in that particular instance, the lawyer-legislator did “engage in a conflict of interest when he represented city employees in their workers’ compensation claims against the City, while serving as an alderman.” *Id.* at 421. Again, whether the court intended “governmental unit” to refer to broad levels of structural government or committees or agents within a particular branch, the court does not articulate any presumption that conflict exists. Rather, it is something that the lawyer-litigator must analyze and avoid.

10. Therefore, a conflict of interest is not automatically engaged when a state legislator represents a client in a collection claim against the Illinois Department of Revenue. *Vrdolyak* deals with a more direct conflict: the lawyer-legislator’s duty to the

city, underlined by his role as a member of the finance committee and the fact that contained within the finance committee was the body making recommendations about workers' compensation settlements, was at odds with the lawyer-legislator's duty to the clients filing those particular claims against the city. Barickman does not create such a conflict when representing a client in a collection claim before the Tribunal in opposition to the Illinois Department of Revenue, an executive agency run by the Illinois Governor.

III. There Are No Statutory or Regulatory Prohibitions in the Illinois Independent Tax Tribunal Act of 2012 or the Illinois Governmental Ethics Act That Would Bar Barickman from Representing Petitioner.

11. The Illinois Independent Tax Tribunal Act of 2012 ("Tax Tribunal Act"), 35 ILCS §§ 1010/1-1 *et seq.*, imposes requirements as to who may represent a party before the Tribunal. The Illinois Governmental Ethics Act ("Ethics Act"), 5 ILCS §§ 420/1-101 *et seq.*, restricts state legislators from certain representation cases. However, neither the Tax Tribunal Act nor the Ethics Act would prohibit Barickman from representing Nottus before the Tribunal.

12. The Tax Tribunal Act defines the contours of the Tribunal's purpose, jurisdiction and composition. The Tax Tribunal Act also speaks to the standards of representation, stating as follows:

Appearances in proceedings conducted by the Tax Tribunal may be by the taxpayer or by an attorney admitted to practice in this State. The Tax Tribunal may allow an attorney authorized to practice or licensed in any other jurisdiction of the United States to appear and represent a taxpayer in proceedings before the Tax Tribunal for a particular matter.

35 ILCS § 1010/1-80(a). Barickman is admitted to practice in the State of Illinois. This minimal requirement is reiterated in the regulations adopted pursuant to the Tax Tribunal Act, which restates the requirement that "[a]ll parties not acting on their own behalf shall be represented by an attorney authorized to practice before the courts of the state of Illinois." 86 Ill. Adm. Code § 5000.305(a)(2). Nothing in the Tax Tribunal Act bars a state employee or official from representing a client before the Tribunal.

13. From the perspective of Barickman's obligations as a legislator, the Ethics Act imposes certain restrictions on a legislator's ability to engage in private legal

representation. However, these restrictions would not operate to prohibit Barickman's representation of Nottus before the Tribunal. As background, the Ethics Act discusses the limitations and restrictions imposed on legislators in the context of a "representation case," which the Ethics Act defines as "the professional representation of any person, client or principal, with or without compensation, in any matter before any State agency where the action or non-action of the State agency involves the exercise of substantial discretion." 5 ILCS § 420/1-113. Working from that definition, the act identifies two instances – namely, representation in the Court of Claims or before the Illinois Workers' Compensation Commission – in which the a legislator may not represent a party. 5 ILCS § 420/2-104. But even this is not an inflexible rule: these prohibitions are relaxed if the legislator "maintains a close economic association" with the person for whom the representation is required. *Id.* Regardless, these narrow prohibitions do not control representation cases brought before the Tribunal.

14. The broader rules applying to legislators in representation cases are as follows. First, legislators are prohibited from accepting representation cases where there is "substantial reason for him to believe that it is being offered with intent to obtain improper influence over a State agency." 5 ILCS § 420/3-105. In a similar vein, a legislator may not "use or attempt to use improper means to influence a State agency in any representation case in which the legislator or any person with whom he maintains a close economic association is participating." 5 ILCS § 420/3-106. A legislator is barred from taking representation cases "unless he believes there is merit to the position he is asked to represent." 5 ILCS § 420/3-204. Finally, "[a] legislator participating in a representation case shall, wherever feasible, arrange for other persons to make appearances before the State agency." 5 ILCS 420/3-205. To the extent that this statute might impose an obligation on Barickman to arrange for other counsel to appear before the Tribunal, it is important to note the statutory caveat in the subsequent section: "Sections 3-201 through 3-205 are intended only as guides to legislator conduct, and not as rules meant to be enforced by disciplinary action." 5 ILCS § 420/3-206.

15. Reviewing these requirements, there is nothing to suggest that Barickman has engaged in a conflict of interests in representing Nottus before the Tribunal. Further, Barickman contacted the Chief Legal Counsel to the Senate Republican

Counsel, Jo Ellen Johnson, to address the potential conflict of interests issue. Ms. Johnson stated: “From the perspective of your role as a Senator, I don’t think there is a problem with you representing a client before the tax tribunal as long as you don’t use your position as Senator to anyway attempt to influence the case.” This position is consistent with the statutes noted above.

IV. Even If Barickman Is Conflicted from Representing Petitioner, Such a Conflict of Interest Is Not Imputed Into the Meyer Capel, P.C.

16. If the Tribunal determines that Barickman’s position in the Illinois State Senate affects his ability to represent Nottus before the Tribunal, there is a question as to whether Meyer Capel P.C. is conflicted by imputation under IRCP 1.10. The exceptions contained within the rule itself makes it clear that Meyer Capel P.C. would not be imputed in any conflict of interest.

17. IRCP 1.10 suggests the type of conflict that would disqualify Barickman from representing Nottus will not disqualify Meyer Capel P.C. from maintaining representation of Petitioner. The rule itself states: “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.” IRCP 1.10(a). In application, IRCP treats each lawyer in a firm as being “vicariously bound by the obligation of loyalty with whom the lawyer is associated.” IRCP 1.10 [Comment 2]. A conflict will be imputed to Meyer Capel P.C. if Barickman’s representation of Nottus is “directly adverse” to the other client under IRCP 1.7(a). The imputation of conflict may be overcome by two ways: first, if there is informed consent from the affected parties; or, second, if the disqualification is based on certain conditions under IRCP 1.10(a).

18. Under IRCP 1.10(c), imputed disqualification “may be waived by the affected client” under the same conditions described in IRCP 1.7. Waiver occurs if the following conditions are met: (1) Meyer Capel P.C. “reasonably believes” that it can provide “competent and diligent representation” to the affected client; (2) the representation is

not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent. Given that Barickman and the Department of Revenue (or more generally, the state) are not in an attorney-client relationship, the third prong does not defeat the possibility of obtaining consent to represent Nottus in this matter.

19. The final clause of IRCP 1.10(a) allows that disqualification based on an attorney's "personal interest," in addition to the absence of a "significant risk of materially limit[ed]" representation of the client, will not be imputed to the attorney's firm. The advisory committee comments reinforce the understanding that the rule is inapplicable in this situation. IRCP 1.10 comment 3 states: "The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Such is the case here, as there is no client loyalty or confidentiality issue presented by Meyer Capel P.C.'s representation of Nottus. Even if Barickman has broadly defined loyalties to the State of Illinois preventing his representation of a client before the Tribunal in an action adverse to the Illinois Department of Revenue, the Illinois Supreme Court has disavowed the idea that the lawyer-legislator actually has an attorney-client relationship with the governmental unit (however defined) in question. *See* footnote 1, *supra*; *see also, In re Vrdolyak*, 137 Ill.2d at 21. As a practical matter, it is doubtful that another Meyer Capel P.C. attorney's loyalty to the client would be limited by Barickman's ostensible loyalty to an executive branch administrative agency. Further, per the Tax Tribunal Act, that agency is represented by the Attorney General, itself an arm of the executive branch. 35 ILCS § 1010/1-80(a).

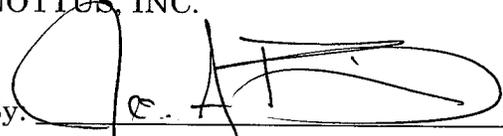
20. If this Tribunal determines that Barickman is prohibited from representing Nottus in an action adverse to the Illinois Department of Revenue, and that Meyer Capel P.C. is disqualified from representing Nottus based on Barickman's putative conflict, the logical consequences are extraordinary. To find an imputed conflict here suggests that no attorney at Meyer Capel P.C. is permitted to represent *any* client in *any* matter adverse to *any* state agency, even though Barickman *does not* have any

attorney-client relationship with those state agencies as a legislator.³ This would be an incredible reading of the Illinois Rules of Professional Conduct, and is a novel take on the imputed limitations on representation heretofore unmentioned since Barickman first assumed legislative duties in 2011 and joined Meyer Capel P.C. in 2012.

CONCLUSION

For the foregoing reasons, Barickman's role in the state legislature does not create an actual or implied conflict of interest with respect to Barickman's representation of Nottus in an adverse action against the Illinois Department of Revenue before the Tribunal.

NOTTUS, INC.

By: 

one of the Attorneys representing
Petitioner.

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³ See IRCP 1.10