

## Outline for Ethics Opinion on Ethics for In-house Counsel

### I. Introduction

In-house legal team members often wear more than one hat while working on behalf of a company. As employees, the legal team and its lawyers must follow company policies, but also have unique ethical obligations with respect to their roles as managerial, supervisory, or subordinate lawyers.

### II. Potential Hypo:

Lawyer, after practicing law for 10 years at a medium size law firm in [non-California jurisdiction] where he or she is licensed to practice law, has decided to take a position as an assistant General Counsel for a large corporation headquartered in California, where Lawyer will relocate to work. Lawyer wants to know what ethical obligations, if any, will apply to his or her new role as in-house counsel for Company.

### III. Outline of Issues:

#### A. Ethics Rules Apply to In-house Lawyers.

- i. Legal department of any company is a “firm” or “law firm” as that term is defined in the rules of professional conduct, so many of the same rules apply to in-house lawyers, managers, and supervisors, as they do to lawyers in private or government practice. [Rule 1.0.1(c)]
- ii. Rules apply whether acting in legal or business capacity.

#### B. Registered In-House Counsel and License to Practice Law

- i. Discussion of issues related to registering for in-house in California (Registration Rules; Cal Rules of Court, Rule 9.46)
- ii. Where Lawyer is authorized to practice law; caution while giving advice related to other jurisdictions not authorized to practice law.

#### C. Duty of Competence

- i. Lawyer should be familiar with the rules of professional conduct applicable to his or her license, where he or she is registered as in-house counsel, or the company has offices or does business.
- ii. Lawyer has obligations to maintain competence regarding developments in the law that are important to Company and part of duties at the company. [Rule 1.1].
- iii. This includes the duty to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. Reference cybersecurity related responsibilities.

- 41                   iv.       If Lawyer encounters situation in which Lawyer believes that he or she  
42                   does not have the necessary learning or skill reasonably necessary to  
43                   perform the services, comply with Rule 1.1(c).  
44

45       **D.     Who Is Lawyer's Client?**

- 46           i.       Lawyer represents Company acting through its duly authorized  
47           constituents, who may be officers, directors, managers, or employees.  
48           ii.      Does not represent any individual officers, directors, managers, or  
49           employees in an individual capacity, or any subsidiaries or affiliates of  
50           Company, unless Company agrees to such a joint representation.  
51                   1.   Which would implicate conflicts rules analysis and likely require  
52                   consent.  
53           iii.     Ways in which Lawyer can clarify role, particularly, during participation in  
54           investigations.  
55

56       **E.     Legal Advice v. Business Advice**

- 57           i.       In-house lawyers are regularly called upon to participate in meetings or  
58           become involved in discussions in writing or in person related to business  
59           decisions where the predominant purpose is to obtain legal advice, but  
60           sometimes role is not clear.  
61           ii.      When providing legal advice must make clear in writing when  
62           communications involve legal opinions or legal advice. All should be  
63           marked "Attorney-Client Privileged and Confidential."  
64           iii.     Cursory discussion to issue spot or more in-depth? Relates to below topic  
65           on handling of privileged or confidential information.  
66

67       **F.     Handling Privileged or Confidential Information**

- 68           i.       As part of a legal team, Lawyer has obligations to keep confidential  
69           information communicated to or from Lawyer, in his or her legal capacity,  
70           confidential. This duty is broader than the duty to maintain attorney-  
71           client privileged communications.  
72           ii.      Lawyer may also be bound by company policies and individual  
73           agreements requiring him or her to keep Company's proprietary  
74           information confidential – different obligation.  
75           iii.     Potential for inadvertent waiver, so must remain mindful of obligations.  
76           iv.      Duties to former employers to maintain confidential info related to prior  
77           clients/employment (do we want to discuss at all? I suggest we note this  
78           and the issue in subsection (ii) in a footnote)  
79

80       **G.     Conflicts of Interest**

- 81           i.       Do we want to discuss in-depth, cursory or not at all? Big topic. I suggest  
82           we focus on one or two only if we decide to address.  
83           ii.      Most common to in-house counsel: joint rep of subsidiary or officer,  
84           intercompany transactions, or related to obtaining confidential

information from prior employment/clients. Others?-negotiating own employment contract/promotions (business transactions/personal interest conflicts); director conflicts.

**H. Up-The-Ladder Reporting**

- i. Discuss rules related to up-the-ladder reporting? Include comparison to ABA Model Rules re: permissive reporting.
- ii. In addition to some statutes and laws that may require up-the-ladder reporting (what about company policies?). Rule 1.13 also requires in-house counsel to disclose material violations of law that are likely to result in substantial injury to the company up-the-ladder if it is in the best interest of the organization to do so.

**I. Communications with Third Parties and Outside Counsel**

- i. At times, Lawyer may be asked to sit in on a call with other parties during contract negotiations or other types of discussions. In those instances, it is important that the other side also has counsel present, and most companies of any size have dedicated in-house lawyers. Otherwise, Lawyer needs permission from other sides in-house counsel (not the client) to participate in those discussions. [Rule 4.2].
- ii. If Lawyer speaks with someone unrepresented by counsel, must be mindful of obligation not to mislead them about Lawyer's role as a lawyer for Company and never provide them with legal advice. [Rule 4.3].
- iii. Discussion of Rule 4.1 (Truthfulness in Statements to Others).

**J. Duties Under 5.1/5.3? Other Issues/Topics-Outsourcing?**

**K. Resignation/Withdrawal.**

- i. Discussion of Rules 1.6, 1.9 and 1.16.