

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:

After practicing law for 5 years as in-house legal counsel for a software company ("Old Company"), Lawyer has decided to take a position as Assistant General Counsel for a software company ("Company") that is a competitor of Old Company.

Question 1: In onboarding Lawyer to its legal department, the General Counsel of Company wants to know how to analyze and navigate any potential conflicts that Lawyer might have based on Lawyer's work at Old Company and to what extent an ethical screen may be required. [Or we can position this from the POV of Lawyer]

[Discussion Rule 1.9 and 1.10 in this context; See also ABA Formal Opinion 99-415, Representation Adverse to Organization by Former In-House Lawyer for guidance]

As part of Lawyer's employment agreement with the Company, Lawyer is presented with a stock option agreement that every salaried employee at the Company is offered. The agreement states that Lawyer has an option to purchase a certain number of shares of the Company's common stock at an exercise price equal to the fair market value of such shares on the date of the grant, based on the Company's Stock Incentive Plan. The agreement also states that the securities will vest over time, at increasing percentages over the course of five years. The also states that in the event of a merger with or acquisition by another company, the vesting of the Lawyer's option will immediately accelerate so as to become fully vested.

Question 2: Lawyer wants to know whether the stock option agreement presents any conflicts of interest, and if so, how and when such conflicts of interest should be addressed with the Company.

Lawyer begins working for Company. Three years later, after Lawyer's securities are 30% vested, Company begins talks with another Company (Public Company) under which Public Company offers to acquire Company such that Company would become a wholly-owned subsidiary of Public Company. Company's CEO asks Lawyer to advise the Board of Directors about the benefits and risks of the proposed deal, and potential negotiation terms including a sales price.

Question 3: Lawyer wants to know whether her status as a stockholder in the Company presents a conflict of interest in connection with the requested advice, and if so, whether the conflict may be waived by the Company. Lawyer also wants to know whether she may ethically represent Counsel in direct negotiations with Public Company and/or its counsel.

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42 **III. Outline of Issues:**

43 **A. Ethics Rules Apply to In-house Lawyers.**

- 44 i. Legal department of any company is a “firm” or “law firm” as that term is
45 defined in the rules of professional conduct, so many of the same rules
46 apply to in-house lawyers, managers, and supervisors, as they do to
47 lawyers in private or government practice. [Rule 1.0.1(c)]
48 ii. Rules apply whether acting in legal or business capacity.
49

50 **B. Registered In-House Counsel and License to Practice Law [DELETE OR**
51 **REFERENCE IN FOOTNOTE]**

- 52 i. Discussion of issues related to registering for in-house in California
53 (Registration Rules; Cal Rules of Court, Rule 9.46)
54 ii. Where Lawyer is authorized to practice law; caution while giving advice
55 related to other jurisdictions not authorized to practice law.
56 *iii. CRC Rule 9.48: temporary practice when as employee of client.*
57 *iv. Remote practice?*
58

59 **C. Duty of Competence**

- 60 i. Lawyer should be familiar with the rules of professional conduct
61 applicable to his or her license, where he or she is registered as in-house
62 counsel, or the company has offices or does business.
63 ii. Lawyer has obligations to maintain competence regarding developments
64 in the law that are important to Company and part of duties at the
65 company. [Rule 1.1].
66 iii. This includes the duty to keep abreast of changes in the law and its
67 practice, including the benefits and risks associated with relevant
68 technology. Reference cybersecurity related responsibilities.
69 iv. If Lawyer encounters situation in which Lawyer believes that he or she
70 does not have the necessary learning or skill reasonably necessary to
71 perform the services, comply with Rule 1.1(c).
72

73 **D. Who Is Lawyer’s Client?**

- 74 i. Lawyer represents Company acting through its duly authorized
75 constituents, who may be officers, directors, managers, or employees.
76 ii. Does not represent any individual officers, directors, managers, or
77 employees in an individual capacity, or any subsidiaries or affiliates of
78 Company, unless Company agrees to such a joint representation.
79 1. Which would implicate conflicts rules analysis and likely require
80 consent.
81 iii. Ways in which Lawyer can clarify role, particularly, during participation in
82 investigations.

iv. *Corporate families: “A parent corporation, even one which owns 100 percent of the stock of a subsidiary, is still, for purposes of [Rule 1.13], a shareholder and constituent of the corporation. Rule [1.13] makes clear that in the representation of corporations, it is the corporate entity actually represented, rather than any affiliated corporation, which is the client. The attorney owes undivided allegiance only to the corporate entity which he or she represents rather than any affiliated persons or entities.” Cal. Formal Opn. No. 1989-113. “When dealing with the constituents of a corporation, the lawyer has a duty to: . . . explain the identity of the client for whom the member acts, whenever it is or becomes apparent that the organization’s interests are or may become adverse to those constituent(s) with whom the member is dealing.” Id., referring to former Rule 3-600.*

“[T]he fact of corporate affiliation, without more, does not necessarily make the affiliate of a corporate client also a client. Nonetheless, the particular circumstances may be such that the affiliate also should be considered a client. It may also be the case that the corporate client has an expectation, binding on the lawyer in the circumstances, that its affiliates will be treated as clients for purposes of addressing conflicts under Rule 1.7, even though there is not a full-fledged client-lawyer relationship with the affiliates.” ABA Formal Opinion 95-390. Generally, there are set three distinct tests for identifying when representation of one member of a corporate family (e.g., parent or subsidiary) will be deemed a representation of its affiliates (e.g., co-subsidiary or parent). (1) two members of a corporate family are “alter egos;” or if (2) in representing one company a lawyer acquires relevant confidential information about its affiliate; or (3) if legal matters for all corporate family members are handled by a single in-house legal department conflict rules may prevent the lawyer from handling a matter adverse to the non-client affiliate. In situations (1) and (3), the conflict will exist for all matters adverse to the affiliate while the lawyer represents the affiliated client. In situation (2), the conflict may forever forbid all adverse representation to which the confidential information is relevant.

E. Legal Advice v. Business Advice

- i. In-house lawyers are regularly called upon to participate in meetings or become involved in discussions in writing or in person related to business decisions where the predominant purpose is to obtain legal advice, but sometimes role is not clear.
- ii. When providing legal advice must make clear in writing when communications involve legal opinions or legal advice. All should be marked “Attorney-Client Privileged and Confidential.”

- 126 iii. Cursory discussion to issue spot or more in-depth? Relates to below topic
127 on handling of privileged or confidential information.
128

129 **F. Dual Roles (?)**

- 130 i. *Serving on board of directors*
131 ii. *Shareholder*
132

133 **G. Handling Privileged or Confidential Information**

- 134 i. As part of a legal team, Lawyer has obligations to keep confidential
135 information communicated to or from Lawyer, in his or her legal capacity,
136 confidential. This duty is broader than the duty to maintain attorney-
137 client privileged communications.
138 ii. Lawyer may also be bound by company policies and individual
139 agreements requiring him or her to keep Company's proprietary
140 information confidential – different obligation.
141 iii. Potential for inadvertent waiver, so must remain mindful of obligations.
142 iv. Duties to former employers to maintain confidential info related to prior
143 clients/employment (do we want to discuss at all? I suggest we note this
144 and the issue in subsection (ii) in a footnote)
145 v. *In context of merger/acquisition: "[W]hen control of a corporation passes*
146 *to new management, the authority to assert and waive the corporation's*
147 *attorney-client privilege passes as well. New managers installed as a*
148 *result of a takeover, merger, loss of confidence by shareholders, or simply*
149 *normal succession, may waive the attorney-client privilege with respect to*
150 *communications made by former officers and directors. Displaced*
151 *managers may not assert the privilege over the wishes of current*
152 *managers, even as to statements that the former might have made to*
153 *counsel concerning matters within the scope of their corporate duties."*
154 *Great Hill Equity IV, LP v. SIG Growth Equity Fund I, LLLP (2013) 80 A.3d*
155 *155, 161, quoting, Commodity Futures Trading Comm'n v. Weintraub*
156 *(1985) 471 U.S. 343, 349; see also, Favila v. Katten Muchin Rosenman LLP*
157 *(2010) 188 Cal.App.4th 189: "However, in the absence of a merger or*
158 *transfer of control of the corporation holding the privilege, the sale of the*
159 *corporation's assets generally does not also transfer the privilege."*
160

161 **H. Conflicts of Interest**

- 162 i. Do we want to discuss in-depth, cursory or not at all? Big topic. I suggest
163 we focus on one or two only if we decide to address.
164 ii. Most common to in-house counsel: joint rep of subsidiary or officer,
165 intercompany transactions, or related to obtaining confidential
166 information from prior employment/clients. Others?-negotiating own
167 employment contract/promotions (business transactions/personal
168 interest conflicts); director conflicts.

- 169 iii. *When GC is a shareholder: 1.8.1 waiver as part of stock option agreement*
170 *and 1.7 material limitation conflict issues that may arise later in*
171 *connection with lawyer's role as shareholder (e.g., shareholder disputes;*
172 *M&A deals)*

173
174 **I. Up-The-Ladder Reporting**

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

182
183 **J. Communications with Third Parties and Outside Counsel**

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

194
195 **K. Duties Under 5.1/5.3? Other Issues/Topics-Outsourcing?**

196 **L. Resignation/Withdrawal.**

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