

## 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 General Counsel for a closely-held software company ("Company"), owned by three shareholders ("Shareholders"). The Shareholders make up the Board of Directors ("Board"). Lawyer is expected to head a small team of three lawyers ("Legal Department").

Company is a competitor of Old Company in that both are in the process of registering competing patents for similar technology. Lawyer was not part of the team that advised Old Company concerning its technology and patent applications. However, Lawyer was responsible for advising Old Company on legal issues concerning its business strategies and marketing, which necessarily involved patented products.

**Question 1:** *Before formally accepting the position, Lawyer 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.*

As part of Lawyer's employment agreement with the Company, Lawyer is presented with a stock option agreement that is offered to the Company's key employees. 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 agreement 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 through a stock purchase and Company would become a wholly-owned subsidiary of Public Company. [Public Company is also a competitor of Old Company and Company?] Company's CEO asks Lawyer to advise the Shareholders (i.e., the sellers under the proposed deal) about the benefits and risks of the proposed deal, and

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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 the requested advice to the Shareholders will present conflicts of interest between and among the Shareholders and/or between the Shareholders and the Company. Lawyer also wants to know whether she may ethically represent Company in direct negotiations with Public Company and/or its counsel.*

### III. Outline of Issues:

#### A. Overview

- i. Ethics Rules apply to in-house lawyers
  1. Lawyer's "client" is the Company
  2. 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)]
  3. Rules apply whether acting in legal or business capacity.
- ii. General approach to conflicts analysis relevant to Questions:
  1. Identification of the Client (and former client):
    - a. CRPC 1.13: Lawyer represents Company acting through its duly authorized constituents, who may be officers, directors, managers, or employees.
    - b. CRPC 1.13(f): "In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.").
    - c. Does not represent any individual officers, directors, managers, or employees in an individual capacity, or any subsidiaries or affiliates of Company, unless Company and individuals agree to such a joint representation.
  2. Conflicts of interests are not limited to litigation apply to all types of "matters" (CRCP 1.7(3); Comment [2])
  3. CRPC 1.13(g): Consent must be given by Board or Shareholders
  4. Principles of duties of loyalty and confidentiality underlying conflicts rules as applied to in-house context.

#### B. Question 1: Successive representation of clients with adverse interests

- i. CRPC 1.9:
  1. Direct representation: (a): A lawyer who has formerly represented

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a client in matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's\* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*

2. Changing "Legal Departments": (b): A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person;\* and (2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed written consent.\*

a. ABA Form. Opn. 99-415: former in-house lawyer may represent client in matter materially adverse to lawyer's former employer in same or substantially related matter, or another member of employer's legal department had done so and former in-house lawyer acquired protected information material to the matter.

b. Same or substantially related?

i. Comment [3]: if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

ii. Playbook conflicts: "not a conflict unless "directly in issue or of critical importance." (Rutter Guide, 4:190)

iii. Definition of Confidential Information

1. B&P 6068(e)/CRPC 1.6: broader than AC privilege

2. Company policies/agreement to keep proprietary information secret?

ii. CRPC 1.10 (Screening Option)

### C. Question 2: Stock Option Agreement

i. Pecuniary Interest Adverse to Client:

1. Rule 1.8.1: A lawyer shall not enter into a business transaction with a client, or knowingly\* acquire an ownership, possessory, security or other pecuniary interest adverse to a client, unless each of the following requirements has been satisfied:

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- a. the transaction or acquisition and its terms are fair and reasonable\* to the client and the terms and the lawyer's role in the transaction or acquisition are fully disclosed and transmitted in writing\* to the client in a manner that should reasonably\* have been understood by the client;
- b. the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing\* to seek the advice of an independent lawyer of the client's choice and is given a reasonable\* opportunity to seek that advice; and
- c. the client thereafter provides informed written consent\* to the terms of the transaction or acquisition, and to the lawyer's role in it.

2. Consequence of failure to comply: Client has option to void the agreement

3. Application to In-House Context?

- a. ABA Form. Opn. 00-418: is this a stock in lieu of fees scenario?); *see also*: NYC Bar Opn. 2000-3
- b. Wages v. fees? (Does 1.5 unconscionability apply to in-house lawyer wages?)
- c. *Chism v. Tri-State Constr., Inc.*, 2016 WL 2643355 (Wash. App. May 9, 2016):
  - i. Rule 1.8(a) was not implicated when an in-house lawyer negotiates a bonus agreement with his employer.
  - ii. "By rendering their compensation agreements prima facie fraudulent, the trial court's interpretation would disturb the settled expectations of many lawyer-employees. It would also subject standard wage contracts for lawyer-employees, which frequently include nonmonetary compensation, to greater scrutiny overall than standard fee contracts, which are generally exempt from the rule. Moreover, it would do this without addressing whether lawyer wage contracts should be exempt from the rule as another type of "transaction [in which] the lawyer has no advantage in dealing with the client," RPC 1.8 cmt. 1, given that, in general, employees are thought to have relatively little power compared with that of their employers."
  - iii. Notes there is little clarity on the issue even with expert opinions.

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iv. Washington State Bar Advisory Opinion 1045: “A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.”

### ii. Material Limitation Conflict:

1. Rule 1.7(b) “A lawyer shall not, without informed written consent\* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client, a former client or a third person,\* or by the lawyer’s own interests.”
2. Independent judgment may be affected. Model Rule 1.7, Comment [10]: “For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. . . . See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients.”
3. ABA Form. Opn. 00-418
  - a. Stock options/stock in lieu of fees creates no “inherent conflict” under 1.7 because management’s role is to enhance value of company.
  - b. However, circumstances where lawyer’s objectivity may be questionable could arise e.g. “the lawyer might have a duty when rendering an opinion on behalf of the corporation in a venture capital transaction to call upon corporate management to reveal material adverse financial information that is being withheld, even though the revelation might cause the venture capital investor to withdraw.”
  - c. Conflict could be non-waivable if stock is lawyer’s primary asset and loss of venture capital investor means lawyer suffers serious financial loss.
  - d. Firm policies that mitigate risk – how would this translate to the in-house context? “In order to minimize conflicts with the interests of the clients such as those described,

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some law firms have adopted policies governing investments in clients. These policies may include limiting the investment to an insubstantial percentage of stock and the amount invested in any single client to a nonmaterial sum. The policies also may require that decisions regarding a firm lawyer's potential client conflict be made by someone other than the lawyer with the principal client contact (who also may have a larger stock interest in the corporate client) and may also transfer billing or supervisory responsibility to a partner with no stock ownership in the client."

### iii. Adequacy of Disclosures –

1. ABA 00-418: "At the outset, the lawyer also should inform the client that events following the stock acquisition could create a conflict between the lawyer's exercise of her independent professional judgment as a lawyer on behalf of the corporation and her desire to protect the value of her stock. She also should advise the client that as a consequence of such a conflict, she might feel constrained to withdraw as counsel for the corporation, or at least to recommend that another lawyer advise the client on the matter regarding which she has a personal conflict of interest"
2. Future Conflicts/Advance Conflict Waiver?
  - a. Factors (Rutter 4:84.1):
    - i. The temporal scope of the waiver (ie, whether it waives a current conflict or is intended to waive all conflicts in the future)
    - ii. The quality of the conflicts discussion
    - iii. The specificity of the waiver
    - iv. The nature of the actual conflict
    - v. Experience and sophistication of client
    - vi. Whether the client is represented by independent counsel when giving the consent
    - vii. The interests of justice
  - b. Specificity: examples of what should Lawyer include?
    - i. Potential sale of company
    - ii. Impact of business operations on Lawyer's stock value
    - iii. HR issues

### D. Question 3: The Acquisition Deal

- i. Can Lawyer advise individual Shareholders?
  1. CRPC 1.13g: Generally, an attorney may represent company and

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constituents subject to 1.7, 1.8.2 (use of confidential info), 1.8.6 (TPP) and 1.8.7 (aggregate settlements)

a. CRPC 1.7(a): is there a direct adversity?

b. If so, sufficiency of waiver?

i. Disclosures

ii. No confidentiality

2. Limited scope?

ii. If Lawyer cannot or does not want to (?) advise individual Shareholders, what disclosures are required?

1. Rutter 4:90.5: "The fact a few shareholders own all of the outstanding stock does not itself make the corporation's lawyer their lawyer as well. But there may be instances in which 'because of close interaction with a shareholder or shareholders' the corporate attorneys 'stand in confidential relationships in respect to both the corporation and individual shareholders.'"

2. Rutter 4:90.6: "The fact an attorney's representation of the corporation may benefit its shareholders does not itself make them clients. Unless otherwise agreed, the corporate entity alone remains the client. The shareholders cannot properly presume corporate counsel is protecting their individual interests."

3. Rutter 4:90.7: Confidential disclosures

4. Practice pointer: "If it appears that the corporation's interests may be adverse to the particular corporate personnel with whom you are dealing, you must protect the corporation. Inform the individuals involved, preferable in writing, that your professional responsibility and allegiance are owed to the corporate entity – not to them individually."

a. Advise to seek independent counsel

b. Do not mislead (1.13f)

iii. Material Limitation Conflict based on Lawyer's status as stockholder

1. Second confirming waiver needed?

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### 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 closely-held software company ("Company") ~~that~~, owned by three shareholders ("Shareholders"). The Shareholders make up the Board of Directors ("Board"). Lawyer is expected to head a ~~competitor of Old Company.~~ small team of three lawyers ("Legal Department").

~~Question 1: In onboarding Lawyer to its legal department, the General Counsel of Company~~ Company is a competitor of Old Company in that both are in the process of registering competing patents for similar technology. Lawyer was not part of the team that advised Old Company concerning its technology and patent applications. However, Lawyer was responsible for advising Old Company on legal issues concerning its business strategies and marketing, which necessarily involved patented products.

Question 1: Before formally accepting the position, Lawyer 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 ~~extend~~ 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 to the Company's key employees. 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 agreement 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.

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vested, Company begins talks with another Company (Public Company) under which Public Company offers to acquire Company ~~such that~~ through a stock purchase and Company would become a wholly-owned subsidiary of Public Company. [Public Company is also a competitor of Old Company and Company?] Company's CEO asks Lawyer to advise the ~~Board of Directors~~ Shareholders (i.e., the sellers under the proposed deal) about the benefits and risks of the proposed deal, and potential negotiation terms including a sales price.

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#### A. Overview

~~A.i.~~ Ethics Rules Apply apply to ~~in~~ in-house ~~Lawyers~~ lawyers

1. Lawyer's "client" is the Company

~~i.~~ 2. 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.~~ 3. Rules apply whether acting in legal or business capacity.

~~B. Registered In-House Counsel and License~~ General approach to Practice Law  
[DELETE OR REFERENCE IN FOOTNOTE]

~~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.~~

~~iii. CRC Rule 9.48: temporary practice when as employee of client.~~

~~iv. Remote practice?~~

~~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.~~ ii. This includes the duty to keep abreast of changes in the law and its practice, including the benefits and risks associated with conflicts analysis

relevant ~~technology. Reference cybersecurity related responsibilities to~~  
Questions:

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

~~D. Who Is Lawyer's Client?~~

1. Identification of the Client (and former client):

~~ia.~~ CRPC 1.13: Lawyer represents Company acting through its duly authorized constituents, who may be officers, directors, managers, or employees.

b. CRPC 1.13(f): "In dealing with an organization's constituents, a lawyer representing the organization shall explain the identity of the lawyer's client whenever the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituent(s) with whom the lawyer is dealing.").

~~ii.c.~~ Does not represent any individual officers, directors, managers, or employees in an individual capacity, or any subsidiaries or affiliates of Company, unless Company ~~agrees~~ and individuals agree to such a joint representation.

2. ~~Which would implicate~~ Conflicts of interests are not limited to litigation apply to all types of "matters" (CRCP 1.7(3); Comment [2])

3. CRPC 1.13(g): Consent must be given by Board or Shareholders

4. Principles of duties of loyalty and confidentiality underlying conflicts rules as applied to in-house context.

B. Question 1: Successive representation of clients with adverse interests

i. CRPC 1.9:

1. Direct representation: (a): A lawyer who has formerly represented a client in matter shall not thereafter represent another person\* in the same or a substantially related matter in which that person's\* interests are materially adverse to the interests of the former client unless the former client gives informed written consent.\*

2. Changing "Legal Departments": (b): A lawyer shall not knowingly\* represent a person\* in the same or a substantially related matter in which a firm\* with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person;\* and (2) about whom the lawyer had acquired information protected by Business and Professions Code section 6068, subdivision (e) and rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives

informed written consent.\*

a. ABA Form. Opn. 99-415: former in-house lawyer may represent client in matter materially adverse to lawyer's former employer in same or substantially related matter, or another member of employer's legal department had done so and former in-house lawyer acquired protected information material to the matter.

b. Same or substantially related?

i. Comment [3]: if the lawyer normally would have obtained information in the prior representation that is protected by Business and Professions Code section 6068, subdivision (e) and rule 1.6, and the lawyer would be expected to use or disclose that information in the subsequent representation because it is material to the subsequent representation.

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iii. Definition of Confidential Information

1. B&P 6068(e)/CRPC 1.6: broader than AC privilege

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b. the client either is represented in the transaction or acquisition by an independent lawyer of the client's choice or the client is advised in writing\* to seek the advice of an independent lawyer of the client's choice and is given a reasonable\* opportunity to seek that advice; and

c. the client thereafter provides informed written consent\* to the terms of the transaction or acquisition, and to the lawyer's role in it.

2. Consequence of failure to comply: Client has option to void the agreement

3. Application to In-House Context?

a. ABA Form. Opn. 00-418: is this a stock in lieu of fees scenario?); see also: NYC Bar Opn. 2000-3

b. Wages v. fees? (Does 1.5 unconscionability apply to in-house lawyer wages?)

c. Chism v. Tri-State Constr., Inc., 2016 WL 2643355 (Wash. App. analysis and likely May 9, 2016):

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iii. Notes there is little clarity on the issue even with expert opinions.

iv. Washington State Bar Advisory Opinion 1045: "A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation."

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1. Rule 1.7(b) "A lawyer shall not, without informed written consent\* from each affected client and compliance with paragraph (d), represent a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client, a former client or a third person,\* or by the lawyer's own interests."
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  - ~~1.~~d. Firm policies that mitigate risk – how would this translate to the in-house context? "In order to minimize conflicts with the interests of the clients such as those described, some law firms have adopted policies governing investments in clients. These policies may include limiting the investment to an insubstantial percentage of stock and the amount invested in any single client to a nonmaterial sum. The policies also may require ~~consent~~, that decisions regarding a firm lawyer's potential client conflict be made by someone other than the lawyer with the principal client contact (who also may have a larger stock interest in the corporate client) and may also transfer billing or supervisory responsibility to a partner with no stock ownership in the client."

~~iii. Ways in which Lawyer can clarify role, particularly, during participation in investigations.~~

~~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~~

iii. Adequacy of Disclosures –

1. ABA 00-418: "At the outset, the lawyer also should inform the client that events following the stock acquisition could create a conflict between the lawyer's exercise of her independent professional judgment as a lawyer on behalf of the corporation and her desire to protect the value of her stock. She also should advise the client that as a consequence of such a conflict, she might feel constrained to withdraw as counsel for the corporation, or at least to recommend that another lawyer advise the client on the matter regarding which she has a personal conflict of interest"

2. Future Conflicts/Advance Conflict Waiver?

a. Factors (Rutter 4:84.1):

i. The temporal scope of the waiver (ie, whether it waives a current conflict or is intended to waive all conflicts in the future)

ii. The quality of the conflicts discussion

iii. The specificity of the waiver

iv. The nature of the actual conflict

v. Experience and sophistication of client

vi. Whether the client is represented by independent counsel when giving the consent

vii. The interests of justice

b. Specificity: examples of what should Lawyer include?

i. Potential sale of company

ii. Impact of business operations on Lawyer's stock value

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1. CRPC 1.13g: Generally, an attorney may represent company and constituents subject to 1.7, 1.8.2 (use of confidential info), 1.8.6 (TPP) and 1.8.7 (aggregate settlements)

a. CRPC 1.7(a): is there a direct adversity?

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a. Advise to seek independent counsel

b. Do not mislead (1.13f)

iii. Material Limitation Conflict based on Lawyer's status as stockholder

1. Second confirming waiver needed?

#### IV. Conclusion



~~iv. 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."~~
- ~~iii. Cursory discussion to issue spot or more in depth? Relates to below topic on handling of privileged or confidential information.~~

#### ~~F. Dual Roles (?)~~

- ~~i. Serving on board of directors~~
- ~~ii. Shareholder~~

**G. Handling Privileged or Confidential Information**

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

**H. Conflicts of Interest**

- i. ~~Do we want to discuss in-depth, cursory or not at all? Big topic. I suggest we focus on one or two only if we decide to address.~~
- ii. ~~Most common to in-house counsel: joint rep of subsidiary or officer, 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.~~
- iii. ~~When GC is a shareholder: 1.8.1 waiver as part of stock option agreement and 1.7 material limitation conflict issues that may arise later in connection with lawyer's role as shareholder (e.g., shareholder disputes; M&A deals)~~

**I. 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.~~

~~J. 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).~~

~~K. Duties Under 5.1/5.3? Other Issues/Topics Outsourcing?~~

~~L. Resignation/Withdrawal.~~

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