

2001

## "Rush to Riches" The Rules of Ethics and Greed Control in the Dot.Com World

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### Recommended Citation

Robert C. Kahrl & Anthony T. Jacono, *"Rush to Riches" The Rules of Ethics and Greed Control in the Dot.Com World*, 2 MINN. INTELL. PROP. REV. 51 (2001).

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**“Rush to Riches”  
The Rules of Ethics and Greed Control  
in the Dot.Com World**

**Robert C. Kahrl and Anthony T. Jacono \***

Introduction.....	52
I. Pitfalls in Taking Equity as a Form of Payment.....	54
A. Material Limitations by a Lawyer’s Own Interests	56
B. Compliance with Model Rules 1.8(a) and 1.5(a) .....	60
1. The Lawyer Must Insure That the Terms of the Transaction are Fair and Reasonable .....	61
2. The Lawyer Must Insure that the Terms Are Fully Disclosed and Explained to the Client .....	63
3. The Transaction Must Be Specified in Writing	64
4. The Lawyer Must Allow the Client to Seek Independent Counsel.....	64
C. Conclusion .....	65
II. Conflicts of Interest for Inside Counsel.....	66
III. Conflicts of Interest Before the Patent and Trademark Office.....	69
Conclusion .....	71
Appendix.....	73

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## INTRODUCTION

Flipping through the morning's correspondence deposited in his in-box, Tom Esquire shuffles past envelopes containing plane tickets to a client meeting in New York, an invitation to speak at a conference in Washington, and a chipper notice announcing his twenty-five year high school reunion. Arriving at a gusset-sized envelope from a nearby venture capital firm, Tom stops his shuffling. He slices through the creased flap with his Waterford crystal letter opener and pulls forth the draft offering statement for his new client, Cashout-Dot-Com. Thumbing through the first few pages of the statement, Tom smiles at how the success of this new client will provide him with a proportional windfall. Tom's compensation package for his work on the deal includes eight percent of the stock that he arranged to issue to the incorporators of the company. Cashout-Dot-Com received its Angel financing and substantial venture financing in its first venture capital round. The venture capitalists are eager to take the company public. The market for IPO issues seems strong, and the public offering is set at 100 million dollars with the closing to occur in two weeks. Tom is overwhelmed with pride in helping to facilitate this potential success, and even more overwhelmed at the prospect of finally breaking free of the shackles of his personal line of credit, so frequently strained since the spring that his daughter was accepted at Stanford.

Just then, Tom receives a telephone call from Washington. Cashout-Dot-Com's principal patent application has just been made the subject of an interference proceeding with a patent application filed by a competitor dot com company. Furthermore, the Patent Office has named Cashout-Dot-Com's inventor as the junior party. As a junior party, Tom's client will have the burden of proof to show that his company invented first. Tom looks more intently at the draft offering statement on his desk. The draft statement includes a section on patent filings, but nothing about the interference. "Investors will want to know about this," Tom thinks to himself. Then the phone rings again. It's Victor Ventura, senior partner in the venture capital firm. Tom tells him about the pending interference.

Victor exclaims, "We don't have to put that in there because you're going to win that one for us, aren't you Tom?"

Tom explains, "As junior party, this is a tough hill to

climb."

Victor's response is immediate and authoritative: "If we put THAT in the statement, this deal may not go. We've got to have an opinion letter from a top-drawer firm like yours that we will win the interference."

The phone call ends. Tom slumps in his chair. If he writes a strong opinion letter, the client will think that his firm will win the interference. If he hedges too much, the deal might not go. He doesn't even have enough time before the closing to interview all the principal individuals, analyze the competitor's legal and factual position, and determine the strength of the evidence and the law supporting Cashout-Dot-Com's date of invention. Tom now realizes that his opinion letter is going to be a second-class piece of work. He wishes that he could just pick up the phone, call Victor and say, "No, we're not going to give an opinion like that."

The phone rings again. It's Cashout-Dot-Com's founder. He says, "Tom, I just talked with Mr. Ventura. He said that this market may have only a short window for doing this IPO, and that you are working on getting the disclosure issues resolved in time. I'm glad we have you to solve these problems."

Tom's throat suddenly feels very dry. He can hardly choke out a soft "thank you," before hanging up. Tom now realizes his problem. If he had this work on an hourly basis, he would have told Victor "no way!" without much hesitation ten minutes ago. After all, he has walked away from other client schemes in the past even though the lost fees could have amounted to twenty-five, fifty, or even a hundred thousand dollars. But this one was much harder. In two weeks he would go from a barely positive net worth to never having to work again. He would COUNT. He would be one of the PLAYERS, not just a spectator in the game. He could be worth five to eight million at the moment of issuance, and maybe worth twenty million at the end of the first day's run-up.

Tom knows what is wrong. He has lost his independence. He can no longer provide effective legal advice. He's not practicing a profession now. He's just trying to make money.

This scene illustrates the tremendous pressures that may unduly influence a lawyer's decisions. The rules of ethics that guide lawyers help define what the public should be able to expect from lawyers they retain. The above scenario demonstrates how a lawyer becomes distracted from these

rules by the very real and powerful influences of an entrepreneurial culture. This article explores several specific dangers that arise in this culture when a lawyer is expected to provide impartial professional advice, either from a position inside or outside of the enterprise.

## I. PITFALLS IN TAKING EQUITY AS A FORM OF PAYMENT

Scenario: NewCo is preparing to go public. NewCo has minimal capital, negligible sales, no contracts, but is on the verge of acquiring \$100 million via investors eager to add a high-risk technology start-up to their portfolio. NewCo has retained Counsel to facilitate its initial public offering. Without funds to pay cash for its legal fee, NewCo has offered Counsel a five percent equity share in NewCo. Counsel eagerly accepts the shares in exchange for traditional hourly billing. NewCo is two weeks away from going public, and Counsel is two weeks away from becoming a millionaire.<sup>1</sup> The challenge for Counsel is to provide independent, unbiased advice and avoid the temptation to simply rush ahead toward the riches that will certainly follow the IPO.

Historically, lawyers have participated with clients in making investments and in taking ownership interests in small businesses.<sup>2</sup> Under the current legal climate, however, the

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1. The prospects of earning millions of dollars overnight is an exciting reality for some firms that have invested in their clients. The top five first-day IPO gains in 1999 for law firms that have invested in clients taking their stock public are as follows: Wilson Sonsini Goodrich & Rosati's ("Wilson Sonsini") 2,068,944 shares of Webvan were valued at \$51,475,327 at the end of the first day of the stock trading; Wilson Sonsini's 102,584 shares of VA Linux were valued at \$24,543,222 at the end of the first day of the stock trading; Wilson Sonsini's 273,773 shares of Ask Jeeves were valued at \$17,778,819 at the end of the first day of the stock trading; Hughes & Luce's 402,552 shares of Perot Systems were valued at \$17,728,512 at the end of the first day of the stock trading; and Brandes Naschitz & Co.'s 863,997 shares of Backweb Technologies were valued at \$17,012,101 at the end of the first day of the stock trading. See Debra Baker, *Who Wants to be a Millionaire?*, 86 A.B.A. J. 36 (February 2000).

2. See, e.g., *Grievance Committee of the Fairfield County Bar v. Leo Nevas*, 96 A.2d 802 (Conn. 1953), where the defendant helped the complainant set up a corporation in which defendant took control of 40 percent of the issued stock. *Id.* at 803-04. The trial court found that defendant was not guilty of unprofessional conduct, and the Supreme Court of Connecticut affirmed this decision under an abuse of discretion standard of review. *Id.* at 805-06. The trial court specifically noted that defendant "had concealed no material fact

scenario where a lawyer accepts equity in a client as a means of payment (as described above) is fraught with ethical pitfalls. This type of transaction may expose a lawyer to malpractice liability and sanctions from an ethics board, in addition to invalidation of the transaction.<sup>3</sup> Having an equity stake in a client can compromise a lawyer's independent judgment and strain a longstanding rapport with that client.<sup>4</sup> Further, only a small portion of the big-name technology IPOs ever turn out to be profitable.<sup>5</sup> Thus, it may be both unethical and highly risky to tread the path of a client equity holder. Although it may be possible to create an equity relationship with a client,<sup>6</sup> the following section discusses the major potential pitfalls, many of which have been addressed in the recently-issued Formal Opinion 418 of the ABA Committee on Ethics and Professional Responsibility ("Opinion 418").<sup>7</sup>

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from the complainant." *Id.* at 805. Despite finding the defendant innocent of unprofessional conduct, the trial court stated that:

I feel that Mr. Nevas, the respondent, deserves criticism for becoming involved personally and financially in his client's business. There was a complete absence of prudence and good taste. His involvement apparently became inextricable after he had put in the first \$5,000. From then on everything he did sought to save the money he had improvidently already paid in. He should not have done that.

*Id.* The appellate court noted that, although the trial court found respondent innocent, it "might well have decided that a public reprimand should be administered to the defendant." *Id.* at 806.

3. See *infra* Parts I.A-C.

4. See *id.*

5. See BAKER, *supra* note 1, at 38-39 ("With all the attention paid to the monster gains in the Internet IPO market, few people are paying attention to the losers. . . . Despite the jackpots that many investors make, observers estimate that in the high-stakes game of technology, losers outnumber the winners by as much as 20 to 1. And that doesn't take into account the companies that make it to the public market but fail a few months down the road.").

6. Indeed, some commentators encourage these types of transactions. See, e.g., Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Lawyers*, 2 COLUM. BUS. L. REV. 330 (1999) ("Allowing compensation of lawyers with client stock or options should be encouraged not only because it is market-driven, but also because it adds value to the client, the economy, and society."); Gwyneth E. McAlpine, Note, *Getting a Piece of the Action: Should Lawyers Be Allowed to Invest in Their Clients' Stock?*, 47 UCLA L. REV. 549, 596 (1999) ("Because of the benefit to the client, the transactions should not be discouraged by ineffectual procedural requirements.").

7. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 418 (2000), reprinted in the Appendix.

## A. MATERIAL LIMITATIONS BY A LAWYER'S OWN INTERESTS

A lawyer who acquires stock in a client in lieu of a cash payment must ensure that his actions are in accord with Model Rules of Professional Conduct Rule 1.7(b). Rule 1.7(b) prohibits a lawyer from representing a client if the representation “may be materially limited . . . by the lawyer’s own interests.”<sup>8</sup> If the representation may be materially limited, the lawyer must decline representation or else satisfy two additional requirements: the lawyer must reasonably believe that “the representation will not be adversely affected,” and the client must consent to the representation after consultation.<sup>9</sup>

The ABA Committee’s Opinion 418 offers a hypothetical that is very similar to the NewCo and Counsel scenario.<sup>10</sup> Opinion 418 describes a situation in which an attorney’s ownership of stock in a corporation may conflict with the attorney’s responsibilities to the corporation.<sup>11</sup> For example, when the attorney is rendering an opinion on behalf of the corporation to potential investors, the attorney may have a duty to advise the corporation to reveal material adverse information, even though the revelation may cause the potential investor to withdraw.<sup>12</sup> Opinion 418 instructs that in this scenario, when the attorney’s financial interest runs counter to the duty to provide independent, unbiased advice, the attorney must “subordinat[e] any economic incentive” that may result from owning equity in the corporation.<sup>13</sup> Then the attorney must evaluate his “ability to maintain the requisite professional independence.”<sup>14</sup>

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8. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (2000). Rule 1.7(b) states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

9. *Id.*

10. *See* Formal Op. 418.

11. *See id.*

12. *See id.*

13. *Id.*

14. Formal Op. 418.

Drawing out the hypothetical even further, Opinion 418 posits a scenario in which the attorney's stock in the corporation is also the attorney's major asset, and a failure to obtain outside investors would result in a significant financial loss to the attorney.<sup>15</sup> Opinion 418 warns that the attorney's self-interest likely justifies a reasonable belief that his representation may not be independent and unbiased.<sup>16</sup> Opinion 418 provides clear advice in this scenario: "This [self-interest] would disqualify [the attorney] under Rule 1.7(b) from providing the opinion even were the client to consent."<sup>17</sup> Thus, not even the consent of a client, after a disclosure of all the potential conflicts of interest, would permit an attorney to continue representation in that situation.<sup>18</sup>

If NewCo's IPO closes as expected, Counsel stands to receive \$5 million, which is analogous to the scenario considered in Opinion 418. This potential immediate payoff for Counsel provides a powerful incentive for him to compromise his independent, unbiased advice in light of the great benefit that completion of the transaction will realize for him. With two weeks separating Counsel from a payday large enough for him to retire from practice, even an attorney guided by a strong ethical compass, with a copy of the Model Rules in hand, would find it difficult to instruct a client that it must make a material, adverse disclosure or that it would be best to hold off on the IPO until certain issues can be resolved – especially given the nebulous nature of the standards of prudence in this area of law.

But what if this particular conflict never materializes? What if preparation for the IPO proceeds as planned and Counsel is never faced with the decision of having to advise NewCo to disclose or postpone? Is Counsel permitted to maintain the significant equity share and continue to represent NewCo? The formal opinion is clear on this point: if the attorney's self-interest justifies a reasonable belief that his representation may not be independent and unbiased, then under Rule 1.7(b) the attorney must decline representation.<sup>19</sup> If

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15. *Id.*

16. *Id.*

17. *Id.*

18. *See id.*

19. *Id.* Model Rule 1.7(b) permits an attorney to continue representation only if "the lawyer reasonably believes the representation will not be adversely affected." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000). One learned treatise notes that Model Rule 1.7(b) "applies whenever

Counsel in this instance must decline representation where *no* actual conflict materializes, then, *a fortiori*, in a situation where Counsel finds himself revisiting his advice to the client based on his own personal interest, and realizes that his potential financial gains are skewing the disinterest of his advice, the representation most certainly must be declined.

The pitfalls of stock ownership are not unique to outside counsel. As an example, if the NewCo and Counsel scenario is slightly altered so that Counsel is working in-house for NewCo and owns equity shares or possesses stock options such that NewCo's impending IPO could compromise Counsel's independent, unbiased advice, then Counsel must decline representation. However, inside counsel are not permitted the luxury of simply choosing not to represent a client – indeed, by definition they only have one client. Inside counsel's declining representation would entail quitting their jobs and risking financial security for themselves and their families. In contrast, outside attorneys with multiple other clients can more easily avoid a potential conflict by declining representation and shifting their time to other clients with available work.

What ethical choice does inside counsel have with respect to representing her only client? She has the duty to inform her management, whenever asked to advise the company in any matter in which inside counsel's ability to provide independent advice might be compromised by economic exigencies, to explain the potential conflict, and to suggest that management consider retaining an independent lawyer to advise the company in the matter. Such situations might arise, for example, when she is asked to advise on the sufficiency of preparations and disclosures for an initial public offering, or when she is asked to handle a subpoena issued to the company in a government investigation, or when she is asked to advise as to the fairness of the CEO's compensation package.

Not only are the options available to inside counsel more constrained, the conflict of interest as described in the NewCo scenario can arise more subtly and with greater frequency, even when stock options are not involved. When the CEO of NewCo instructs Counsel to execute a business plan, Counsel

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representation of a client *may* be impaired or limited by the lawyer's responsibilities to others, and does not depend upon the existence of an actual adverse relationship, 'direct' or not." GEOFFREY C. HAZARD, JR. ET AL., 1 THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.7, at 249 (2d ed. 1998) (emphasis in original).

feels a natural compulsion to assist the CEO in executing the plan, even if the legality of certain steps in the plan might otherwise trouble him. Counsel may feel a more powerful compulsion than an outside counsel, who is not so dependent on the personal goodwill of the CEO for his family's immediate sustenance. The CEO's influence over Counsel's status at NewCo, and the inherent compulsion that Counsel feels to align himself to the goals of the CEO, may be analogous to the conflict of interest that Counsel feels when he is two weeks away from turning his five percent equity into five million dollars. If Counsel feels any propensity whatsoever to act against his independent professional advice, regardless of whether an actual conflict ever materializes, then Counsel is in the same situation as an equity-holding attorney who is advising his client on going public. Again, Opinion 418 is clear on the action that must be taken: if the attorney's self-interest justifies a reasonable belief that his representation may not be independent and unbiased, then under Rule 1.7(b) the attorney must decline representation.<sup>20</sup>

In another permutation of the Counsel and NewCo hypothetical, NewCo's founder and CEO ("Founder") cashes out his equity and begins another business venture. As an outside attorney, Counsel handles the legal aspects of the business transaction, in addition to drafting the noncompete agreement that restrains Founder from developing any technology for the next three years that would compete with NewCo. One year after the equity buyout, Founder creates a new restaurant chain named Cheese-E-Chuck. Because of the relationship that Founder developed with Counsel while at NewCo, Founder calls Counsel and asks him to assist in his new business endeavor. Counsel is eager to handle Founder's work. Founder's innovative ideas resulted in the success at NewCo, and Counsel believes that representing Founder in his new business endeavor with Cheese-E-Chuck could be very lucrative.

Before Counsel accepts Founder's offer, Counsel must consider whether the ethical rules permit this representation. When Founder worked at NewCo, he was the majority shareholder and CEO and thus spoke for the company. Counsel took orders from Founder, and it was Founder that instructed Counsel to prepare the buyout transaction.

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20. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 418 (2000).

Although Counsel perceived Founder as the client, his client was actually the business entity NewCo. When Counsel evaluates whether he can represent Founder after his departure from NewCo, Counsel must consider whether there are any potential conflicts between NewCo and Founder that may adversely affect his representation of both parties. If NewCo's new owner forms a belief that Founder's warranties were not fulfilled or if some controversy arises with respect to the conduct of the business prior to the change in ownership, Counsel will be placed in a position of being unable to represent Founder.<sup>21</sup> For example, if Cheese-E-Chuck develops into a competitor of NewCo within the next two years, NewCo may have a claim for breach of contract against Founder. Since Counsel represented NewCo in the drafting of the contract, this prior representation would make Counsel ineligible to represent Founder.

Another conflict could arise if NewCo is sued for producing a defective product. Counsel may have reviewed a safety analysis while working for Founder and NewCo. Although Counsel's personal knowledge of Founder's actions while at NewCo would be an advantage to NewCo in investigating the products liability claim, Counsel's current representation of Founder may disqualify Counsel from assisting NewCo.<sup>22</sup> Thus, Counsel must carefully consider any other potential conflicts before Counsel accepts an offer to work for Founder, or Counsel may be risking a future disqualification and potential malpractice liability.

## B. COMPLIANCE WITH MODEL RULES 1.8(a) AND 1.5(a)

When Counsel, either as an inside or outside attorney, decides to accept equity in NewCo, Counsel must satisfy certain ethical "procedural" requirements, in addition to avoiding a conflict of interest. Thus, a lawyer who acquires stock in a client corporation in lieu of or in addition to a cash fee enters into a business transaction with a client, such that the requirements of Model Rule 1.8(a) must be satisfied.<sup>23</sup> Under

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21. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000).

22. See *id.*

23. Model Rule 1.8(a) reads:

(a) A lawyer shall not enter into a business transaction with a client . . . unless:

(1) the transaction and terms on which the lawyer acquires the interest

Rule 1.8(a), the transaction must be fair and reasonable; the terms must be fully disclosed and explained to the client; the transaction must be specified in writing; and the lawyer must allow the client to seek independent counsel.<sup>24</sup> The following section discusses how to properly satisfy the "procedural" requirements of Model Rule 1.8(a).

## 1. The Lawyer Must Ensure That the Terms of the Transaction are Fair and Reasonable

In determining whether Rule 1.8(a)'s first requirement of fairness and reasonableness to the client is satisfied, an attorney must consider the factors enumerated in Model Rule 1.5(a).<sup>25</sup> Rule 1.5(a) states:

The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.<sup>26</sup>

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are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

- (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- (3) the client consents in writing thereto.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (2000).

### 24. *Id.*

25. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (2000). In addition, in evaluating whether the transaction is fair and reasonable, the lawyer may have to consider criteria beyond just the factors in Rule 1.5(a). For example, in determining reasonableness of a fee when accepting client stock, the lawyer also should consider: (i) the liquidity of the stock, (ii) the potential for it to be publicly traded, (iii) restrictions on the transferability of the stock that may affect its value, and (iv) the stock's expected value, in light of any risks that a proposed patent or trademark may not be granted or necessary government approvals may not be received. See Utah Ethics Adv. Op. Comm., Op. 98-13, 1998 WL 863904 \* 1 (Dec. 4, 1998).

### 26. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(a) (2000).

Opinion 418 explains that the Rule 1.5(a) criteria must be evaluated in determining whether an equity transaction between a lawyer and a client is fair and reasonable.<sup>27</sup> A lawyer must properly balance these factors in bartering his legal services for a client's equity because in a disciplinary hearing he will bear the burden of persuasion in demonstrating that the transaction was fair and reasonable.<sup>28</sup> Further, not only is the burden on the lawyer to demonstrate that the transaction was fair and reasonable, but the lawyer is held to an objective standard, *i.e.*, it is incumbent upon the lawyer to take account of all information reasonably ascertainable at the time when the agreement for stock acquisition is made.<sup>29</sup>

One of the risks in these types of transactions is that failing to satisfy the fair and reasonable requirement may result in an invalidation of the equity transfer.<sup>30</sup> Opinion 418 provided two case citations as examples of this danger.<sup>31</sup> The first example described a scenario involving a lawyer for a corporation to whom the board had authorized issuance of \$33 million in stock of the corporation in connection with his legal services.<sup>32</sup> The lawyer was denied recovery of the \$33 million in stock because he had failed to advise the board of directors to consult independent counsel about the transaction.<sup>33</sup> The court noted that independent counsel could have provided information such that "the board of directors might or might not have been so enthusiastic about [the lawyer's offer] as to give away three percent of the stock."<sup>34</sup> The second example from the Formal Opinion involved a judicial order canceling a contract that transferred to a lawyer an undivided one-fourth interest in mineral rights in land owned by clients.<sup>35</sup> The court found that consideration for the conveyance was lacking and

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27. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 418 (2000).

28. *See id.* (citations omitted).

29. *See id.* (citations omitted).

30. *See id.*

31. *Id.*

32. *See* Passanate v. McWilliams, 53 Cal. App. 4th 1240, 1242, 62 Cal. Rptr.2d 298, 299 (Cal. Ct. App. 1997).

33. *See id.* at 1248, 62 Cal. Rptr.2d at 302.

34. *See id.* ("Bargaining between the parties might have resulted in Passante [the lawyer] settling for just a reasonable finder's fee. Independent counsel would likely have at least reminded the board members of the obvious — that a grant of stock to Passante might complicate future capital acquisition.").

35. *See* Matthews v. Spears, 24 So.2d 195, 196-97 (La. App. 1945).

that the lawyer did not fully disclose the nature of the transaction.<sup>36</sup> Both of these cases demonstrate the risks a lawyer faces when acquiring a financial interest in a client.

## 2. The Lawyer Must Ensure that the Terms Are Fully Disclosed and Explained to the Client

Beyond satisfying requirements of fairness and reasonableness under Rule 1.8(a), an attorney must fully disclose the terms of the transaction in a manner that can be reasonably understood by the client.<sup>37</sup> Opinion 418 instructs that an attorney must "explain the transaction and its potential effects on the client-lawyer relationship in a way that the client can understand it."<sup>38</sup> As an example, Opinion 418 explains that "if the acquisition of stock by the lawyer will create rights under corporate by-laws or other agreements that will limit the client's control of the corporation, the lawyer should discuss with the client the possible consequences of such an arrangement."<sup>39</sup> Again, the formal opinion provided two case citations as examples of the possible consequence of failing to explain adequately a transaction to the client.<sup>40</sup> First, a transaction between a lawyer and his client involving the sale of the client's land to a group of investors in which the lawyer was a member was referred to disciplinary authority, even though the contract between client and lawyer was sufficiently fair and reasonable to decree specific performance.<sup>41</sup> Second, an attorney's failure to make a full disclosure where he was acquiring an interest in his client's farm land resulted in a court-ordered attorney reprimand "even though [the attorney] did not act dishonestly or make a profit on the transaction."<sup>42</sup>

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36. *See id.* at 198 ("While there is nothing to prevent an attorney from dealing with his client and acquiring from him property or property rights for a valuable consideration either in money or for services rendered or to be rendered, yet such dealings will be closely scrutinized by the courts, and if it appears that the attorney did not fully inform his client of all phases of the transaction and its full meaning and import, and any disadvantages that might result to the client, the courts will not hesitate to set aside the transaction.")

37. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(a) (2000).

38. Formal Op. 418.

39. *Id.* (citations omitted).

40. *Id.*

41. *See* *Ruth v. Crane*, 392 F. Supp. 724, 731-32 (E.D. Pa. 1975), *aff'd*, 564 F.2d 90 (3d Cir. 1977).

42. *Comm. on Prof. Ethics and Conduct of Iowa State Bar Ass'n v.*

### 3. The Transaction Must Be Specified in Writing

Opinion 418 explains that full disclosure of the terms of the transaction must go beyond a simple discussion with the client: “Full disclosure also includes specifying in writing the scope of the services to be performed in return for receipt of the stock or the opportunity to invest.”<sup>43</sup> Further, Opinion 418 states that a test for adequate written disclosure is whether the attorney employed the writing to make “a good faith effort to explain in understandable language the important features of the particular arrangement and its material consequences as far as reasonably can be ascertained at the time of the stock acquisition.”<sup>44</sup> Although the ideal writing would contain all the salient features of the lawyer-client transaction, Opinion 418 acknowledges that “compliance with Rule 1.8(a) does not require reiteration of details that the client already knows from other sources.”<sup>45</sup> However, the opinion does warn that “the lawyer bears the risk of omitting a term that seems unimportant at the time, but later becomes significant because [the lawyer] has the burden of showing reasonable compliance with Rule 1.8(a)(1).”<sup>46</sup>

### 4. The Lawyer Must Allow the Client to Seek Independent Counsel

In addition to fully disclosing the fair and reasonable equity transaction and codifying the agreement in writing, the attorney must also provide the client with a “reasonable opportunity to seek the advice of independent counsel in the transaction and [the client] must consent in writing to the transaction and its terms.”<sup>47</sup> The formal opinion noted that “although not required by the Model Rules, the written documentation of the transaction should include the lawyer’s recommendation to obtain such advice.”<sup>48</sup>

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Mershon, 316 N.W.2d 895, 899-900 (Iowa 1982).

43. Formal Op. 418 (2000).

44. *Id.* (citation omitted).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

### C. CONCLUSION

Although taking equity in a client is permissible under the Model Rules, Opinion 418 and the principles outlined above suggest that this type of transaction is fraught with ethical pitfalls. As an example of how differently another group of professional advisors views investments in client ventures, certified public accountants are prohibited from investing in their clients.<sup>49</sup> The American Institute of Certified Public Accountants (AICPA) Code of Conduct, the rules governing certified public accountants, recognizes a per se conflict of interest when accountants invest in clients for whom they perform auditing services.<sup>50</sup> The AICPA Code of Conduct states that independence is impaired when the accountant has a direct or material indirect financial interest in a client.<sup>51</sup> The AICPA Code of Conduct requires that the accountant withdraw regardless of whether the client is willing to waive the conflict:

This strict policy highlights the gravity of the potential conflict of interest when professional advisors are also investors. Clearly, if the accountant has significant equity at stake, there is an incentive to make the financial statements appear more favorable to the accountant's investment. The AICPA ethical rules are designed to take away that incentive.<sup>52</sup> The Model Rules that guide attorneys, however, approach this scenario differently.

Although the AICPA ethical guidelines prohibit certified public accountants from acquiring equity in their clients, the Model Rules permit this type of transaction under limited circumstances. The ABA's formal opinion advises that a great deal of care and forethought and a close reading of the Model Rules must be employed to properly execute a lawyer-client equity transaction. To apply the requirements of Rules 1.7(b), 1.8(a), and 1.5(a) to the scenario of NewCo and Counsel, Counsel should begin by using the factors in Rule 1.5(a) to determine whether receiving the bargained-for stock in lieu of cash payments is fair and reasonable.<sup>53</sup> Then, Counsel must make a full disclosure to NewCo. Counsel must fully explain

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49. See McAlpine, *supra* note 6, at 564-65.

50. See 2 AICPA PROFESSIONAL STANDARDS § 101.01-02, at 4411 (1996).

51. See *id.*

52. See McAlpine, *supra* note 6, at 565.

53. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 418 (2000).

not only the terms of the stock transfer, but also the potential effects on the NewCo-Counsel relationship.<sup>54</sup> Counsel should inform the client that events subsequent to the stock acquisition could create a conflict of interest between Counsel's exercise of independent professional judgment as a lawyer and the desire to protect the value of the newly-acquired stock.<sup>55</sup> Counsel also should advise the client that as a consequence of such a conflict, he might be required to withdraw as counsel for NewCo, or, at a minimum, recommend that another lawyer advise NewCo on the matter regarding which Counsel has a personal conflict of interest.<sup>56</sup>

## II. CONFLICTS OF INTEREST FOR INSIDE COUNSEL

Although in-house counsel have been traditionally termed "single client" lawyers, these "single client" lawyers are increasingly finding themselves mired in impermissible client conflicts.<sup>57</sup> These impermissible conflicts result from a simultaneous representation of multiple clients, such as the joint representation of both a company and its constituents, including officers, directors, or employees.<sup>58</sup> This joint representation often stems from a misunderstanding with respect to the lawyer's interaction with individuals within the company.<sup>59</sup>

The Restatement of the Law Governing Lawyers provides that an attorney-client relationship arises when "a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person" and either the lawyer "manifests to the person consent to do so" or "the lawyer fails to manifest lack of consent to do so, and . . . the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services."<sup>60</sup> In a comment, the Restatement specifically addresses the representation of organizational clients, such as corporations, stating that "a

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54. *See id.*

55. *See id.*

56. *See id.*

57. *See* Nancy J. Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998).

58. *See id.*

59. *See id.*

60. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26 (1998).

lawyer's failure to clarify whom the lawyer represents in circumstances calling for such a result might lead a lawyer to have entered into client-lawyer representations not intended by the lawyer."<sup>61</sup> The comment continues:

Hence, the lawyer must clarify whom the lawyer intends to represent when the lawyer knows or reasonably should know that, contrary to the lawyer's own intention, a person, individual, or agents of the entity, on behalf of the entity, reasonably rely on the lawyer to provide legal services to that person or entity. . . . Such clarification may be required, for example, with respect to an officer of an entity client such as a corporation, with respect to one or more partners in a client partnership, or in the case of affiliated organizations such as a parent, subsidiary or similar organization related to that client person or entity.<sup>62</sup>

The Model Rules of Professional Conduct also provide instruction on representation of individuals within a corporation. Rule 1.13(d) provides that "[i]n dealing with an organization's directors, officers, employees, members or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."<sup>63</sup>

Both the Restatement and the Model Rules instruct a lawyer to clarify to individuals in a corporation that the entity is the client whom the lawyer represents and the individual is not.<sup>64</sup> However, there is always a danger of an inadvertent representation. One situation that may give rise to an inadvertent representation is an internal corporate investigation in response to a pending criminal or regulatory investigation.<sup>65</sup> Corporate officers may not understand that inside counsel are not conducting interviews for the purpose of defending the officers, but rather to defend the corporation even if the corporation's defense requires that counsel develop a case against the officers and later divulge the information about them to the authorities.<sup>66</sup> Inside counsel must be especially sensitive to this misunderstanding if the attorney

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61. *Id.* at cmt. f.

62. *Id.*

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) (2000).

64. See discussion *supra* notes 60-63 and accompanying text.

65. See Moore, *supra* note 57, at 502.

66. See *id.* at 502-03.

has frequent contact with an individual within the corporation or if the attorney reports to that person.<sup>67</sup> It may be advisable to proffer a “corporate ‘Miranda’ warning” that informs the individual that his statements to corporate counsel may be used against him in a court of law.<sup>68</sup>

Although corporate investigations may give rise to misunderstandings as to whom the attorney is representing, these situations are not the only ones in which inadvertent representations can exist.<sup>69</sup> The line between the position of an advising attorney and a fellow corporate employee is often blurred for inside counsel when they participate in drafting employment agreements and compensation plans for management, when they provide assistance in exercising of stock options, and when they advise on the purchase or sale of securities and other filings.<sup>70</sup> Inside counsel may view these services as simply acting on the company’s behalf; however, failing to clarify who is the client and the nature of the representation at the outset may lead to the formation of an inadvertent attorney-client relationship with an individual.<sup>71</sup>

Further blurring of the line between representing an individual and representing the corporation can occur when inside counsel is called on to represent individuals within the corporation, such as directors, officers, employees, members, or shareholders. As discussed above,<sup>72</sup> Model Rule 1.7 controls when an attorney faces potential or actual conflicts of interest in representing both the corporation and an employee.<sup>73</sup> If consent is permissible to cure the potential conflict, the consent by the corporation must be given by an individual distinct from the employee who is being represented.<sup>74</sup> For example, a CEO whose interests may diverge from that of the corporation is not

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67. *See id.* at 503.

68. *See id.* (internal citation omitted). *See also* D.C. Bar Ethics Committee, Op. 269 (“A lawyer retained by a corporation to conduct an internal investigation represents the corporation only, and not any of its constituents, such as officers or employees. Corporate constituents have no right of confidentiality as regards communications with the lawyer, but the lawyer must advise them of his position as counsel to the corporation in the event of any ambiguity as to his role.”)

69. *See Moore, supra* note 57, at 505.

70. *See id.*

71. *See id.*

72. *See discussion supra* note 19 and accompanying text.

73. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (2000).

74. *See The Ethics of the Lawyer-Client Relationship, in* ETHICAL LITIGATION § 10.3 (1997).

permitted to consent to the representation on behalf of the corporation.

In sum, inside counsel must be vigilant in articulating their position as representatives for the corporate entity and not the employee. Since officers who have daily interaction with inside counsel may assume that counsel's advice applies to them personally, the duty is on the counsel to guard against this misunderstanding and avoid any inadvertent representations.

### III. CONFLICTS OF INTEREST BEFORE THE PATENT AND TRADEMARK OFFICE

An attorney who practices before the United States Patent and Trademark Office ("PTO"), specializing in drafting patents in a specific technological field, may find himself caught in a baffling conflict of interest. The Federal Regulations, governing procedures before the PTO, require disclosure by the inventor or his attorney of any information known to either of them and material to the prosecution of a patent application.<sup>75</sup> Meanwhile, Rule 1.6 of the Model Rules of Professional Conduct prohibits an attorney from revealing the confidential information of his client.<sup>76</sup> The PTO Code ("Code") also requires that an attorney preserve "the confidences and secrets of a client."<sup>77</sup> The Code defines "confidences" as "information protected by the attorney-client or agent-client privilege under applicable law."<sup>78</sup> Under the Code, "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which

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75. See 37 C.F.R. 1.56 (2000). The duty of candor established in this provision reads in pertinent part:

Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability as defined in this section . . .

(c) Individuals associated with the filing or prosecution of a patent application within the meaning of this section are:

- (1) Each inventor named in the application;
- (2) Each attorney or agent who prepares or prosecutes the application . . . .

*Id.*

76. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (2000).

77. 37 C.F.R. 10.56 (2000).

78. 37 C.F.R. 10.57(a) (2000).

would be embarrassing or would be likely to be detrimental to the client.”<sup>79</sup> Unless the client consents, the attorney is not permitted to disclose the secrets or confidences or use them to the disadvantage of the client.

Although the duty to disclose and the requirement to keep client confidences often dovetail, they diverge when an attorney possesses confidential information from one client that also happens to be material to the prosecution of a patent for another client.<sup>80</sup> This divergence is especially critical because a patent prosecuted without full disclosure by the attorney may be unenforceable. Specifically, the Federal Regulations explain that it is “misconduct” for an attorney to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.”<sup>81</sup> This “conduct” is defined as “knowingly giving false or misleading information or knowingly participating in a material way in giving false or misleading information to the PTO,”<sup>82</sup> as well as “knowingly violating or causing to be violated the requirements of 37 C.F.R. 1.56.”<sup>83</sup>

If an attorney is unable to disclose client confidences or secrets because the client prohibits the attorney from divulging this information, but the attorney is duty-bound to disclose the

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79. *See id.* The PTO Code also provides that:

(a) A practitioner shall decline proffered employment if the exercise of the practitioner’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve the practitioner in representing differing interests, except to the extent permitted under paragraph (c) of this section;

(b) A practitioner shall not continue multiple employment if the exercise of the practitioner’s independent professional judgment in behalf of a client will be or is likely to be adversely affected by the practitioner’s representation of another client, or if it would be likely to involve the practitioner in representing differing interests, except to the extent permitted under paragraph (c) of this section;

(c) In the situations covered by paragraphs (a) and (b) of this section a practitioner may represent multiple clients if it is obvious that the practitioner can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the practitioner’s independent professional judgment on behalf of each.

37 C.F.R. 10.66(a)-(c) (2000).

80. *See* David Hricik, *The Risks and Responsibilities of Attorneys and Firms Prosecuting Patents for Different Clients in Related Technologies*, 8 TEX. INTELL. PROP. L.J. 331, 332-34 (2000).

81. 37 C.F.R. 10.23(b)(4).

82. 37 C.F.R. 10.23(c)(2)(ii).

83. 37 C.F.R. 10.23(c)(10).

information in order to fulfill his duty of candor to the PTO, the attorney must withdraw from the representation.<sup>84</sup> An attorney does not have the option to continue prosecuting a patent application while failing to disclose his actual material knowledge, even though this information may be the secret or confidential information of another client.<sup>85</sup>

This difficulty is particularly germane to a lawyer whose practice is focused in particular forms of business activity, such as the dot.com world. He will have access to the technical information of various companies, each of which will be seeking a technological edge against the others, through patenting or convenience of use, or both. When one client proposes to patent its technical solution to an internet problem, and the lawyer has already seen a similar solution being proposed or implemented at another dot.com enterprise, his ethical dilemma as to each client is insoluble. Must he tell the first client what he has seen at the second client's facility? Must he tell the second client of the first client's plan to patent their technology? Must he tell the PTO of the second client's prior use? How can he sit in a meeting listening to the first client's business strategy, while knowing about the second client's technology?

## CONCLUSION

The rules of ethics represent an effort by lawyers, thinking abstractly, to define what the public should be able to expect from the counsel they retain. Those expectations may be compromised by a lawyer's eagerness to sign a new client or increase his family's standard of living. Admittedly, it is not always easy for a lawyer to do the right thing. There is novelty and excitement to signing a new client. The prospect of financial prosperity is a powerful motivator. However, situations arise in which a lawyer must carefully evaluate a prospective advantage against his own ability to provide forthright advice. The rules of ethics help guide a lawyer in periods of weakness, insuring that obligations to existing clients are not overcome and that a lawyer will remain independent in providing a professional opinion. Although the dot.com phenomenon has presented its own ethical pitfalls, the

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84. See Hricik, *supra* note 80, at 344.

85. See *id.*

rules of ethics should serve the same role in this culture as in the more traditional settings, in guiding attorneys away from situations in which professional independence may be compromised.

## APPENDIX

### AMERICAN BAR ASSOCIATION Standing Committee on Ethics and Professional Responsibility

Formal Opinion 00-418

Acquiring Ownership in a Client in Connection with  
Performing Legal Services\*

July 7, 2000

*The Model Rules of Professional Conduct do not prohibit a lawyer from acquiring an ownership interest in a client, either in lieu of a cash fee for providing legal services or as an investment opportunity in connection with such services, as long as the lawyer complies with Rule 1.8(a) governing business transactions with clients, and, when applicable, with Rule 1.5 requiring that a fee for legal services be reasonable. To comply with Rule 1.8(a), the transaction by which the lawyer acquires the interest and its terms must be fair and reasonable to the client, and fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client. The client also must be given a reasonable opportunity to seek the advice of independent counsel in the transaction and must consent to the transaction in writing. In providing legal services to the client's business while owning its stock, the lawyer must take care to avoid conflicts between the client's interests and the lawyer's personal economic interests as an owner, as required by Rule 1.7(b), and must exercise independent professional judgment in advising the client concerning legal matters as required by Rule 2.1.*

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## BACKGROUND

With growing frequency, lawyers who provide legal services to start-up businesses are investing in their clients, sometimes accepting an ownership interest as a part or all of the fee.<sup>1</sup> Some representatives of the organized bar have questioned this practice.<sup>2</sup> Many lawyers nevertheless believe that acquiring ownership interests in start-up business clients is desirable in order to satisfy client needs and also, because of growing competition with higher paying venture capital and investment firms, to attract and retain partners and associates.<sup>3</sup> From the client's perspective, the lawyer's willingness to invest with entrepreneurs in a start-up company frequently is viewed as a vote of confidence in the enterprise's prospects. Moreover, a lawyer's willingness to accept stock instead of a cash fee may be the only way for a cash-poor client to obtain competent legal advice. Frequently, this may be the determining factor in the client's selection of a lawyer.<sup>4</sup>

The Committee in this Opinion examines the issues that

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1. See, e.g., Jason M. Klein, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Lawyers*, 1999 COLUM. BUS. L. REV. 329, 330-31; Debra Baker, *Who Wants to be a Millionaire?*, 86 A.B.A. JOURNAL, February 2000, at 36, 37. Although the interest the lawyer acquires usually is in the form of stock or warrants or options to buy stock of a corporation, this Opinion applies equally to ownership in any form of business entity, such as a limited liability company, limited partnership, or business trust that is the client of the lawyer. For convenience, this Opinion assumes the ownership interest is comprised of corporate stock.

2. See, e.g., ABA Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* (1986), in which the Commission identified lawyers investing in the activities of clients as one of several problem areas. The Commission expressed the view that lawyers investing in clients "may make the client's financing efforts easier, [but that] it creates a potential or actual conflict of interest, changing the lawyer-client relationship in a very fundamental way." *Id.* at 31 (footnotes omitted). See also ABA Section of Litigation Task Force on the Independent Lawyer, *Taking an Interest in the Client's Business in Lieu of a Fee* (Draft August 1999); Baker, *supra* note 1, at 39-40.

3. See, e.g., Sean Somerville, *Lawyers Stocking Up on Payday*, BALTIMORE SUN, November 7, 1999, at D-1. See also Shawn Neidorf, *Silicon Valley Lawyers Embrace VC-Like Role*, VENTURE CAPITAL J., Oct. 1, 1999, at 1, 2 ("Most Silicon Valley attorneys defer billing, with many offering discounts for the opportunity to invest in a client's company through a law firm's fund.").

4. Klein, *supra* note 1, at 351, also argues that compensating lawyers with equity interests finds support in public policy. Similar to contingent fees, permitting clients to pay with stock or options creates a financing device that allows clients broader access to legal services by providing an alternative currency to pay for those services.

must be addressed under the ABA Model Rules of Professional Conduct when a lawyer or law firm acquires an ownership interest in a client in connection with performing legal services.<sup>5</sup> A typical situation might be one in which the client business is a corporation that the law firm is organizing at the request of the founding entrepreneurs. The latter already have a few friends and family members who are eager to invest funds to start up the corporation. The founders may allow the lawyer working with them to invest the firm's fee for legal services in stock of the corporation. The organizers expect the law firm to introduce them to the firm's venture capital contacts and to continue representing the corporation, eventually performing the services necessary to take it public.<sup>6</sup>

#### A. COMPLIANCE WITH RULES 1.8(a) AND 1.5(a) WHEN ACQUIRING OWNERSHIP IN A CLIENT

In our opinion, a lawyer who acquires stock in her client corporation in lieu of or in addition to a cash fee for her services enters into a business transaction with a client, such that the requirements of Model Rule 1.8(a) must be satisfied.<sup>7</sup> In

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5. The Committee notes that a lawyer considering the acquisition of ownership in a client should address practical issues as well as legal issues that arise under law other than the Model Rules when a lawyer owns an interest in a client. Among these issues are: (1) extent of coverage under lawyer professional responsibility policies when the lawyer also is a stockholder; (2) possibility of civil liability claims, including stockholder derivative actions resulting from the lawyer representing the client in certain types of matters; (3) desirability of adopting clear policies on investing in clients in order to minimize liability risks and to avoid internal disharmony among lawyers in the firm regarding investment opportunities individual lawyers may be offered by clients; and (4) need for assuring compliance by all firm personnel with securities law and regulations.

6. We see no substantial difference under the Model Rules between direct payment to the lawyer of her fee by way of an interest in the business entity in lieu of cash and the opportunity to purchase an interest for cash, if the opportunity to acquire the stock would not have been offered had the lawyer not also undertaken to perform legal services. The same ethical issues also must be addressed whether the ownership interest is acquired directly by the lawyer or by an investment partnership controlled by the lawyer or members of her firm.

7. Rule 1.8(a) states in pertinent part:

(a) A lawyer shall not enter into a business transaction with a client . . . unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably

determining whether Rule 1.8(a)'s first requirement of fairness and reasonableness to the client is satisfied, the general standard of Rule 1.5(a) that "[a] lawyer's fee shall be reasonable" and the factors enumerated under that Rule are relevant.<sup>8</sup>

For purposes of judging the fairness and reasonableness of the transaction and its terms, the Committee's opinion is that, as when assessing the reasonableness of a contingent fee, only the circumstances reasonably ascertainable at the time of the transaction should be considered.<sup>9</sup> It seems clear that "in a

understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Authorities are in agreement that Rule 1.8(a) applies when a lawyer accepts an interest in the client in connection with a fee for legal services. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Official Draft 1998) § 126 cmt. a (requirements of § 126 apply when lawyer takes interest in client's business as fee); see also G.C. HAZARD AND W.W. HODES, THE LAW OF LAWYERING (2d ed. 1998) § 1.8:202 *et seq.*; C. WOLFRAM, MODERN LEGAL ETHICS (1986) § 8.11.2 (Model Rule 1.8(a) or former Code of Professional Responsibility DR 5-104(A) apply to the transaction). Rule 1.8(a) does not, however, apply when the lawyer acquires the stock in an open market purchase or in other circumstances not involving direct intervention by the client.

8. Rule 1.5(a) states that:

The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Rule 1.5 would not apply if the opportunity to invest was not offered in connection with undertaking to provide legal services.

9. See *supra* note 7, RESTATEMENT § 207 Cmt. e ("Fairness is determined based on facts that reasonably could be known at the time of the transaction, not as facts later develop."). See also ABA Formal Op. 94-389 (1994) (Contingent Fees), note 21 (finding various aspects of contingent fee arrangements to be ethical. The note cites Lester Brickman, *Contingent Fees Without Contingencies*, 37 U.C.L.A. L. REV. 29, 87 (1989), to the effect that the legitimacy of a contingency fee is to be judged by the effort expected "prior to

discipline case, once proof has been introduced that the lawyer entered into a business transaction with a client, the burden of persuasion is on the lawyer to show that the transaction was fair and reasonable and that the client was adequately informed.”<sup>10</sup> Accordingly, it is incumbent upon the lawyer to take account of all information reasonably ascertainable at the time when the agreement for stock acquisition is made.<sup>11</sup>

Determining that the fee is reasonable in terms of the enumerated factors under Rule 1.5(a) does not resolve whether the requirement of Rule 1.8(a) that the transaction and terms be “fair and reasonable to the client” has been met. Determining “reasonableness” under both rules also involves making the often difficult determination of the market value of the stock at the time of the transaction. As Professors Hazard and Hodes state, “one danger [to the lawyer who accepts stock as a fee] is that the business will so prosper that the fee will later appear unreasonably high.”<sup>12</sup> Of course, instead of increasing in value, the stock may become worthless, as occurs frequently with start-up enterprises.<sup>13</sup> The risk of failure and

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the *commencement of representation*,” not by the actual effort expended.) (Emphasis supplied); Klein, *supra* note 1, at 336 (“Review of the fee is only appropriate at the time the fee is granted, for the lawyer has undertaken 100% of the risk associated with the value of that fee in the future.”).

10. See *supra* note 7, RESTATEMENT § 207 at 639; see also Cmt. e at 641-42. The transaction also remains voidable in a civil suit, and the lawyer investor, as a fiduciary, has the burden of proving its fairness. See RESTATEMENT § 207 cmt. a; see also *Passanate v. McWilliams*, 53 Cal. App. 4th 1240, 1248, 62 Cal. Rptr.2d 298, 302 (Cal. Ct. App. 1997) (lawyer for corporation denied recovery of \$32 million for stock of corporation that its board previously had authorized to be issued him in connection with his legal services because the lawyer failed to advise board to consult independent counsel about the transaction); *Matthews v. Spears*, 24 So. 2d 195 (La. App. 1945) (court cancelled contract transferring to lawyer undivided one-fourth interest in mineral rights in land owned by clients on the grounds that the lawyer did not fully disclose the nature of the transaction and because consideration for the conveyance was lacking).

11. See also Comment [2] to Rule 1.5(a) stating that a fee paid in property (such as corporate stock) “may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer’s special knowledge of the value of the property.” Though the Comment is applicable here, meeting the requirements of Rule 1.8(a) serves to satisfy the special scrutiny standard applicable to the receipt of property in exchange for services.

12. HAZARD & HODES, *supra* note 7, § 1.8:202 at 264.

13. In comparing cash to stock compensation, Klein points out that “when a lawyer is compensated with stock or options rather than with cash, the lawyer accepts the risk or uncertainty in the value of the stock or options. . . . The risk in the future value of the stock or options is significant, because there

the stock's nonmarketability are important factors that the lawyer must consider, along with all other information bearing on value that is reasonably ascertainable at the time when the agreement is made.<sup>14</sup>

One way for the lawyer to minimize the risk noted by Professors Hazard and Hodes is to establish a reasonable fee for her services based on the factors enumerated under Rule 1.5(a)<sup>15</sup> and *then* accept stock that at the time of the transaction is worth the reasonable fee. Of course, the stock should, if feasible, be valued at the amount per share that *cash* investors, knowledgeable about its value, have agreed to pay for their stock about the same time.

A reasonable fee also may include an agreed percentage of the stock issued or to be issued when the value of the shares is not reasonably ascertainable. For example, if the lawyer is engaged by two founders who are contributing intellectual property for their stock, it may not be possible to establish with reasonable certainty the cash value of their contribution. If so, it also would not be possible to establish with reasonable certainty the value of the shares to be issued to the lawyer retained to perform initial services for the corporation. In such cases, the percentage of stock agreed upon should reflect the value, as perceived by the client and the lawyer at the time of the transaction, that the legal services will contribute to the potential success of the enterprise. The value of the stock received by the lawyer will, like a contingent fee permitted under Rule 1.5(c), depend upon the success of the undertaking.<sup>16</sup>

In addition to assuring that the stock transaction and its

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is no downside protection." *Supra* note 1, at 339-40.

14. See Utah Ethics Adv. Op. Comm Op. 98-13, 1998 WL 863904 \* 1 (Dec. 4, 1998) (in addition to factors enumerated under Rule 1.5(a), the lawyer also should consider in determining reasonableness of a fee when accepting client stock: (i) the liquidity of the stock, (ii) whether and when it can be expected to be publicly traded, (iii) any restrictions on its transfer, and (iv) its presently anticipated value, including the risks that a proposed patent or trademark may not be granted or necessary government approvals may not be received).

15. *Supra* note 8 and accompanying text.

16. The Committee is aware that sometimes the lawyer will ask the corporation to issue her a percentage of the shares initially issued to the founders as a condition to the lawyer agreeing to become counsel to the new enterprise. We take no position on the ethical propriety of this practice. We caution, however, that in this circumstance, and especially if the cash value of the shares is not reasonably ascertainable, the lawyer should take special care to be in a position to justify the reasonableness of the total fee should it later be questioned as a violation of Rule 1.5(a).

terms are fair and reasonable to the client, compliance with Rule 1.8(a) also requires that the transaction and its terms must be fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client.<sup>17</sup> Thus, the lawyer must be careful not only to set forth the terms in writing, but also to explain the transaction and its potential effects on the client-lawyer relationship in a way that the client can understand it. For example, if the acquisition of stock by the lawyer will create rights under corporate by-laws or other agreements that will limit the client's control of the corporation, the lawyer should discuss with the client the possible consequences of such an arrangement.<sup>18</sup>

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.<sup>19</sup> 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

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17. As Professor Wolfram notes, "the fact that a transaction is arguably fair and reasonable does not mean that MR 1.8(a) has been complied with if the other requirements of the rule are not satisfied." WOLFRAM, *supra* note 7, § 8.11.4 at 480 (even though contract between client and lawyer was sufficiently fair and reasonable to decree specific performance, lawyer's failure to make full disclosure of the transaction to client referred to disciplinary authority) (citing *Ruth v. Crane*, 392 F. Supp. 724, 731 (E.D. Pa. 1975), *aff'd*, 564 F.2d 90 (3d Cir. 1977)); *Comm. on Prof. Ethics and Conduct of Iowa State Bar Ass'n v. Mershon*, 316 N.W.2d 895, 900 (Iowa 1982) (violation of DR 5-104(A) established "even though respondent did not act dishonestly or make a profit on the transaction").

18. If the lawyer is acquiring a percentage of the equity or a class of securities that entitles her to exercise rights not shared by stockholders generally, then specific disclosure might be required. *See, e.g.*, *Comm. on Prof. Ethics and Conduct of Iowa State Bar Ass'n v. Humphreys*, 524 N.W.2d 396, 399 (Iowa 1994) (lawyer disbarred when, inter alia, without advising client-majority stockholder of the potential conflict of interest, he acquired stock and prepared corporate documents that prevented the lawyer's termination as a director and required the lawyer's approval to reduce his compensation as an officer or to take certain other corporate actions). As to the absolute right of a client to discharge the lawyer and the conflict created by differences over business decisions, *see infra* notes 33 and 34 and accompanying text.

19. Rule 2.1 admonishes: "In representing a client, a lawyer shall exercise independent judgment and render candid advice." *See also* Comment [6] under Rule 1.7 ("lawyer's own interests should not be permitted to have an adverse effect on representation of a client"); HAZARD & HODES *supra* note 7, § 1.8:202 at 264 ("Another danger is that the business will falter, and that [the lawyer], worried about recovering her fee [stock rather than cash] for work already performed, will not be able to advise the client dispassionately.").

at least to recommend that another lawyer advise the client on the matter regarding which she has a personal conflict of interest.<sup>20</sup>

Full disclosure also includes specifying in writing the scope of the services to be performed in return for receipt of the stock or the opportunity to invest. The scope of services should be covered in the written transmission to the client even though the stock is acquired by the firm's investment partnership as an opportunity rather than by the firm directly as a part of the fee in lieu of cash. If the client's understanding is that the lawyer keeps the stock interest regardless of the amount of legal services performed by the lawyer and solely to assure the lawyer's availability, it is important to set forth this aspect of the transaction in clear terms.<sup>21</sup> Otherwise, a court might regard the stock acquisition as being in the nature of an advance fee for services and require part of the stock to be returned if all the work originally contemplated as part of the services for which the stock was given has not been performed.<sup>22</sup>

Although it is better practice to set forth all the salient features of the transaction in a written document, compliance with Rule 1.8(a) does not require reiteration of details that the client already knows from other sources. Indeed, too much detail may tend to distract attention from the material terms. Nonetheless, the lawyer bears the risk of omitting a term that

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20. See *infra* note 31 and accompanying text regarding actions the lawyer must take should a conflict later arise.

21. See Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof. Resp. Formal Op. 95-100, 1995 WL 902545 \*3 (August 1, 1995) (non-refundable retainers permissible so long as confirmed by "clear and unambiguous language of a written statement provided to the client or a written agreement between the attorney and client").

22. Even though in such a case a court might not order disgorgement of the fee in a civil action if the client ends the relationship without cause, see, e.g., *Ryan v. Butera et al.*, 193 F.3d 210, 218 (3rd Cir. 1999), the lawyer's ethics might be questioned for failure to return the "unearned" portion of the stock acquired by the lawyer. See also Oregon State Bar Ass'n Bd. of Gov. Formal Op. 1998-151, 1998 WL 717731 \*2 (July 1998) (lawyer must return pro rata portion of fixed fee, even though specified as "earned on receipt," if representation ends before lawyer performs all the work); District of Columbia Bar Op. 264 (1996) ("special retainers or fee advances in this jurisdiction must be refundable," at least where "tied directly to provision of legal services, rather than designed solely to ensure availability"); *In re Cooperman*, 83 N.Y.2d 465, 475, 633 N.E.2d 1069, 1073, 611 N.Y.S.2d 465, 469 (N.Y. 1994) ("non-refundable retainer fee agreement clashes with public policy because it inappropriately compromises the right to sever the fiduciary services relationship with the lawyer").

seems unimportant at the time, but later becomes significant because she has the burden of showing reasonable compliance with Rule 1.8(a)(1). A good faith effort to explain in understandable language the important features of the particular arrangement and its material consequences as far as reasonably can be ascertained at the time of the stock acquisition should satisfy the full disclosure requirements of Rule 1.8(a).<sup>23</sup>

The client also must have a reasonable opportunity to seek the advice of independent counsel in the transaction and must consent in writing to the transaction and its terms. In addition, although not required by the Model Rules, the written documentation of the transaction should include the lawyer's recommendation to obtain such advice. This serves to emphasize the importance to the client of obtaining independent advice. The client's failure to do so then is his own deliberate choice. The lawyer has complied with Rule 1.8(a) in this respect because actual consultation is *not* required.<sup>24</sup>

The best way to comply with the requirements of Rule 1.8(a) is to set forth the salient terms of the transaction in a document written in language that the client can understand and, after the client has had an opportunity to consult with independent counsel, to have the document signed by both client and lawyer.

## B. CONFLICTS BETWEEN THE LAWYER'S INTERESTS AND THOSE OF THE CLIENT

On rare occasions the acquisition of stock in a client corporation will amount to acquiring, in the language of Rule

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23. Professor Wolfram describes the elements constituting full disclosure applicable *generally* to business dealings with clients as follows:

- (1) the nature of the transaction and each of its terms; (2) the nature and extent of the lawyer's interest in the transaction; (3) the ways in which the lawyer's participation in the transaction might affect the lawyer's exercise of professional judgment in concurrent legal work for the client, if any; (4) the desirability of the client's seeking independent legal advice if the client is not already independently represented; and (5) the nature of the respective risks and advantages to each of the parties to the transaction.

WOLFRAM, *supra* note 7, § 8.11.4 at 485 (footnotes omitted).

24. When a client declines to obtain the advice of independent counsel or chooses to seek financial advice instead, the lawyer also may wish to confirm this in writing.

1.8(j), “a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting.”<sup>25</sup> As Comment [7] under Rule 1.8 explains, the prohibition “has its basis in common law champerty and maintenance [and] is subject to specific exceptions developed in decisional law and continued in these Rules, such as the exception for reasonable contingent fees set forth in Rule 1.5 . . . .” The modern rationale for the rule is the concern that a lawyer acquiring less than all of a client’s cause of action creates so severe a conflict between the lawyer’s interest and the client’s interest that it is nonconsentable.<sup>26</sup>

In our view, when the corporation has as its only substantial asset a claim or property right (such as a license), title to which is contested in a pending or impending lawsuit in which the lawyer represents the corporation, Rule 1.8(j) might be applicable to the acquisition of the corporation’s stock in connection with the provision of legal services. If the acquisition of the stock constitutes a reasonable contingent fee, however, Rule 1.8(j) would not prohibit acquisition of the stock.<sup>27</sup>

25. Rule 1.8(j) states:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and
- (2) contract with a client for a reasonable contingent fee in a civil case.

26. Professor Wolfram, in condemning Rule 1.8(j) as unnecessary, nevertheless notes: “[a] purchase of a partial interest, of course, does present the possibility that the lawyer will not seek and accept client guidance on major decisions in the lawsuit because of the lawyer’s own economic interest in the outcome.” WOLFRAM, *supra* note 7, § 8.13 at 492. The Committee believes that the failure to consult with the client and accept the client’s decision as posited by Professor Wolfram would violate Rule 1.2(a) and Rule 1.7(b), discussed in the next part of this Opinion. As Professor Wolfram suggests, no flat prohibition against a lawyer’s purchase of an interest in a client’s cause of action is needed “so long as the client consents and the transaction is fair and reasonable.” *Id.* Of course, because this constitutes a business transaction with a client, the lawyer also must fully comply with all the other requirements of Rule 1.8(a) as discussed earlier in this Opinion.

27. See District of Columbia Bar Op. 179 (1987) (under DR 5-103(A), though acquiring stock in a corporation represented in an FCC license application amounted to acquiring an interest in the client’s license proceeding, no disciplinary rule is violated by the lawyer in “accepting a reasonable contingent fee that takes the form of a small and noncontrolling equity interest in the client”). The District of Columbia’s Rules of Professional Conduct, later adopted, do not contain Rule 1.8(j) or any other specific prohibition against acquiring an interest in litigation. Of course, Rule 1.8(j)

Rule 1.7(b) prohibits representation of a client if the representation “may be materially limited . . . by the lawyer’s own interests,” unless two requirements are met. The lawyer must reasonably believe that “the representation will not be adversely affected,” and the client must consent to the representation after consultation.<sup>28</sup>

A lawyer’s representation of a corporation in which she owns stock creates no inherent conflict of interest under Rule 1.7. Indeed, management’s role primarily is to enhance the business’s value for the stockholders. Thus, the lawyer’s legal services in assisting management usually will be consistent with the lawyer’s stock ownership. In some circumstances, such as the merger of one corporation in which the lawyer owns stock into a larger entity, the lawyer’s economic incentive to complete the transaction may even be enhanced.<sup>29</sup>

There may, however, be other circumstances in which the lawyer’s ownership of stock in her corporate client conflicts with her responsibilities as the corporation’s lawyer. For example, 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

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also would apply were the stock itself subject to a claim in which the lawyer represents the corporation or other stockholders. *See* Kansas Bar Assn. Op. 98-06 (Sept. 15, 1998) (contracts regarding corporate stock that is the subject of litigation are not *per se* unethical, depending on the circumstances in the case).

28. Rule 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

29. *See* Klein, *supra* note 1, at 355-56 suggesting stock ownership as an incentive that is in furtherance of the lawyer’s fiduciary duties to her corporate client. Ownership of corporate client stock should not create a conflict with the corporate client’s interests because the lawyer’s duty of loyalty is to the corporation. Rule 1.13(a) states: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized representatives.”

investor to withdraw.<sup>30</sup> In that circumstance, the lawyer must evaluate her ability to maintain the requisite professional independence as a lawyer in the corporate client's best interest by subordinating any economic incentive arising from her stock ownership. The lawyer also must consider whether her stock ownership might create questions concerning the objectivity of her opinion. She must consult with her client and obtain consent if the representation may be materially limited by her stock ownership.

The conflict could be more severe. For example, the stock of the client might be the lawyer's major asset so that the failure of the venture capital opportunity could create a serious financial loss to her. The lawyer's self-interest in such a case probably justifies a reasonable belief that her representation of the corporation would be affected adversely. This would disqualify her under Rule 1.7(b) from providing the opinion even were the client to consent.<sup>31</sup>

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30. Rule 2.3 applies to legal evaluations made for the use of others and states:

(a) A lawyer may undertake an evaluation of a matter affecting a client for the use of someone other than the client if:

(1) the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client; and

(2) the client consents after consultation.

(b) Except as disclosure is required in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

As Comment [4] cautions: "The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client." When making an evaluation under Rule 2.3, the lawyer should establish with the client in the beginning the types of information that will be revealed and any information that must be withheld. See Comment [5] ("The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based.").

31. See Rule 1.7, Comment [4] ("Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other . . . interests. The conflict in effect forecloses alternatives that would otherwise be available to the client."). See also Utah Ethics Adv. Op. Comm Op. 98-13, *supra* note 14 (quoting Comment [4]). A lawyer who owns stock in a client corporation may, in circumstances where her disagreement with some transaction approved by the corporation's board limits her ability to provide independent professional advice to management, call upon another firm lawyer who is not so limited to advise the client respecting the transaction. In such a circumstance, the lawyer-stockholder must obtain consent of the client pursuant to Rule 1.7(b) to avoid imputed disqualification of other lawyers in the firm under Rule 1.10(a). When the probity of the lawyer's own conduct is questioned, however, better

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 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.<sup>32</sup>

Even though a lawyer owns stock in a corporation, she, of course, has no right to continue to represent it as a lawyer if the corporate client discharges her.<sup>33</sup> Were the lawyer to challenge the decision duly made by the authorized corporate constituents to discharge her, she would violate Rule 1.7(b) because it is clear that her own interests adversely affect the

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practice calls for independent counsel to advise the client. See Comment [6] under Rule 1.7 ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."). See also ABA Formal Op. 98-410 (1998) (Lawyer Serving as Director of Client Corporation) at 9-10; Peter Geraghty, *ASK ETHICSearch*, in *THE PROFESSIONAL LAWYER* 21 (Fall 1999) (citing other examples of conflicts between a lawyer's interest as owner of client property and the interests of the client).

32. Other law firm policies regarding investments in clients also include some of the following: (1) No lawyer may invest in or with any firm client without prior executive committee approval, sometimes excepting purchases in *de minimis* amounts in a private placement or open market purchase; and (2) Investments in nonpublic clients offered firm lawyers are to be allotted among partners (or all firm lawyers) as investment opportunities, or may be placed in a pooled investment fund or allocated to a bonus plan. Reminders to avoid securities violations, including Section 10-b-5 (anti-fraud) and Section 16 (short swing profits), and mechanisms to avoid insider trading also are frequently included.

33. Rule 1.16(a)(3) states in pertinent part that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the lawyer is discharged." See also Comment [4]. The decision to discharge the lawyer is made by the corporation "acting through its duly authorized constituents," usually its chief executive or more likely the Board of Directors in this circumstance. See Rule 1.13(a), *supra* note 29. Sometimes authority to discharge counsel is vested in the stockholders giving rise to the question whether a lawyer who is a stockholder may ethically vote as a stockholder to retain her firm. Once the decision is duly made, however, the client's right to discharge a lawyer is absolute. Whether because of contract the lawyer may recover damages for her discharge is a matter of law beyond the scope of an ethics opinion.

representation of the corporation.<sup>34</sup>

## CONCLUSION

When a lawyer accepts stock or options to acquire stock in a client corporation in connection with providing legal services to it, she must comply with the requirements of Rule 1.8(a) because the stock acquisition constitutes a business transaction with a client and if applicable, with the requirement of Rule 1.5(a) that the lawyer's fee shall be reasonable. Under Rule 1.8(a), the stock transaction and its terms must be fair and reasonable to the client. This is satisfied if the fee, including receipt of the stock, is reasonable applying the enumerated factors under Rule 1.5(a), and if the transaction and its terms in other respects are fair and reasonable to the client under the circumstances that are reasonably ascertainable at the time the arrangement is made.

The terms of the transaction also must be fully disclosed in writing to the client in a manner that can be reasonably understood by the client. Full disclosure includes, for example, discussions of the consequences of any rights by virtue of the lawyer's stock ownership that may limit the client's control of the corporation under special corporate by-laws or other agreements and the possibility that the lawyer's economic interests as a stockholder could create a conflict with the client's interest that might necessitate the lawyer's withdrawal from representation in a matter. The client also must be afforded a reasonable opportunity to consult independent counsel concerning the transaction and its terms. Finally, the client's consent must be in writing.

Although a lawyer's representation of a corporation in which the lawyer owns stock creates no inherent conflict of interest, circumstances may arise that create a conflict between the corporation's interests and the lawyer's economic interest

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34. See, e.g., Comm. on Prof. Ethics and Conduct of Iowa State Bar Ass'n, 524 N.W.2d at 398. A lawyer who no longer represents a client whose stock she owns must remember that a conflict of interest under Rule 1.7(b) may arise if another client seeks representation on a matter adverse to the former client. The law firm in seeking the new client's consent may need to disclose not only the earlier client-lawyer relationship, but also the investment relationship if it is material. Of course, if the stock value is so high or subject to such risk from the second client's matter that it would not be reasonable to conclude that the representation would not be affected adversely, the lawyer must decline the representation.

as a stockholder. In such event, the lawyer must consult with the client and obtain client consent if, as a result of her ownership interest, the representation of the corporation in a particular matter may be materially limited. The lawyer may in some circumstances be required under Rule 1.7(b) to withdraw from representing the client in a matter if her financial interest in the client is such that she cannot reasonably conclude that the representation would not be adversely affected.

