

ETHICS FOR IN-HOUSE COUNSEL

September 2012

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1. Introduction.

A. Many Similarities, Important Differences.

While there are probably as many similarities as there are differences in the day-to-day ethical concerns of in-house lawyers relative to their private firm peers, in few cases do those differences ease or narrow the challenges facing in-house counsel. Notable exceptions to this include:

- No fee dispute issues.
- No client trust account issues.
- Fewer opportunities for conflicts of interest.
- No advertising or prospective client communication issues.

These areas of relief aside, ethical issues facing in-house counsel are challenging and sometimes perilous. Even when issues common to private practice arise in-house, they usually arise under different circumstances and require unique analysis.

B. Four Defining Characteristics. Four characteristics of in-house practice significantly influence the application of ethics rules:

- The in-house attorney's client is an organization.
- The organization is usually the attorney's only client.
- The in-house lawyer is surrounded by fellow employees who interact directly with the attorney on legal and non-legal matters and who view the lawyer as a "business partner".
- The in-house attorney is both the client's attorney and its employee.

While these aspects of in-house practice are part of its allure, they also raise special challenges. In-house lawyers tend to know much more about the activities of their clients and have greater involvement in those activities. This proximity to "the action" can lead to a higher level of professional and legal accountability. It is also clear that the view of in-house counsel as a corporate gatekeeper is here to stay. Meeting the unique professional challenges of in-house practice requires a delicate balancing act: while remaining alert to ethical concerns, personifying integrity, and establishing appropriate attorney-"constituent" boundaries, an in-house lawyer must also be viewed as a strong team member and champion for the client. Knowledge, good judgment and hard work are required to perform the balancing act successfully.

- C. Organization and Content. These materials are based on Washington’s Rules of Professional Conduct (the “Rules”) and on the official comments to the Rules. Rules in other jurisdictions may differ in the treatment of particular issues. Concepts are covered here in roughly the order that they appear in the Rules. Because of its importance, however, the concept of the “Organization as Client” is addressed first. On the other hand, rules that do not require unique analysis or that do involve unique concerns for the in-house lawyer are not addressed.

2. The Organization as Client.

Rule 1.13 contains multiple parts addressing concepts unique to, or with unique application to, the organizational client. These include: (i) the relationship among client, lawyer and the client’s officer and employee constituents, (ii) “reporting up” and “reporting out,” (iii) discharge or withdrawal by the attorney in situations involving “reporting up” or “reporting out,” (iv) disclosure of the lawyer’s role when potentially adverse to specific constituents, and (v) dual representation. Together with its comments, Rule 1.13 explains and defines the role and professional responsibilities of in-house counsel more than any other single Rule.

- A. The Organizational Client and its “Constituents”. Rule 1.13(a) states the following overarching principle:

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

- (i) Role Clarification and Mandatory Disclosure. The in-house lawyer’s role is usually not well understood by others until explained. Confusion can lead to misunderstandings with important consequences. Instructing non-law colleagues on the nuances of who the actual client is, the role of officers, employees and others in that attorney-client relationship, and the consequences that flow from these facts can be mutually beneficial. At a minimum, there might be fewer visits from colleagues expecting advice on personal landlord-tenant issues. Potential wrong-doers might also be prevented from assuming they can take questionable actions and receive protection of in-house counsel’s legal skills if the scheme is uncovered.

Lastly, in a situation where in-house counsel has mistakenly allowed one or more executives to believe that he or she is actually their attorney too, the attorney may find it impossible to fulfill his or her duties to the organization under the conflicts rules because of the “pre-existing relationship” that has developed with the executive(s).

Beyond the general wisdom of educating non-law colleagues, Rule 1.13(f) specifically requires in-house counsel to be alert for the need to timely disclose and explain these concepts:

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Comment 10 to Rule 1.13 clarifies this obligation and the communications that should be made for the benefit of potentially adverse constituents:

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

- (ii) Confidentiality. A related principal, touched on in Comment 2 to Rule 1.13, is that of “confidentiality”. The in-house lawyer has a duty to protect the client’s confidences – to not divulge “information relating to the representation” unless the client gives informed consent or the disclosure is “impliedly authorized to carry out the representation.”

For in-house counsel, “the representation” is not a single project or issue – it involves numerous separate and distinct projects and issues. The in-house lawyer must continually use professional judgment and discretion to determine which employees are appropriate recipients of any “information relating to the representation”. Proactively educating non-lawyer colleagues about the in-house lawyer’s role and obligations of confidentiality can help set boundaries for both the lawyer and his or her non-lawyer colleagues.

B. “Reporting Up” to Protect the Client from Wrongdoing.

- (i) Rule 1.13(b). The obligation to “report up” is one of several “gatekeeper” functions imposed on in-house counsel. Companies who are subject to the

SEC's rules on up-the-ladder reporting under Section 307 of the Sarbanes-Oxley Act no doubt have adopted and implemented responsive policies and procedures. Those rules are beyond the scope of these materials.

The "reporting up" obligation under Rule 1.13(b) is stated as follows (underlining added):

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

- (ii) Reasonably Should Know. The following sentence of Comment 3 to Rule 1.13 indicates that "knows" really means "knows or reasonably should know."

...As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

- (iii) Refer Up or Urge Reconsideration? Rule 1.13(b) says the lawyer should *proceed as is reasonably necessary in the best interest of the organization.* Comment 4 to Rule 1.13 provides the following guidance (underlining added):

In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best

interest of the organization does not require that the matter be referred to higher authority.

Virtually any decision under 1.13(b) will involve legal and factual considerations calling for professional judgment. First of all, the Rule describes conduct or anticipated conduct that “is” a violation of law or company policy. This suggests certainty regarding applicable law or policy. In cases where there is real concern of a potential violation or claim of violation but also doubt in the lawyer’s mind about the application of law or policy to the conduct in question, it seems the lawyer should simply explain his or her view of the law and his or her concerns and urge the constituent to take an approach that avoids the potential issue.

Also, the phrase “*intends to act*” suggests something more than a constituent’s discussion or consideration of an idea involving unlawful or otherwise improper conduct. Might the idea be quickly or secretly implemented? If not, the lawyer may still urge a different course – an “*I think you just don’t understand...*” conversation. The lawyer should feel confident in saying that “the company will not stand for illegal or improper behavior.” If the company’s ethical environment suggests otherwise, the lawyer’s task may be more difficult.

- (iv) Voluntary Reporting Up. Lastly, if the constituent with a legally questionable idea is not a senior employee in the organization, the lawyer should consider reporting up wholly apart from the requirements of Rule 1.13(b), based on the theory that lower-level constituents are not empowered with the same level of authority to make policy decisions or to assume unusual risks on behalf of the client. Likewise, a particularly cavalier attitude on the part of a senior officer may warrant reporting up in the lawyer’s professional judgment, even where Rule 1.13 is not clearly triggered. The following language in Comment 4 addresses non-mandatory reporting up:

Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Taken together, the Rule and the comments give some latitude to urge reconsideration based on the factors listed, but there is an explicit theme in the Rule that, under certain circumstances, the only appropriate course is to report up – in a timely and “appropriate” manner - to the Board or to the Audit Committee where necessary.

- C. Disclosing Client Confidences to Prevent Criminal Conduct. Ethics rules governing mandatory and permissive disclosures to prevent or to remedy client misconduct vary from state to state. Additionally, the SEC initially proposed a mandatory “noisy withdrawal” rule but appears to have quietly defaulted to a “permissive” rule in order to avoid a fight with a number of state bar associations, including possibly the WSBA.

Under Rule 1.13(c), when “reporting up” fails, counsel to organizational clients may “disclose out” under the following circumstances:

(c) ... if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Comment 6 relates Rule 1.13 to Rules 1.2(d), 1.6(b) and 1.16(a):

...[t]he lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

“Reporting out” is also discussed below under Protecting Client Confidences regarding Rule 1.6(b). Again, in-house counsel should help to educate their non-lawyer colleagues. Constituents who understand in

advance the lawyer's reporting up obligations under Rule 1.13(b) and latitude to disclose client confidences under Rules 1.13(c) and 1.6(b) may be less likely to consider improper actions.

- D. Dual Representation. Rule 1.13(g) specifically provides for dual representation of an organization and its constituents as follows:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

The nature of the organizational client, including its need to act through employees, officers, directors and shareholders, causes the issue of dual representation to arise on occasion. The issue may arise, for example, any time a third party sues both the company and its officers and directors. As a practical matter, dual representation carries special risks, both for the lawyer and for the clients. Absent compelling circumstances, dual representation generally should be discouraged. The issue is touched on again below under Conflicts of Interest, but its full complexity is beyond the scope of these materials.

- E. Reconciling the Roles of Counsel and Business Partner.

In-house counsel are often expected to serve as “business partners” or as “members of the strategic team”. These expectations can be compatible with good lawyering, but first and foremost, counsel must be counsel. Striving to be a good business partner or strategic team member is no excuse for falling short of one's ethical obligations. Internal constituents need to understand this priority.

The business lawyer serves the client best when he or she is the standard bearer for matters of legal and business ethics, while at the same time supporting the business with prompt, quality legal work, anticipating and proactively meeting challenges that might otherwise harm or distract the business, providing creative legal solutions to issues that concern the business, and using his or her knowledge and communication skills to advance negotiations, transactions and other strategic objectives.

Lastly, where sensitive legal information is concerned and where jeopardizing the applicability of the attorney-client privilege or the “attorney work product” rule would create material legal risks, the lawyer must function strictly in a legal capacity. Mixing business and legal

responsibilities can adversely impact the analysis under either doctrine. The lawyer bears the responsibility for anticipating and guarding against these concerns.

3. Competence, Diligence and Communication.

A. Competence and Diligence.

Competence and diligence complaints are major sources of lawyer disciplinary actions, perhaps eclipsed only by outright dishonesty and trust account malfeasance.

While organizational clients seem less inclined to report these matters than individual clients, competence and diligence issues do present themselves in-house. A few years ago, in-house litigation counsel in a Washington State agency failed to timely file an appeal, costing taxpayers \$20 million. In another widely publicized incident, the general counsel of Hewlett-Packard failed to adequately inform herself about the legal and ethical implications of “pretexting”. And in 2005, Google’s general counsel was taken to task by the SEC for bad advice regarding stock option rules.

These examples demonstrate the need for in-house lawyers to hold themselves to the highest levels of professionalism.

- (i) Competence. Rule 1.1, Competence, is the first substantive commandment in the Rules; it is also at the core of a lawyer’s professional commitments:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

In-house generalists are often expected to handle a broad range of matters. In smaller law departments, this pressure can extend to matters beyond the lawyer’s competency. At the same time, in-house lawyers often do not receive the same level of professional mentoring that firm lawyers enjoy and the client’s constituents often simply want a particular answer, “yes,” without a lot of hand-wringing.

First and foremost, the in-house lawyer must develop and maintain competency across a range of substantive areas appropriate to the client’s needs. In a less structured in-house environment this requires discipline and dedication. When questions come up that require research, it is important for in-house counsel to acknowledge that fact rather than give a

quick answer that may turn out to be wrong. It is also important to promptly recognize when an issue or project calls for the assistance of outside specialists. On this point, Comment 1 to Rule 1.1 states in part:

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question....

- (ii) Diligence. Like competence, diligence is core professional commitment. Rule 1.3, Diligence, states:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Meeting this obligation in-house requires skillful time management, thoughtful prioritization, and nearly heroic efficiency. It also requires professional judgment to realize when the timelines for a project cannot be met without outside assistance. Clients' interests can be compromised by untimely or poorly performed legal work, whether in a litigation, transactional, regulatory or other context.

This excerpt from Comment 3 highlights the professional sin of procrastination:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness....

And this excerpt from Comment 4 emphasizes the importance of following through:

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client....

(a) Workload. The primary challenge in being diligent is often workload. Workload issues can be difficult in-house since the lawyer is surrounded by colleagues who all think of themselves as “clients.” Many are empowered to seek assistance directly from the lawyer and they often have aggressive timing expectations. The result is that “urgent” assignments can be piled on and the lawyer may feel compelled to accept them all.

Contrast this fact with Comment 2 to Rule 1.3:

A lawyer's work load must be controlled so that each matter can be handled competently.

Notably absent from Rule 1.3 and its commentary are acceptable excuses for not being diligent. The only relief is found in this excerpt from Comment 3:

...A lawyer's duty to act with reasonable promptness... does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

If bandwidth runs short and neither internal nor external assistance is available, the lawyer should escalate the situation to the highest level in the organization necessary to correct it. The goal must be to protect the client through some combination of additional resources or reduction of workload so important matters can be properly prioritized. In almost every excessive workload situation, less critical matters can be identified for deferral by the client. Resort to an internal higher authority is often the only means allocating limited legal resources among competing constituents.

(b) Consent to Limit the Representation. If remedial efforts fail and critical legal work cannot be performed due to competing priorities and insufficient resources, the attorney should consider presenting those concerns to the client’s highest authority and request written consent to limit the lawyer’s representation to those matters that the lawyer is able to properly handle. Rule 1.2(c) states:

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Comment 6 to Rule 1.2 further supports this approach:

...A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms

upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly....

(c) Withdrawal. If the client will not agree to reasonably limit the scope of representation, the lawyer may need to withdraw (resign) in order to avoid a violation of the Rules of diligence and competence, and possibly, charges of malpractice. Rule 1.16(a)(1) states (underlining added):

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law....

B. Communication. Rule 1.4 and its comments emphasize the need for good communication with, and active participation by, the client in legal matters.

Rule 1.4, Communication, provides:

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent... is required...;*
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;*
- (3) keep the client reasonably informed about the status of the matter;*
- (4) promptly comply with reasonable requests for information and;*
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules... or other law.*

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

The comments to Rule 1.4 provide guidance on the nature, timing and goals of client communications. The in-house lawyer should be alert to

the need for client consent or input when making certain decisions. Client consent is required, for example, before accepting a settlement in a civil matter. It can be difficult sometimes for in-house lawyers to hold the interest of key constituents regarding legal matters. It may help to inform them not only of your legal obligation to communicate, but also of their responsibility, and fiduciary obligation, to participate thoughtfully.

The following excerpt from Comment 6 to Rule 1.4 touches on the subject of confidentiality, addressed above under The Organization as Client and below under Protecting Client Confidences:

...When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization....

Lastly, the final sentence of Comment 6 may be applicable to certain routine aspects of practice:

...Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

4. Criminal or Fraudulent Conduct.

Rule 1.2(d) states:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

- (i) The “Gatekeeper” Concept. Rule 1.2(d)’s prohibitions are related to the “reporting up” and “disclosing out” concepts in Rule 1.13(b) and (c) and Rule 1.6(b), and to Rule 4.1(b)’s mandate to disclose facts to third parties when necessary to avoid assisting a criminal or fraudulent act by a client. Together, these rules provide the ethics framework for the frequently cited attorney “gatekeeper” function. That function is viewed as particularly important for in-house counsel because of their greater awareness of the client’s activities and their greater likelihood of being consulted on sensitive matters.

(ii) Practical Implications.

Counseling on the *consequences* of questionable conduct is not prohibited. Comment 9 to Rule 1.2 provides:

Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

Regarding the lawyer's responsibilities once conduct has begun, Comment 10 to Rule 1.2 provides:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

Required communications under Rule 1.2(d) are described under Comment 13:

If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

5. Protecting Client Confidences.

Client confidentiality is fundamental to the attorney-client relationship. Meeting the obligation of confidentiality can be challenging for the in-house lawyer. Unlike firm lawyers, in conversations with friends or family members, or when speaking on CLE panels, in-house counsel can rarely speak anonymously, and thus confidentially, about “a client” – any conversation about “a client” is obviously about “the client.” Further, the in-house lawyer is also readily accessible around the office and frequently asked for information about sensitive matters.

A. Rule of Confidentiality.

Rule 1.6(a) states:

A lawyer shall not reveal information relating to the representation of a client, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

B. Covered Communications.

- (i) Scope of the Duty. The ethical duty of confidentiality is broader than the attorney-client privilege. Privilege covers information provided or received in response to a request for legal advice, while the ethical duty of confidentiality in Washington covers all information *relating to the representation of a client*, whether or not communicated in confidence and *from whatever source*.

Comment 19 to Rule 1.6 highlights Washington’s expansive reading of the “*relating to the representation*”:

The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

- (ii) The Organizational Client. The first half of Comment 2 to Rule 1.13 explains Rule 1.6’s coverage of in-house communications:

When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6....

The second half of Comment 2, however, highlights the need for in-house counsel to be guarded in communications with non-lawyer colleagues:

...This does not mean... that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

- (iii) Internal Investigations. In-house counsel conducting an internal investigation must inform each employee witness that in-house counsel represents the company and will divulge information to it.

On the other hand, employee statements to in-house counsel in an investigation initiated by the company and concerning conduct within the scope of the employee's employment are covered by the corporation's privilege if made to assist corporate counsel in assessing or responding to legal consequences of possible malfeasance.

- (iv) Exceptions to the Prohibition on Disclosure. The following are four exceptions found in Rule 1.6(b) to the general rule of confidentiality that are most relevant to in-house practice:

A lawyer to the extent the lawyer reasonably believes necessary: ...

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules; ...

(6) may reveal information relating to the representation of a client to comply with a court order; ...

Note that all of these exceptions to the rule of confidentiality use the permissive term “may.” The mandatory term “shall” is used only in 1.6(b)(1), where disclosure is necessary *to prevent reasonably certain death or substantial bodily harm.*

- (v) Limitations on Permitted Disclosures. Comment 14 to Rule 1.6 requires counsel to limit potential harm to the client:

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose....

Comment 23 to Rule 1.6 adds the following admonition:

The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

- (vi) Business versus Legal Advice. In-house counsel must avoid carelessly jeopardizing attorney-client privilege. When legal advice and business advice are mixed, the privilege can be jeopardized, as it applies only to what is predominantly legal advice. Preserve the privilege by always providing legal and business advice separately and by documenting through appropriate recitals when legal advice has been sought.
- (vii) Other Confidentiality Protections. The Rules and related comments provide other guidance for preserving client confidentiality. Regarding employees, contractors, and others

working with or under an attorney's supervision, Comment 16 to Rule 1.6 provides:

A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

Regarding communication transmission, Comment 17 to Rule 1.6 states in part:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy....

- (viii) As with attorneys in firms, the duty of confidentiality continues after the client-lawyer relationship terminates. Comment 18 to Rule 1.6 states:

The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

6. Conflicts of Interest.

Rule 1.7 addresses conflicts involving *current* clients. It identifies two types of conflicts - "direct" conflicts and "material limitation conflicts". Both types of "concurrent" conflicts are permissible under certain circumstances, provided all clients involved give knowing consent, confirmed in writing.

Rule 1.7 states:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Although even direct conflicts may be “consentable”, under Rule 1.7(b)(3), conflicts that “*involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal*” are specifically not consentable.

Rule 1.7 is another rule with many helpful comments – 41 in all. They describe, among other things, how to identify the two types of conflicts, the analytical steps for assessing whether a conflict is “consentable,” how to address conflicts that arise once representation has already begun, and conflicts considerations specific to transactions, litigation, and organizational clients.

(i) Direct Conflicts In-house. The following two paragraphs on direct conflicts are from Comments 6 and 7, respectively:

... [A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated....

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

As between the two conflict types, “direct” conflicts are less likely to arise in-house. In most instances, the in-house lawyer has only one client, so it is difficult to end up on both sides of a litigation matter, both sides of a transaction, or otherwise in a directly adverse position to the client.

- (ii) “Material Limitation” Conflicts In-house. Material limitation conflicts can and do arise in-house and they must be handled with care. The following excerpts from the comments to Rule 1.7 touch on a few of the special considerations raised by conflicts questions.

The following excerpt from Comment 8 describes challenges presented by the duty of loyalty:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client....

This excerpt from Comment 28 describes a potentially “consentable” situation:

Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them.

This excerpt from Comment 29 describes risks of failed joint representations:

In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For

example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.

(a) In-House Litigation Scenario. A fairly common scenario in-house arises when a third party sues both the company and its officers and directors and the in-house lawyer is asked to represent all parties. While there may be compelling arguments for presenting a united defense, careful assessment of the facts is required to determine the likelihood that, at some point, the parties' interests might materially diverge such that the lawyer will no longer be able to represent any of the parties. If that is a real possibility, the lawyer should advise against the dual representation, given the potential for significant harm to all involved.

(b) In-House Transaction Scenarios. The in-house lawyer might also be asked to work on matters in which he or she has a direct interest, such as advising the Board on matters relating to a new compensation plan. Whenever the lawyer has a direct financial interest, he or she should decline to advise on the matter and recommend that outside counsel advise the board. Less obvious day-to-day matters can also present conflicts situations. In-house counsel might be asked by the CEO to review his or her employment contract. To do so would require the informed, written consent of the "client", in this instance acting through its Board or compensation committee. Except in extraordinary circumstances, in-house counsel and their clients are best served by a policy of avoiding such conflicts by referring them to outside counsel.

(c) In-House Investigations. Internal investigations issues are beyond the scope of these materials. It is worth noting here, though, that in-house counsel must always conduct a conflicts assessment before undertaking to advise a corporate client on when, whether and how to conduct an investigation. If the lawyer's conduct may be in any way implicated, he or she has a conflict and should not be involved. The same may be true if the lawyer's close relationships with others who might be implicated could impair, or could be viewed as impairing, his or her independence in pursuing the investigation. When in doubt, or when matters of any significance are involved, investigations should be conducted by independent, outside parties.

(d) Personal Relations. Rule 1.8(j) prohibits attorneys from engaging in sexual relations with clients and representatives of clients as follows:

A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

Comment 19 to Rule 1.8 adds the following regarding organizational clients:

When the client is an organization, paragraph (j) of this Rule applies to a lawyer for the organization (whether inside or outside counsel). For purposes of this Rule, "representative of a current client" will generally be a constituent of the organization who supervises, directs or regularly consults with that lawyer on the organization's legal matters. See Comment [1] to Rule 1.13 (identifying the constituents of an organizational client).

7. Truthfulness in Statements to Others.

In-house counsel deal directly and indirectly with third parties and must avoid making or becoming entangled in misrepresentations.

Rule 4.1 states:

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

A. Misrepresentation. Comment 1 to Rule 4.1 provides the following gloss on what constitutes a misrepresentation.

(i) There is no affirmative duty to inform an opposing party of relevant facts.

- (ii) Misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.
- (iii) Misrepresentation can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.

B. Statements of Fact. Comment 2 to Rule 4.2 defines what is meant by “statements of fact.”

- (i) The rule applies to statement of fact, a determination that depends on the circumstances.
- (ii) ... *Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category....*

C. Crime or Fraud. Comment 3 relates Rule 4.1 to Rule 1.2(d), provides guidance on when paragraph (b) might require withdrawal or similar action regarding an opinion or document, and addresses mandatory reporting out:

Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client’s crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client’s crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client’s crime or fraud. If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

8. Communications with Persons Represented by Counsel.

Rule 4.2 prohibits communications with persons represented by counsel:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by

another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Compliance with Rule 4.2 in-house requires constant vigilance. In-house counsel are frequently invited to attend meetings or teleconferences with third parties regarding all types of contracts and other transactions. If the lawyer has previously received any correspondence from the third party's counsel regarding the transaction or any other information indicating the involvement of counsel, the lawyer cannot have *any* direct communications with the third party outside of the presence of their counsel unless the lawyer has obtained consent from *counsel* for the third party. This prohibition covers verbal communication as well as email or other written communication.

- A. Represented Person Cannot Waive. Only *counsel* for a represented person can waive the requirements of Rule 4.2 – not the represented person. Comment 3 to Rule 4.2:

The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if... the lawyer learns that the person is one with whom communication is not permitted by this Rule.

- B. Non-lawyer Communications Not Prohibited. Comment 4 to Rule 4.2 states that, although a lawyer may not use others to cause prohibited communications, non-lawyer parties can communicate and the lawyer can advise the client regarding those communications:

... A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

- C. Organization as Client. The first part of Comment 7 to Rule 4.2 identifies covered constituents in “represented organizations”:

In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter. Consent of the organization's lawyer is not required for communication with former constituent....

Comment 10 to Rule 4.2 flags the leading Washington case in this area, Wright v. Group Health, a case highlighting the fact intensive nature of the inquiry required under Rule 4.2.

... Whether and how lawyers may communicate with employees of an adverse party is governed by Wright v. Group Health Hospital, 103 Wn.2d 192, 691 P.2d 564 (1984). See also Washington Comment [5] to Rule 3.4.

- D. Dealing with Unrepresented Persons. On a similar subject, in-house counsel must also keep in mind Rule 4.3's requirements regarding unrepresented persons (underlining added):

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

9. Responsibilities of Supervisory Lawyers.

- A. Law Department as "Law Firm." Rule 5.1 describes the supervisory responsibilities of lawyers with managerial authority. While the rule itself speaks of partners and other managing lawyers in a "law firm," Comment 1 to Rule 5.1 clarifies that, under Rule 1.0(c), this includes lawyers having "comparable managerial authority" in a "law department of an enterprise."
- B. Precautions and Accountability. In-house lawyers who manage other lawyers or non-lawyer assistants are thus required to take reasonable precautions to ensure that those persons' activities are consistent with the lawyer's professional obligations. Rule 5.1(b) provides that:

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Rule 5.1(c) holds the supervising lawyer accountable for subordinate lawyers' violations under certain circumstances:

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer... has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Responsibilities regarding non-lawyer assistants are covered under Rule 5.3(b) and (c):

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer... has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

C. Policies, Procedures, and Remedial Action. The Comments to Rule 5.1 provide guidance for meeting Rule 5.1's supervisory requirements:

(i) Comment 2 to Rule 5.1 states in part that:

... Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

(ii) This excerpt from Comment 3 to Rule 5.1 highlights the need to tailor appropriate policies and procedures to the size and nature of the practice:

... In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can

make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics....

- (iii) Comment 5 to Rule 5.1 provides guidance on when “supervisory authority” is present and, as excerpted below, also addresses remedial action:

... Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer’s involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

- (iv) Comment 1 to Rule 5.3 states that a lawyer’s duties under Rule 5.3 regarding supervision of non-lawyers covers *independent contractors*, extending the rule’s requirements to third parties such as private investigators. Comment 1 provides the following guidance regarding supervision of such persons:

... A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

10. Unauthorized Practice of Law.

A few years back there were a number of high profile “outings” of GCs who were not licensed to practice in the states where they practiced. Many in-house lawyers are apparently operating “under the radar” in disregard of licensing requirements. Others are violating the requirements out of ignorance.

- (i) Rule 5.5(d)(1). A number of states, such as Washington and Utah, have adopted Model Rule 5.5(d)(1) without modification. It allows an in-house attorney to render services “to the lawyer’s employer or its organizational affiliates” provided the attorney is a member in good standing of another jurisdiction.

Rule 5.5(d)(1):

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission;

Comment 16 to Rule 5.5 explains the scope and basis for the rule:

Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

- (ii) Limited Licenses. Many other states have adopted either modified versions of Rule 5.5(d)(1) or other rules governing “limited” or “special” licenses for in-house counsel. These licensing provisions are not “self-implementing”. They often require extensive paperwork, ethics classes, background checks, and other formal requirements. It is the lawyer’s responsibility to find out what is required to meet and remain in compliance with those requirements. Ongoing obligations may include CLE attendance, trust fund declarations and other regular paperwork.
- (iii) No Special Provision for In-House Counsel. As many as half of the states, including New York and Connecticut, have no special licensing exceptions or other relief for in-house counsel. Absent helpful case law or other practical guidance, in-house counsel in these jurisdictions probably must assume that they are subject to the same licensing requirements as their private firm peers and that failure to meet those requirements could constitute the unauthorized practice of law.
- (iv) Licensing Paperwork. Do not rely blindly on others to handle your licensing paperwork without your close supervision. All bar associations view these as the lawyer’s responsibilities.

11. Misconduct.

Most of what constitutes misconduct under Rule 8.4 is fairly obvious: (i) violating or attempting to violate the Rules, (ii) committing criminal acts that reflect adversely on the lawyer's honesty, trustworthiness or fitness in other respects, and (iii) engaging in conduct involving dishonesty, fraud, deceit or misrepresentation.

The misconduct rules go even further, however. Under Rule 8.4(a), violations of the Rules can be attributed to the lawyer who knowingly assists or induces another's violation of the Rules or who otherwise violates the Rules *through the acts of another*.

In-house lawyers responsible for supervising other attorneys, paralegals, outside counsel, and other outside service providers must be alert for red flags. In the recent Hewlett-Packard "pretexting" scandal, HP's general counsel should have considered whether she was violating the Rules by allowing private investigators to falsely impersonate others to gain access to private phone records. The acts themselves involved *dishonesty, fraud, deceit or misrepresentation*. Allowing them to proceed through the conduct of private detectives would have given her little comfort had she reviewed the Rules.

12. Ten Practical Suggestions.

- A. Constituent Education. In-house counsel should consider educating their non-law colleagues across some or all of the following areas:
- Identity of the client;
 - Counsel's relationship to employees and other constituents and implications regarding confidentiality, and privilege;
 - Prohibition against facilitating fraudulent or criminal conduct;
 - Counsel's obligations to report up;
 - Counsel's obligations to protect client confidences;
 - Employee's role in protecting attorney-client privileged materials;
- B. Establish a Culture That Preempts the Need to "Report Up". Make ethics a priority that is respected from the top down so that reportable situations do not arise in the first place.
- C. Be Clear and Firm. Conviction and determination are called for in the face of issues that trigger or threaten to trigger the in-house lawyer's obligations under Rules 1.2(d) and 1.13(b). Understand what is called for under these rules and communicate your concerns and obligations clearly and firmly.

- D. Confidentiality is Sacred. Discretion is a professional duty. Like other lawyers, in-house counsel are obliged to protect the confidentiality of all matters “related to the representation”. Treat all important company matters as sensitive and consider the appropriateness of each and every disclosure internally and externally.
- E. Avoid Conflicts of Interest. When in doubt, seek the advice of trusted outside counsel for an objective viewpoint.
- F. Be Diligent, Competent, and Communicative. Do not procrastinate or hide important information from the client about legal matters. Know when to use outside counsel. If job demands exceed your ability to meet professional standards, speak up and fix the situation.
- G. Communication with Represented Persons. This is an easy violation to commit accidentally. Even a letter or email directed to a represented person rather than to their counsel constitutes a violation, and it might very well be reported by the other lawyer if he or she feels it was intentional.
- H. Licensing. Comply with all licensing requirements applicable to your position. Take nothing for granted and do not rely on others to handle licensing administrative matters without direct and thorough oversight.
- I. When in Doubt, Ask. There is no need to face an ethics question alone. When in doubt, consult with outside counsel or the WSBA Ethics Line (206-727-8284) for guidance. Care must be taken to avoid violation of the lawyer’s obligation of confidentiality. Rule 1.6(b)(4) specifically permits disclosure necessary to receive confidential advice on ethics obligations.
- J. Choose Your Company Well. When considering your next employment move, conduct enough due diligence to understand the type of environment you are getting into. Among other things, ask for permission to speak with the audit committee and with the company’s auditors.