

LEGAL ETHICS: High Tech"

21ST ANNUAL INSTITUTE ON
COMPUTER LAW

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Introduction

Discusses the ethical problems of investing in a client.

I. THE ETHICS PROBLEM WITH EQUITY FEES

Accompanying the visible successes of the high tech industry has been the practice by attorneys to participate in that success by taking an equity position in start-up companies. This has resulted in a flurry of articles and comments concerning ethical problems relating to such practice.¹ In a recent ethics opinion, the ABA has weighed in with the American Bar Association Formal Ethics Opinion 00-418, *Acquiring Ownership in a Client in Connection with Performing Legal Services*. The opinion is attached as an exhibit to this article. Most of the commentators ultimately come to a conclusion that it is ethically acceptable for an attorney to acquire an interest in its client's business as a fee. Almost all such opinions are conditioned on a number of requirements that make the taking of such a fee problematic. One of the oddest aspects of the justification for client equity as a fee shows up explicitly in the ABA opinion. Opinion 00-418 states, "Many lawyers nevertheless believe that acquiring ownership interest in start-up business clients is desirable in order to satisfy client needs and also because of growing competition with higher paying venture capital investment firms to attract and retain partners and associates." (Emphasis added.) It can be very beneficial to a start-up company to reduce its capital needs by avoiding cash outlays for attorney's fees. It seems strange, however, to justify such a fee, because lawyers have a need for the cash. Even the most illegal means of acquiring cash is usually justified by the actor because he has a purpose for the money.

¹ See Gwyneth E. McAlpine, Comments: *Getting a Piece of the Action: Should Lawyers be Allowed to Invest in Their Client's Stock?* 47 UCLA L. REV. 549, 558 (1999) (citing a large literature); Jason M. Cline, *No Fool for a Client: The Finance and Incentives Behind Stock-Based Compensation for Corporate Lawyers*, 1999 COLUM. BUS. L. REV. 329.

Consequently, the real measure of the ethical question is to compare the benefit to the client by reducing their need for immediate capital compared to the restrictions that are placed upon such transactions by the various codes and statutes governing attorney conduct.

II. ETHICAL CONSIDERATIONS LIMIT THE PRACTICE²

The ABA Opinion 00-418 sets forth four basic principles in establishing the propriety of such transactions.

1. The fee must be reasonable at the time the attorney-client contract was formed.
2. The terms of the transaction must be fully disclosed to the client in a reasonably understandable manner.
3. The client must be afforded the opportunity to seek independent counsel and the client consents in writing to the arrangement.
4. There cannot be a material conflict of interest with the client which would preclude representation.

It seems clear that each of these restrictions merits discussion on its own and significantly reduces the number of times that the taking of an equity position is permissible.

² Much of this material came from *Investments in Client: Dangerous Liaisons*, by Michael Quinn and Matt Bob, University of Texas, Advanced Patent Law Seminar, 2000.



A. THE FEE MUST BE REASONABLE AT THE TIME THE ATTORNEY-CLIENT CONTRACT WAS FORMED.

Fee contracts between lawyers and their clients are presumed invalid. Consequently the burden of showing both fairness and reasonableness falls upon the attorney in case of any dispute. If a contract between a lawyer and a client for services sets a fee which is not reasonably proportionate to any mix of the following, the contract will be invalidated:

- The time involved
- The labor involved
- The difficulty of the questions involved
- The novelty of the questions involved
- The skill required to do the job
- The reduction of the lawyer's capacity to take other work
- Usual fees charged
- The amounts at stake
- The amounts obtained
- Time constraints
- The length and nature of the professional relationship between the lawyer and client
- The experience, reputation, and ability of the lawyer
- The nature of the fee, e.g., contingent.³

³ Texas Disciplinary Rules of Professional Conduct ("Texas Rules") 1.04, ABA Model Rules of Professional Conduct ("Model Rules") 1.5(a).

Texas Rule 1.08(a) provides the most important rule for considering the economic transactions between clients and lawyers. It states as follows:

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 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. (*Italics added.*)

Because the attorney-client relationship is a fiduciary duty and because the burden is on the attorney should any dispute arise to prove the transaction with his client fair and overcome the presumption of unfairness, it is clear that the reasonableness of a fee will be determined by hindsight. The lawyer will be judged based upon the documentation and the way the transaction turned out. While it can be argued that reasonableness should be determined at the time of the contract and not at the time of the dispute, hindsight clearly poses a great threat to any attorney mired in a dispute with his client. There are simply more questions than answers in determining the reasonableness of an equity position taken as a fee.

Assume that a lawyer takes a percentage of a corporation's stock as a fee. What is a fair and reasonable

percentage? In a dispute between the client and the lawyer, how is it possible to determine a fair and reasonable percentage if the stock has multiplied in value a number of times? Wouldn't that impact in the finder of fact's evaluation of a fair percentage? Thus, a company whose stock growth has resulted in a million-dollar profit to an attorney is going to have a harder time convincing the trier of fact that the percentage was reasonable. Conversely, if the stock has remained constant without much growth, a higher percentage in hindsight would look justified. How then does a lawyer protect herself upfront in determining a reasonable percentage?

The problem is compounded by the definition of the work to be done for the equity position. Some clients expect that in return for giving up an equity position, the client has acquired a lawyer for life. That means that if the stock nose-dives, the company goes bankrupt and the stock is now worthless, is the attorney now obligated to provide bankruptcy services to the corporation for no fee because he took an equity position in the company as his fee? It seems clear that there can be no equity position taken as a fee by any lawyer unless there is an explicit understanding of the work covered by that fee. To pretend this is not a problem is simply asking for malpractice litigation should the company not be successful.

All the problems attached to contingent fees in a personal injury practice seems to also attach to the taking of an equity position in the client. The big difference is that the personal injury contingent fee lawyer has years of case law which establishes the range of work required to be done for the contingent fee and a general range of permissible percentages. The transaction lawyer who now wishes to take what is essentially a contingent fee does not have the same case law protection.

**B. THE TERMS OF THE TRANSACTION MUST
BE FULLY DISCLOSED TO THE CLIENT IN
A REASONABLY UNDERSTANDABLE
MANNER.**

As we have seen, Texas Rule 1.08(a) provides that the transaction and terms of an acquired interest by a lawyer be “fully disclosed in a manner which can be reasonably understood by the client.” This requirement, when viewed in hindsight by an allegedly aggrieved beneficiary of a fiduciary duty, becomes extremely onerous. The plaintiff’s lawyer representing the client-investees will take this requirement quite literally and will present it that way to the jury. The lawyer is likely to succeed in this effort. She will get favorable jury instructions. After all, the law frequently distinguishes between things being fully done and things being substantially done. The law distinguishes between something being reasonably correct and it being perfectly correct. The fiduciary rules governing lawyers in Texas, do not use the language of reasonable-this or substantially-that. They use the language of fullness and completeness.

For every respect in which a transaction runs amok, there is likely to be something which was not disclosed or which has somehow misdisclosed. Indeed, from the benefit of hindsight, it will always be possible to find such things and to formulate a plausible hypothetical disclosure such that, if the client had been told precisely that, the client never would have consented. Thus, the requirement of disclosure is so high for equity fees that if a deal goes south, it will invariably be possible to find something which the lawyer failed to disclose or find something formulated in such a way that the client will say that had he known that he never would have consented to the deal. Also invariably, it will be

possible (more or less) reasonably to attribute causation, in part, to that failure in proper disclosure.

If a lawyer succeeds in making absolutely full and complete disclosure at the level of perfection, the disclosure will be so technical and so detailed that no client will be able to understand it, and the price a client will have to pay to another lawyer for sorting out the disclosure and explaining will render the flame unworthy of the candle. There are also practical problems associated with full and complete disclosure. Lawyers are addicted to form disclosures. Predictably, there will be pages upon pages of boilerplate caveats in any disclosure. Many of them will be inapplicable to the case at hand. Plaintiff's will have field day with such disclosure documents.

Defending the adequacy of any such disclosures is fraught with difficulties:

1. Frequently, the disclosures by lawyers will contain really material misrepresentation. They may not be deliberate, but that fact does not matter.
2. The disclosures may be so badly written that no one can understand them.
3. They may be so voluminous that nobody could really get through them.

The propriety, and even to a greater extent the practicality, of taking an equity position as a fee is determined by how well the attorney thinks he can overcome the requirements of full disclosure. In hindsight, the lawyer must be prepared to prove that every aspect of the economic

transaction (price, dividend, stock splits, appreciation, the extent of disclosure, the work covered by the fee, the work not covered by the fee, and so on and so on) is fully fair, fully reasonable and fully disclosed.

C. THE CLIENT MUST BE AFFORDED THE OPPORTUNITY TO SEEK INDEPENDENT COUNSEL AND THE CLIENT CONSENTS IN WRITING TO THE ARRANGEMENT.

The foot dragging on actually getting a second opinion concerning the fairness of the transaction from another lawyer is systemic. Very few lawyers wish to refer their client to another lawyer for fear of losing the client. Many lawyers take solace in the requirement of the rule that the client simply be given an opportunity to have the transaction reviewed by an independent lawyer. However, failure to actually get an opinion approving the transaction means that if a dispute arises between the client and lawyer, there is a fact dispute as to the actual opportunity to confer. The requirement for obtaining a writing poses many difficulties for the lawyer because the drafter of the writing has the ever-present appearance of overreaching. The client resists involving an additional lawyer because it's an out-of-pocket expense for which the client at that point usually views as a wasted expense.

The rules, therefore, place restrictions upon taking equity as a fee that is very dangerous:

(1) the lawyer may not be able to establish that the client was given sufficient opportunity to consult with other counsel;

(2) the lawyer may have had a hand in picking other counsel and that can be made to look terrible; and

(3) the written consent signed by the client may actually be written by the lawyers to whom the consent is given, and that too will be made to look retched.

**D. THERE CANNOT BE A MATERIAL
CONFLICT OF INTEREST WITH THE
CLIENT THAT WOULD PRECLUDE
REPRESENTATION.**

This is a standard conflict of interest test, but it does not apply just to the beginning of the relationship but instead lasts throughout the existence of the relationship. Something which may not have been a conflict of interest when it started could become a conflict of interest later on.

Texas Rule 1.06(b) states as follows:

[A] lawyer shall not represent a person if the representation of that person:

1. involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of...the lawyer or the lawyer's firm; or

2. reasonably appears to be or become(s) adversely limited...by the lawyer's or law firm's own interests. (Emphasis added.)

Assume an attorney owns a valuable portion of a client's business and the client is now required to make disclosures that will decrease the value of the stock. Can the lawyer be fully objective in giving the advice on whether to disclose?

Section 206 of the RESTATEMENT, entitled "Lawyer's Personal Interest Affecting Representation of a Client,"⁴ states as follows:

Unless the affected client consents to the representation under the conditions and limitations provided in § 202, a lawyer may not undertake or continue to represent a client if a substantial risk exists that a financial or other personal interest of the lawyer will materially and adversely affect the lawyer's representation of the client.

Section 202(1), which is entitled "Client Consent to a Conflict of Interest," is this:

A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 201 if each affected client gives informed consent to the lawyer's representation. Informed consent requires that the client have adequate information about the risks and advantages of such representation to that client.

Section 201, entitled "Basic Prohibition of Conflict of Interest," says this:

Unless all affected clients consent to the representation under the limitations and conditions provided

⁴ Restatement (Third) Of The Law Governing Lawyers (2000).

in § 202, a lawyer may not represent a client if the representation would constitute a conflict of interest. A conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests...

The general point of §§ 201, 202 and 206 is that "when lawyers have substantial personal interest at stake, their representation of clients may well be compromised." Comment b to § 206 contains this remark: "Personal interests of a lawyer that are inconsistent with those of a client may significantly limit the lawyer's ability to pursue the client's interest." Lawyers are not always able to subordinate their substantial personal interests to the interests of their clients. Even if they could, it would be difficult to know when they had done so.

III. PARTICULAR PATENT PROBLEMS⁵

Because patent practice has transaction, administration and litigation aspects to it, it not only has all the problems previously outlined but also is overlaid with patent office regulations and rules.

The PTO Code provides that a practitioner "shall not acquire a proprietary interest in the subject matter of a proceeding before the Office which the practitioner is conducting for a client, except that a practitioner may:

Acquire a lien granted by law to secure the practitioner's fee or expenses; or

⁵ This material came from *Ethics in Patent Prosecution and Litigation*, by David C. Hricik, 38th Annual Institute on Patent Law, 2000.

Contract with a client for a reasonable contingent fee; or

In a patent case, take an interest in the patent as part or all of his or her fee.

37 C.F.R. § 10.64 (emphasis added).

The “legislative history” in the Federal Register sheds only some indirect light on this section. In promulgating this rule the Patent Office stated that it was designed to make the patent rule “consistent with Informal Opinion No. 280 of the American Bar Association...” 49 Fed. Reg. 33790, 33798 (Aug. 24, 1984). This PTO Code provision is clear in only one aspect: it does not apply to trademarks. See 49 Fed. Reg. 33790, 33798 (Aug. 24, 1984). Otherwise, it is rife with ambiguity on critical issues. For example:

1. Does it permit a lawyer to take an interest in an application he is prosecuting, or merely a “patent” that has been issued (and, for example, is involved in an interference proceeding)?

2. Does it preclude a lawyer from taking an interest in a patent in exchange for more than all or a part of the fee?

3. Does it apply to the activities of a practitioner representing a patent owner during litigation, and so preempts state law prohibiting ownership in the cause of action?

4. Does it obviate the need, as required by other provisions of the PTO Code requiring disclosure and consent

before the interest can be granted to the lawyer by the client, or preempt state law that would require it?

With respect to the first question, it seems reasonable to conclude that the word “patent” is used loosely, and would permit a lawyer prosecuting an application to contract with a client to grant part of any resulting applications to the lawyer.

The second question is important, and not purely semantical. If the lawyer is permitted to secure only his fee for the interest in the patent, then a client could argue that any grant of a value in excess of a reasonable fee exceeds the scope of the grant permitted by the rule. A client can argue that the rule does not permit any larger grant.

Third, it is doubtful that the rule would permit a practitioner representing a client during litigation to take an interest in a patent where state law otherwise prohibited it. The PTO Code does preempt state law, but only “to the extent necessary for the Patent and Trademark Office to accomplish its federal objectives.” 37 C.F.R. § 10.1. It does not seem likely that a court would hold that patent litigators must be allowed to take interests in patents in order for the patent office to accomplish its federal objectives. But see William E. Jackson, *Contingent Fee Representation in Intellectual Property Cases*, 1 U. Balt. Intel. Prop. L.J. 207, 218 (1993) (reasoning that general rule prohibiting ownership in subject of litigation “might not apply to the litigation attorney who has an interest in the patent” as permitted by Section 10.64). Thus, patent litigators – especially those who are not practitioners – who, for whatever reason, want to take an interest in the patent, should probably consult state law, not the PTO Code. Many complex choice of law issues can arise where a practitioner who has taken an interest in a patent during prosecution represents the client during litigation of that patent. See

generally David S. D'Ascenzo, Federal Objective or Common Law Champerty? – Ethical Issues Regarding Lawyers Acquiring an Interest in a Patent, 3 Tex. Intel. Prop. L.J. 255, 265 (1995) (discussing various scenarios).

Fourth, the PTO Code does not eliminate the need for the lawyer to advise the client as to the advisability of granting the lawyer the interest. Instead, 37 C.F.R. § 10.65 provides:

A practitioner shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the practitioner to exercise professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

This is identical in substance to the Model Code, upon which the PTO Code is based. See Model Code DR 5-104(A). It is less restrictive than the Model Rules, however, which provide:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(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 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 Rule 1.8(a). Texas Rule 1.08(a) is identical to this Model Rule.

Since the PTO Code requires less disclosure than the Model and Texas Rules, which applies can be an important question. The only court to address the issue held that state rules govern whether the disclosures necessary to create an enforceable agreement between lawyer and client were made. See *Buechel v. Bain*, 2000 WL 1429598 (N.Y. App. Div. Sept. 28, 2000). See also D.C. Bar Op. 195 (Dec. 13 1988) (without addressing PTO Code, opinion reasoned that lawyer could not take assignment of patent to secure payment of fees due to prosecuting application). Thus, a practitioner prosecuting an application for a client may, under § 10.64, take an interest in the application. However, he must make disclosures. Whether under state law or the PTO Code, is unclear. Obviously, the lawyer should comply with the more stringent of the two.⁶

IV. CONCLUSION

Every attorney should recognize the difficulty of complying with the ethical requirements of taking an equity position in a client for a fee. Most attorneys feel fairly comfortable with the practice because “everybody’s doing it.” Practitioners should remember that at one time the Bar Association believed that enforcing minimum fee schedules

⁶ Again, however, it bears emphasizing that a federal court may apply “national standards” of ethics to this issue – not just the Texas state rules. See, e.g., *In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992). By complying with the most stringent, the lawyer will no doubt meet any standard.

was ethical and legal, and further, the Bar believed that at one time receiving portions of a title insurance company fee for title work without informing the client was ethical. A hard look has to be taken at each fee arrangement to make sure it fully complies with all fiduciary duties, full disclosure requirements, conflict of interest requirements, and is truly in the best interest of the client and the attorney regardless of the economic advantage to the lawyer.

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ACQUIRING OWNERSHIP IN A CLIENT IN
CONNECTION WITH PERFORMING LEGAL SERVICES

July 7, 2000

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. [FN1] Some representatives of the organized bar have questioned this practice. [FN2] 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. [FN3] 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. [FN4]

The Committee in this Opinion examines the issues that 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. [FN5] 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. [FN6]

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. [FN7] In 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. [FN8]

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. [FN9] It seems clear that "[i]n a 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.” [FN10] 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. [FN11]

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, “[o]ne 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.” [FN12] Of course, instead of increasing in value, the stock may become worthless, as occurs frequently with start-up enterprises. [FN13] The risk of failure and 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. [FN14]

One way for the lawyer to minimize the risk noted by Professors Hazard and Nodes is to establish a reasonable fee for her services based on the factors enumerated under Rule 1.5(a) [FN15] 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. [FN16]

In addition to assuring that the stock transaction and its 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. [FN17] 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. [FN 18]

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. [FN19] She also should advise the client that as a consequence of such a conflict, she might feel constrained to

withdraw as counsel for the corporation, or at least to recommend that another lawyer advise the client on the matter regarding which she has a personal conflict of interest. [FN20]

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. [FN21] 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. [FN22]

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 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). [FN23]

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. [FN24]

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 1.8(j), "a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting." [FN25] 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. [FN26]

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. [FN27]

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. [FN28]

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. [FN29]

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 investor to withdraw. [FN30] 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. [FN31]

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. [FN32]

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. [FN33] 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 representation of the corporation. [FN34]

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 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.

FNI. 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.

FN2. 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.

FN3. 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.”).

FN4. 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.

FN5. 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.

FN6. 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.

FN7. 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 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 Model 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.

FN8. 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 were not offered in connection with undertaking to provide legal services.

FN9. See RESTATEMENT, *supra* note 7, § 207 Comment 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 the commencement of representation,” not by the actual effort expended.) (Emphasis supplied); Klein, supra note 1, at 336 (“[R]eview 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.”).

FN10. RESTATEMENT, supra note 7, § 207 at 639; see also Comment 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).

FN11. 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.

FN12. HAZARD & HODES, *supra* note 7, § 1.8:202 at 264.

FN13. In comparing cash to stock compensation. Klein points out that “[w]hen 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 is no downside protection.” *Supra* note 1, at 339-40.

FN14. 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).

FN15. *Supra* note 8 and accompanying text.

FN16. 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).

FN17. 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 (ED. 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”).

FN18. 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.

FN19. 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.”).

FN20. See *infra* note 31 and accompanying text regarding actions the lawyer must take should a conflict later arise.

FN21. 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”).

FN22. 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”).

FN23. 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).

FN24. 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.

FN25. 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.

FN26. 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.

FN27. See District of Columbia Bar Op. 179 (1987) (under DR 5-103(A), though acquiring stock in a corporation the lawyer 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) 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).

FN28. 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.

FN29. 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."

FN30. 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.”).

FN31. 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 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).

FN32. 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.

FN33. 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.

FN34. See, e.g., *Comm. on Prof. Ethics and Conduct of Iowa State Bar Ass’n v. Humphreys*, 524 N.W.2d at 398, *supra* note 18. 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.

ABA Formal Op. 00-418.

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