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# In-House Risk

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## Introduction

Over the last thirty years or so, as the number of in-house counsel rose and their role increased in scope and prominence, increased attention has been given the various challenges these lawyers face under the ABA Model Rules of Professional Conduct (“Rules”),<sup>1</sup> from figuring out who is the client the in-house lawyer represents, to navigating conflicts of interest, maintaining independence, and engaging in a multijurisdictional practice of law. Less attention, to date, has been given to business risk assessment, perhaps in part because that function appears to be part of in-house counsel’s role as a business person rather than as a lawyer. Overlooking the role of in-house counsel in assessing risk, however, is a risky proposition, because risk assessment constitutes for some in-house counsel a significant aspect of their role, a role that in turn informs and shapes how in-house counsel perform other more overtly legal tasks. Part I of this paper outlines some of the traditional challenges faced by in-house counsel under the Rules. Part II explores risk assessment by in-house counsel and its impact on their role and function under the Rules.

## Part I: The Traditional Challenges of In-House Counsel under the Rules of Professional Conduct

### A. Who is the Client?

Rule 1.13(a) states that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”<sup>2</sup> This seemingly straightforward conceptual proposition has both affirmative and negative components. Affirmatively, it sets out the entity as the client, and negatively, it states that the constituents are not the client.<sup>3</sup> Comment 1 explains that “[a]n organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client.”<sup>4</sup> Accordingly, Rule 1.13(a) stands for the proposition that by virtue of representing the entity, the in-house attorney’s client is the entity and the entity alone, and that the in-house lawyer does not represent any of the entity’s constituents such as its board, board committees, individual board members, or officers.

However, Rule 1.13 does not forbid lawyers for an entity, in-house attorneys included, to concurrently represent the entity and one or more of its constituents. Rule 1.13(g) states in relevant part that “[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,”<sup>5</sup> the conflicts of interest rule. In other words, while a lawyer for an entity-client does not also automatically represent any of the entity’s constituents, she may concurrently represent constituents if such representations do not give rise to a prohibited conflict of interests. Rule 1.13(g) adds that “[i]f the organization’s consent to the dual representation is required by Rule

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<sup>1</sup> ABA MODEL R. PROF. CONDUCT (2015).

<sup>2</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(a) (2015).

<sup>3</sup> Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1013-16 (1997).

<sup>4</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13 com. 1 (2015).

<sup>5</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(g) (2015).

1.7[a],” because a conflict of interests exists, “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.”<sup>6</sup>

Next, the phrase “duly authorized constituents” raises complexities as well. Because a lawyer representing an entity cannot deal with the client directly, and instead can only communicate with the entity via the client’s agents – the constituents of the entity – a lawyer must always ensure that the constituent she is dealing with is authorized to be speaking and acting on behalf of the entity on the matter.<sup>7</sup> Often, determining whether a constituent is authorized to speak and act on behalf of an entity-client is an easy task, for example, when interacting with the entity’s C-suite executives or board members. At other times, however, the issue may not be so obvious. For example, Rule 1.13 is silent as to whether such authority expires upon an unlawful act or violation of fiduciary duty to the principal entity-client. On the one hand, it is well established that no agent may “lawfully overstep the limits imposed by the principles of agency law on an agent’s authority to commit to a course of action on behalf of the principal.”<sup>8</sup> As noted by William Simon, “[e]ven the highest authority, when it engages in an injurious and ‘clearly’ illegal course of conduct, is not ‘duly authorized.’ If it lacks authority to engage in the conduct, then it lacks authority to instruct the lawyer to remain passive about it.”<sup>9</sup> On the other hand, by not including language in its framework that addresses such a situation, Rule 1.13 creates the impression that the agent-constituent who has violated his duties to the principal entity-client may still retain authority over the lawyer. By not establishing this principle clearly within its language, Rule 1.13 adds to the general tendency towards conflating the entity and its constituents and contributes to the alignment pressures felt by the in-house attorney given the fact that the lawyer is accountable to the constituents yet represents the entity.

What is a lawyer for an entity to do when the interests of the entity-client are adverse to those of its constituents (when the lawyer also represents a constituent per 1.13(g), when the constituent acts without authority, or when the constituent acts in a manner the lawyer believes is contrary to the interests of the client)?

Rule 1.13(f) states that “[i]n 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.”<sup>10</sup> Comment 10 adds that “[t]here 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

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<sup>6</sup> *Id.* See, ABA MODEL R. PROF. CONDUCT, R. 1.7(b)(4) (2015).

<sup>7</sup> Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, *supra* note 3, at 1013-16.

<sup>8</sup> Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, 74 *FORDHAM L. REV.* 983, 1046 (2005).

<sup>9</sup> William H. Simon, *Whom (Or What) Does the Organization’s Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 *CAL. L. REV.* 57, 81 (2003).

<sup>10</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(f) (2015).

representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.”<sup>11</sup>

Rule 1.13(f) reveals that a significant challenge faced by an attorney for an entity-client in terms of “who is the client?” is practical rather than conceptual: lawyers for entities often know full well that their client is the entity rather than its constituents. Practically speaking, however, when adversity arises between the interests of the entity-client and those of a constituent, say, the Chief Executive Officer, “explain[ing] the identity of the client” to the CEO, advising the CEO “that the lawyer cannot represent” him or her and that the CEO “may wish to obtain independent representation” may be easier said than done.

The difficulty is twofold. First, authorized constituents, such as a CEO, have the power to hire and fire a lawyer for the entity such that the lawyer may be somewhat reluctant to “explain” to the CEO concerns about adversity. Second, and as important, exactly because the entity-client can only act through its authorized constituents, a lawyer for an entity client may only effectively represent the client when she establishes strong working relationships with the constituents. Indeed, the formation of strong working relationships with the entity’s constituents is very much in the entity-client’s best interests, because it allows its lawyer to effectively and efficiently represent it. However, it is these very strong relationships which may discourage the lawyer from “explaining” to the CEO a concern about adversity because such explanations may chill the relationship between the CEO and the lawyer, thus undermining the latter’s ability to effectively represent the client. Stating the obvious, Comment 11 to Rule 1.13 notes that “[w]hether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.”<sup>12</sup> In sum, oftentimes, a thorny issue regarding the identity of the client is a practical rather than a conceptual one, calling for the careful exercise of professional judgment in protecting the best interests of the entity client while maintaining strong working relationships with its key constituents.

## B. Navigating Conflicts of Interest

A lawyer for an entity-client faces at least two categories of potential conflicts of interest. First, a problem arises when a lawyer becomes aware that the CEO or any constituent with whom the lawyer interacts is behaving in ways that are in conflict with the interests of the organization.<sup>13</sup> If the constituent in question is a concurrent client of the lawyer per Rule 1.13(g), a conflict of interests arises immediately per Rule 1.7(a)(1) because “the representation of one client [the entity-client] will be directly adverse to another client [the constituent].”<sup>14</sup> Even if the constituent is not a client of the lawyer, however, a conflict of interest may arise. To begin with, as explained above, the entity-client has an interest in its lawyer maintaining strong working relationships with its constituents. Thus, while the entity has an interest in its lawyer taking action to address the CEO’s misconduct, it also has an interest in the lawyer maintaining a strong working relationship with the constituent. As Pam Jenoff points out, “while outside

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<sup>11</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13 com. 10 (2015).

<sup>12</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13 com. 11 (2015).

<sup>13</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(b), (c) (2015) (detailing reporting up duties within the entity as well as discretion to report outside of the entity in some circumstances).

<sup>14</sup> ABA MODEL R. PROF. CONDUCT, R. 1.7(a)(1) (2015).

attorneys might also encounter this scenario, it is clearly more prevalent and complicated for in-house counsel, who work alongside and in some cases for, the individual who may be engaging in misconduct. Maintaining the requisite independence to take the steps required by Rule 1.13 and reporting potentially wrongful conduct may be problematic in light of these close working and, in some cases, subordinate relationships.”<sup>15</sup>

Indeed, in-house counsel may face a particular challenge – a personal conflict of interests – in this situation because of the fact that she has but one client, her employer, the entity-client. Rule 1.7(a)(2) defines a conflict of interest when “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*.”<sup>16</sup> Here, the concern might be that there is a significant risk that the representation of the entity-client, namely, the lawyer’s duty to act to address the CEO’s wrongdoing, will be materially limited by a personal interest of the lawyer in keeping her job.

To be sure, Rule 1.13(e) states in relevant part that a “lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization’s highest authority is informed of the lawyer's discharge or withdrawal,”<sup>17</sup> but this limited protection may not sufficiently guard against the lawyer’s disincentive to take action on behalf of the entity-client when taking action may cost the lawyer her job.

Second, even in instances when no wrongdoing by a constituent is taking place, a lawyer for an entity, and in particular in-house counsel, may face a challenging personal conflict of interests per Rule 1.7(a)(2). Suppose in-house counsel is asked to advise the entity on a controversial course of conduct. Of course, if the proposed course of conduct constitutes a crime or fraud, the lawyer may not counsel or assist the client,<sup>18</sup> and if the entity-client insists on pursuing the conduct the lawyer will have to withdraw (an in-house counsel will have to resign).<sup>19</sup> But what if the proposed course of conduct is neither criminal nor fraudulent? Here, in-house counsel’s personal interest – her interest in her salary (and possibly in stock options she has received from the entity-client) may cloud her judgment. On the one hand, an in-house counsel wishing to protect her personal interest in receiving her salary may be risk-averse and advise the entity-client against controversial conduct that may expose it to liability and jeopardize her position and salary. On the other hand, an in-house counsel may be less risk-averse than her client, for example, because she might believe that high-risk controversial conduct may result in a significant increase in the value of the entity’s shares and thus in a

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<sup>15</sup> Pam Jenoff, *Going Native: Incentive, Identity, and the Inherent Ethical Problem of in-House Counsel*, 114 W. VA. L. REV. 725, 736-37 (2012).

<sup>16</sup> ABA MODEL R. PROF. CONDUCT, R. 1.7(a)(2) (2015) (emphasis added).

<sup>17</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(e) (2015).

<sup>18</sup> ABA MODEL R. PROF. CONDUCT, R. 1.2(d) (2015).

<sup>19</sup> ABA MODEL R. PROF. CONDUCT, R. 1.16(a) (2015). *See, e.g.*, Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 193-99 (2001); Christopher J. Motz, *Officious Meddler or Ethical Advocate? Corporate Counsel's Model Rule 1.13 Obligation to Report Up the Ladder: Defining "Related to the Representation"*, 10 U. ST. THOMAS L.J. 362, 366 (2012); Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 480 (2006).

significant benefit to her when her stock options vest. The point is that the lawyer's interest in her compensation may influence the nature of the legal advice she gives her entity-client in a way that constitutes a personal conflict of interests.

Once again, the risk of a personal conflict of interests may be of particular concern for in-house counsel compared with outside counsel. First, an in-house attorney sits at a different place "on the food chain" than that of her outside counsel counterpart. Specifically, in-house counsel may be more significantly involved in the client's decision-making processes. That is, while outside counsel is often retained to address significant events in the life of the entity-client after they take place (for example, a major litigation), in-house counsel has a seat at the decision-making table before and while major events take place such that she has more of an ability to influence key decisions as they are made and thus more of an opportunity for her personal interest to impact the decisions by the client.

Second, because the entity-client is the in-house counsel's only client, there is more at stake from the lawyer's point of view. That is, not only does outside counsel usually have less of an opportunity to impact decision-making by the client (and thus less of a risk for her personal interest to taint her advice), outside counsel also has less at stake because she represents many clients such that if a particular client pursues a controversial course of conduct and suffers a significant loss, the outside counsel's downside is limited to losing the client.<sup>20</sup> In contrast, in-house counsel has more at stake (and thus more of a concern that her personal interest may taint her advice) because the client's controversial conduct may jeopardize her job stability.

Rule 1.13 is mostly silent with regard to both of these complex categories of potential conflicts of interest – misconduct by a constituent and a personal conflict of a lawyer for an entity. Instead, subsections 1.13(b) and 1.13(c) focus their attention and offer limited guidance regarding a constituent's misconduct.

Rule 1.13(b) states that:

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.<sup>21</sup>

Note that while Rule 1.13(b) identifies no less than five demanding conditions before mandating reporting up the conduct in question within the entity ("knows" of

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<sup>20</sup> This is not to belittle the predicament of individual partners in outside counsel law firms who often cannot afford to lose a major client because such a loss might undermine their status at the firm. *See, e.g.,* MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2005).

<sup>21</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(b) (2015).

“action... related to the organization”, which is “violation of a legal obligation... or a violation of law”, which “reasonably might be imputed to the organization”, and is “likely to result in substantial injury to the organization”), it provides no guidance whatsoever to a lawyer about the risk of chilling her relationship with the constituent in question and the resulting harm to the entity, or about the concern regarding a personal conflict of interests.

Similarly, Rule 1.13(c) states that:

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.<sup>22</sup>

Once again, while Rule 1.13(c) imposes meaningful conditions on a lawyer’s discretion to reveal information outside of the entity-client (“highest authority... fails to address in a timely and appropriate manner” the lawyer’s concerns and “the violation is reasonably certain to result in substantial injury to the organization”), it offers no guidance to lawyers as to how to navigate the complex potential conflicts of interest stemming from reporting up and outside of the entity-client.

### C. Maintaining Independence of Judgment

The exercise of professional judgment free of interference is a hallmark of the practice of law.<sup>23</sup> For example, Rule 5.4(c) states that “[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services,”<sup>24</sup> insisting that a lawyer’s exercise of professional judgment on behalf of a client must be independent from influences by a person who employs or pays the lawyer. In the context of in-house practice, the independence principle and Rule 5.4(c) mean that in-house counsel’s exercise of independent professional judgment may not be influenced by non-lawyers such as entity constituents.

As was the case with determining the identity of the client and dealing with potential conflicts of interest, maintaining independence of judgment is a concern not unique to in-house lawyers. Large law firm lawyers, for example, experience at least two threats to their exercise of professional judgment. Increasingly, powerful entity-clients retaining outside counsel in a competitive market environment are able to exercise greater control over the practice realities of outside counsel, intervening in matters of budgets, costs and staffing. And individual law firm

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<sup>22</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13(c) (2015).

<sup>23</sup> See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988).

<sup>24</sup> ABA MODEL R. PROF. CONDUCT, R. 5.4(c) (2015).

partners have long faced interference by their partners, if only to ensure that no individual partner undertakes a representation that causes a conflict of interests with another firm client.<sup>25</sup>

In-house lawyers, however, often face a unique set of independence concerns. To begin with, the in-house attorney faces pressures to break out of the stereotype that the legal department is a drain on corporate resources, or the place where deals “go to die,” and instead prove that the legal team brings value to the entity-client. Thus, in-house lawyers often experience implied pressures to exercise their professional legal judgment in a manner that creates value or at least is perceived not to constitute a hurdle to generating value. Specifically, in-house lawyers often experience implied pressures to say “yes” and approve courses of conduct they may otherwise have concerns about to prove to their non-lawyer colleagues that they are team members and not mere naysayers.

Relatedly, because the in-house attorney sits at a different place “on the food chain” than that of her outside counsel counterpart, her inside role and exercise of judgment mixes legal and business functions.<sup>26</sup> The in-house attorney is a player on the corporate team, typically enmeshed within the business functions of the organization and “wearing many hats” for the entity. Inherently, therefore, in-house counsel’s exercise of judgment may involve non-legal considerations and influences.

In theory, of course, in-house counsel may be able to draw a clear distinction between legal questions with regard to which her exercise of judgment may not be influenced and interfered with by non-lawyers, and business or non-legal questions with regard to which insights from non-lawyers may be helpful, appropriate and welcomed. In practice, however, sometimes the legal-business decision-making line is blurred and the risk to independence is real.

#### D. Multijurisdictional Practice of Law

Notwithstanding the nationalization, for some even the globalization of law practice, the regulation of law practice continues to be state-based.<sup>27</sup> Rule 5.5(a) stating that “[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so,”<sup>28</sup> generally stands for the proposition that a lawyer may only practice law in jurisdiction in which she is licensed. Such a state-based regulatory scheme would be a practical impossibility for in-house counsel who are often called upon to practice for an entity-client on a national (and even global) basis. Fortunately, Rule 5.5(d)(1) carves an exception for in-house counsel, holding that: “[a] lawyer admitted in another United States jurisdiction or in a foreign jurisdiction. . . may provide legal services through an office or other systematic and continuous presence in this jurisdiction that: (1) are provided to the lawyer’s employer or its organizational affiliates. . . .”<sup>29</sup>

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<sup>25</sup> ABA MODEL R. PROF. CONDUCT, R. 1.7, com. 3 (2015).

<sup>26</sup> Jenoff, *Going Native: Incentive, Identity, and the Inherent Ethical Problem of in-House Counsel*, *supra* note 15, at 732.

<sup>27</sup> See, Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011).

<sup>28</sup> ABA MODEL R. PROF. CONDUCT, R. 5.5(a) (2015).

<sup>29</sup> ABA MODEL R. PROF. CONDUCT, R. 5.5(d)(1) (2015).



Notably, Rule 5.5(d)(1)'s in-house exception to the state-based regulatory approach of the Rules only removes the formal barrier to national law practice. In-house lawyers practicing on a national basis must of course comply with Rule 1.1 and be competent in rendering such advice.<sup>30</sup> When necessary, in-house lawyers may retain national and local outside counsel to assist them yet fundamentally the license to practice law nationally (and globally) on behalf of entity-clients is a mixed blessing as it holds in-house lawyers to a demanding national (and global) standard of competency.

## Part II: The Challenge of Assessing Non-Legal Risks

Part I has surveyed some of the, by now, familiar yet challenging aspects of in-house lawyers' practice under the Rules. Less attention, however, has been given by the Rules and literature to the role of in-house lawyers as risk assessors on behalf of their entity-clients. To some extent, the reluctance of the Rules to guide lawyers' exercise of business judgment is understandable: the Rules predominantly purport to regulate and conduct the conduct of lawyers qua lawyers, not as business people.

Accordingly, the Comment to Rule 1.13 states in relevant part: "[w]hen constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."<sup>31</sup> And eminent legal ethics scholar Geoff Hazard opines that: "[t]he decisive judgment calls, even when they entail substantial financial, political or legal risk, are for the corporate officials, not for the corporate lawyer. But there is a limit to the corporate official's authority. The corporate official cannot lawfully overstep the limits imposed by the principles of agency law on an agent's authority to commit to a course of action on behalf of the principal."<sup>32</sup> That is, the Rules take the position that assessing (non-legal) risk is outside of the lawyers' province and that decisions concerning risk are not for the corporate lawyer.

For some in-house lawyers, especially General Counsel and Chief Legal Officers of large publically traded companies, however, such rhetorical statements simply do not capture their practice realities and role. Rather, some in-house lawyers face complex questions the resolution of which requires exercising legal and business judgment. To be sure, in "easy" cases (that is, easy conceptually, not practically) like clear fraud or illegality, Rule 1.13(b) and 1.13(c) offer a guide for the in-house attorney on how to proceed. But how often do lawyers face such black and white instances, in which they are able to follow along the subsections of the Rule, checking off each triggering element? In practice, complex questions often come in shades of gray because the attorney is not necessarily facing a situation of clear fraud or illegality, but instead a more attenuated situation, for example, an operations officer who is taking on too much risk.<sup>33</sup>

Moreover, for many General Counsel and some in-house lawyers making policy decisions concerning risk is exactly the job description. Indeed, as Jan Nishizawa notes, "In-

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<sup>30</sup> ABA MODEL R. PROF. CONDUCT, R. 1.1 (2015).

<sup>31</sup> ABA MODEL R. PROF. CONDUCT, R. 1.13, com. 3 (2015).

<sup>32</sup> Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, *supra* note 3, at 1014.

<sup>33</sup> Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, *supra* note 8, at 1052.

house counsel are called upon to be managers of costs and productivity. This requires a good business budgeting sense and risk analysis and management skills.”<sup>34</sup> Moreover, “[g]eneral counsel who are able to manage these tasks are therefore highly valued.”<sup>35</sup> Professor Kim offers an illuminating example of the challenges faced by in-house lawyers who also serve as members of the entity-client’s management team: “[a]lthough inside counsel’s duties include a prominent role in corporate compliance, it is business management that guards the right to decide whether to comply with the law, which is seen as the ultimate risk-management decision.”<sup>36</sup> Put differently, wearing her hat as General Counsel, a lawyer for the entity-client will opine and explain issues of compliance with the law. Importantly, however, wearing her hat as the Chief Legal Officer, the same lawyer may now be called upon as a member of business management to participate in the decision whether to comply with the law.

Sally Weaver explores the significant difference in the respective roles of outside and in-house lawyers when it comes to assessing business risk, which often entails exercising judgment over business and legal problems. “Senior management often asks outside counsel to respond to *a narrowly defined legal problem* presented by management in a particular context.”<sup>37</sup> In contrast, in-house counsel “may find it necessary to identify independently a particular legal risk for the organization and suggest appropriate action to eliminate or minimize the risk. Management’s perception of the second situation may differ significantly from management’s perception of the first.”<sup>38</sup> That is, whereas outside counsel is often called upon to advise regarding narrowly crafted legal questions, in-house lawyers are called upon to advise regarding broader issues, which inherently entail legal as well as business questions. For such in-house attorneys “[d]ecisions concerning policy and operations, including ones entailing serious risk, are” very much “in the lawyer’s province.”

Veasey and Di Guglielmo insightfully capture the new landscape occupied by some in-house lawyers.

The corporation’s lawyer, particularly the general counsel, must be continuously mindful of what is over the horizon. Corporate counsel must also be assertive about legal and ethical issues while matters are still “ripe”— that is, while decisions or changes may still be made. He or she needs to think ahead and anticipate what is coming, just as a good hockey player skates not to where the puck is, but to where the puck is going. Corporate counsel should try to maintain a clear distinction between legal and business roles, with emphasis on legal matters as his or her primary responsibility. Counsel should avoid interjecting herself unduly into business decisions, usually constraining his or her role to one of pure counselor—

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<sup>34</sup> Jan C. Nishizawa, *Ethical Conflicts Facing in-House Counsel: Dealing with Recent Trends and an 'Opportunity for Positive Change*, 20 GEO. J. LEGAL ETHICS 849, 852 (2007), citing Carl D. Liggio, *The Randolph W. Thrower Symposium: The Role of the General Counsel: Perspective: The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1219-20 (1997).

<sup>35</sup> Nishizawa, *supra* note 34, at 852. See, e.g., See Eriq Gardner, *Welcome to His Honeywell*, CORP. COUNSEL, Mar. 2, 2004, available at <http://www.law.com/jsp/article.jsp?id=1076428388530>.

<sup>36</sup> Kim, *The Banality of Fraud: Re-Situating the Inside Counsel As Gatekeeper*, *supra* note 8, at 1017, citing Robert Eli Rosen, *Risk Management and Corporate Governance: The Case of Enron*, 35 CONN. L. REV. 1157, 1172 (2003).

<sup>37</sup> Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1028 (1997) (emphasis added).

<sup>38</sup> *Id.*

advising the company's agents on the legal aspects of pending decisions, as enhanced by the considerable knowledge counsel possesses concerning the business. Nevertheless, as discussed in the next part, there is often an invitation, temptation, or gravitation of counsel's role into a mixture of legal and business considerations."<sup>39</sup>

Yet, as we have seen, sometimes separating the business and legal functions the in-house attorney carries out is not a realistic means of addressing the challenges of effective entity-client identification and representation, because members of the in-house legal department inherently must wear the business hat as well as the legal hat to effectively perform their roles and address complex issues that involve both legal and business questions.

In-house lawyers, to be sure, are not alone in wearing multiple hats in the corporate environment. Business people often wear multiple hats, for example, as officers, directors and shareholders, not to mention as creditors, of the entity. Importantly, at times, such different roles impose on business people varying, and indeed, competing legal obligations and fiduciary duties. When competing duties cannot be resolved, a business person must step down from a particular role. Often, however, careful attention to role and context allows business people to successfully wear different hats.

The key to in-house lawyers' successful navigation of multiple roles, and, in particular, to their effective assessment of business risk is keen awareness of the various hats they are called upon to wear. In some instances, for example, when a constituent insists on a criminal or fraudulent course of conduct, the in-house counsel's lawyerly role must take precedent and dictate her response. At other times, however, for example, when called upon to assess business risk which does not entail criminal or fraudulent conduct, in-house counsel's business role and judgment may prevail.

Navigating these various roles may not be easy for lawyers, whose training and habits of mind often teach them to zoom in on legal risks to the exclusion of business risks. Indeed, law schools continue to teach law students "to think like a lawyer" and law firms, the historical breeding grounds for in-house counsel positions, in a world of increased specialization master the narrower contemplation of legal questions. Yet the present and future of in-house counsel practice demand of its practitioners the careful and gradual coming to terms, buildup and mastery of business risk analysis skills, alongside the cultivation of traditional legal risk analysis tools. And learn we will.<sup>40</sup>

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<sup>39</sup> E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 23 (2006).

<sup>40</sup> While lawyers dislike dealing with business risk, they have proven themselves more than capable of mastering it. See, e.g., Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957 (2006).