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CONFLICTS OF INTEREST IN RENEWABLE ENERGY

Hypotheticals and Analyses*

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∗ These analyses primarily rely on the ABA Model Rules, which represent a voluntary organization's suggested guidelines. Every state has adopted its own unique set of mandatory ethics rules, and you should check those when seeking ethics guidance. For ease of use, these analyses and citations use the generic term "legal ethics opinion" rather than the formal categories of the ABA's and state authorities' opinions -- including advisory, formal and informal.

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Identifying the Client Within a Corporate Family: In-House Lawyers' Issues

Hypothetical 1

After about three years of practice, you decided to move in-house with your largest client. From your work with that client, you know that it has several wholly owned subsidiaries and several partially owned subsidiaries.

As an in-house lawyer, will you be jointly representing the parent corporation (which employs you) and all of its subsidiaries?

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Analysis

Lawyers representing corporations owe their duty to the corporation as an entity, not to any of its constituents. ABA Model Rule 1.13(a). This basic rule seems easy to understand in the abstract, but can result in enormously difficult ethics situations for in-house and outside lawyers representing corporations.

The ABA Model Rules explain that

> [w]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed.

ABA Model Rule 1.0 cmt. [3] (emphasis added).

In the disqualification context, the stakes of improperly identifying the client (or in recognizing the attorney-client relationship) can involve very high stakes.

The ABA Model Rules include law departments within their definition of law firms.

> "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."

ABA Model Rule 1.0(c). (emphasis added).

This seemingly innocuous definition imputes to an entire law department an individual in-house lawyer's disqualification under ABA Model Rule 1.10 (absent some other ABA Model Rules provision). Thus, each in-house lawyer must guard against his or her own individual disqualification -- to avoid an imputed disqualification. The risk of each lawyer's disqualification in turn depends on the identity of that lawyer's current and former clients.

The Restatement similarly recognizes that the existence of an attorney-client relationship within a single corporation or a corporate family depends on the circumstances.

> Whether a lawyer represents affiliated organizations as clients is a question of fact . . . . When a lawyer represents two or more organizations with some common ownership or membership, whether a conflict exists is determined primarily on the basis of formal organizational distinctions. If a single business corporation has established two divisions within a corporate structure, for example, conflicting interests or objectives of those divisions do not create a conflict of interest for a lawyer representing the corporation. Differences within the organization are to be resolved through the organization's decisionmaking procedure.
>
> If an enterprise consists of two or more organizations and ownership of the organizations is identical, the lawyer's obligation is ordinarily to respond according to the decisionmaking procedures of the enterprise, subject to any special limitations that might be validly imposed by regulatory regimes such as those governing financial institutions and insurance companies.

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