1)

======== Start of Answer #1 (2461 words) ========

Very good!

Part 1: Notes in preparation for meeting with Bob

1. An attorney who represents a corporation does not also represent the directors and officers. However, they may do so if they reasonably believe they are able to adequately represent the individuals AND the corporation, and if they fully disclose the representation and potential for conflict in writing to all parties, and gain consent in writing from all parties.

Because I am counsel for Radient, and because Bob is a director for Radient, there is at least an appearance of potential conflict of interest, and I would need to fully disclose to Radient what I am doing, and gain their consent. As discussed below this raises other concerns as well, and Bob will need to make disclosures to fulfill his duties as a director of Radient anyway, if he intends to proceed with this business opportunity.

As attorney for Radient, I am its agent, and as such, I have a duty of loyalty to Radient that includes not obtaining a benefit from a third party by use of my agency position. I have a duty not to compete, not to act adverse to the corporation's interests, to keep it informed about matters that it would reasonably want to know and to use care in carrying out my assigned tasks. I am prohibited from keeping profits that arise from taking advantage of my position as agent for Radient. The facts are not clear, but there is at least an argument that I am being asked to assist in this new matter as a result of my position as counsel for Radient, and if so, would need to disgorge any profits obtained thereby.

Given the apparent conflict of interest, it would be prudent to suggest that they retain other representation for this new project.

2. Bob has experience as a board member of a publicly traded company, which could be useful to the new enterprise. However, he comes with some special baggage as well, due to his current directorship with Radient.

Duty of loyalty: A director has a duty to exercise their power in the interest of the corporation, not to act adverse to the corporation or to compete with it. The duty of loyalty is implicated when one of three situations occurs:

- the director is a party to a transaction with the corporation
- the director or a close relative has a pecuniary interest in the matter
- the director is on both sides of the transaction, aka interlocking directorates

The conflict of interest may be in the form of self-dealing, which is subject to the common law fairness test, looking at the fairness of the process and the substantive terms of the transaction. Alternatively, if the state has a safe harbor statute, it may allow a director to be protected if the transaction is approved by a majority of disinterested and independent directors who were fully informed. The facts here do not indicate that any transactions with Radient are contemplated, so this may be set aside.

The issue of executive compensation is another situation where the duty of loyalty may be implicated, but this too is not in the facts.

The corporate opportunity doctrine provides that a director may not usurp an opportunity that rightfully belongs to the corporation. Here, Bob may have an issue. There are multiple tests applied by various jurisdictions: expectancy, line of business, fairness, modified fairness and ALI. While there are various factors involved, the Delaware multi-factor test is a good example for this situation. It requires consideration of the following questions:

- Does the corporation have the financial capacity to take advantage of the opportunity?

Because Radient is a publicly traded company, and this is a start up business idea, it seems likely that Radient will have adequate capacity to fund such new product development in the event it desires to do so.

• Does the new opportunity fall into the line of business that the corporation currently operates in?

It does not have to be exactly what the corporation does now but must be related to and naturally complementary to the current line of business. Here, we would first need to determine what line of business Radient is engaged in. While the facts do not state, given that Linda is frustrated with her boss's unwillingness to allow her to develop some new ideas, it appears that there may be some fairly closely related products and testing devices. This needs to be explored fully.

• Does Radient have an interest or expectancy in the new opportunity?

It is possible that Radient would expect that they would be the beneficiaries of Linda's new ideas, given that to some degree they may have been developed during her employment with Radient. If the company is involved in the same area of development and products, it is reasonable that Radient would have an expectancy in any new products developed from the existing business scope.

• Does Bob's taking this opportunity place him in a position inimical to the interests of Radient?

If Bob is an owner (or his spouse is), will it place him in a position where he will have a conflict of interest in his duties to Radient? It seems likely. However, the opportunity has not come to him as a result of his position as a director (rather, as Linda's spouse), so that weighs in favor of allowing Bob to take the opportunity.

ALI requires full disclosure and refusal of the opportunity by the corporation before a director can take advantage of an opportunity. Given the issues noted above, I will recommend to Bob that he fully disclose the opportunity to the rest of the board, and then recuse himself from discussion as to whether to take advantage of it or not,

allowing for a decision by a disinterested independent majority of the board. This will then protect him from liability in a claim of breach of his duty of loyalty.

3. There are multiple forms that a business enterprise can take, each with attendant advantages and disadvantages. Some key considerations that Linda and Nancy will want to remember are:

Very good to list considerations (8)

- Ease of formation
- How the entity will be managed
- How the business will be capitalized, initially and in the future
- How the owners expect to obtain a profit/return on their investment
- Who will be liable for the obligations of the business and to what extent? Alternatively, how can they protect themselves from personal liability?
- How will the business be taxed? How can they minimize their tax liability?

Sole proprietorship: While a sole proprietorship is easily formed, it is only available to sole owners (and married couples), and is therefore not an option for LInda and Nancy.

General Partnership: A general partnership does not require any formalities for formation, requiring only an agreement to operate a business and share profits and losses. While there is no requirement for even a partnership agreement, I strongly recommend that one is drawn up, that each partner has the opportunity to obtain separate counsel to review it and then it is signed. This agreement would provide for management, how investments would be made, how a partner could withdraw or the partnership could be dissolved, what would happen on the event of a death of a partner, etc. It should also provide for dispute resolution processes. However, if LInda and Nancy form a general partnership, they will be jointly and severally liable for the partnership's debts and obligations, with full personal exposure. While they would have the benefit of pass-through taxation (partnership does not pay taxes, the profits are passed through to the partners, who may have other offsets that reduce their overall tax

liability), they are still exposing themselves to higher risk.

Management is generally shared by the partners, absent a contrary agreement. They could capitalize the business by equity injections or debt. If they choose to borrow from Uncle Willie, they would want to set up a standard promissory note, with set payment terms, and treat it as a true obligation. Alternatively they could offer Willie ownership, which would mean that he would expect to get a share of profits each year instead of payments on a note. If a debt, his return is set, if an investment, he stands to gain or lose depending on how well the business performs.

Limited partnership: A limited partnership differs from a general partnership in that it is required to file a certificate of partnership with the secretary of state, and the limited partner's liability is limited to the extent of their investment. The limited partner cannot participate actively in management of the partnership, or they may lose their liability shield. This may be a good option for Linda and Nancy since WIllie wants no part in day to day management, just a return on his investment. It protects Willie, but still does not shield Linda or Nancy from personal liability. However, the pass-through taxation is a nice feature.

LLP: A limited liability partnership provides for limited liability to all partners, but is only available to certain professionals, such as attorneys, CPA's and doctors. It will not be available here. Filing requirements must be strictly complied with.

LLC: A limited liability company allows for liability shield *and* pass-through taxation, and due to the contractual nature of the operating agreement, it can be set up so that even though Willie has a large investment, he does not participate in management. Filing requirements must be strictly complied with to retain liability protection.

Corporation: a corporation provides the most flexible capitalization options, with equity more readily available by sale of stock. If the corporation has not elected S-Corp status, it will be subject to direct taxation, known as double taxation. This is because

the corporation itself pays tax on its profits, and the owners then also pay tax personally on any income they receive. The formalities of formation and ongoing operations are far greater for a corporation. However, it also allows for centralized management, which is very useful for publicly traded companies.

While initially the new business will probably be small, and managed by LInda and Nancy, if they expect/hope to grow the business and possibly take it public in the future, they may want to form a C-Corp. If they really want to control the business themselves, they may want to elect S-corp status. If they and Willie are the only owners, it will be considered a closely held corporation, because there will be a small number of shareholders, no ready market for the shares, and ownership and management will be closely tied.

In summary, it depends on the future plans for the business, what personal assets Linda, Nancy and Willie (and Bob) may need to protect, and what their individual tax situations are, as to which entity will best serve.

Joint venture: a joint venture is very much like a partnership, except that it is typically formed for a specific project, and generally has a limited life. It would not be appropriate for Linda and Nancy.

4. Shareholder duty: Nancy and Linda are both shareholders of Radient, but it is a publicly traded company, and so they generally would owe no duty to the other shareholders or the corporation.

Employee duty/Agency: Agency is the fiduciary relationship that is created when one consents for another to act on their behalf and under their control, and the other so consents to act. Both Nancy and Linda are agents of Radient. As such, they have the duties of an agent to Radient.

Duties of agent: An agent has the duty not to compete, not to act adverse to the

principal, not to obtain a material benefit from a third party in their agency role, not to share or use confidential information of the principal's to their own or a third party's advantage, not to use the principal's property to their own purpose or advantage.

They have a duty to inform the principal of information they would want to have regarding matters encompassed in the subject of the agency relationship, to keep records, not to commingle funds.

The agent has a duty to use the care, competence and diligence that a reasonable/prudent agent would use in like circumstances.

Generally, the higher the position in the company that a person holds, the higher their duty to the corporation. While Bob is a director, Linda and Nancy are just employees, and therefore could discharge their obligations by terminating their employment, as long as they do not take with them any Radient technology, ideas, products, etc. If they did that, they would have to disgorge any profits made thereby. Freedom of contract in employment is a particularly strong public policy, and so leaving Radient will solve their duty issues.

Bob's duty to Radient: As noted, the fact that Bob is a shareholder does not give rise to any particular duties. His directorship, however, is a different matter.

Bob has a duty of loyalty to Radient, as discussed above in #2. Because of the corporate opportunity doctrine, he will be obliged to disclose and obtain a declination from Radient as to this opportunity. This will be true even if he elects not to participate in the new venture, due to the fact that he has a close relative who will have a pecuniary interest. If he participates, he would be faced with a situation analogous to the interlocking directorate situation. If he fails to take these steps, he exposes himself to a claim for breach of loyalty, for which the corporation could obtain money damages. While a corporation can indemnify for breach of loyalty, it cannot do so when there is improper personal benefit to the director.

Bob also has a duty of care to Radient, which requires that he act as a prudent director would in like circumstances, in good faith and with reasonable belief that the action being taken is in the best interests of the corporation. If so, the business judgment rule is applied, which requires that disinterested and independent directors make the decision, that they are adequately informed (including reliance on experts, committees, and the like) and that they have a rational basis for the decision.

If Bob does not obtain the approval, or decline of the opportunity by a majority of disinterested, independent and fully informed directors, he will not have the protection of the business judgment rule for his actions.

Linda's duty to DNA lab: Linda may have a similar issue as to the DNA lab, although it is not clear from the facts what the new business will do. If it falls in the same line of business, she will need to look at the same questions discussed in #2.

======== End of Answer #1 ========

2)

======== Start of Answer #2 (2184 words) ========

Part II.

- Indemnification is

1. A director or officer has three possible means for limiting their exposure to liability in their position as a director/officer (D/O). They may be exculpated for their duty of care by a provision in the articles or bylaws, which can limit their liability for breach of the duty of care, may alter standards of conduct or may put a cap on personal liability. Exculpation does not exist for the duty of loyalty, and it is not available for claims of waste, fraud or gift.

Indemnification provides for reimbursement to the D/O for expenses related to defense

of a claim for breach of loyalty.

Mandatory indemnification is based on statutory provision, and generally requires that the claim arise due to the D/O's function as a director or officer and that they are successful in the defense of the claim. Note that success does not require complete vindication, but the D/O must not have any liability for money damages as a result of the action. Even a procedural defense such as the statute of limitations is sufficient to provide the necessary 'success'.

Permissive indemnification is first provided for in either the articles, bylaws, a contract, or a board resolution, and requires good faith or at least the absence of bad faith on the part of the director. Bad faith is conscious disregard for one's duty.

Court ordered indemnification may be appropriate in three situations: when mandatory indemnification is appropriate and the corporation is refusing to pay, when permissive indemnification is appropriate and the corporation refuses to pay, and when the court finds it is fair and reasonable. However, the court cannot order indemnification for proscribed conduct.

Indemnification is not available where the director did in fact breach their duty of loyalty, where there is improper personal benefit or fraud. It is not available when criminal statutes are applicable to the conduct.

Insurance known as D&O insurance is available to reimburse the corporation for indemnification costs and to cover the cost of unindemnifiable costs. Insurance can cover actual breach of duty, neglect, omission and the like. It cannot cover knowing violations of the law, fraud and improper personal benefit.

2. Cash out mergers force the minority shareholder to give up their shares for cash, resulting in the loss of ownership. This is one scenario in which a controlling shareholder has special duties to the minority shareholder.

Absent approval by the minority shareholder in a cash out merger, the controlling shareholder must meet the entire fairness test, which has two prongs. They are knowns as fair dealing and fair price. Fair dealing looks at the process whereby the merger was initiated, disclosed, negotiated and approved, and will require adequate investigation and disclosure. The fair price prong considers the substantive terms of the merger-is the price fair? It needs to include the market value of the stock, assets, the company's earnings (historical) and its future prospects.

The stockholders will have a right to vote, as this is a fundamental corporate change. (However, approval by the minority shareholder is not required for a short form merger, in which the majority shareholder owns 90% or more of the stock.)

The stockholder who dissents will also have the right of appraisal, generally the sole remedy for a dissenting stockholder, absent wrongdoing. This provides for a judicial determination of the fair value of the stock, by any customary method in the industry. If the stockholder was paid less than that determined value, they will have a claim for money damages for the difference. The market out exception is unlikely to apply in this situation but if it does, the court will use the market price rather than a judicial valuation to determine the fair value. This is applied when the stock is widely traded, and is based on the concept that the market provides a superior valuation mechanism in that case over what the court could obtain.

3. Limited liability refers to the concept of limiting a business owner's exposure to liability for obligations of the business. When a business form provides for limited liability, it allows the owner (shareholder, LLC member, limited partner) to cap their own liability at the amount of their investment, subject to certain exceptions:

well done

• One requirement for a corporation is that the stockholder give adequate consideration for the stock. A failure to do so will result in watered stock, which will mean that the

stockholder may be liable for the difference between what they paid and what the stock was worth at issuance.

• Another exception applies more commonly to owners of closely held entities and directors/officers of a corp - an owner or agent is always liable for their own tortious conduct.

• Where an alter ego situation is found to exist, the corporate veil may be pierced and the stockholder will then be liable for the debts/obligations of the corporation.

4. Piercing the corporate veil is a term that describes the court's action when it reaches beyond the liability shield normally enjoyed by owners of a corporation and finds that equity and justice requires that the owner(s) be held liable for the corporation's debts or obligations. In Baatz, the court found that the following factors were significant in this determination:

• fraudulent representation by directors
• undercapitalization
• includes thin incorporation • failure to maintain corporate formalities
• board meetings, contracts
• maintain filings with Secretary of State as required
• annual meetings
• special meetings and notice as required • absence of records, or incomplete records
• minutes, including existence of investigation and discussion
• resolutions • payment of personal obligations with corporate funds (alter ego concept)
• use of corporate form to promote fraud or illegality

While no one of these factors is necessarily dispositive, undercapitalization or alter ego are significant.

5. Both are required to file a certificate of partnership with the secretary of state, and the limited partner's liability is limited to the extent of their investment. The limited partner in a limited partnership cannot participate actively in management of the partnership, or they may lose their liability shield. However, it must have at least one general partner who retains personal liability. A partner in an LLP can participate fully in management without losing

A limited liability partnership provides for limited liability to all partners, but is only available to certain professionals, such as attorneys, CPA's and doctors. Filing requirements must be strictly complied with.

6. The Securities Exchange Act of 1934 provides for regulation of securities fraud. The specifics are delineated in Rule 10b5, which provides that it shall be unlawful for one to employ any device, artifice or scheme to defraud, make any untrue statements of material fact, or omit statements that would make it untrue, or engage in any act, practice or course of business that acts as a fraud in connection with the purchase or sale of securities.

Securities in this act include those registered with the SEC/publicly traded and those traded face-to-face.

The elements are:

• materiality

• would a reasonable investor consider the information important in making an investment decision? • scienter

• knowing conduct, intent • in connection with/ touch test

• nexus between the purchase or sale of a security and the conduct •

reliance/transaction causation

• this may be shown by fraud on the market: the investor bought or sold at market price, which was based on then available information. If the misleading or false or omitted information had not been promulgated, the market price would have accurately reflected value • economic loss

• actual monetary loss from the transaction(s)

• not just deciding *not* to purchase • loss causation

• link between the actual damages and the transaction causation

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Enforcement is provided for by:

• private action (civil)

• To have standing to bring an action, the plaintiff must have bought or sold the securities. • SEC regulatory action (criminal)

• DOJ action (criminal)

7. A sole proprietorship is owned by one person, or a married couple only. A partnership must have at least two partners. Both a sole proprietor and a partner has personal liability for the business' obligations, but they are taxed slightly differently.

A partnership's income is divided based on ownership percentage and is passed through to the partners, who then pay based on their personal tax situations. The sole proprietorship is not actually a separate legal entity, and the income/profit is reported directly on the owner's tax return, on their Schedule C.

Neither has any formation requirements, such as filing with the Secretary of the State, although both would benefit from a trade name/fictitious business name filing where applicable.

If the partnership is a limited partnership or an LLP, some of the partners will have the advantage of limited liability.

Management of the sole proprietorship is by the owner, while it is generally shared in a partnership (may be altered by agreement).

Profit/return for a sole proprietor is direct, while partners will need to either pay themselves a salary or take a distribution from the partnership.

8. A poison pill is a defensive strategy also known as a shareholder rights plan. This devise is one that may be employed by a corporation in response to an undesired (hostile) takeover attempt, such as a tender offer. It can be either a put or call, both of which operate differently. A common means is by providing that upon a triggering event, all shareholders other than the acquiring party will have a right to buy additional shares of stock at a reduced price, which has the effect of diluting the bidder's ownership percentage. Or it may grant the shareholders an option to sell their shares at a premium, which the bidding corporation would then have to honor, making the cost of the acquisition prohibitive.

This agreement must meet the Unocal test. Unocal duties require that the directors either:

a. have a reasonable belief that there exists a credible threat to the corporation's policy or effectiveness AND

b. the response to the threat is reasonable in relation to the threat OR

c. approved by the shareholders

The court will then apply the business judgement rule to the decision.

9. The misappropriation theory is one way in which liability under 10b5 is found for a variation on insider trading. The misappropriator must owe a fiduciary duty that they have breached by appropriation of material nonpublic information about a third party corporation, and have traded on that information to their advantage. The printer cases demonstrate the requirement of fiduciary duty-in Chiarella the employee had no duty,

therefore was not liable. However in Materia, the employer printer had clearly informed the employee of their duty, which he then breached by appropriating information about the third party corporations, and he was found liable under 10b5.

10. A tender offer is a solicitation directly to the shareholders of a corporation for purchase of their stock. It may be hostile or not. A tender offer is made to obtain a controlling share of a company, and will have specified terms, such as a price offered, a short time frame in which to respond (may be pressure) and a minimum number of shares that will be acceptable. It is communicated by some sort of announcement.

Answers question

The Williams Act was added to the Securities Exchange Act of 1934 and is in parts of Section 13 and 14 of the Act. It requires that a solicitation for tender offers must provide sufficient disclosures and information for the shareholder to make a decision whether to tender their shares. It must not have misleading or false information or be manipulative. The provisions of the Act are applicable to tender offers and the target's responses to the tender offer.

Goes above & beyond w/ Act Elements Cases

Elements of an action under the Williams Act include materiality, causation, and scienter. Materiality is determined based on whether a reasonable shareholder would find the information important in making a decision whether to tender.

The Williams Act requires disclosure to the SEC if the transactions result in greater than 5% ownership of the corporation's stock. If the bidder later agrees to pay a higher price to an offeree, they must then pay that higher price to all tendering shareholders. If the offer is oversubscribed, the bidder must purchase on a pro rata basis.

When disputed, a court will find an action to be a tender offer when in light of all the circumstances there would be a likelihood that the offeree would not have sufficient information to make a decision if the Williams Act is not applied (Hanson). This is done to promote the policy behind the Williams Act.

Standing to bring a private action for violation of the Williams Act is available to at least four groups: The corporation may bring an action against the bidder, the bidder may bring an action against the corporation -probably for its response, but only for injunctive relief, a non-tendering shareholder, and a purchaser or seller of the stock may bring an action. This implied right of private action is utilized along with SEC or DOJ criminal actions to promote compliance with the Act.

======== End of Answer #2 ========

END OF EXAM