

# **ETHICS ISSUES FACING CORPORATE COUNSEL: PART I (IDENTIFYING THE CLIENT)**

## **Hypotheticals**

**Thomas E. Spahn  
McGuireWoods LLP**

Copyright 2016

## **Hypothetical 1**

As the General Counsel of your publicly traded client, you naturally find yourself dealing with complicated situations. You just received a call from one of your client's directors, who serves on the Audit Committee. She has asked you to hire an outside law firm to assist the Audit Committee in conducting an internal corporate investigation into possible accounting irregularities. A prominent local lawyer comes immediately to mind, and within five minutes you have him on the phone. Before you can explain the situation in any detail, he asks you a simple question.

Who will be the outside law firm's client in this representation --

The board member who called you?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?

## **Hypothetical 2**

One of your law school classmates is interviewing for in-house law jobs. She is a careful planner, and she wants your reaction to two issues, "just in case they come up."

- (a) If state law and the governing corporate documents require a majority board of directors vote to fire the company's lawyer, may she continue to represent the corporation if the board deadlocks on a motion to fire her?

YES

NO

- (b) What should your roommate do if the head of one company division gives her direction that is directly contrary to that given by the head of another division?

### **Hypothetical 3**

You have represented a closely held corporation for several years, dealing with each of the two owners and many of the corporation's employees. The two owners have been quarreling more vigorously than usual lately, and you wonder what that means for your representation.

If the two owners become acutely adverse, can you represent the corporation and one of the owners in litigation against the other owner?

YES

NO

### **Hypothetical 4**

You have been asked to bring a lawsuit against a Dallas-based corporation. Although your law firm's computerized conflicts search does not reveal any problems, one of your partners just called to tell you that she is handling a small amount of labor work for one of the proposed defendant's sister corporations. Your law firm does not represent the parent. The sister corporations are in different businesses, but both rely on the parent's law department for legal advice.

May you represent your client in the lawsuit against the Dallas-based corporation (without its consent)?

YES

NO

### **Hypothetical 5**

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?

YES

NO

## **Hypothetical 6**

As the most experienced transactional lawyer in your law department, you generally take responsibility for large corporate transactions. Your client has been trying to strategically downsize, and you have several questions about the effect of transactions on the attorney-client relationship (including the privilege).

- (a)** If you sell the stock of a subsidiary to another company, who will own the attorney-client relationship and privilege --

Your client?

The former subsidiary?

- (b)** If your client sells substantially all the assets of a subsidiary to another corporation, who will own the relationship and privilege --

Your client?

The asset's purchaser?

- (c)** Can you affect the relationship's and the privilege's ownership in the transactional documents?

YES

NO

### **Hypothetical 7**

Last year, you represented your firm's largest corporate client in spinning off one of its subsidiaries to become an independent company. The timing could not have been any worse, and the newly-independent former subsidiary declared bankruptcy. This morning you received a call from the lawyer representing the recently-appointed bankruptcy trustee. The lawyer demanded all of your law firm's files created during your work on the transaction, claiming that you had jointly represented the parent and the then-subsiidiary in the spin. Given that lawyer's threatening tone, you have been trying to remember what damaging documents might exist in the file -- while considering the trustee's lawyer's legal position.

If you had jointly represented the parent and the then-subsiidiary in the spin transaction, does the bankruptcy trustee have the right to your law firm's file?

YES

NO



### **Hypothetical 8**

As the only in-house lawyer for a privately-held company, you are occasionally asked to represent company employees (often distant relatives of the primary owner). You want to make sure that such representations do not run afoul of any rules, or jeopardize your main job as the company's lawyer.

**(a)** May you intentionally represent a company employee in a company-related matter?

YES

NO

**(b)** May you intentionally represent a company employee in a non-company-related matter?

YES

NO

## **Hypothetical 9**

As your company's in-house lawyer primarily responsible for litigation matters, you recently worked with outside counsel during an investigation of possible wrongdoing by three executives. You prepared notes of your interview sessions. Your notes reflect that you and your outside colleague made the following statements to the three executives:

- "We represent the company but we could represent you as well, as long as no conflict appeared."
- "We can represent you until such time as there appears to be a conflict of interest."
- "We represent the company, and can represent you too if there is not a conflict."

As it turned out, the executives had indeed engaged in wrongdoing -- and the company fired them. The federal government began to investigate the wrongdoing, and asked for your interview notes. The former employees' new lawyers claim that you and outside counsel jointly represented the company and the employees, which gives them a "veto power" over your waiver of the privilege. The federal government is becoming increasingly insistent that you hand over the notes.

May you waive the privilege covering your interview of the then-employees, over their objection?

YES

NO

### **Hypothetical 10**

You are the General Counsel of a company owned by approximately 500 shareholders. You just learned that about 75 of the shareholders have filed a derivative case targeting several company executives who the shareholders claim to have engaged in wrongdoing. The lawyers filing the derivative case also notified you that they will be seeking access to your communications with your corporate client's upper management as part of their expedited discovery.

Will the shareholders successfully gain access to your communications with your corporate client's management?

YES

NO