

# Corporate Counsel – Ethics Presentation

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## Attorney-client Privilege

You close the deals for large corporations. A downsizing client raises questions about the a/c relationship (including privilege).

Who owns it?

(a) Client sells the stock of a subsidiary to another company?

Your client? The purchasing company?

(b) Client sells substantially all assets of a subsidiary ?

Your client? The asset's purchaser?

(c) Ways to draft around it in transactional documents?

## Attorney-client Privilege

(a) The purchasing company

NB: bankruptcy

(b) The asset's purchaser (Maybe)

NB: Bright line v. practical consequences

Jo Ann Howard & Assocs., P.C. v. Cassity, No. 4:09CV01252 ERW,  
2012 U.S. Dist. LEXIS 52178, at \*19 (E.D. Mo. Apr. 13, 2012)

(c) Maybe



## **Adverse Representation**

While your law firm's conflicts search does not reveal any problems with a Defendant in a new suit you wish to bring, a partner mentions she does labor work for Defendant's sister corp. Your law firm does not represent the parent. Sister corps 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 sister corp Defendant?  
(without its consent)?



## Identifying the Client

You are GC of a publicly traded client called by Director on the Audit Committee, who asks to hire outside law firm to conduct internal corporate investigation into “accounting irregularities.” The lawyer you call immediately asks who is the client?

Director who called?

The Audit Committee?

The Board of Directors?

The corporation?

The corporation's shareholders?



## Identifying the Client

We are pleased that you as outside directors (the "Outside Directors") of Just For Feet, Inc. (the "Company") have decided to engage [Skadden] to assist you in your review of various matters relative to the Company. . . .





## Identifying the Client

With respect to the Company and its subsidiaries and parties affiliated with the Outside Directors generally, it is our understanding that the [Skadden law firm] is not being asked to provide, and will not be providing, legal advice to, or establishing an attorney-client relationship with, the Company, its subsidiaries, any such affiliated party or any Outside Director in his individual capacity and will not be expected to do so unless the [Skadden law firm] has been asked and has specifically agreed to do so.

Ex parte Smith, 942 So. 2d 356, 357-58 (Ala. 2006).





## Joint Representation

Last year, large corp client spun off a subsidiary to become an independent company. The sub declared bankruptcy. The bankruptcy trustee demands your law firm's files from the transaction, claiming you jointly represented parent and subsidiary in the spin.

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





## Noncompetition

You receive an offer to join a new law department. Newco sends you a proposed employment agreement that would:

- (1) prevent you from serving in-house for any competition for one year after you leave Newco; and
- (2) preclude your representation adverse client to Newco for five years after you leave the company.

(a) May you sign where you agree not to serve in a competitor's law department for one year?

(b) May you sign where you agree not to take any representations adverse to the company for five years?

## Noncompetition

- (1) prevent you from serving in-house for any competition for one year after you leave Newco; and NO
- (2) preclude your representation adverse client to Newco for five years after you leave the company. NO
  - (a) May you sign where you agree not to serve in a competitor's law department for one year? NO
  - (b) May you sign where you agree not to take any representations adverse to the company for five years? NO

**32:5.6**



## **Serving on Board of Directors**

You are honored by a mentor's recent request that you serve on a sister corporation's board of directors. However, now you are wondering whether you can or should accept the offer.

- (a) May you serve on the client's sister corp. board of directors?
- (b) If so, what special considerations should you keep in mind?





## **Serving on Board of Directors**

You GC of a 500 shareholder company. 50 shareholders have filed derivative suit targeting executives believed to have engaged in wrongdoing. Plaintiffs' lawyers 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 they gain access to your communications with your corporate client's management?





## **Knock, Knock, it's the FBI**

You worked with outside counsel during an investigation of three executives' possible wrongdoing. What is the impact of the following statements?

"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."





## **Knock, Knock, it's the FBI**

After wrongdoing is discovered executives are fired. The federal government investigates and asks 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 over your waiver of the privilege.

The feds want the notes.

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





THANKS!



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