

# The Many Hats of Corporate Counsel

*Avoiding the Ethical Perils of Multi-Role Employment*

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## The Many Hats of Corporate Counsel

- ▶ Functions of Corporate Counsel
  - General Counsel / Asst. Gen. Counsel
  - Corporate Officer
  - Director of Internal Affairs
  - Board of Directors
  - Registered Agent
  - Counselor to Officers/Employees
  - Business Advisor

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## Ethical Hazards

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### ► Unauthorized Practice of Law

#### – Rule 5.5

- ◆ Counsel must be authorized to practice law in the state in which the lawyer has an office and, if different, in the state (or states) in which counsel advises the corporate client.

## Ethical Hazards (cont'd)

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### ► Unauthorized Practice of Law

#### – Traps

- ◆ Legal advice to corporate client regarding law of a foreign jurisdiction: e.g., counsel based and admitted in Missouri providing legal opinion regarding a contract to be entered into between a division of the corporate client based in Kansas and incorporated in Delaware and a Texas entity, which is governed by Delaware law (*see* Rule 5.5(c)).
  - when pro hac admission is not required, must be based on advice of counsel admitted to the jurisdiction.

## Ethical Hazards (cont'd)

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### ► Unauthorized Practice of Law

#### – Traps

- ◆ Litigation in a foreign jurisdiction: no direct representation without pro hac admission; cannot represent anyone other than the corporate client without written consent from the corporate client (e.g., suit naming corporation and various employees/officers).
- ◆ Advising the corporate client on litigation strategies.

## Knowing the Corporate Client

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### ► MRPC 1.13(a): Corporate counsel represents the organization acting through its duly authorized constituents.

- *Commonwealth v. Timothy M. Curley, et al.*, Ct. of Cmn. Pl., Dauphin Cty., Penn., Nos. 3614 CR 2013, 3616 CR 2011, 3615 CR 2013 (Jan. 14, 2015).
- MRPC 1.13(f), Upjohn Warnings, and Broadcom (*United States v. Nicholas*).
- Friendly legal advice: MRPC 1.7, 1.9(c).
- Representing Corporate Affiliates: Compensation and subsequent adversity (MRPC 1.7, 1.8, 1.9).

## Perils of Board Membership

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- ▶ GC as Board Member: Not *per se* ethically impermissible (ABA Formal Op. No. 98-410).
  - Traps
    - ◆ Being asked to advise the corporation on the action of other directors;
    - ◆ Resignation compelled by conflict of interest;
    - ◆ Knowledge of privileged corporate communications that do not need to be reported to the Board, but which may impact Board decision-making;
    - ◆ Creation of confusion regarding whether the privilege attaches to Board communications.

## Perils of Board Membership (cont'd)

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- ▶ Best Practices
  - Inform Board of potential conflicts
  - Advise participants at Board meetings of the scope and nature of privilege
  - Designate specific portions of minutes relating to provision of legal advice

## Not Your Average Employee

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### ► Engagement

#### – MRPC 1.8

- ◆ Fair and reasonable terms, reduced to writing;
- ◆ Client given the opportunity to seek independent legal counsel on the transaction; and,
- ◆ Client consents to the representation, in writing.

## Not Your Average Employee (cont'd)

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### ► Compensation (Fees)

#### – MRPC 1.5

- ◆ Must be reasonable; including any non-monetary compensation, incentives, or options.
  - e.g., stock options may be viewed as unreasonable when the options vest and the “fee” is collected.
- ◆ Compensation should be reduced to writing, with provision that client was advised to seek independent legal counsel, specifically referencing all aspects of compensation, including benefits, incentives, or options. May consider articulating the factors contained in Rule 1.5.

## Not Your Average Employee (cont'd)

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### ► Resignation (Withdrawing from Representation)

#### – MRPC 1.16

- ◆ Does withdrawal have a material adverse effect on the interests of the client?

#### – Post-Resignation Perils

- ◆ Representation of, or employment with, competing companies (MRPC 1.9).
- ◆ Protection of confidential information—more than just contractual, may result in ethics charge (MRPC 1.6).

## Contact

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