



PROFESSIONAL COUNSEL[®]

Advice and Insight into the Practice of Law[®]

Serving on Boards: Blurred Lines May Blind Lawyers to the Risks

Lawyers serving on a board of directors may derive many benefits from such service, including honing one's business skills, developing professional relationships, enjoying the prestige and recognition of board membership, and strengthening the lawyer's ties with an existing or potential law firm client. Lawyers contemplating board service must weigh the potential benefits against the risks inherent in such appointments prior to acceptance and throughout the tenure of any board service. Ambiguity concerning the lawyer-director's precise role, as well as inattention to conflicts of interest and other liability issues may lead to negative consequences for the company, the lawyer's law firm, and the lawyer herself.

There is no rule or law that prohibits lawyers from simultaneously serving as legal counsel and a board member for an organization. Comment 35 to ABA Model Rule of Professional Conduct ["ABA MRPC"] Rule 1.7 cautions, however, that if "there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as director or should cease to act as the corporation's lawyer when conflicts of interest arise." Moreover, if the lawyer contemplating board service determines that conflicts probably would arise frequently and be significant, the lawyer should either decline the offer to serve as a board member or decline to represent the company as legal counsel.

Clarifying the Role and Protecting the Attorney-Client Privilege

Lawyers accepting board positions should clarify the precise nature of their role at the outset with documentation expressly defining the role and verbal reminders. If the lawyer is serving solely as a board member and not as legal counsel, fellow board members and the corporation's constituents must be informed of that important limitation. The lawyer-director who serves solely as a director must resist the temptation to offer legal advice and refer fellow board members seeking such advice to the designated legal counsel for the corporate entity. If the lawyer-director and the corporate entity later decide to change their relationship by having the lawyer-director provide legal services to the corporate entity, that change must be documented in writing and communicated to all relevant parties. The lawyer-director also should inform her fellow board members that she is not representing them in any individual capacity, unless, of course, she and any fellow board members so intend.

Lack of clarification may lead to confusion as to whether the lawyer-director is offering general business advice or legal advice and thus may vitiate the attorney-client privilege.

Lawyer-directors who assume this dual role must take special precautions to protect the attorney-client privilege of the corporate entity. Lack of clarification may lead to confusion as to whether the lawyer-director is offering general business advice or legal advice and thus may vitiate the attorney-client privilege. Techniques to manage this risk may include:

- Providing legal advice only when in executive session and at times other than regular board meetings;
- Maintaining separate minutes for any executive session meetings in which legal advice is provided with specific references in the corporate minutes stating that the purpose of the meeting is the discussion of a legal matter;
- Having another lawyer from the lawyer-director's law firm participate in any executive sessions where legal advice is provided; and
- Labeling any documentation drafted or reviewed in such executive sessions as "attorney-client privileged and confidential" and retaining them in discrete files separate from other corporate minutes.

Notwithstanding the aforementioned precautions, it can be difficult to segregate business advice from legal advice, and there is no guarantee that a lawyer-director's legal advice to the board or the corporate entity will always be afforded the attorney-client privilege. Ambiguity as to whether or not the necessary elements of the attorney-client privilege have been met are construed against the proponent of the privilege.¹ Moreover, courts have interpreted this exception to discovery narrowly, since applying the privilege ultimately has the effect of withholding relevant information from the fact-finder.² Accordingly, prior to accepting a board position, the lawyer considering such service must inform the corporate entity and the board that if the lawyer accepts the board position, her status as a lawyer may jeopardize their assertion of the attorney-client privilege.³

Consider the Risks

Even if the lawyer considering board service and her law firm are not serving as counsel for the company or its board of directors, the potential for conflicts of interest exists. In one ethics opinion, a lawyer was asked to serve on the board of a reinsurance company that neither he nor his law firm represented and asked the advisory committee whether he could agree to serve on the board.⁴ The lawyer represented other insurance companies with respect to property insurance claims under policies that his insurer clients had issued. The ethics opinion noted the conflicting interests between his clients and the reinsurance company, whose board the lawyer had been asked to join. In this scenario, the reinsurer would prefer to have the claims settled within monetary limits of the underlying insurance policy, saving the reinsurer from having to expend money to resolve claims. However, the lawyer's insurance company clients issuing the underlying policies might seek reinsurance for claims that exceeded policy limits.

The advisory committee determined that the conflict could be waived if the lawyer reasonably believed his representation of the insurance companies would not be adversely affected by serving as a director of the reinsurer and that his clients provided informed consent to the continued representation.⁵ It also opined that the lawyer had a duty to communicate his board appointment and obtain the informed consent of all clients who were competitors of the reinsurance company.⁶

Even if no legal conflict of interest exists, lawyers should evaluate whether board service for an entity may deter current or potential clients from engaging the law firm. For example, a lawyer pondering board service for a fossil fuel company should weigh whether that board appointment may alienate her law firm's existing green technology client base.

Pursuant to ABA MRPC 6.4, lawyer-directors serving on boards of organizations that seek to reform the law or the administration of the law have a duty to inform the organization if such a reform will materially benefit one of the clients of the law firm of the lawyer-director by a decision in which the lawyer participates. The rule further notes that the identity of the client need not be disclosed. If a client of the lawyer-director's law firm will be adversely affected by the legal reforms sought by the organization, ABA MRPC Rule 6.4 is silent as to the lawyer's duties to the client. The Comment to ABA MRPC Rule 6.4, however, references ABA MRPC Rule 1.7, which prohibits conflicts where the lawyer's duties to a third party may materially limit the lawyer's representation of a current client, absent the client's informed consent to a conflicts waiver.

¹ *Scholtisek v. Eldre Corp.*, 441 F.Supp.2d 459 (W.D.N.Y. 2006).

² *Fisher v. United States*, 425 U.S. 391 (1976).

³ D.C. Bar Ethics Op. 382 (Aug. 2021).

⁴ Illinois State Bar Assoc. Advisory Op. on Prof. Conduct 02-01 (October 2002).

⁵ Citing to the Illinois corollary rule to ABA Model Rule of Professional Conduct Rule 1.7.

⁶ Citing to the Illinois corollary rule to ABA Model Rule of Professional Conduct Rule 1.4.

Conflict Risks Increase with a Dual Role

If the lawyer contemplating board service and her law firm are representing (or planning to represent) the company (or its board), numerous conflict scenarios may arise. The ABA and other bar associations have issued ethics opinions that cover some of the more common scenarios. The cases and hypotheticals discussed below address issues related to lawyers in private practice serving on corporate entity boards. Many of the same issues discussed below apply to board service on not-for-profit entities and government lawyers serving on boards. Regardless of the type of entity seeking a board member, or whether the lawyer is in private practice or not, any lawyer contemplating board service should review all relevant laws and rules, assess the fiduciary duties owed to any parties, and consider consulting with an ethics counsel prior to accepting a board position.

The Board Seeks an Objective that the Lawyer-Director Opposes

If the lawyer-director disagrees with a board decision that she unsuccessfully opposed in her role as a director, a conflict may exist. In most situations where a client rejects a lawyer's advice, the differing viewpoints will not impair the attorney-client relationship. If, however, the lawyer-director concludes that her opposition to the proposed course of action is so strong that she does not reasonably believe that she can provide competent and diligent representation in her role as a lawyer to pursue the company's objective, withdrawal from this assignment is imperative.⁷ While most conflicts due to a personal interest will not disqualify the remainder of the affected lawyer's law firm, in certain circumstances, it may.⁸

The Lawyer-Director Participated in Board Actions and the Company Now Seeks a Legal Opinion

If the lawyer-director participated as a board member in a board decision that later becomes the subject of potential or actual litigation, the lawyer-director and her law firm probably will have a conflict if asked by the board to provide an opinion on the legality of the board's decision. As an example, if the board, with the lawyer-director participating as a board member, decided to exercise the termination clause in a company executive's employment agreement, and the fired executive threatens to sue the company for wrongful termination and breach of contract, the lawyer-director and her law firm would have a conflict if asked to by the company to provide a legal opinion on the decision to terminate the executive. Whether the conflict could be waived by the company's informed consent is questionable and would depend on a variety of factors. In order to cure any potential conflict issue, it would be prudent to request that another law firm provide such a legal opinion to the company.⁹

The Board is Considering Actions that Will Affect the Lawyer-Director's Law Firm

If the board is considering an action that will affect the lawyer-director's law firm, such as hiring the lawyer-director's law firm for legal work, a potential conflict exists between the lawyer-director's duties to the board and her duties to her law firm. At a minimum, she should notify her fellow board members of the potential conflict of interest. The ABA, as well as the ethics opinions of the majority of jurisdictions, recommend that a lawyer-director abstain from voting on board decisions that involve the retention, evaluation of performance, payment, or termination of the lawyer-director's law firm.¹⁰ Other jurisdictions adopt a more stringent approach and opine that the lawyer must recuse herself as a board member from participating in any such decisions.¹¹ These jurisdictions view the loyalty that is owed to her law firm may undermine her judgment as lawyer-director for the corporate entity.¹²

The Company Seeks the Lawyer-Director for Representation in Litigation

If a plaintiff sues the corporate entity with its directors and officers named as defendants and an issue exists concerning the legal advice provided to the corporate entity by the lawyer-director's law firm, a potential conflict exists. Therefore, best practices would dictate that another law firm represent the corporate entity in the litigation. Outside counsel would be required if it is probable that the corporate entity would assert a cross-claim against the lawyer-director or her law firm¹³.

The Lawyer-Director (or her Firm) Represents a Client Where the Company is an Adverse Party

Conflicts may arise where the lawyer-director represents a client adverse to the corporation on whose board he is a member. In an ethics opinion that examined this type of conflict, the lawyer-director served on the board of a local bank in which he also had an 8% ownership interest. In his law practice, the lawyer-director represented a municipality on numerous business transactions where the bank was an adverse party. The lawyer-director suggested that he could avoid the conflict by abstaining from any board decisions involving the bank's dealings with the municipality. The advisory opinion concluded, however, that the conflict of interest was so severe that the municipality-client could not waive the conflict.¹⁴

¹⁰ *Id.*

¹¹ Comm. On Prof. Ethics of the Assoc. of the Bar of City of New York, Op. 1988-5 (1988).

¹² D.C. Bar Ethics Op. 382 (Aug. 2021).

¹³ ABA Formal Ethics Op. 98-410 (Feb. 27, 1998).

¹⁴ Illinois State Bar Assoc. Advisory Op. on Prof. Conduct 13-04 (May 2013).

⁷ ABA Formal Ethics Op. 98-410 (Feb. 27, 1998).

⁸ D.C. Bar Ethics Op. 382 (Aug. 2021); see also ABA Model Rule 1.10.

⁹ ABA Formal Ethics Op. 98-410 (Feb. 27, 1998).

Heightened Liability and the Potential Need for Additional Insurance Coverage

Some older court decisions have held lawyer-directors to a higher standard of care than non-lawyer directors, especially when the company makes false or misleading statements with respect to financial documents and the lawyer-directors fails to report the malfeasance or investigate further.¹⁵ Moreover, as discussed above, the lawyer-director may now be sued in his capacity as a director of the corporate entity in causes of action that would not apply to those acting solely as a lawyer for the entity.

Lawyer-directors should protect themselves from this heightened risk of liability by securing the necessary insurance coverage. Customarily, a traditional lawyers professional liability policy will not provide coverage for a claim that arises out of a lawyer-director's role as a board member for the corporate entity. Accordingly, a lawyer contemplating board service should ensure that the corporate entity maintains directors and officers ("D&O") insurance for the lawyer's role as director, as well as appropriate indemnification provisions for board members. If the corporate entity lacks such coverage, the lawyer should explain the benefits of adding such coverage to the corporate entity. If the corporate entity is unwilling or unable to provide the necessary D&O insurance coverage, the lawyer or his law firm should either consider the purchase of such a policy, or the lawyer should decline the board appointment.

Lawyer-directors should protect themselves from this heightened risk of liability by securing the necessary insurance coverage.

Risk Control Tips

The lawyer and law firm must adopt sound risk control policies with respect to board member service at the outset and during the course of such membership. For the individual lawyer who will only serve as a board member and not as legal counsel:

- Document the fact that the lawyer will not be assuming a dual role and serving solely in the capacity of a board member;
- Inform your fellow board member of this fact verbally, especially if they ask for legal advice or services;
- Consider adding into board meeting minutes that neither the lawyer nor the law firm is serving as legal counsel for the company, its board, or any individual constituents of those entities; and
- If circumstances change and the lawyer is asked and agrees to serve in a dual role, document this change and follow the guidance below.

For the lawyer assuming the dual role as lawyer-director:

- Draft a memorandum to the board and corporate entity outlining all the potential risks that may arise due to the lawyer-director's dual role, including the potential loss of the attorney-client privilege;
- Remain vigilant in identifying and managing any potential or actual conflicts of interest as they become apparent;
- Take all the necessary steps to protect attorney-client privileged communications, as mentioned above;
- Recuse or abstain from voting on any matters that may involve a conflict of interest or other ethical concern; and
- Be willing to either resign as a board member or terminate the attorney-client relationship if the dual role as legal counsel and board member results in severe or repeated conflicts of interest or other ethical concerns.

¹⁵ See *Blakely v. Lisac*, 357 F. Supp. 255 (D. Or. 1972); *Escott v. BarChris Construction Corp.*, 283 F. Supp. 643 (SDNY 1968).

For the law firm:

- Establish a set of criteria that permits board service and require that any lawyer seeking to serve on an organization's board of directors seek and obtain the law firm's approval in writing before accepting any such position;
- Designate an individual or committee within the law firm to review and determine whether a lawyer seeking to serve on an organization's board may or may not accept such a position;
- Require that the organization provide and confirm in writing insurance coverage and indemnification for the lawyer-director;
- Enter the lawyer-director's designation as a board member of the organization, including any parent company, subsidiaries, and affiliates, into the law firm's conflict of interest database for all conflict of interest checks;
- Require that all legal matters for the corporate client have a matter-specific engagement agreement in order to avoid the waiver of any attorney-client privilege;
- Look for and fill any gaps in coverage between the organization's directors and officers liability coverage and the law firm's lawyers professional liability coverage.

Serving as a board member can be mutually beneficial for the lawyer and the corporate entity. Instituting the appropriate risk control measures at the outset and throughout the tenure of the lawyer-director will help ensure that those benefits are preserved and protected from the inherent risks of serving as a corporate board member.

This article was authored for the benefit of CNA by:**Sean Ginty**

Sean Ginty is the Risk Control Director for CNA's Lawyers Professional Liability Program. He collaborates with other CNA Risk Control lawyers on the design and content of lawyers' professional liability risk control services, products and publications. Sean lectures frequently at CNA-sponsored events and at state and local bar associations and national seminars hosted by industry-leading organizations. He also writes articles focusing on law firm risk control and professional responsibility issues. Prior to joining CNA, he served as Chief of Staff and General Counsel for an Illinois state agency and practiced law with a Chicago-based law firm, as well as serving as conflicts counsel for an international law firm. He is admitted to practice in Illinois and United States District Court, Northern District of Illinois.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com