

THE LAWYER SERVING AS A DIRECTOR OF A CLIENT/ORGANIZATION

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This outline provides references for lawyers who wish to serve as directors of client organizations. Because of the complicated nature of this situation, space and time do not permit an in-depth discussion, but what I have attempted to do is to flag what I believe to be the most important sources of guidance and briefly describe those sources. It is hoped that this may provide a starting point for further research.

Wisconsin's Rules of Professional Conduct for Attorneys (the "Rules") do not directly address the situation wherein a lawyer is asked to serve as a director of and organization that the lawyer represents as a client (or conversely, when a lawyer who serves as a director of an organization is asked to also provide legal services to the organization). The Comment, however, to SCR 20:1.7 (Conflicts of interest: Current Clients) provides as follows in paragraph [35]:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

The Rules thus implicitly recognize that lawyers can and do serve in such dual capacities, but that such service carries potential hazards for the lawyer. This comment reflects a consensus developed through ethics opinions, the most important being *ABA Formal Opinion 98-410*,

which is discussed further herein. It is noteworthy that the sole mention of lawyers serving as directors of client organizations is made in the Comment to the main Rule governing conflicts of interest for lawyers (SCR 20:1.7). Conflicts are the primary hazard for lawyers acting in any dual capacity, and such problems arise for lawyers who choose to serve as directors for client organizations.

In the *Restatement (Third) of the Law Governing Lawyers* (the “Restatement”),¹ the situation in which a lawyer serves as a director of a client organization is addressed in §135 and its accompanying comment, which provide as follows:

§ 135. A Lawyer with a Fiduciary or Other Legal Obligation to a Nonclient

Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client in any matter with respect to which the lawyer has a fiduciary or other legal obligation to another if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's obligation.

d. A lawyer as corporate director or officer. A lawyer's duties as counsel can conflict with the lawyer's duties arising from the lawyer's service as a director or officer of a corporate client. Simultaneous service as corporate lawyer and corporate director or officer is not forbidden by this Section. The requirement that a lawyer for an organization serve the interests of the entity (see § 96(1)(a)) is generally consistent with the duties of a director or officer. However, when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue to serve as corporate counsel without the informed consent of the corporate client. The lawyer may not participate as director or officer in the decision to grant consent (see § 122, Comment c(ii)).

Illustration:

3. Lawyer serves on the board of directors of Company and is also employed by Company as corporate secretary and inside legal counsel. Company proposes to give bonuses to its five highest-paid officers, including Lawyer. Authority to pay such bonuses presents a close legal question. The directors have requested Lawyer to render an opinion as counsel concerning the legality of the payments. Lawyer's status as recipient of the bonus and role as a director to whom the opinion will be addressed create a substantial risk that Lawyer's opinion for Company will be materially and adversely affected. The conflict would not be cured by having the opinion prepared by a partner of Lawyer, because conflicts under this Section are imputed to affiliated lawyers. Both Lawyer's personal conflict and the imputed conflict are subject to effective consent by agents of Company authorized to do so (see § 122).

A second type of conflict that can be occasioned by a lawyer's service as director or officer of an organization occurs when a client asks the lawyer for representation in a

¹ The Restatement is not binding authority, but is frequently relied upon by courts in professional responsibility matters.

matter adverse to the organization. Because of the lawyer's duties to the organization, a conflict of interest is present, requiring the consent of the clients under the limitations and conditions provided in [§ 122](#).

Illustration:

4. Lawyer has been asked to file a medical-malpractice action against Doctor and Hospital on behalf of Client. Hospital is operated by University, on whose Board of Trustees Lawyer serves. While Lawyer would not personally be liable for the judgment if Client prevails (compare [§ 125](#), Comment c), the close relationship between Lawyer and University requires that Lawyer not undertake the representation unless Client's consent is obtained pursuant to [§ 122](#).

e. A lawyer as director of a legal-services organization. Service of a private-practice lawyer on the board of directors of a legal-services organization can usefully support the delivery of legal services to persons unable to pay for them. However, the agency's clients might from time to time have interests opposed to those of the lawyer's clients. Such service does not constitute an inherent conflict of interest with the lawyer's private clients, but the lawyer must be alert to the possibility of a conflict with respect to particular decisions. In general, if there is a risk that the lawyer-director's performance of functions as a director with respect to a particular decision would materially and adversely affect the lawyer's representation of private clients, the lawyer may not participate in that decision without the informed consent of affected clients.

Illustration:

5. A significant part of Lawyer's practice consists of enforcing the claims of banks against borrowers. Lawyer is also on the board of directors of the local Legal Services Agency (LSA). LSA is considering a proposal that it bring an action to challenge the use of certain clauses in consumer sales contracts that facilitate collection of bank claims. Such litigation would materially and adversely affect the interests of Lawyer's bank clients. Accordingly, Lawyer may not participate in the LSA board's consideration of the proposal.

As in the Comment to SCR 20:1.7, the emphasis in the Restatement is on alerting the lawyer to potential conflicts between the dual roles.

Perhaps the most important resource for lawyers considering assuming these dual roles is *ABA Formal Opinion 98-410*. This opinion was issued as a result of extensive study by the ABA of this issue in the 1990s,² and focuses on three primary areas of concern for lawyers serving in these dual roles:

- I. The lawyer must carefully advise the client regarding the dual roles.**
- II. The lawyer-director must exercise reasonable care to protect the organizations attorney-client privilege**

² See *The Lawyer-Director: Implications for Independence* (Task Force on the Independent Lawyer, ABA Sec. Litigation, March 1998).

III. The lawyer-director must confront and resolve ethical issues that arise during the dual roles.

In order to address these areas of concern, the opinion recommends that the lawyer-director follow these guidelines:

1. Reasonably assure that management and the board of directors understand (i) the different responsibilities of legal counsel and director; (ii) that when acting as legal counsel, the lawyer represents only the corporate entity and not its individual officers and directors; and (iii) that at times conflicts of interest may arise under the rules governing lawyers' conduct that may cause the lawyer to recuse herself as a director or to recommend engaging other independent counsel to represent the corporation in the matter, or to serve as co-counsel with the lawyer or her firm.
2. Reasonably assure that management and the board of directors understand that, depending upon the applicable law, the attorney-client evidentiary privilege may not extend to matters discussed at board meetings when the lawyer-director is not acting in her corporate counsel role and when other lawyers representing the corporation are not present in order to provide legal advice on the matters.
3. Recuse herself as a director from the board and committee deliberations when the relationship of the corporation with the lawyer or her firm is under consideration, such as issues of engagement, performance, payment or discharge.
4. Maintain in practice the independent professional judgment required of a competent lawyer, recommending against a course of action that is illegal or likely to harm the corporation even when favored by management or other directors.
5. Perform diligently the duties of counsel once a decision is made by the board or management, even if, as a director, the lawyer disagrees with the decision, unless the representation would assist in fraudulent or criminal conduct, self dealing or otherwise would violate the Model Rules.
6. Decline any representation as counsel when the lawyer's interest as a director conflicts with her responsibilities of competent and diligent representation, for example, when the lawyer is so concerned over her personal liability as a director resulting from the course approved by management or the board that her representation of the corporation in the matter would be materially and adversely affected.

The ABA's opinion also identifies several important legal and risk issues for evaluation by a lawyer and client who is considering a lawyer's service on the client's board:

- Provisions of substantive law concerning agents, fiduciaries, and corporate governance
- Stock exchange regulations and rules of the Securities and Exchange Commission
- Possible exclusion of the lawyer-director from the corporation's officer and director

insurance coverage

- Possible exclusion of the lawyer-director from the lawyer's own professional liability coverage
- Possible loss of indemnification under the statutes of some states in minority share holder and derivative actions
- Possible exposure of the lawyer's firm to vicarious liability
- Increased likelihood of disqualification from representing the corporation in litigation or other matters

Any lawyer considering assuming the dual roles of both lawyer and director should carefully consider these risks and their possible effects both on the individual lawyer and the lawyer's firm.