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**Lawyer-Directors:
Good Business or Bad?**

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Lawyers have long served as directors for companies that their firms represent. In many situations, it is good business for both the client and the firm. The client gets the benefit of a seasoned advisor and the firm tightens its bond with the client. At the same time, having a firm lawyer serve on the board of a client can present risks for both. The Oregon State Bar in Formal Ethics Opinion 2005-91 and the ABA in Formal Ethics Opinion 98-410 offer excellent advice to lawyer-directors, their firms and their clients on the risks that go along with the benefits of having a firm lawyer serve as a director for a firm client. In this column, we'll examine some of those risks. We'll first look at conflicts and then examine several risks beyond conflicts.

Conflicts

Conflicts for lawyer-directors come in three basic variants. They are "variants" because although each puts the accent on one side or the other of "lawyer-director," all of them stem from the same potentially dueling tensions. With each, the conflict arises on the "lawyer side" under RPC 1.7(a)(2), which governs conflicts between the lawyer's financial interest and the interests of the client. Under RPC 1.10(a), the "firm unit rule," the lawyer-director's conflict will

be imputed to the firm as a whole. On the “director side,” the conflict is governed by controlling corporate law.

First, some conflicts focus primarily on the lawyer-director’s role as a lawyer. Formal Opinion 2005-91, for example, gives the illustration of a lawyer-director who is representing the corporation involved in litigation and whose performance in the case is subject to board review.

Second, some conflicts focus primarily on the lawyer-director’s role as a director. *In re Kinsey*, 294 Or 544, 660 P2d 660 (1983), for example, involved a lawyer-director whose role and potential testimony as a director became a critical element in a shareholder derivative case the lawyer’s firm was handling for the corporation.

Third, some conflicts focus squarely on the lawyer-director’s dual roles. Again, Formal Opinion 2005-91 provides ready examples of this variant with the board negotiating with the lawyer-director’s firm over compensation generally or a specific business transaction involving the two.

Beyond Conflicts

Although not an exhaustive list of risks beyond direct conflicts, others include potential confusion over who is the client, loss of the shield from liability for assisting in the breach of a corporate fiduciary duty and potential loss of the attorney-client privilege.

Who Is the Client? Under RPC 1.13(a), the client of a law firm representing a corporation is the corporation itself. Yet, lawyer-directors can often come to be viewed by key corporate officers and fellow directors as “their” lawyer, too. Although RPC 1.13(g) does not prohibit such additional representation, it can be fraught with problems if there are later differences between the corporation and the individual corporate officer or director. *In re Jans*, 295 Or 289, 666 P2d 830 (1983), for example, involved a lawyer who was counsel for both the corporation (of which he was a part-owner) and its key officer and who later represented the corporation against the officer over the employment contract the lawyer had negotiated between the corporation and the officer.

Assisting in Breach of Fiduciary Duty. In *Reynolds v. Schrock*, 341 Or 338, 142 P3d 1062 (2006), the Oregon Supreme Court ruled that lawyers could not be held liable for assisting in a client’s breach of a fiduciary duty to a third party if the lawyer was simply providing otherwise lawful legal advice to the client within the course of a lawyer-client relationship. This immunity from “aiding and assisting” liability, however, does not apply if “the lawyer acted outside the scope of the lawyer-client relationship.” (341 Or at 351.) With a law firm that solely provides legal advice to a corporate client, that line is fairly well demarcated. With a lawyer-director, however, that line can become much less distinct and, in some situations, can put the shield from liability afforded by *Reynolds* at risk.

The Attorney-Client Privilege. Lawyer-directors often provide both legal and business advice to their corporate clients. Although the former falls within the attorney-client privilege, the latter does not. As Professor Kirkpatrick put it in his leading treatise, *Oregon Evidence*: “If the client consults with the lawyer as a friend, counselor, business advisor, executor, investigator, tax preparer, attesting witness, or scrivener, the privilege will not arise.” (5th ed. 2007 at 307.) Comment 35 to ABA Model Rule 1.7, upon which Oregon’s corresponding rule is patterned, echoes this and advises lawyer-directors to counsel fellow board members on the scope of the privilege so they will not inadvertently conclude that it applies whenever the lawyer-director is present regardless of the topic under discussion.

ABOUT THE AUTHOR

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