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Pro Bono:
Risk Management Considerations for Nonprofit Board Membership

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Lawyers follow many different paths to providing *pro bono* services. One common way is through board membership for a nonprofit that the lawyer's firm represents. This is usually a "win-win" scenario for both the lawyer and the nonprofit. The lawyer is able to engage in the community. The nonprofit, in turn, gains the benefit of a lawyer's insight into its operations on the board.

At the same time, board membership in this context can present many of the same risk management issues as when a lawyer is a director of a firm corporate client. In this column, we'll survey three key areas lawyers and their firms should evaluate when considering whether a firm member should also serve as a director of a nonprofit for which the firm also provides legal services: (1) conflicts; (2) attorney-client privilege; and (3) competence.

This is not intended to be an exclusive list. Rather, they are simply some of the more commonly recurring issues. Similarly, although these issues are sharpened if the nonprofit is also a firm client, they don't necessarily go away if not.

Conflicts

Conflicts for a lawyer-director can arise from both the roles as "lawyer" and "director." OSB Formal Opinion 2005-91 (rev 2016) discusses conflicts in both of these roles and is available on the OSB web site.

On the "lawyer" side, conflicts can be either multiple-client under RPC 1.7(a)(1) or material limitation under RPC 1.7(a)(2). *Kidney Association of Oregon v. Ferguson*, 315 Or 135, 843 P2d 442 (1992), touches on both. A lawyer-director of a local charity whose firm also represented the charity was asked to handle the probate of the estate of a decedent whose sole beneficiary was the charity. The Supreme Court ultimately concluded that neither a multiple client nor a material limitation conflict arose because the personal representative and the charity shared an interest throughout in maximizing the estate's distribution to the charity. Nonetheless, friction still arose between the lawyer and the charity over the legal fees incurred because the probate turned out to be significantly more complicated than anticipated and ate into the eventual gift.

On the "director" side, statutory and decisional law typically impose fiduciary duties of care and good faith on directors. These can be triggered, for example, when the board is asked to evaluate the work of the lawyer-director's firm. For lawyers who are invited to join the board of a nonprofit and may not be

familiar with the duties of a director, the Attorney General's Office has a practical "Guide to Nonprofit Board Service in Oregon" available on its web site.

Attorney-Client Privilege

Courts have long drawn a line between legal and business advice provided by lawyers—with the former generally accorded protection under the attorney-client privilege and the latter usually not. Professor Kirkpatrick put it this way in his *Oregon Evidence* treatise (6th ed. 2013 at 336): "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."

This distinction can have important practical consequences for lawyer-directors given their overlapping roles.

With business advice, if privilege is not available, the lawyer may become a fact witness in later litigation over the matters concerned. In that event, the lawyer-witness rule—RPC 3.7—may come into play. RPC 3.7(a) generally prohibits a lawyer from acting as trial counsel if the lawyer will be a "likely" witness. Under RPC 3.7(c), personal disqualification can ripen into firm disqualification if the testimony from the lawyer-witness will be adverse to the lawyer's client. OSB Formal Opinion 2005-8 (rev 2016) outlines these twin facets of the lawyer-witness rule in detail.

With legal advice, ABA Formal Opinion 98-410 (1998), which discusses lawyer-director issues extensively from a national perspective, counsels (at 6) that lawyers should keep legal and business advice separate in an effort to preserve privilege:

> "[I]t is vital that that the lawyer who also serves as a director be particularly careful when her client's management or board of directors consults her for legal advice. The lawyer-director should make clear that the meeting is solely for the purpose of providing legal advice. . . . When appropriate, the lawyer-director should have another member of her firm present at the meeting to provide the legal advice."

Given the sensitivity of privilege, the ABA opinion suggests that lawyer-directors discuss this area with their fellow board members and executives at the client organization when they join the board involved.

Competence

Particularly with smaller nonprofits, lawyer-directors may be viewed by their fellow directors as authoritative voices on all things legal. Today's practice reality, however, forces most of us into relatively narrow niches and a lawyer-director may not necessarily have substantive expertise on the particular legal point confronting the board. In that situation, lawyer-directors need to be diplomatic enough to demur on providing legal advice in an area beyond their competence. Simply because legal advice is provided *pro bono* to a nonprofit

does not exempt it from the regulatory duty of competence or the civil standard of care. Even if they are not able to advise on a particular matter, lawyer-directors are often in an excellent position to identify other lawyers within their firms or the community at large who can provide the specialized advice required.

ABOUT THE AUTHOR

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