Ethics Corner: Lawyer Serving on Board of Client

There can be obvious advantages for a lawyer to sit on the board of a corporate client, particularly if the client is a large, successful, respected entity. In such a case it is likely the other board members are successful and powerful people who can be sources of much business for the lawyer/director's law firm.

Legal ethics rules contain no general prohibition of the practice of serving on clients' boards. Comment [35] to ABA Model Rule 1.7 discusses the practice in the most general way. It includes the following:

> If there is a 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.

We are not aware of any state ethics rule that is more restrictive than the Model Rules on the practice of lawyers sitting on boards of clients. The Restatement (Third) of the Law Governing Lawyers does not purport to condemn the practice either, § 135, cmts. d and e, nor does the ABA Standing Committee on Ethics and Professional Responsibility in its treatment of the subject at Formal Op. 98-410 (1998). State and local ethics opinions, while urging caution, recognize the propriety of lawyers sitting on boards of clients. *See, e.g.*, Association of the Bar of the City of New York, Committee on Professional and Judicial Ethics, Formal Op. 1988-5 (1988) (in the context of a lawyer/tenant serving on a cooperative board). (Accountants enjoy no such flexibility. The Code of Professional Conduct of the American Institute of CPAs declares that a member's independence is "impaired" if the member sits on the board of a client. *See* Interpretation 101-1(C)(1).)

Attorney-Client Privilege. The privilege is important in this context. There will always be a danger that a court will hold that the lawyer's communications with other board members or management were while she was wearing her "director hat" and not her "lawyer hat," and that the communications are discoverable in litigation. *See, e.g., Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990). At least one state bar ethics committee has opined that a lawyer asked to be a director must fully advise the client of this danger. New York State Bar Association, Committee on Professional Ethics, Op. 589 (1988).

Lawyer Malpractice Insurance Coverage. Insurance underwriters look askance at lawyers serving on boards of clients. As a result, malpractice insurance policies vary wildly in how they treat the practice. At one extreme, policies provide that whenever a lawyer sits on a board, the lawyer and the lawyer's firm have no coverage whatsoever in connection with that client. Less restrictive policies will provide coverage where the lawyer was acting as a lawyer (but not as a director). Determining whether a lawyer is acting as a lawyer or as a director can be highly contentious. Lawyers who wish to serve on boards (and their firms) must review their policies with great care to know what is covered and what is not. ABA Model Rule 1.4 provides that lawyers must keep clients informed about what they need to know to make decisions about the representation. The possibility that board service could deprive the law firm of coverage is something the client needs to know. In recognition of the coverage issues and some of the problems firms have had with lawyer/directors, law firms are regulating (in some cases,

prohibiting) the practice as never before. Susan Kostal, *Board to Pieces*, A.B.A.J. 12 (June 2006).

More on Liability. In either an enforcement or liability context, courts have for many years held that directors who are also lawyers are held to a higher standard in what they know or should know about company matters. *See, e.g., Blakely v. Lisac*, 357 F. Supp. 255 (D. Ore. 1972); *Feit v. Leasco Data Processing Equip. Corp*., 332 F. Supp. 544 (E.D.N.Y. 1971); *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968); *Cammer v. Bloom*, 711 F. Supp. 1264 (D.N.J. 1989) (lawyer/director a "controlling person under § 20(a) of the Securities Exchange Act of 1934).

Other "Unintended Consequences." A lawyer/director may not be able to try a case on behalf of the client, especially where he may be a witness. *Harrison v. Keystone Coca-Cola Bottling Co*., 428 F. Supp. 149 (M.D. Pa. 1977). In a trade secret context, a lawyer/director handling case may not be able to see certain of the other side's confidential documents. *Norbrook Laboratories, Ltd. v. G.C. Hanford Mfg. Co.*, 2003 U.S. Dist. LEXIS 6851 (N.D.N.Y. April 24, 2003). A law firm cannot be adverse to an entity where a lawyer in the firm had been on the board. *See e.g., Berry Saline Mem. Hosp*., 907 S.W.2d 736 (Ark. 1995).

Representative Law Reviews. Bethany Smith, Note, *Sitting on vs. not Sitting on your Client's Board of Directors*, 15 Geo. J. Legal Ethics 597 (2002); *The Lawyer as Director of a Client*, 57 Bus. Law. 387 (November 2001); Stephen M. Zaloom, *Legal Status of the Lawyer-Director: Avoiding Ethical Misconduct*, 8 U. Miami Bus. L. Rev. 229 (2000).
