

## **The Dual Role of Corporate Attorney and Board Member**

**by**

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A lawyer can simultaneously represent a corporation and serve on the corporation's board of directors; however, the lawyer's duties to the corporation can conflict with the lawyer's duties as a board member.

This article outlines some of the general concerns that lawyers acting in such dual capacity should be aware of in order to avoid potential ethical dilemmas.

### **Who's the client?**

An important question to consider when representing an organization is who is the client?

Under Rule 1.13(a) of the Minnesota Rules of Professional Conduct (MRPC), a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. The lawyer's obligation is to the organization itself versus any particular individuals such as a director, officer or shareholder.

### **Ethical dilemmas**

The potential for ethical dilemmas is another concern.

Acting as both lawyer and director for a corporation has many inherent pitfalls. First and foremost, conflicts of interest can develop under MRPC Rule 1.7(b) where lawyers may not be able to distinguish their own personal interest as directors from the advice that they give the corporation as counsel.

For example, a lawyer may not be able to serve as corporate counsel on a matter that the lawyer unsuccessfully opposed as a director. The lawyer's ability to represent the corporation may be "materially limited" under Rule 1.7(b) by his opposition to the motion as director.

Lawyers serving as both corporate counsel and director must also continue to maintain client confidentiality under Rule 1.6 of the MRPC. A lawyer serving a corporation in both roles can result in the loss of client confidentiality when the lawyer's responsibilities include both business management and legal advice.

Discussions occurring at a meeting of the board of directors may not be subject to the attorney-client evidentiary privilege when the director is also counsel to the corporation. *See, e.g., United States v. Vehicular Parking Ltd.*, 52 F.Supp. 751 (D. Del. 1943).

Finally, there is also the possibility that a lawyer serving as corporate counsel and director could be named as a witness, and thereby be disqualified from representing the corporation in litigation. *See, Berry v. Saline Mem. Hosp.*, 907 S.W.2d 736 (Ark. 1995).

### **Whose role is it?**

Another consideration is whose role it is to resolve questions regarding conflict of interest in such a situation.

The Comment to Rule 1.7(b) states that the responsibility lies primarily with the lawyer serving as corporate counsel and director. If any of the above factors materially limit the lawyer's ability to represent the corporation, the lawyer must also determine whether the representation will be "adversely affected" under 1.7(b).

### **Steps to take**

There are steps a lawyer can take to prevent ethical dilemmas from arising when acting as corporate lawyer-director.

The Comment to Rule 1.7 suggests several guidelines for evaluating conflict situations and minimizing the risk of ethical violations. First, the lawyer should look to the frequency and intensity with which such conflicts arise.

For example, how often is corporate counsel required to evaluate and advise the corporation on decisions made by the board of directors?

Second, the lawyer should evaluate what effect the lawyer's resignation would have on the corporation along with the corporation's ability to obtain legal advice from a second source should a conflict arise. The Comment states that 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 director." *See also, ABA Formal Ethics Opinion 98-410* (1998).

### **Rising conflicts**

If a conflict of interest arises, can a lawyer acting as corporate counsel and director give informed consent to the conflict?

Restatement Third, "The Law Governing Lawyers," sec. 135, cmt. d (2000), states that when the personal interests or obligations of the lawyer as director are materially adverse to the requirements of the lawyer as corporate counsel, the lawyer cannot serve as corporate counsel or take part in the decision to give informed consent.

### **Legal Services**

Finally, what about legal service organizations?

Rules 6.3 and 6.4 of the MRPC specifically permit a lawyer to serve as a director, officer or member of a legal services organization or an organization involved in legal reform, despite the fact that the organization may serve individuals with interests adverse to the lawyer's clients. A lawyer acting in such capacity does not have an attorney-client relationship with the individuals served by the organization.

While it is not unethical for a lawyer to serve as both corporate counsel and director, lawyers acting in such capacity should be sensitive to these and other ethical dilemmas that may arise while representing a corporation or other organizational entity.