



NEW YORK STATE BAR ASSOCIATION

ONE ELK STREET ALBANY, NEW YORK 12207 TEL. (518) 463-3200

Committee on Professional Ethics

Opinion 589 - 3/18/88 (25-87)

Topic: Conflict of interest; lawyer serving as director of client organization.

Digest: Not *per se* improper for lawyer to serve as director of client organization or as chair of board of directors; ethical constraints reviewed.

Code: DR 1-102(A)(6), 2-103(A), 5-101(A), 5-102, 5-105(D); EC 5-1, 5-2, 5-9, 5-10

QUESTION

1. What are the ethical constraints upon a lawyer for a corporation or other organization who also serves as a member of its board?
2. Are there additional ethical considerations where the lawyer for the organization is also the chair of its board?

OPINION

Without endorsing the practice, which has received considerable attention and criticism, we conclude there is no *per se* rule of professional ethics that prohibits a lawyer for a corporation or other organization from also serving on its board of directors or trustees. In fact, a number of ethics opinions from various jurisdictions have established the ethical propriety of a lawyer serving as a director of a client organization. See, e.g., ABA Inf. G-431 (1961); Illinois Op. 483 (1975), Ill. B.J. 136 (1975), indexed in Maru's Digest No. 8371 (1975); Maryland Op. 87-29 (1987), indexed in ABA/BNA Manual (Vol. III, No. 21, Nov. 11, 1987); N.Y. City 611 (1942); North Carolina Op. 802 (1972), N.C.S.B. II-250 (1972), indexed in Maru's Digest No. 9553 (1975); Oregon Op. 461 (1981), indexed in ABA/BNA Manual 801:7107; Virginia Op. 453 (1983), indexed in ABA/BNA Manual

801:8809; Wisconsin Op. E-84-12 (1984), indexed in ABA/BNA Manual 801:9913. Nevertheless, the potential for compromise of a lawyer's independent professional judgment presented by such dual service has led many commentators to condemn the practice. See, e.g., C. Wolfram, *Modern Legal Ethics* 738-40 (1986); Lorne, "The Corporate and Securities Adviser, the Public Interest, and Professional Ethics," 76 Mich. L. Rev. 423, 490-95 (1978); Cary, "Professional Responsibility in the Practice of Corporate Law — The Ethics of Bar Associations," 29 Rec. Ass'n Bar City of N.Y. 443, 446 (1974).

It is the view of this Committee that a lawyer representing an organization may also serve as one of its directors, provided the responsibilities of the two roles do not conflict. Thus,

1. the lawyer may not take advantage of the directorship as a feeder for his or her legal practice;
2. the lawyer must disclose to the client the risk of loss of the attorney-client privilege and any other consequences of counsel's dual role; and
3. in carrying out his or her role as counsel, the lawyer must exercise independent professional judgment free of compromising influences that arise in connection with service as a director.

There is no question that the lawyer/director relationship raises a number of concerns under the Code of Professional Responsibility. An examination of these concerns, in turn, allows us to articulate guidelines by which a lawyer serving as a director of a client organization may govern his or her conduct.

DR 2-103(A) of the Code prohibits solicitation of employment by a lawyer in violation of any statute or court rule. See also N.Y. Judiciary Law § 479; *In re Greene*, 54 N.Y.2d 118 (1981), *cert. denied*, 455 U.S. 1035 (1982); *In re Koffler*, 51 N.Y.2d 140 (1980), *cert. denied*, 450 U.S. 1026 (1981); *In re Alessi*, 60 N.Y.2d 229 (1983); N.Y. State 566 (1984); N.Y. State 549 (1983). This provision prohibits a lawyer from taking advantage of his or her position as a director to procure professional employment for the lawyer or the lawyer's firm. See, e.g., N.Y. State 465 (1977); N.Y. State 206 (1971); cf. ABA Inf. C-431 (1961). This provision also must be interpreted to preclude a lawyer/director from participating in the decision-making process

concerning the retention of the lawyer as the organization's legal counsel. See N. Y. City 611 (1942); Wisconsin Op. E-84-12 (1984), indexed in ABA/BNA Manual 801:9913.

The Code expressly forbids a lawyer, absent client consent, from accepting employment if the lawyer's exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests. DR 5-101(A). An attorney has an ethical responsibility to exercise professional judgment solely for the benefit of the client and should not allow personal interests, other clients' interests, nor third persons' desires to dilute this loyalty. EC 5-1. In addition, EC 5-2 warns that a lawyer should not assume a position that would tend to make the lawyer's judgment less protective of the interests of the client.

This general conflict of interest provision is also contained in the American Bar Association's Model Rules of Professional Conduct. The Model Rules have not been adopted in New York State. We believe, however, that the Comment to Rule 1.7 of the Model Rules accurately reflects the relevant concerns under the principles articulated in the Code of Professional Responsibility. That Comment notes the potential conflict that board service by an organization's lawyer entails:

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.

These general conflict of interest principles coupled with the universal prohibition against fiduciary self-dealing would prohibit a lawyer/director from participating in any decision of the client that will or reasonably may affect the lawyer's own personal or financial interests as counsel. See also, DR 1-102(A)(6); Business Corp. Law § 713; Not-for-profit Corp. Law § 715. In addition to such obvious situations, the lawyer serving on the client's

board must be sensitive to more subtle influences that could impair his or her independent professional judgment.

The risk that professional judgment may be improperly influenced by the lawyer/director's dual role will depend on such factors as the nature of the matter on which legal advice is sought, the financial remuneration paid to the director and the fees paid to the lawyer. It is clear, for example, that a lawyer who also serves as director would be disqualified as counsel in any controversy between the organization and its directors. Other situations, such as rendering legal advice to the client regarding a lawsuit involving the directors, or the personal liability of directors to the organization, likewise present a serious risk that professional judgment would be improperly influenced. Less obviously, if the directorship fees are financially significant to the lawyer, his or her professional judgment on behalf of the client reasonably may be affected. It is the duty of each lawyer to examine carefully the potential for conflict presented by different circumstances, and to disqualify himself or herself (and the lawyer's firm) as counsel wherever there exists a risk that professional judgment or loyalty may be compromised.

Further ethical qualifications upon a lawyer sitting on a client's board are found in DR 5-102 which, with certain specified exceptions, requires a lawyer to withdraw as counsel when the lawyer becomes a potential witness in contemplated or pending litigation. See also EC 5-9, 5-10. It has also been held that the lawyer/director must fully disclose to the client the potential loss of the attorney-client privilege incident to the lawyer's involvement in the client's business decisions. See Illinois Op 483 (1975), Ill. B.J. 136 (1975), indexed in Maru's Digest No. 8371 (1975); cf. C. Wolfram, *Modern Legal Ethics* 739-40 (1986).

As to the second question, we do not believe that a different analysis should apply where the lawyer is serving as chair of the client's board of directors. See, e.g., ABA Inf. C-431 (1961) (lawyer may serve as chair of bank's board of directors). Because of the chair's more extensive involvement in decision-making concerning the management of the organization, however, it is possible if not, indeed, likely that the responsibilities of the two roles will conflict more frequently than in the case of a mere director. If that in fact occurs, and if the non-participation of the chair in such matters is seriously detrimental to the functioning of the board, then the lawyer should not serve as chair. Moreover, in that circumstance the mandate of DR 5-105(D) would also apply, namely that if a lawyer would be required to decline or to

withdraw from service as a member or chair of the client's board, no partner or associate of that lawyer may accept that board position.

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