

What Color Is Your Hat?

Issues When Attorneys Serve on Nonprofit Boards

Presented by:

Jennifer L. Rawson

Samantha J. Walter



General Fiduciary Duties of Directors

- **Duty of Care**

A Director must act with the care a person in a like position would reasonably believe to be appropriate under similar circumstances.

- **Duty of Loyalty**

A Director must act in good faith and in a manner that the director reasonably believes to be in the best interests of the organization.

Mother May I?

“The Model Rules of Professional Conduct do not prohibit a lawyer from serving as a director of a corporation while simultaneously serving as its legal counsel, but there are ethical concerns that a lawyer occupying the dual role of director and legal counsel should consider.”

ABA Formal Ethics Opinion 98-410

Endorsed by PBA Committee on Legal Ethics
and Professional Responsibility

The Risks

- **Loss of independent professional judgment / Conflicts of Interest**
- **Inadvertent creation of the attorney-client relationship**
- **Potential loss of privilege**
- **Role confusion on the part of other directors**
- **Heightened exposure to liability**



Set the Ground Rules at the Start

At the outset, the attorney should reasonably assure that:

- management and the other board members understand the different responsibilities of legal counsel and director;
- understand that in some circumstances matters discussed at board meetings with the attorney in her role as director will not receive the protection of the attorney-client privilege; and
- understand that conflicts of interest could arise requiring the attorney to recuse herself as a director or to decline representation of the corporation in a matter.

ABA Formal Ethics Opinion 98-410

Loss of Independence / Conflicts of Interest

- Is there a **material risk** that the attorney's independent professional judgment will be compromised if the organization is also a client?
- **Considerations (Model Rule 1.7, Comment 35):**
 - Frequency of potential conflict
 - Potential intensity of conflict
 - Effect on organization of attorney's resignation from the Board
 - Possibility of organization's obtaining legal advice elsewhere

Loss of Independence / Conflicts of Interest

- **Conflict between organization and:**
 - Attorney-Director's law firm (e.g., fee dispute)
 - An existing client of Attorney-Director's law firm
 - Prospective client of Attorney-Director's law firm
- **Inherent Conflicts:**
 - Asked to advise in matters involving actions of other directors
 - Decisions regarding the hiring of outside counsel

Inadvertently Creating an Attorney-Client Relationship

“Absent an express contract, an attorney-client relationship will be found if:

- 1) The purported client sought advice or assistance from the attorney;
- 2) The advice sought was within the attorney’s professional competence;
- 3) The attorney expressly or impliedly agreed to render such assistance; and
- 4) It is reasonable for the putative client to believe the attorney was representing him.”

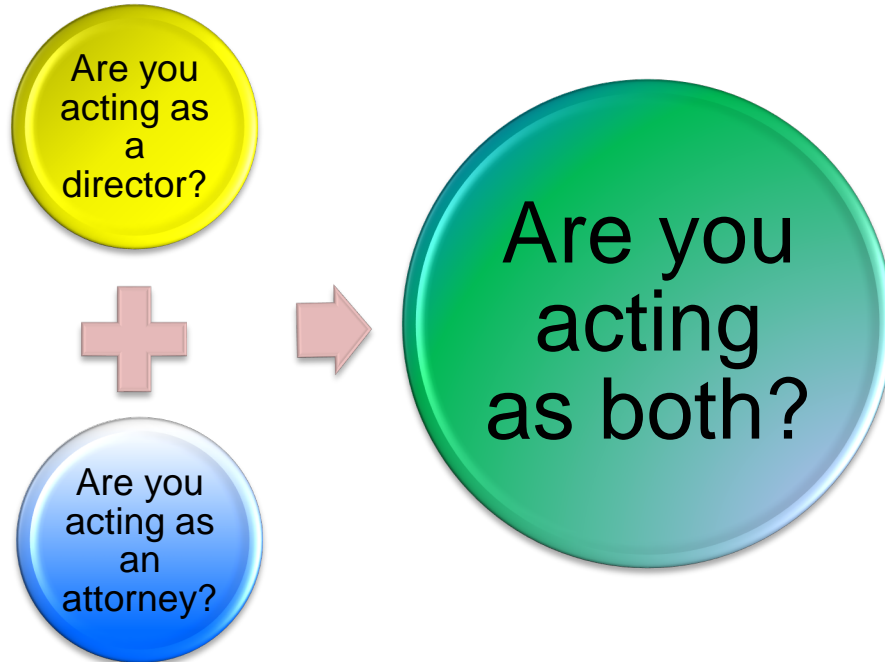
Cost v. Cost, 450 Pa. Super. 685, 691-92 (1996)



Loss of Attorney-Client Privilege

- Attorney's duty to maintain confidentiality (Model Rule 1.6)
- Purely legal advice is generally protected
- Communications made in the capacity of an attorney
- Communications made in the capacity of a director
- Communications made in a mixed capacity
- Will legal advice given by an Attorney-Director be presumed to be incidental to the business advice and not protected by the privilege?

Role Confusion



Role Confusion

Do your co-directors know in which capacity you are acting?

- Danger of unwarranted, unspoken deference in reliance on your words
- Danger of dilution of importance of legal advice



Potential Heightened Exposure to Liability

- **Duty of Care:**
 - Directors' decisions are often protected under the Business Judgment Rule
 - Attorneys may be held to a higher standard when wearing their attorney hat
 - They must provide **competent** representation
- **Issues can frequently arise in an area of the law in which the Attorney-Director does not regularly practice**
 - Executive Compensation/Reimbursement?
 - IRS Compliance (Form 990) & State Compliance (Charitable Solicitation Rules/Gambling)?
 - Public Availability of Documents?
 - Employee matters?
 - Litigation?
 - Etc.

Potential Heightened Exposure to Liability

- **Reliance Defense**
 - The Board may assert the reliance defense if it relies on the opinion of the Attorney-Director
 - May lead to vicarious liability of Attorney-Director's law firm when the Attorney-Director is an agent of the firm
- **Can you mitigate liability risk with insurance?**
 - D&O insurance covers wrongful acts by the insured in his or her capacity as a director
 - Professional liability insurance covers wrongful acts by the insured in his or her capacity as an attorney
 - Where it is not clear in which capacity the insured participant participated in the wrongful act, risk of insurers denying coverage

Summing up

- Inform management and the board about your role and the issues regarding attorney-client privilege up front.
- Identify in what capacity you are communicating (make sure it's accurately reflected in the minutes).
- Exercise reasonable care to identify and resolve conflicts of interest.
- At all times when rendering legal advice, exercise the competence and independent professional judgment required of a attorney.

