

## Utah Ethics Opinions

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UTAH STATE BAR Ethics Advisory Opinion Committee  
Opinion No. 98-10

Approved October 2, 1998

**Issue:** Is it ethical for an attorney to serve as member of the board of directors of a client corporation?

**Opinion:** The Utah Rules of Professional Conduct do not prohibit an attorney from serving as a member of the board of directors of a client corporation. However, to avoid ethical violations, an attorney who undertakes a dual role as director and counsel for a corporate client should take adequate precautions both before and during the relationship.

Before a lawyer undertakes the dual role of corporate director and attorney, he must comply with several ethical obligations: (a) determine whether the responsibilities of the two roles may conflict; (b) advise and consult with the client concerning this determination and of the risks of dual service; and (c) decline service as a director if it would create a conflict of interest or compromise the lawyer's independent professional judgment.

A lawyer who has undertaken the dual role of corporate director and attorney must comply with similar ethical obligations during the existence of the dual role: (i) continue to determine whether the responsibilities of the two roles are in conflict on particular matters; (ii) advise and consult with the client concerning these determinations and of the risks of dual service; (iii) recuse from participation in board decisions where participation would present a conflict; (iv) exercise reasonable care to protect the corporation's confidential information; and (v) resign service as a director and, if necessary, as counsel if continued service would create a conflict of interest or compromise the lawyer's independent professional judgment.

**Analysis:** The request for this opinion notes that the American Bar Association has adopted a formal opinion on this topic and asks that this Committee consider the issue as well. This Committee has not previously addressed whether an attorney may ethically serve on the board of directors of a client corporation. An official Comment to Utah Rule of Professional Responsibility 1.7 recommends caution in

undertaking a dual role as a corporate director and attorney:

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 a material risk that the dual role will compromise the lawyer's independence of professional judgment while acting as counsel, the lawyer should not serve as a director. (fn1)

This comment underscores the lawyer's ethical responsibility carefully to evaluate conflicts and risks to the client both before and during service as a director of a client corporation. Under Utah Rule of Professional Conduct 1.4(b), a lawyer must "explain a matter to the extent reasonably necessary to enable the client to make informed decisions regarding the representation." A lawyer considering or fulfilling a dual role as a director and attorney of a corporate client must explain to the client matters reasonably necessary to enable the client to make informed decisions regarding the representation.

After several years of study, the ABA issued its Formal Opinion No. 98-410, "Lawyer Serving as Director of Client Corporation," on February 27, 1998. The ABA's Opinion begins with the following summary paragraph:

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 a director and legal counsel should consider. The lawyer should reasonably assure at the outset of the dual relationship 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 lawyer 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 lawyer to recuse herself as a director or to decline representation of the corporation in a matter. During the dual relationship, the lawyer should exercise reasonable care to protect the corporation's confidential information and to confront and resolve conflicts of interest that arise. From the discussion of these ethical concerns, the Committee derives general guidelines that a lawyer, once having agreed to serve on the board of a corporate client, should follow in order to minimize the risk of violations of

the Model Rules. (fn2)

We agree with this general statement.

The ABA's opinion identifies several important ethical issues for evaluation by a lawyer and client considering or implementing a lawyer's service on the client's board:

Avoiding conflicts of interest, including in the following areas:

Serving as counsel in a matter the lawyer opposed as a director

Giving a legal opinion on a board action in which the lawyer-director participated

Acting as a director in corporate matters affecting the lawyer or the lawyer's firm

Representing the corporation in litigation naming directors as defendants

Maintaining the professional independence of the lawyer

Avoiding confusion over whether the lawyer-director's views are legal advice or business suggestions

Protecting against disclosure of confidential information and waiver of the attorney-client privilege

A lawyer who undertakes a dual role as director and attorney should evaluate each of these issues and take reasonable steps to avoid ethical violations.

The ABA's opinion also identifies several important legal and risk issues for evaluation by a lawyer and client who is considering a lawyer's service on the client's board:

Provisions of substantive law concerning agents, fiduciaries, and corporate governance

Stock exchange regulations and rules of the Securities and Exchange Commission

Possible exclusion of the lawyer-director from the corporation's officer and director insurance coverage

Possible exclusion of the lawyer-director from the lawyer's own professional liability coverage

Possible loss of indemnification under the statutes of some states in minority shareholder and derivative actions

Possible exposure of the lawyer's firm to vicarious liability

Increased likelihood of disqualification from representing the corporation in litigation or other matters

A lawyer undertaking a dual role as director and attorney should evaluate each of these issues and take reasonable steps to avoid harm to the client. A lawyer considering a dual role as a director and attorney may properly decline to undertake the dual role based upon considerations of risk to the client, the lawyer or the lawyer's firm.

The ABA's opinion provides the following guidelines lawyer-directors may use in seeking to avoid ethical violations:

1. Reasonably assure that management and the board of directors understand (i) the different responsibilities of legal counsel and director; (ii) that when acting as legal counsel, the lawyer represents only the corporate entity and not its individual officers and directors; and (iii) that at times conflicts of interest may arise under the rules governing lawyers' conduct that may cause the lawyer to recuse herself as a director or to recommend engaging other independent counsel to represent the corporation in the matter, or to serve as co-counsel with the lawyer or her firm.

2. Reasonably assure that management and the board of directors understand that, depending upon the applicable law, the attorney-client evidentiary privilege may not extend to matters discussed at board meetings when the lawyer-director is not acting in her corporate counsel role and when other lawyers representing the corporation are not present in order to provide legal advice on the matters.

3. Recuse herself as a director from the board and committee deliberations when the relationship of the corporation with the lawyer or her firm is under consideration, such as issues of engagement, performance, payment or discharge.

4. Maintain in practice the independent professional judgment required of a competent lawyer, recommending against a course of action that is illegal or likely to harm the corporation even when favored by management or other directors.

5. Perform diligently the duties of counsel once a decision is made by the board or management, even if, as a director, the lawyer disagrees with the decision, unless the representation would assist in fraudulent or criminal conduct, self-dealing or otherwise would violate the Model Rules.

6. Decline any representation as counsel when the lawyer's interest as a director conflicts with her responsibilities of competent and diligent representation, for example, when the lawyer is so concerned over her personal liability as a director resulting from the course approved by management or the board that her representation of the corporation in the

matter would be materially and adversely affected. (fn3)

We agree with the ABA's opinion that following these guidelines should help to avoid disciplinary violations. The ABA's opinion emphasizes that "[t]he issues to be faced will differ depending on the nature of the legal services to be provided by the lawyer-director or her firm, the nature of the client's business, and the nature of the representation which could range from serving as general counsel to handling a few discrete transactions." (fn4) No general list of guidelines can address all possible issues that may be presented by a lawyer's serving as a director of a corporate client while simultaneously serving as the corporation's counsel. Evaluation of issues arising in this dual relationship must be made on a case by case basis.

#### **Footnotes**

1. Utah Rules of Professional Conduct 1.7 cmt.
2. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 98-410, slip op. at 3 (1998).
3. *Id.* at 14-15.
4. *Id.* at 4.

Rule Cited:

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