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# Legal Status of the Lawyer-Director: Avoiding Ethical Misconduct

Stephen M. Zaloom

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# LEGAL STATUS OF THE LAWYER-DIRECTOR: AVOIDING ETHICAL MISCONDUCT

STEPHEN M. ZALOOM\*

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## I. INTRODUCTION

There is a long-standing practice of attorneys accepting positions as corporate directors, roles that to a large degree are indicative of professional accomplishment. Accepting a position on a corporation's board of directors is enticing for lawyers since they may enjoy the opportunity to influence corporate decisions in the business arena. Additionally, lawyers are prime candidates for directorships because they are uniquely qualified to assess business issues from a legal standpoint. In fact, it is common practice both in the past and today for attorneys to assume the dual role of both attorney and director.<sup>1</sup> Corporate clients continuously request that lawyers not only sit on the board of directors but also serve the corporation as its attorney.<sup>2</sup> However, assuming the dual role of both lawyer and director undoubtedly raises ethical concerns. This article examines the dual role of attorney-director, and the ethical dilemmas that inevitably result from the practice.

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\* LL.M. in Taxation Candidate, May 2001, University of Florida Fredric G. Levin College of Law; J.D. *cum laude*, May 2000, University of Miami School of Law; B.S.F.S. 1997, Georgetown University.

<sup>1</sup> See Robert T. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 170 (1949). In this early but important piece, Swaine urged a change in ethical canons prohibiting lawyers from serving on the boards of a client corporation, but noted that the practice is probably too widespread to effectuate a realistic change in policy. *Id.*

<sup>2</sup> See Amy Stevens, *Lawyers Are Finding Corporate Board Seats More Uncomfortable*, WALL ST. J., Dec. 31, 1993, at 11 (observing that in 1993, 78 of the largest 250 industrial companies had an attorney on their board).

## II. THE GOVERNING RULES

Although it is common practice for attorneys to become directors for their client corporations, the law of professional responsibility has not squarely addressed the issue. The American Bar Association's ("ABA") *Model Rules of Professional Conduct* offers only minimal guidance on the topic. Comment 14 to the general rule governing conflict of interest provides:

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 might 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 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 director.<sup>3</sup>

As such, the Rules provide an attorney with substantial latitude in assuming the dual role of lawyer and director by allowing her to make a determination about whether serving in the dual capacity could potentially conflict. Nonetheless, comment 14 specifically constricts this lenient standard by pronouncing that the lawyer should not serve as director if there is a material risk that wearing both hats will affect the lawyer's independent judgment.<sup>4</sup> Common law doctrine dictates that so long as a director or officer acts rationally on an informed basis and in the interests of the corporation, he shall not be held personally liable even if the decision produces a disastrous result.<sup>5</sup>

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<sup>3</sup> MODEL RULES OF PROF'L CONDUCT Rule 1.7 cmt. 14 (1999). In addition, the ABA's *Model Code of Professional Responsibility* is completely silent on the attorney-director dual role issue. See generally MODEL CODE OF PROF'L RESPONSIBILITY (1969).

<sup>4</sup> See MODEL RULES OF PROF'L CONDUCT Rule 1.7 cmt. 14 (1999). It should be noted that while Comments add guidance to the Rules, they are not obligatory in nature. See *id.* Scope at 13. Moreover, the Rules are not exhaustive of the moral considerations lawyers might face. See *id.* Scope at 14.

<sup>5</sup> This doctrine is typically referred to as the business judgment rule. See, e.g., *Fin. Indus. Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir. 1973) The court explained:

[t]he business judgment rules has been expressed in a variety of ways but it may be stated that the directors and officers of a corporation will not be held liable for errors or mistakes in judgment, pertaining to law or fact, when they have acted on a matter calling for the exercise of their judgment or discretion, when they have used such

A lawyer-director's independent business judgment will conceivably be compromised if the lawyer advocates a course of action that might generate legal work for the lawyer or the lawyer's firm. Even though the decision might be a business decision, there is still a degree of self-interest if the lawyer stands to benefit financially.

The lack of guidance from the ABA has since been remedied by the issuance of ABA Formal Opinion 410, which has clarified the issue, addressing the propriety of an attorney serving on the board of directors of a client corporation.<sup>6</sup> This article takes ABA Formal Opinion 410 into consideration and analyzes the issues and complexities involved in the dual role.

### III. DEFINING THE CLIENT

ABA Model Rule 1.7 is patently brought into question when an attorney serves on the board of directors of a *client* corporation. Model Rule 1.7 states in part, "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, *or by the lawyer's own interests.*"<sup>7</sup> This rule is circumscribed by providing that such representation shall be allowed if the client consents after consultation or the lawyer reasonably believes the representation will not be affected adversely by the conflict.<sup>8</sup>

Perhaps the singular reason lawyers believe their representation will not be adversely affected by the dual role is because of the corporate structure itself. The ABA Model Rules are explicit in noting that a corporation's attorney represents the entity itself, not the shareholders, directors, or agents of the business.<sup>9</sup> Although an organization can only conduct affairs through the actions of its constituents,<sup>10</sup> the lawyer's retention by an entity rather than a person has a natural distancing effect that may carry a deflection of responsibility which is typically associated in organizational settings.<sup>11</sup> The

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judgment and have so acted in good faith.

*Id.* at 518.

<sup>6</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 410 (1998).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT Rule 1.7(b) (1999) (emphasis added).

<sup>8</sup> See *id.*

<sup>9</sup> See *id.* Rule 1.13(a) (stating that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."). Additionally, constituents of an organizational client are not clients of the lawyer. See *id.* at cmt. 3. See also MODEL CODE OF PROF'L RESPONSIBILITY EC 5-18 (1980) (promulgating the lawyer's allegiance to the business entity rather than its agents).

<sup>10</sup> See MODEL RULES OF PROF'L CONDUCT Rule 1.13 cmt. 1 (1999).

<sup>11</sup> See Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, in THE LEGAL PROFESSION:

very nature of corporations is of an impersonal character that often causes certain fragmentation of moral responsibility.<sup>12</sup> Moreover, if the interests of the corporation's constituents diverge, the lawyer's role is complicated since he must act in the interest of an artificial being—the corporate entity, and not in the interest of the constituents.<sup>13</sup> For example, if a corporate lawyer were to discover that an officer is engaged in antitrust violations, the lawyer has a duty to bring it up the corporate ladder because the duty to the corporation exceeds the duty to the officer. Thus, even where the attorney is not a director or officer of the client corporation, there are significant difficulties in corporate representation.

Indeed, some opponents of attorneys serving in this dual capacity find that the roles can never be properly separated.<sup>14</sup> Moreover, the roles of lawyer and director are not identical, and insofar as one role influences, even remotely, the other, there is a loss of professionalism.<sup>15</sup> For instance, a director owes a fiduciary duty of loyalty to the company and its stockholders,<sup>16</sup> while the attorney's fiduciary duty is owed exclusively to the company itself.<sup>17</sup> At the point where the lawyer-director's professionalism is compromised, both roles remain inadequately fulfilled.<sup>18</sup> The *Restatement (Third) on the Law Governing Lawyers*<sup>19</sup> takes an identical stance:

Simultaneous service as corporate lawyer and corporate director or officer is not forbidden by this Section, [though] when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue to serve as

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RESPONSIBILITY AND REGULATION 279, 280 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994).

<sup>12</sup> See *id.*

<sup>13</sup> See George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605,609 (1988); see also *Cottonwood Estates, Inc. v. Paradise Builders, Inc.* 624 P.2d 296, 303 (Ariz. 1981) (finding that a lawyer's corporate ministerial duties conflicted with his professional duty to exercise independent judgment for his client).

<sup>14</sup> See Wilton S. Sogg & Michael L. Solomon, *The Changing Role of the Attorney with Respect to the Corporation*, 35 CLEV. ST. L. REV. 147, 154 (1987) (opining that since there is already substantial confusion in determining who is the client of the corporate attorney, it would be imprudent to have the attorney serve as the director of the client).

<sup>15</sup> See *id.*

<sup>16</sup> See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

<sup>17</sup> See MODEL RULES OF PROF'L CONDUCT Rule 1.13 (1999).

<sup>18</sup> See Sogg & Solomon, *supra* note 14, at 154.

<sup>19</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft 1996).

Persuasive in nature, the Restatement serves more as a guideline, and in some instances, proposals of how the law should be, than binding authority.

corporate counsel without the informed consent of the corporate client.<sup>20</sup>

It would appear that the prevailing view is that, despite the ubiquitous, obvious difficulties in representing a corporation, the corporate lawyer has sufficient freedom in deciding whether to accept a position on a corporation's board of directors.

#### IV. INCREASED DUTY OF CARE

Any attorney serving as director may be held to a higher standard of care due to his specialized knowledge.<sup>21</sup> A district court in New York went so far as to hold a lawyer-director liable as an inside director due to the attorney's misleading registration statement under section 11 of the Securities Act of 1933.<sup>22</sup> The well-known case of *Escott v. BarChris Construction Corporation* came to a similar result, that anyone with special expertise has an obligation to the corporation that directors without similar expertise would not be expected to recognize.<sup>23</sup>

The attorney-director's standard of care will therefore be raised (to that of the ordinary inside-director).<sup>24</sup> Therefore, the dual role may expose the lawyer, and his law firm, to potential liability that could easily be averted if the directorship were declined.<sup>25</sup> Fees garnered from more legal work resulting from the dual relationship, however, largely offset the potential liability.

#### V. CONFLICTS OF INTEREST

One step an attorney should always take before she accepts a position on a corporate board is informing the client of the applicable ethical rules and delineating her potentially conflicting role. Naturally, this explanation should take place before the lawyer accepts the position in order for the corporate client to have an opportunity to object if it believes the lawyer serving in a dual capacity may hinder its interests. This is also a necessary precaution in

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<sup>20</sup> *Id.* at § 216 cmt. d.

<sup>21</sup> See *Report of Committee on Corporate Laws: Changes in the Model Business Corporation Act*, 30 BUS. LAW. 501, 506 (1974).

<sup>22</sup> See *Feit v. Leasco Data Processing Equip. Corp.*, 332 F. Supp. 544, 550 (E.D.N.Y. 1971).

<sup>23</sup> See generally, *Escott v. BarChris Constr. Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968).

<sup>24</sup> See William E. Knepper, *Liability of Lawyer-Directors*, 40 OHIO ST. L.J. 341, 346 (1979).

<sup>25</sup> See 1 WILLIAM E. KNEPPER & DAN A. BAILEY, *LIABILITY OF CORPORATE OFFICERS AND DIRECTORS* § 1-10, at 26 (6th ed. 1998).

ensuring that other directors and managers know the risks involved of having a lawyer serve on their board.<sup>26</sup>

While it is recommended that a lawyer address any possible conflicts of interest with the client before representation begins, this is not required by the Model Rules themselves.<sup>27</sup> The escape hatch is the language that allows representation to continue, even without informing the client of potential risks, if the lawyer thinks his representation will not be "materially limited."<sup>28</sup> Notwithstanding this language, a lawyer should always cover his tracks by avoiding any entanglements in possible ethical dilemmas. Clearly, the safer route is to consult with the client beforehand, overtly discuss the situation, and obtain written waiver from the client, since a lawyer's personal determination in self-policing might not be an adequate defense to a disciplinary proceeding's determination of what could reasonably "materially limit" representation. Because the standard is quite subjective, informing the client should be the preferred route. One prudent commentator recommends "[leaning] over backwards to avoid the appearance of impropriety."<sup>29</sup>

Although the language in Comment 14 to Model Rule 1.7 and the ensuing formal opinion issued by the ABA may be lenient, Model Rule 1.7 itself may forbid the dual practice in various circumstances.<sup>30</sup> An attorney's representation becomes "materially limited" whenever his ethical responsibilities under the appropriate rules governing attorney conduct deviate from his fiduciary obligations as director.<sup>31</sup> As an agent of the corporation, any director has a duty of loyalty to the corporation itself and therefore, the shareholders as well. If an attorney's representation violates this duty of loyalty, due to a course of action that is self-interested, it represents a conflict of interest since the lawyer's responsibilities to the shareholders are compromised.<sup>32</sup>

In actuality, however, such a circumstance is extremely rare. The attorney is given the latitude to keep both positions if she reasonably believes the

<sup>26</sup> See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 410 (1998); see also Cornelia W. Honchar, *Service on a Board of Directors Can Pose Many Conflicts*, CHI. DAILY L. BULL., May 12, 1998, at 6.

<sup>27</sup> See generally MODEL RULES OF PROF'L CONDUCT Rule 1.7 (1999).

<sup>28</sup> *Id.*

<sup>29</sup> William Schwarz, *Law Firm Partnership and Benefits Report* (August 1998) (unpublished report, on file with author). Mr. Schwarz is a partner at Cadwalader, Wickersham & Taft who serves a director for companies including Viacom International, Inc.

<sup>30</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (1999) (stating that "[a] lawyer shall not represent a client if the representation of that client may be materially limited . . .").

<sup>31</sup> See Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413, 431 (1996).

<sup>32</sup> See *id.*

representation will not be materially impeded. Attorneys clearly enjoy the benefits of having broad discretion in a potentially dangerous realm. Although the risks are relatively low, the upshot of not removing oneself from a conflict of interest situation could be devastating.<sup>33</sup>

The dearth of case law on the topic is most likely attributable to the frequency of settlement once the threat of litigation arises. Nonetheless, lessons can be drawn from lawyer-director conflicts that have received significant publicity. In 1994, the stockholders of Weirton Steel Corporation forced the resignation of a well-respected attorney, Harvey Sperry, who had served as a director for ten years.<sup>34</sup> Sperry's firm was pulling in over \$1 million in legal business per year exclusively from Weirton Steel, but the firm also represented nearly two dozen rival steel makers.<sup>35</sup> The President of Weirton's Steel Employee Shareholders' Association told reporters, "[i]f we're going to have an independent director, we want one who's really independent."<sup>36</sup> This represents precisely the sort of conflict of interest that can arise from an attorney-director position. It would be nearly impossible for someone in Perry's position to keep the best interests of Weirton Steel in mind when his firm was directly interested in the performance of rival steel companies. It is quite likely that both the duty as attorney and as director could be hindered in this sort of situation.

Also receiving noteworthy publicity was the report of Hillary Rodham Clinton using her board influence at TCBY Enterprises, Inc. to help her then-partners at the Rose Law Firm in Little Rock to garner more than \$1.2 million of the company's legal business in 1991 to 1992.<sup>37</sup> It should be considered improper for a lawyer to use her position as director to channel business for her law firm. Doing so certainly takes away the essential element of serving the company, since the director's personal financial interest is clearly paramount. Any business decision that might involve potential litigation or needing the firm's services for any reason would cause a serious conflict of interest for the director. As one commentator states, "[i]f you have a self-interest, then, by necessity, you can't be looking after shareholder interests with the proper degree of objectivity."<sup>38</sup>

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<sup>33</sup> See generally *id.* (discussing possible sanctions in this area).

<sup>34</sup> See Gail D. Cox, *For Lawyers, Lure of the Boardroom Has Its Perils*, NAT'L L.J., July, 1, 1996, at B1.

<sup>35</sup> See *id.*

<sup>36</sup> *Id.*

<sup>37</sup> See *id.*

<sup>38</sup> *Id.* (quoting Melvyn I. Weiss, a specialist in stockholder derivative suits).



## VI. THE ATTORNEY-CLIENT PRIVILEGE

Another concern arising from serving as both lawyer and director is the possibility of surrendering information that might otherwise be privileged. Lawyers serving concurrently as directors of their client corporations run the risk of courts taking an all or nothing approach, finding the lawyer to be primarily a lawyer or businessperson, and treating communications accordingly. Therefore, it would be unethical if attorneys cried privilege when acting in the capacity of a director. The dual role should not serve as a clever way to expand the basic definition of attorney-client privilege.<sup>39</sup> This privilege is designed to run solely between the client and his attorney, and is the privilege of the client, not counsel. To that end, it would be unfair if this privilege were extended by counsel to protect information that would not otherwise be protected.

The harsh reality of serving in the dual role is that communications intended to be purely legal advice may be treated as business advice and lose privileged status. Moreover, a lawyer's position as a director can often be attributed to his legal background rather than his business sense. Thus, one might question whether all of the lawyer-director's advice should be treated as legal advice. However, when sitting on a board, the lawyer's role as a decision-maker does not limit him to the giving of advice. There is also a component of observation of whatever topic is brought before the board. Certainly, all discussions with an attorney-director present should not benefit from privilege. The dilemma becomes much more problematic in complex business issues where legal issues are inherently implicated. It is nearly impossible to draw the line and decipher when the attorney is acting as lawyer, and when he is acting as director. The primary reason why this line is difficult to draw is because nearly all the attorney-director's business advice takes his legal expertise into consideration.

Thus, the attorney clarifying certain communications as legal advice should be paramount. It will be difficult for the business entity to later prove that any particular communication occurred during a consultation with the lawyer-director for legal advice,<sup>40</sup> so a clarification by the attorney should be

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<sup>39</sup> See JOHN H. WIGMORE, A STUDENTS' TEXTBOOK OF THE LAW OF EVIDENCE, 392-93 (The Foundation Press, Inc. 1935). According to Wigmore, the attorney-client privilege arises when legal advice is sought from a professional lawyer who is acting in that capacity at the time. Furthermore, in order to be protected, the communication must be made in confidence and is permanently protected from disclosure unless waived by the client. See *id.*

<sup>40</sup> See Carolyn T. Thurston, *Corporate Counsel on the Board of Directors: An Overview*, 10 CUMB. L. REV. 791, 797 (1980).

a basic precaution in case the confidentiality of the communication is questioned. Nonetheless, there is a presumption that communication between a client and her attorney be treated as legal advice.<sup>41</sup> It remains to be seen whether this presumption would attach to the unique case of an attorney-director where both roles clearly overlap. Due to the precarious nature of the relationship, however, it is entirely possible that the business entity might bear the burden of convincing the court that the director was consulted as a lawyer rather than a director.<sup>42</sup>

An older case that vividly illustrates the difficulties of the dual role is *United States v. Vehicular Parking, Ltd.*<sup>43</sup> *Vehicular Parking* involved an antitrust claim brought by the government against a corporation contending that various communications with its attorney-director were privileged and therefore inadmissible at trial. The court determined that the blending of the dual role did not automatically allow the defendant to claim privilege, and in fact regarded several of the communications as basic business parlance.<sup>44</sup> *Vehicular Parking* was seen as accepting most communications from the lawyer-director as business advice rather than legal advice. Additionally, there were other circumstances working against the attorney-director in this situation. Primarily, the attorney-director's law office was established as the principal place of business for the corporation, and he commonly acted as business manager and agent for *Vehicular Parking*.<sup>45</sup> Clearly, the level of involvement the attorney-director had in the business affairs of the company led to presumption that he was acting in his business capacity as director.

Another way in which the attorney-client privilege may be compromised is any communication between the lawyer-director and the board in a shareholder derivative suit. The fiduciary obligations of the lawyer-director and the corporation to the shareholders will most likely override the privilege afforded between attorney and client.<sup>46</sup> The court in *Garner v. Wolfenbarger*,<sup>47</sup> a stockholder derivative case, denied a claim of attorney-client privilege for a lawyer-director.<sup>48</sup> Reasoning that the privilege exists for the benefit of the

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<sup>41</sup> See, e.g., *Sogg & Solomon, supra* note 14, at 155-56; see also *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (holding that there is a prima facie presumption that communication between client and attorney is for the sake of legal advice).

<sup>42</sup> See *Thurston, supra* note 40, at 811.

<sup>43</sup> 52 F. Supp. 751 (D. Del. 1949).

<sup>44</sup> See *id.* at 753. The court, pointing out several exhibits, boldly stated "[t]his is more than attorney-talk. It is big—as well as basic—business diction." *Id.*

<sup>45</sup> See *id.*

<sup>46</sup> See *Sogg & Solomon, supra* note 14, at 156; see also *Valente v. PepsiCo, Inc.*, 68 F.R.D. 361, 368 (D. Del. 1975).

<sup>47</sup> 430 F.2d 1093 (5th Cir. 1970).

<sup>48</sup> See *id.* at 1100-01.

client and not the attorney, the court found the assertion of privilege contradictory since the plaintiffs (as shareholders) are one entity with the corporation and the interests should be mutual.<sup>49</sup> Therefore, a court in all likelihood will not honor any claim that a particular communication is privileged to the board but not the shareholders or the corporate entity itself. This decision does not cut against Model Rule 1.13, since the entity of the corporation itself is more represented by its shareholders than by its agents—the directors and officers.<sup>50</sup>

## VII. CONCLUSION

Perhaps the arrangement of lawyers serving on the board of client corporations is such a commonplace phenomenon that the notion of banning the practice as unethical would come across as rather jarring and possibly highhanded. The long tradition of accepting the dual role has institutionalized the practice as a convenient and effective way for attorneys to increase both personal profits and influence. Furthermore, clients enjoy the accessibility of having a legal expert in a decision-making capacity. However, simply because the practice is commonplace should not give attorneys a carte blanche to take advantage of an arrangement which teeters on the edge of violating the rules but which has not been forbidden outright by the ABA.

The very nature of the dual role is inherently contradictory. Absolute objectivity, while ideal, is unlikely to result from a situation where the attorney knows her decisions will have an effect on her (or her firm's) welfare. Even more disconcerting is the weak standard set by the ABA, essentially calling on the attorneys themselves to determine whether the representation will be hindered.<sup>51</sup> This lenient self-policing leaves too much room for abuse.

Prohibiting the practice outright would prove to be wildly unpopular, but the ABA should consider adding teeth to their opinion. Primarily, it is paramount that the discretion be taken out of the hands of the attorney himself, and given to the client after an informed consultation. The more lenient the standard, the higher the probability for abuse, and the standards of self-policing are lenient indeed.

Below is a proposed rewording of Comment 14 to Model Rule 1.7:

*[14] A lawyer serving as counsel for a corporation or other organization who is also a member of its board of directions is in a*

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<sup>49</sup> See *id.*

<sup>50</sup> See *supra* notes 9-13 and accompanying text.

<sup>51</sup> See *supra* notes 3-6 and accompanying text.

*position where there is an ever-present possibility of conflict of interests. Regardless of the frequency with which such conflicting situations may arise and the potential intensity of the conflict, the lawyer is required to consult with the client before accepting the dual role. Consultation shall include discussion of the contradictory nature of the position and how such conflicts might affect representation. It is recommended that consultation of this kind be reduced to writing and signed by both attorney and client. If there is material risk, to the attorney or client, that the dual role will compromise the lawyer's independence of professional judgment or the client's interests, the lawyer shall not serve as director.*

The requirement of consultation would at least put clients on notice that the dual role is somewhat irregular and conflicts may arise which mandate withdrawal as counsel pursuant to Model Rule 1.16.<sup>52</sup> Furthermore, if clients were always given the opportunity to object with full knowledge of the potential conflicts, the number of attorney-directors would likely decline as clients became more wary. Nonetheless, many business entities would still want to keep a lawyer on their board to infuse legal discussion into making business decisions, and since the lawyer is relied upon to simplify and make judgments on the arcane and otherwise inaccessible nature of the law.<sup>53</sup> Otherwise, the practice of having an attorney present during all board meetings but not on the actual board itself may be a viable alternative.

Just as important as informing the client of a potential conflict of interest is the need for the attorney to fulfill his duties of care and loyalty to the client.<sup>54</sup> If there is a genuine chance that a conflict of interest due to the dual role of attorney and director would hinder the representation of the client, representation should not continue unless the client explicitly waives objection to the arrangement.

Beyond the simple conflict of interest, the attorney should also be aware of the possibility of a higher standard of care once accepting the dual role. In a society as litigious as ours, concerns of personal liability for malpractice should not be ignored. The fiduciary roles as both attorney and director expose accountability to a large pool of potential plaintiffs.<sup>55</sup> Moreover, the dual

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<sup>52</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.16 (1999).

<sup>53</sup> See Robert A. Kagan and Robert E. Rosen, *Symposium on the Law Firm as a Social Institution: On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 406 (1985).

<sup>54</sup> See MODEL RULES OF PROF'L CONDUCT Rule 1.7 cmt. 1 (1999).

<sup>55</sup> See Albert, *supra* note 31, at 452.

nature allows plaintiffs a variety of legal theories with which to attack the lawyer-director.<sup>56</sup>

Lastly, the attorney-director need be especially careful in safeguarding the attorney-client privilege. While general business rhetoric will not be protected by the privilege, the client is entitled to a privilege, at least in some form. It therefore falls upon the shoulders of the attorney to ensure that the necessary attorney-client privilege is protected. Clearly, the line between business advice and legal advice may become skewed, but a clarification that a certain communication is purely legal advice may serve to protect the privilege should it be questioned in later proceedings.

Ultimately, the ABA has established a broad standard that is easily followed—self-policing. By giving the attorney rather than the client the discretion, the phenomenon of the attorney-director will continue to flourish. Nonetheless, due to the inherent proclivity of the dual role leading to conflicts of interest, wearing the hats of both counsel and director remains somewhat precarious, and a prudent attorney will accept the dual arrangement cautiously. Given the widespread nature of the practice, though, a red flag should go up whenever self-policing is simply replaced by self-serving.

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<sup>56</sup>*See id.* at 453.