

## Should Lawyers Serve as Corporate Directors?

BY RONALD C. MINKOFF

In the wake of revelations about the cozy relationship between Enron and its regular outside counsel, Vinson & Elkins, corporate lawyers should already know to be cautious about getting too close to their clients. Nevertheless, we still get inquiries from a wide array of attorneys about serving on their corporate clients' boards of directors. These attorneys consider the chance to serve as a director not only to be a personal honor, but also a priceless business getting opportunity which allows them to develop close working relationships with corporate officers while hobnobbing with the other directors (who themselves may have legal business to dispense).

In our current "eat what you kill" legal environment, chances such as these are hard to pass up. Nevertheless, both the New York Code of Professional Responsibility and an ABA Task Force have cautioned against lawyers' serving on corporate boards. EC 5-18 captures the problem succinctly:

A lawyer for a corporation or other organization *who is asked to become a member of its board of directors* should determine whether the responsibilities of the two roles may conflict... If there is material risk that the dual role will compromise the lawyer's independent professional judgment on behalf of the corporation, the lawyer should not serve as a director.

Similarly, a Task Force of the ABA Litigation Section declared in 1998 that the practice of serving both as a lawyer and as a client "should be discouraged in most cases" even though neither the Model Code of Professional Responsibility nor the Model Rules of Professional Conduct specifically prohibit it. See, John F.X. Peloso & Irwin H. Warren, *The Lawyer-Director: Implications for Independence*, 1998 A.B.A. Sec. Litig. Task Force Rep. on the Indep. Law. 14, 63-64 (1998) ("Task Force"). The Task Force made clear that it used the phrase "in most cases" because the legal community would probably not accept a blanket prohibition on the practice. See, *id.* at 63. See, also, *Gries Sports Enter., Inc. v. Cleveland Browns Football Co.*, 496 N.E.2d 959, 982 (Ohio 1986) (Wright J., dissenting) ("the personnel of a great many, if not most, American corporations would have to be reconstituted" if lawyers were completely prohibited from being board members).

The primary problem with a lawyer's serving in the dual role as director and counselor is that the lawyer becomes his own client and ultimately "has to advise himself or herself as to what is or is not appropriate, what degree of risk... is present, and whether prior board conduct (including conduct in which the attorney participated as director) was proper or lawful or needs to be changed or disclosed." *Id.* at 38. Conflicts may ensue when legal fees are discussed at board meetings, when the corporation is involved in litigation and the client is forced to find alternative counsel, when the lawyer is asked to take positions in litigation that she opposed while on the board, or when the attorney-client privilege is compromised because the lawyer's advice is deemed to be related to business, not legal, matters. See, Patrick W. Straub, *ABA Task Force Misses the Mark*, 25 Del. J. Corp. L. 261, 265-266 (2000) (discussing the conflicts of

interest in greater depth); ABA Formal Op. 410 (1998) (lawyer may "pull her punches" when forced to assert positions she opposed on the board). Significantly, under DR 5-105(D) and Model Rule 1.10(a), the lawyer's conflict will be imputed to the "rest of her firm's lawyers, who are also disqualified from the representation." Id.

One solution is to have the lawyer abstain from opining on legal fees or offering advice outside the legal realm. See, e.g., *United States v. Chevron*, No. C-94-1885 SBA, 1996 U.S. Dist. LEXIS 4154, at \*7-8 (N.D. Cal. Mar. 13, 1996) (holding that there was no attorney-client privilege since the advice had been given for "simultaneous [consideration] by legal and nonlegal personnel" and therefore it "cannot be said that the primary purpose of the [advice was] to secure legal advice"). See, also, *Restatement (Third) of the Law Governing Lawyers* § 216 cmt. D (Proposed Final Draft No. 1, 1996) (generally banning lawyers who are also board members from voting on legal fees). This approach, however, is too simplistic: it fails to take into account the varied roles a lawyer plays as a board member, and unduly prevents duly authorized board members from participating in corporate decision-making. Instead, prevailing authority suggests that a lawyer may serve on his client's board if the following four-step analysis is satisfied:

1. What are the lawyer's financial, business, property, or personal interests in the matter?
2. Will any of those interests definitely affect the lawyer's professional judgment in representing or advising the client? If not, is it at least "reasonably" possible that they "may" affect the lawyer's judgment?
3. If so, would a "disinterested lawyer" nevertheless believe that the lawyer's representation of the client the lawyer's interests after the lawyer has fully disclosed to the client not only the nature of the lawyer's conflicting interests but also the manner in which those interests may affect the lawyer's professional judgment in the matter? In other words, does the client consent to the certain or reasonably possible conflicts with the lawyer's own interests after the lawyer has fully explained the conflicts and their possible impact on the client's matter?

R. Simon, *Simon's New York Code of Professional Responsibility Annotated*, 336-337 (2001). For an extended version of the test, see, ABA Formal Op. 410 (1998) ("Lawyer Serving as Director of Client Corporation"). As the ABA Committee on Professional Responsibility recognized, this approach - which is really just a modification of the analysis required for any personal interest conflict under DR 5 101(A) and Model Rule 1.7 - can work only if there are "full, free and frank discussions by the lawyer with the corporation's executives and other board members" about potential conflicts, both at the outset of the lawyer's board membership and as particular issues arise. Id. Such a methodical approach ensures that both the lawyer and his client are aware, and are able to gauge, the potential conflict of interest and proceed accordingly.

There are two other simple guidelines lawyer-directors should follow.

As to attorney-client privilege issues, lawyer-directors must be especially careful to ensure that any legal advice they provide remains cloaked by the privilege. Accordingly, the lawyer-director must make clear that a meeting at which he is being asked for legal advice is being held solely for that purpose. The lawyer-director should even have other firm attorneys present at the meeting, to emphasize its

exclusively legal nature, and should avoid providing business advice during the session. See, ABA Formal Op. 410 (1998).

Finally, the lawyer-director must avoid being placed in a position in which the interests of the lawyer's firm may be favored over those of the corporate client. Indeed, the Association of the Bar of the City of New York has been particularly strict about this, stating, in N.Y. City 1988-5, that the lawyer- director may not participate in any board decision that will or reasonably may affect the lawyer's personal or financial interests as counsel. Without taking such a blanket approach, the ABA also made it clear that "the prudent lawyer should at a minimum abstain from voting as a director on issues which directly involve the relationship of the corporation with her law firm. . . ." ABA Formal Op. 410 (1998).

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