

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2008-2

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SYLLABUS: A lawyer who sits on the board of directors of a corporation but not as corporate counsel has a material limitation conflict of interest under Rule 1.7(a)(2) that prohibits the lawyer from representing a client in a lawsuit against the corporation. Pursuant to Rule 1.7(c)(2), the conflict of interest of a lawyer, who sits as a corporate director but not as corporate counsel, in the representation of a client suing the corporation cannot be waived under Rule 1.7(b) because the client and the corporation are directly adverse in the same proceeding. The corporation is not technically a client of a lawyer director who is not corporate counsel, but a lawyer director cannot isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer.

The prohibited lawyer's conflict of interest is imputed to the law firm under Rule 1.10(a). Therefore, it would be improper for a law firm member, partner, or associate of the prohibited lawyer to represent a client in a lawsuit against the corporation on which the prohibited lawyer serves on the board of directors. Imputation of the law firm's disqualification may be waived by the affected client (the client suing the corporation) pursuant to Rule 1.10(e); however, pursuant to Rule 1.7(c)(2), the conditions set forth for waiving a conflict under Rule 1.7(b) cannot be met because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not technically a client of the law firm but the lawyer director's fiduciary duties to the corporation cannot be isolated from the lawyer's professional duties.

This opinion applies to the representation of a client who is directly adverse in the same proceeding to a corporation on which the lawyer or a member or associate of the lawyer's firm serves as a corporate director.

OPINION: The question addressed in this opinion regards a lawyer's service on a board of directors of a corporation, but not in a dual role as corporate counsel.

When a lawyer sits on the board of directors of a corporation but not as corporate counsel is it proper for a law firm member, partner, or associate to represent a client in a lawsuit against the corporation?

Introduction

A lawyer's service on a board of directors of a corporation is fraught with potential conflicts of interest, but such service is not barred by the Ohio Rules of Professional Conduct. Some lawyers serve in a dual role as corporate director and corporate counsel, while some lawyers serve as corporate director but not as corporate counsel.

Serving in a dual role as a corporate director and corporate counsel is cautioned because of the ethical challenges: conflicts of interest calling into question the lawyer's professional independence; confusion among other directors and management as to whether a lawyer's views are legal advice or business suggestions; and concerns regarding protection of the confidentiality of client information, especially the attorney-client privilege. See ABA Formal Opinion 98-410 (1998). A common example of a conflict of interest calling into question a lawyer's independent judgment would be if a lawyer director is called upon to advise the corporation in matters involving the actions of the directors.

But, serving as a corporate director and not as corporate counsel also raises ethical concerns. For instance, conflicts of interest may arise between the lawyer's duties as corporate director and the lawyer's duties in representation of clients. Directors and management may rely on the views of the lawyer as legal advice rather than business advice, even though the lawyer is not serving as the corporate counsel. Concerns may arise regarding protection of confidential and privileged information particularly if other directors and managers look to the lawyer director for legal advice or if the lawyer director voluntarily or inadvertently offers legal advice as well as business advice or if the line between the lawyer director's business advice and legal advice is so fine that it cannot be parsed as one or the other.

The analysis of the question raised begins with whether a lawyer sitting on the board of directors of a corporation, but not serving as corporate counsel, may represent a client in a lawsuit against the corporation. If precluded from the representation, the analysis becomes whether the conflict of interest is imputed to the law firm. A prerequisite to this analysis is a review of the applicable rules.

Applicable Rules of Professional Conduct

Pertinent to resolving the inquiry is Rule 1.7 and Rule 1.10 of the Ohio Rules of Professional Conduct.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*.

[(b) through (g) omitted]

(e) A disqualification required by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

Discussion of Rule 1.7

Rule 1.7 establishes two broad categories of conflict of interest. The first category, Rule 1.7(a)(1), is referred to as a “directly adverse” conflict of interest—a representation of a client directly adverse to another current client. The second category, Rule 1.7(a)(2), is referred to as a “material limitation” conflict of interest—a representation in which there is a substantial risk the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by the lawyer’s own personal interests.

Both types of conflicts of interest may be ameliorated under Rule 1.7(b) if the requirements of the rule are met. The requirements in Rule 1.7(b)(1), (2), (3) are that a lawyer must be able to provide competent and diligent representation to each affected client; each affected client must give informed consent, confirmed in writing; and the representation must not be precluded by division (c) of the rule.

Rule 1.7(c) establishes two types of conflict that may not be ameliorated: a representation prohibited by law; and a representation involving the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

Material limitation conflict of interest

As explained in Comment [20] to Rule 1.7, “[t]he lawyer’s own interests should not be permitted to have an adverse effect on representation of a client.”

A corporate director has legal and fiduciary duties to the corporation. Under Ohio’s general corporation law, “[a] director shall perform the director’s duties as a director, including the duties as a member of any committee of the directors upon which the director may serve, in good faith, in a manner the director reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person in a like position would use under similar circumstances.” Ohio Rev. Code Ann. §1701.59(B) (West Supp 2008). Under Ohio’s general corporation law, “[e]xcept where the law, the articles, or the regulations require action to be authorized or taken by shareholders, all of the authority of a corporation shall be exercised by or under the direction of its directors.” Ohio Rev. Code Ann. §1701.59(A) (West Supp

2008). Under Ohio's nonprofit corporation law, parallel duties exist. Ohio Rev. Code Ann. §1702.30(A), (B) (West Supp 2008).

A lawyer has professional duties of loyalty and independent judgment to a client. Protection of these duties is the reason for the conflict of interest rules. As explained in Comment [1] to Rule 1.7, "[t]he principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of these rules. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All potential conflicts of interest involving a new or current client must be analyzed under this rule."

A lawyer's fiduciary duties as a corporate director may create a material limitation conflict on the lawyer's professional duties to a client in a legal representation.

Comment [18] to Rule 1.7 explains that a lawyer's duties of loyalty and independence may be materially limited by a lawyer's fiduciary duties as a corporate director. "A lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as family members or persons to whom the lawyer, in the capacity of a trustee, executor, or corporate director, owes fiduciary duties."

Comment [19] to Rule 1.7 further explains that the dual roles of corporate director and corporate counsel may present a "material limitation" conflict.

[19] If a lawyer for a corporation or other organization serves as a member of its board of directors, the dual roles may present a "material limitation" conflict. For example, a lawyer's ability to assure the corporate client that its communications with counsel are privileged may be compromised if the lawyer is also a board member. Alternatively, in order to participate fully as a board member, a lawyer may have to decline to advise or represent the corporation in a matter. Before starting to serve as a director of an organization, a lawyer must take the steps specified in division (b), considering whether the lawyer can adequately represent the organization if the lawyer serves as a director and, if so, reviewing the implications of the dual role with the board and obtaining its consent. Even with consent to the lawyer's acceptance of a dual role, if there is a material risk in a given situation that the dual role will compromise the lawyer's independent judgment or ability to consider, recommend, or carry out an appropriate course of action, the lawyer should abstain from participating as a director or withdraw as the corporation's lawyer as to that matter.

A material limitation conflict may also arise when a lawyer serves only as a corporate director and not corporate counsel. The lawyer's duties as a corporate director may interfere with the lawyer's duties of loyalty and independent judgment to a represented client. A prime example of a material limitation conflict of interest is provided in the questions presented--a client comes to a lawyer and wants to retain the lawyer to sue the corporation on which the lawyer serves as corporate director. The lawyer's duties as a corporate director would materially limit the lawyer's ability to represent the client against the corporation.

Thus, as to the Board's first consideration of whether a lawyer who serves as a corporate director and not as corporate counsel has a conflict of interest in a representation of a client in a lawsuit against the corporation, the answer is yes. It is a conflict of interest under Rule 1.7(A)(2) for a lawyer who sits as a corporate director and not as corporate counsel to represent a client suing the corporation because the lawyer's fiduciary duties to the corporation and the lawyer's personal interest in serving as a corporate director would be a material limitation upon the lawyer's ability to represent the client. A significant risk would exist that the lawyer's duties of loyalty and independence on behalf of the client would be materially limited by the lawyer's fiduciary duties to the corporation and the lawyer's own personal interest in serving as a corporate director.

Pursuant to Rule 1.7(c), the conflict of interest of a lawyer, who sits as a corporate director and not as corporate counsel, in the representation of a client suing the corporation cannot be waived under Rule 1.7(b) because the client and the corporation are directly adverse in the same proceeding. The corporation is not technically a client of a lawyer director who is not corporate counsel, but a lawyer director cannot isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer.

And, although not the subject of this opinion, the Board notes that it would be both a material limitation conflict under Rule 1.7(A)(2) and a directly adverse conflict of interest under Rule 1.7(A)(1) for a lawyer who sits as a corporate director *and* as corporate counsel to represent a client suing the corporation. The lawyer would be representing one client directly adverse to another client in the same proceeding. And, pursuant to Rule 1.7(c), in that situation the conflict could not be ameliorated, not even by meeting the conditions set forth in Rule 1.7(b).

Imputation of conflict of interest

Now, the Board must consider whether the lawyer's conflict of interest is imputed to other lawyers in the law firm. Rule 1.10 governs the imputation of conflicts of interest. Rule 1.10 is already set forth in its entirety.

In pertinent part, Rule 1.10(a) provides that if the lawyers in a law firm know or reasonably should know that a lawyer is prohibited by Rule 1.7 from representing

a client none of the lawyers in the firm shall represent the client, unless the lawyer's prohibition is based upon a personal interest of the prohibited lawyer *and* does not present a significant risk of materially limiting the representation of the client by the other lawyers in the firm.

In brief, a conflict of interest is not imputed to other lawyers in the law firm if two conditions exist: 1) the conflict of interest is based upon a personal interest of the lawyer and 2) the conflict of interest does not present a significant risk of materially limiting the representation of the client by the other lawyers in the law firm.

Examples of personal interest conflicts are provided in Comments [20], [21], and [22] to Rule 1.7. Comment [20] provides as examples, situations in which the probity of a lawyer's own conduct in a transaction is in serious question; a lawyer's discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent; or a lawyer's related business interest, such as referring clients to an enterprise in which the lawyer has an undisclosed financial interest. Comment [21] provides as an example lawyers closely related by blood or marriage representing different clients in the same matter or in substantially related matters whereby there may be a substantial risk that client confidences will be revealed and the family relation will interfere with both loyalty and independent professional judgment. Comment [22] provides as an example, a sexual relationship with a current client that predates the formation of the client-lawyer relationship.

The material limitation conflict of interest of a lawyer who serves as a corporate director and whose client is suing the corporation arises from both the lawyer's fiduciary duties to the corporation *and* the lawyer's personal interest in serving on the board. Both of these material limitation conflicts of interest, the personal interest and the fiduciary duties owed, pose a significant risk of materially limiting the lawyer's loyalty and independence in representing a client against the corporation.

Thus, the Board's view is that the conflict of interest of the lawyer who serves as corporate director and not as corporate counsel and whose client is suing the corporation is imputed to other lawyers in the firm under Rule 1.10(a). Because the prohibited lawyer's conflict is based upon a fiduciary duty to the corporation as well as a personal interest of the prohibited lawyer *and* presents a significant risk of materially limiting the representation of the client the conflict is imputed to the law firm pursuant to Rule 1.10(a).

For other authority imputing a lawyer director's conflict of interest to other members of the lawyer's firm under Rule 1.7 and Rule 1.10(a) see Virginia State Bar Assn. LEO 1821 and *Berry v. Saline Mem. Hosp.* (Ark. 1995), 322 Ark. 182, 186-87, 907 S.W.2d 736, 739 (imputing conflict of a former lawyer director).

Rule 1.10(e) does provide for waiver of the law firm's disqualification upon consent of the affected client under conditions stated in Rule 1.7. But, pursuant to Rule 1.7(c)(2), the conditions for waiving a conflict under Rule 1.7(b) cannot be met, because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not a client of the law firm but a lawyer director's fiduciary duties to the corporation cannot be insulated from the lawyer's professional duties.

Views of other states

Ethics committees in other states have advised that a Rule 1.7 material limitation conflict of interest exists when a lawyer sits on the board of a company whose interests are inconsistent with those of the lawyer's client. See Illinois State Bar Assn. Op. 02-01 (2002) (explaining that a material limitation conflict of interest exists between a lawyer's position on the board of a reinsurer and the representation of the underlying insurance company regarding property insurance claims; and advising that "[a]bsent disclosure and consent, a lawyer cannot represent an insurer with regard to a claim where the insurer's interests are inconsistent with those of a reinsurer on whose Board the lawyer sits"). See Advisory Comm. Missouri Sup.Ct, Op. 970171 (advising that there was no conflict for a lawyer who formerly served on the board of directors of a not for profit corporation, not as counsel, to represent a client seeking to file an intentional tort suit against the corporation's employees and chairman; however, if the actions occurred while the attorney was on the board or as a result of the board's actions while the attorney was a member, the attorney would have a conflict of interest prohibiting the attorney from the representation). See Virginia State Bar, LEO 1821 (concluding that a lawyer who sits on the board of a trust company has a material limitation conflict of interest precluding the lawyer from representing a party suing the trust company; the conflict of interest is imputed to attorneys in the law firm but may be cured).

Conclusion

A lawyer who sits on the board of directors of a corporation but not as corporate counsel has a material limitation conflict of interest under Rule 1.7(a)(2) that prohibits the lawyer from representing a client in a lawsuit against the corporation. Pursuant to Rule 1.7(c)(2), the conflict of interest of a lawyer, who sits as a corporate director but not as corporate counsel, in the representation of a client suing the corporation cannot be waived under Rule 1.7(b) because the client and the corporation are directly adverse in the same proceeding. The corporation is not technically a client of a lawyer director who is not corporate counsel, but a lawyer director cannot isolate the fiduciary duties owed to the corporation from his professional duties as a lawyer.

The prohibited lawyer's conflict of interest is imputed to the law firm under Rule 1.10(a). Therefore, it would be improper for a law firm member, partner, or associate of the prohibited lawyer to represent a client in a lawsuit against the corporation on which the prohibited lawyer serves on the board of directors. Imputation of the law firm's disqualification may be waived by the affected client (the client suing the corporation) pursuant to Rule 1.10(e); however, pursuant to Rule 1.7(c)(2), the conditions set forth for waiving a conflict under Rule 1.7(b) cannot be met because the corporation and the client are directly adverse to each other in the same proceeding. The corporation is not technically a client of the law firm but the lawyer director's fiduciary duties to the corporation cannot be isolated from the lawyer's professional duties.

This opinion applies to the representation of a client who is directly adverse in the same proceeding to a corporation on which the lawyer or a member or associate of the lawyer's firm serves as a corporate director.

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