



# To Serve or Not to Serve

by Wendy Inge and Donna Lange

You act as corporate counsel for Corporation X. They value your opinion and ask you to serve on their board of directors.

Your response is:

- a. You can't believe it has taken them so long to ask and immediately accept;
- b. You agree to serve because if you decline they will be offended;
- c. You agree to serve because you will make your mother proud;
- d. none of the above.

If you picked “none of the above”, you are on the right track. In 1998, the ABA released Formal Opinion 98-410 (2-27-98)<sup>1</sup> and a Task Force Report from the Litigation Section, both of which address the propriety of serving on the Board of Directors of a Corporate client.<sup>2</sup> The Task Force Report confirmed and supported the Formal Opinion while expanding upon it. The report recognized the practice of lawyers serving on their corporate clients' boards of directors as a long-standing one that could have benefits for both the lawyer and the client. However, after balancing the ethical, professional, and practical risks created by the lawyers' dual role, the task force concluded that the practice should be discouraged in most instances. Likewise, the Formal Opinion concluded that while not unethical per se for the lawyer to serve in this dual role, it recommended that counsel who elects to perform the dual role should take steps to minimize the risks and exposures involved. The consistency between the two sets of recommendations was no coincidence since both groups had access to the other's documents and progress. Thus, the suggested guidelines set forth in both documents are largely the same and are shared herein.

First, you must determine that the dual role will not compromise your independence of professional judgment. Then,

you should fully explain, and memorialize in writing, the potential problems that could result, specifically:

1. Absence or waiver of attorney/client privilege and potential disclosure of confidential information;
2. Potential conflicts of interest which prohibit you or your firm from representing/advising company;
3. Potential need for you to withdraw from the board where dual role will compromise your independent judgments;
4. Increased risk that you may be individually liable and your law firm vicariously liable to shareholders;
5. Potential for costs to indemnify directors not being recoverable under D&O insurance due to exclusions triggered by your dual role; and
6. The alternative of simply attending board meetings as counsel rather than director should be explored.

After full disclosure, you and the corporation may still wish to proceed and should then adopt measures that will reduce the anticipated risks. The following measures may help control these risks:

- Do not participate in discussions concerning attorney's fees, selection of counsel, and other situations in which you or your firm may have an interest.
- Safeguard the attorney-client privilege. For example, clarify in board deliberations and minutes: (i) whether questions from other directors to you are being directed to you in your role of lawyer or director and (ii) whether your response is providing legal advice or business judgment. Review board minutes to see that they reflect when certain communications fall within the attorney-client privilege.
- Examine your professional liability insurance and have

the corporation examine their directors and officers liability insurance to review coverage and exclusions.

- Remain mindful that your activity in the dual role may require more frequent and thorough documentation.

Finally, whenever working with the entity, you must continuously evaluate the potential problems to determine when you should abstain from voting or refrain from rendering legal advice.

Serving in a dual role is not easy and in most instances is better off avoided. However, if you feel you must serve in such a dual role you should also remember the risks to you as a board member and take the following steps to minimize them:

1. Investigate before voting—don't rubber stamp staff recommendations;
2. Act independently making your vote recorded if you dissent;
3. Review minutes moving for corrections where necessary; and
4. Refrain from discussing corporate matters outside of the board meetings. ⚠

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ENDNOTES

- 1 ABA Formal Opinion 98-410: Lawyer Serving as Director of Client Corporation (2-27-98).
- 2 The Lawyer-Director: Implications for Independence (Task Force on the Independent Lawyer, A.B.A. Sec. Litigation. March 1998).

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