

# Lawyers and Non-Profit Board of Directors: An Ethical Review

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## Lawyer on Non-Profit Board

Special Considerations for Lawyers  
Accepting a Dual Role

## Lawyer Serving on the Board



### Lawyer Serving as Board Member or Board Member Who is also a Lawyer?

- Attorney-Client Relationship
- Misconduct
- Privilege
- D&O and Malpractice Insurance
- Conflicts of Interest
- Disqualification

#### Questions to Consider Before Accepting Dual Role:

- Am I asked to provide legal service or advice to the board?
- Has the extent of my representation been clearly defined?

## Board Member Who is a Lawyer



- Attorney-Client Relationship
  - Providing legal services or advice may create an attorney-client relationship
- Misconduct
  - Board members owe a fiduciary duty and duty of loyalty to the non-profit, a breach can result in professional discipline
- Privilege
  - Other board members may be accustomed to the general notion that communications with a lawyer are privileged
- Insurance
  - D&O exclusion when not acting "solely" as a board member

#### Questions to Consider Before Accepting Dual Role:

- Do the board and I understand that our conversations are not protected by the attorney-client privilege?
- Does the corporation have D&O insurance?
- Does the D&O insurance exclude coverage when the otherwise insured person is covered by a different policy?

## Lawyer Serving on the Client's Board



- Attorney-Client Relationship
  - Lawyer owes his or her professional obligations to non-profit client and not to the board as a whole or to any individual member
- Privilege
  - Difficult to distinguish whether lawyer is acting in his or her board member capacity or as a lawyer
  - Communications made in the presence of third parties destroy the privilege
- Insurance
  - Malpractice exclusion when acting in a capacity other than a lawyer

### Questions to Consider Before Accepting Dual Role:

- Do the board and I understand when a discussion of a legal issue is or is not a legal opinion that is protected by attorney client privilege?
- Do the board and I understand that the non-profit is the client?
- Does my professional malpractice insurance cover me?
- Does the malpractice insurance exclude coverage when a lawyer is covered by another policy, D&O?
- Does the D&O coverage exclude when an otherwise insured person is covered by an attorney liability policy?

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## Conflicts of Interest



### Key Points:

Lawyer must be able to exercise his or her professional independence

Non-waivable conflicts may disqualify lawyer and lawyer's firm

Conflicts may not be waivable by board's informed consent on behalf of non-profit

- Duties as a board member may conflict with duties as the non-profit's lawyer
- Legal position of the non-profit and the board may conflict
- Lawyer may be asked to pursue matters as a lawyer that he or she opposed as a board member
- The non-profit client may request advice of a matter in which the lawyer was involved as a board member
- Lawyer may be asked to take actions as a board member that involve the lawyer or the lawyer's firm
- The lawyer or lawyer's firm may be asked to represent the non-profit in litigation against the board and/or organization

### Conflict Questions to Consider Before Accepting Dual Role

- Have I considered the potential conflicts of interest that may arise from a dual role?
- Have I discussed the potential conflicts of interest with the board?
- Have I considered and discussed with the board how I would handle conflicts?

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## Planned Giving

Competent Representation of a Non-Profit that Participates in a Planned Giving Program



## Planned Giving

To competently represent a non-profit that participates in a planned giving program, a lawyer should:

- Have a general knowledge of the legal and ethical issues involved with planned giving programs
- Understand the general legal issues surrounding the potential donor
- Avoid actual conflicts and the appearance of conflicts

## Planned Giving



To competently represent a non-profit that participates in a planned giving program, a lawyer should:

- **First**, have a general knowledge of the legal and ethical issues involved with planned giving programs
  - Securities
  - Tax
  - Estate Planning/Probate
  - Planned Giving Ethical Standards
- No need to know everything – but know what you don't know!

## Planned Giving



To competently represent a non-profit that participates in a planned giving program, a lawyer should:

- **Second**, understand the general legal issues surrounding the potential donor
  - Duress
  - Undue Influence
  - Potential Donor's Lawyer's Competence
  - Diminished Capacity

## Planned Giving



To competently represent a non-profit that participates in a planned giving program, a lawyer should:

- **Finally**, avoid actual conflicts and the appearance of conflicts
  - Beware dual representations of non-profits and potential donors
  - Avoid inadvertently creating an attorney-client relationship with potential donors:
    - Speak to potential donors in groups
    - Provide potential donors with general information
    - Meet with potential donors one-on-one only in the presence of the potential donor's lawyer
  - Recommend that the potential donor consult other professionals, including:
    - Accountants
    - Financial planners
    - Insurance professionals
    - Trust officers
    - Stockbrokers

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Thank You