

Ethical Considerations for Attorneys Serving on Nonprofit Boards



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Attorneys as Board Members: Ethical Pitfalls

- Can being on a Board of a nonprofit corporation get you on the ethical hot seat?
- Who is your Client?
- Conflicts of Interest & Fiduciary Duties
- Confidentiality v. Disclosure
- Excessive Compensation & Self-Dealing Concerns
- Other Practical Considerations
- When the Attorney Must Resign



Volunteer Attorneys

WE ARE VOLUNTEERS SERVING ON BOARDS

Where Nonprofit Law goes BUMP in the night with other practice areas:

- Real Estate Law (purchase, sale, property tax exemption)
- IP (copyrights, trademarks, patents)
- Employment Law (volunteers v. employees, EE v. IC, EEOC/MDHR)
- Business Law (ownership??, formation/dissolution, Articles & Bylaws, mergers)
- Tax Law (deductibility requirements, disclosures to donors, filings)
- Estate Planning (charitable bequests, family foundations, *cy pres*)
- Administrative Law (charitable gambling and other gov't licenses, government audits)
- Environmental Law (conservation, easements, pollution concerns with gifted property)
- Criminal (theft, embezzlement)
- Contracts (you name it!)
- Professional Responsibility/Ethics (conflicts of interest & fiduciary duties, advertising issues, authority to represent??)



Being a Director

- Attorneys are often sought out to be Directors and Officers for nonprofit organizations because they bring special skills – superior reasoning skills, advanced schooling, expertise, attention to detail, and the THOUGHT of free legal advice.
- But, with great power comes great responsibility....



BUT...Nonprofit as CLIENT?

- Formation of the Attorney-Client Relationship:
 - Formation of an attorney-client relationship requires the client’s intent to form the relationship and the lawyer’s consent or failure to manifest the absence of consent with the knowledge that the client is reasonably relying on the lawyer to provide legal services. Restatement Third, The Law Governing Lawyers § 14.
 - An attorney-client relationship may be established using either contract or tort theory. *See Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).
 - A contract for legal services can be express or implied from the parties’ conduct. *Ronnigen v. Hertogs*, 199 N.W.2d 420, 422 (Minn. 1972).
 - Under tort theory, an attorney-client relationship is created when a person seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on the advice. *Admiral Merchs. Motor Freight, Inc. v. O’Connor & Hannan*, 494 N.W.2d 261, 265-66 (Minn. 1992).
 - Attorney-client relationship may also be created by court order. *See* Restatement Third, The Law Governing Lawyers § 14(2), and comment g.
 - Inadvertently Creating Attorney-Client Relationships:
 - What happens when legal questions arise at Board meetings?
 - If you provide “advice,” does the rest of the Board think you are acting in the role of the “nonprofit’s attorney” or merely as a nonprofit “Director”?
 - Balance willingness to be philanthropic with possible malpractice
 - When you are a lawyer, other Board members may approach you with their own legal questions informally (parking lot clients)
 - Remember “non-representation letters” in difficult situations



Can they hire me?

- Nonprofit as Corporate Client: YES, BUT....
 - **Minn. R. Prof. Conduct R. 1.13:**
 - (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
 - (e) In dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.
 - (f) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization’s consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.
 - A lawyer representing a nonprofit corporation represents the nonprofit organization itself, NOT its directors, officers, or members. Moreover:
 - A lawyer who represents a trade association (i.e., 501(c)(6) – business association or professional association formed for the benefit of its membership) does not merely by reason of that fact have an attorney-client relationship with individual members of the association. ABA Formal Opinion 95-390 (Jan. 25, 1995), *citing* ABA Formal Opinion 92-365.
 - The fact of corporate affiliation, without more, does not make all of a corporate client’s affiliates into clients as well. ABA Formal Opinion 95-390 (Jan. 25, 1995).
 - If you represent the nonprofit as a corporate client, presumably your malpractice insurance will cover you for missteps. Be sure, because the statutory defense found in Minn. Stat. § 317A.257 does not protect you for “representation” acts. Outside the scope of Director responsibilities.



Can I do both?

- Conflict between being a Director and exercising fiduciary duties and being counsel and being objectively detached.
- Confusion about Representation
 - If you do represent the nonprofit organization as its corporate counsel, who do you report to? The Executive Director/CEO? The Board? What if they give you conflicting directives?
 - If you report to the Board, what happens if the Board fractures into two (2) factions and one wants to sue the other? Then who do you report to?
 - What happens if you aren't representing the nonprofit organization as its corporate counsel, but a sticky situation comes up and the Board members say, "you're a lawyer, so everything we say in this meeting is privileged now, right??" What do you do?



Can I do both?

- **Minn. R. Prof. Conduct R. 1.7: Conflict of Interest: Current Clients**
 - (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.
 - (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.
- **Minn. R. Prof. Conduct R. 1.8: Conflict of Interest: Current Clients: Specific Rules**
 - (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:
 - (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
 - (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
 - (3) the client gives informed consent, in a document signed by the client separate from the transaction documents, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
 - (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.



Can I do both?

- Minn. R. Prof. Conduct R. 1.7: Conflict of Interest: Comment 35
 - *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 may 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 may 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 a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.*



Can I do both?

If lawyer serves as both a nonprofit organization's corporate counsel and a nonprofit Director:

- Responsibilities and duties of a Director
- Responsibilities and ethical obligations of being a corporate counsel
- There is an inherent conflict of interest per Minn. R. Prof. Conduct R. 1.7(b) and perhaps the duty of loyalty. Can it be waived? Yes, BUT....
- FULL of pitfalls:
 - How does the Board know when you are acting with your attorney hat and when you are acting with your Director hat? Both you and the other Directors could be forced to testify about business decisions or discussions that might have been protected if the lawyer had acted solely as a lawyer. *See United States v. Phillip Morris, Inc.*, 209 F.R.D. 13, 17 n.2 (D.D.C. 2002).
 - Personal conflicts may arise when the lawyer is asked to represent the nonprofit corporation regarding an action that the lawyer previously opposed as a Director. Can you zealously represent your client after voting "no" to something as the nonprofit's Director? Even if you can, there may be a perception by the other Directors that you can't.
 - Lawyer may be required to provide advice regarding the legality of past Board actions that the lawyer him/herself participated in as a Director. How can you be independent and obtain an informed consent waiver?
 - Excessive compensation and self-dealing concerns: You are an insider benefitting from the organization. The Board must appropriately consider your representation and fee pursuant to the nonprofit corporation's Conflict of Interest Policy (with you recusing yourself during the vote). Is the representation in the best interests of the organization? Is it an impermissible excess benefit transaction? Are you acting in your own self-interests or the organization's interests by taking the representation?
 - Tip: Pick a role. Either be the nonprofit organization's corporate counsel OR a Director. It's just to confusing and risky to be both. It's not a breach of the ethical rules, but it's confusing to you and everyone else involved.



Pennsylvania v. Curley & Schultz Pennsylvania v. Spanier



Penn State University
President Gram Spanier,
Athletic Director Tim Curley,
and VP-Finance Gary
Schultz accused of failing to
report child abuse and then
perjuring themselves 10
years later



Penn State

- Case again raises the question of “who is the client” in the context of Officers v. Directors
- If Freeh Report is believed, Baldwin as general counsel sided with the University President in keeping the Board of Directors uninformed
- Resisted calls for independent investigation:
“If we do this, we will never get rid of this group in some shape or form. The Board will then think they should have such a group.”
- Board of Directors described as passive
- President indicted



New Destiny Treatment Center

- Power struggles can lead to confusion about representation
- Neither faction could seat a quorum
- Law Firm of deposed leader sued for malpractice by New Destiny, for finding a quorum and allowing removal of independent board members
- Law Firm found *not liable*

New Destiny Treatment Center

A ministry of Barberton Rescue Mission

Can I do both?

Confidentiality v. Disclosure: As a Director on a nonprofit Board, you may have a fiduciary duty to report bad acts to the IRS, Attorney General's Office, and/or other government agencies. As the nonprofit's attorney, you may not have the ability to disclose based on Minn. R. Prof. Conduct R. 1.6 if the Board votes not to disclose. How do you square those responsibilities?

Confidentiality shouldn't end when the lawyer walks through the nonprofit's doors

[Blog](#) [White Collar Alert](#)

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May 1 2015



Yesterday, the Association of Corporate Counsel ("ACC") filed an [amicus curiae](#) brief requesting that the Pennsylvania Supreme Court uphold the Commonwealth Court's decision that there is no fiduciary duty for attorneys of nonprofit corporations to report suspected theft or wrongdoing to law enforcement.

The details of the underlying case are murky (the current caption of the case is "Redacted vs. Redacted") but it arose over allegations that an unnamed nonprofit illegally diverted resources to private entities and that non-profit's attorney (also not identified) believed that she had a fiduciary duty to report the suspected illegal activities to the Attorney General. But the Commonwealth Court disagreed and held that the public's interest had sufficient protections from the *parens patriae* power of the state. *Parens patriae* refers to "the ancient powers of guardianship over persons under disability and of protectorship of the public interest which originally were held by the Crown of England as the 'father of the country,' and which as part of the common law devolved upon the states and federal government." *In re Pruner's Estate*, 136 A.2d 107, 109 (1957) (internal citations omitted).

The ACC agreed with the lower court, and [argued](#) that "[p]ermitting attorneys for non-profit organizations – whether organized for charitable or other public purposes – to disclose information about their clients at will would violate the fundamental duty of loyalty owed by counsel, thereby eroding the attorney-client relationship that is integral to the administration of justice in our society." We agree, and hope the Pennsylvania Supreme Court affirms this decision.



[Author page »](#)

Tags USA, Legal Practice, Litigation, Non-profit Organizations, Montgomery McCracken Walker & Rhoads LLP



Can I do both?

Confidentiality:

Minn. R. Prof. Conduct R. 1.6 - Confidentiality of Information

- (a) Except when permitted under paragraph (b), a lawyer shall not knowingly reveal information relating to the representation of a client.
- (b) A lawyer may reveal information relating to the representation of a client if:
 - (1) the client gives informed consent;
 - (2) the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client;
 - (3) the lawyer reasonably believes the disclosure is impliedly authorized in order to carry out the representation;
 - (4) the lawyer reasonably believes the disclosure is necessary to prevent the commission of a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services or to prevent the commission of a crime;
 - (5) the lawyer reasonably believes the disclosure is necessary to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used;
 - (6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm;
 - (7) the lawyer reasonably believes the disclosure is necessary to secure legal advice about the lawyer's compliance with these rules;
 - (8) the lawyer reasonably believes the disclosure is necessary to establish a claim or defense on behalf of the lawyer in an actual or potential controversy between the lawyer and the client, to establish a defense in a civil, criminal, or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond in any proceeding to allegations by the client concerning the lawyer's representation of the client;
 - (9) the lawyer reasonably believes the disclosure is necessary to comply with other law or a court order;
 - (10) the lawyer reasonably believes the disclosure is necessary to inform the Office of Lawyers Professional Responsibility of knowledge of another lawyer's violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. See Rule [8.3](#); or
 - (11) the lawyer reasonably believes the disclosure is necessary to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.
- (c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client..



Disclosure to the IRS

Despite Duty of Confidentiality, EO Practitioners must:

- Respond to IRS information and audit requests unless information is privileged.
- Inform the IRS who has the documents and information it seeks (if you cannot disclose it yourself).
- Advise clients who have erred on a document or filing
- Be diligent in preparing filings – substantiate and verify
 - Have a reasonable basis for positions taken
 - No willful understatement or reckless disregard
 - Filings are public record, so statements made in filings are communications to the public



Rules for EO Counsel

- If a nonprofit corporation client commits wrongdoing, the lawyer must “proceed as is reasonably necessary in the interests of the organization.”
 - Note: The wrongdoing must be related to the representation of the nonprofit organization itself (not individual to the Director and/or Officer)
 - Wrongdoing must be a violation of duty to the EO, or a crime, fraud, etc. that could be imputed to the EO
 - Refer the situation to “higher authorities” like local law enforcement, the IRS, the Attorney General, etc.
- Beyond that, EO is bound by Minn. R. Prof. Conduct R. 1.6



When Attorney Must Resign:

Required Withdrawal:

Minn. R. Prof. Conduct R. 1.16 - Declining or Terminating Representation

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
 - (1) the representation will result in violation of the Rules of Professional Conduct or other law; [i.e., excessive benefit transactions, private inurement/self-dealing, fraud, child abuse, other required disclosure, others??]
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
 - (3) the lawyer is discharged.



When Attorney Must Resign:

Permissible Withdrawal:

Minn. R. Prof. Conduct R. 1.16 Declining or Terminating Representation

- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
 - (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.



Hypothetical:

You recently joined the Board of XYZ, a medium-sized nonprofit devoted to spreading the love of music across the United States of America. This organization records its own original music and sells licensed reproductions of this music as part of its business plan. The organization is very excited to finally have a lawyer on the Board. At your second meeting, the Board wants to know if it needs to copyright its music and engage in any other sort of trademark protection. The Board also wants to get a legal opinion about some commercial leases that the organization is in the process of renewing with its landlord. One of the Board members asks you your opinion because she knows you are a guru on IP law matters. In fact, the Board is willing to hire you. You should:

1. Decline representation
2. Agree to review the IP matters (and not the real estate matters), but only charge half of your hourly rate because you feel bad.
3. Disclose the terms of your engagement to the entire Board at a meeting, and then have them approve hiring you by a majority vote.
4. Work only with the Executive Director and refuse to share information about your representation with the Board unless the ED approves it.
5. Resign from the Board
6. Other – and what??

Thank you!!!



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