



The Fundamentals of Loss Prevention for Lawyers

EXCERPT

► **CHAPTER 15: Director or Officer
and Other Risky Business Relationships**

Serving Illinois Lawyers

Chapter 15: Director or Officer and Other Risky Business Relationships

Adopt a policy forbidding any lawyer from serving as an officer or director of a corporate client or entering a business relationship with a client without the express written consent of each partner. Several troubling issues are raised when lawyers engage in such activities:

Conflicts of Interest

Lawyers who serve on the boards of directors of clients or engage in other business activities with clients run a substantial risk of exposing themselves to conflict of interest charges. For example, assume that the board of directors is voting on two different courses of action: one will generate legal work and revenue for the lawyer/director's firm, while the other will not. If the lawyer/director votes for the former course of action, they may later have trouble convincing a shareholder that their decision was unbiased.

The Deep Pocket

Many corporations today do not carry Directors and Officers liability insurance. Even if the corporation carries a D&O policy, the coverage is often too low to cover a major claim or is severely limited by numerous exclusions. A lawyer's malpractice insurance policy provides the third-party claimant with an attractive alternative deep pocket. To bring your legal malpractice policy into play, the claimant merely needs to allege that you were acting as both director/officer/owner and legal counselor.

Ethical Concerns

In addition to the potential conflict of interest issues, the client and the lawyer should each be aware that the lawyer-client privilege may be lost in certain circumstances where the lawyer is also a member of the client's board of directors. For example, the opposing party may argue that a lawyer/director's comments at a board meeting were made in their capacity as a director, not as a lawyer, and are therefore not protected by the lawyer-client privilege.

Disqualification of the Firm

In cases where both the firm and the client are sued as co-defendants, the firm may be disqualified from defending the client because the lawyer is also serving as an officer or director or was a business partner. Thus, the client could lose the services of the lawyer who possesses the most experience and knowledge regarding the client and its business.

Insurance Coverage Issues

Lawyers also risk their legal malpractice coverage when they venture outside their traditional role as legal advisors. Most legal malpractice policies do not cover wrongful acts committed in a lawyer's capacity as a director, officer, owner, or manager of a corporation or partnership. The best advice is to stick to the practice of law.

Serving as a Director or Officer Do's and Don'ts

Do...

- ✓ Be rigorous in the prevention of conflicts of interest.
- ✓ Review your insurance policy to make sure you understand your coverage.

Don't...

- ⊖ Don't serve as a director of a corporate client.
- ⊖ Don't venture outside the role of legal advisor without reviewing your insurance policy.



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