The Changing Role of the Attorney with Respect to the Corporation

Wilton S. Sogg  
*Cleveland-Marshall College of Law*

Michael L. Solomon  
*University of Dayton Law School*

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I. INTRODUCTION

Supreme Court Justice Potter Stewart once stated that "[t]he propriety of a lawyer serving as a member of the Board of Directors of his corporate client remains, even today, a vexing problem of professional responsibility."1

Historically, accountants have been assumed, as well as required, to be independent of any enterprise in which they express an opinion regarding

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the enterprise's financial statements. Independence had been interpreted to mean that accountants may not serve on the board of directors or invest in any enterprise which they, or their firm, audit, or for whom either expresses an opinion on the enterprise's financial statements. By contrast, attorneys have been counsel to an enterprise, have served as officers and directors, and have invested in the enterprise. There is no prohibition against such a relationship in the Code of Professional Responsibility or the Model Rules of Professional Conduct adopted by the American Bar Association ("ABA").

Over a period of years, there has been increasing pressure and commentary regarding the need for attorneys to move in the direction of accountants' independence by not serving as board members in an enterprise for which they act as counsel.

The purposes of this article are to: (1) compare and contrast the difference between the accounting and the legal profession's self-regulation of board membership; (2) analyze the trend towards requiring more independence of attorneys as it relates to simultaneously providing legal advice to a client and serving on the client's board of directors; and (3) predict the future trends regarding attorneys serving as directors of clients.

II. PROFESSIONAL REGULATION OF THE CLIENT RELATIONSHIP

A. Accountants

Rule 101 of the Code of Professional Ethics for certified public accountants states:

A member or a firm of which he is a partner or shareholder shall not express an opinion on financial statements of an enterprise unless he and his firm are independent with respect to such enterprise. Independence will be considered to be impaired if, for example . . . B. During the period covered by the financial statements, during the period of the professional engagement, or at the time of expressing an opinion, he or his firm

1. Was connected with the enterprise as . . . a director or officer or in any capacity equivalent to that of a member of management or of an employee . . . . 2

Ethics Ruling 15 3 provides that a member who has withdrawn from his


3 AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS COMM. ON PROFESSIONAL ETHICS, Ruling 15 (1984). Ethics rulings consist of formal rulings issued by the AICPA's Professional Ethics Division Executive Committee after exposure to state societies and state
firms and become an officer and director of several corporations audited by the firm, but who still maintains an office in the firm and continues to perform services for the firm for which he is compensated, will adversely affect the independence of the firm.

Another ethical ruling provides as follows:

When a CPA expresses an opinion on financial statements, not only the fact but also the appearance of integrity and objectivity is of particular importance. For this reason, the profession has adopted rules to prohibit the expression of such an opinion when relationships exist which might pose such a threat to integrity and objectivity as to exceed the strength of countervailing forces and restraints. These relationships fall into two general categories: (1) certain financial relationships with clients and (2) relationships in which a CPA is virtually part of management or an employee under management's control.4

The authors of Principles of Auditing have stated:

If auditors owned shares of stock in a company in which they audited, or if they served as members of the Board of Directors, they might subconsciously be biased in the performance of auditing duties. A CPA should therefore avoid any relationship with a client which would cause an outsider who had knowledge of all the facts to doubt the CPA's independence. It is not enough that CPA's be independent; they must conduct themselves in such a manner that informed members of the public will have no reason to doubt their independence.5

A relevant regulation issued by the Securities Exchange Commission states:

The Commission will not recognize any certified public accountant or public accountant as independent who is not in fact independent. For example, an accountant will be considered not independent with respect to any person or any of its parents, its subsidiaries, or other affiliates . . . (2) with which, during the

boards. These rulings summarize the application of the Rules of Conduct and Interpretation to a particular set of factual circumstances. Members of the AICPA who depart from such rulings and similar circumstances will be requested to justify such departures.

4 AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS COMM. ON PROFESSIONAL ETHICS, ET § 52.10 (1986). ETs are concepts of professional ethics which are philosophical essays approved by the professional ethics division of the AICPA. ETs suggest behavior which CPA's should strive for beyond the minimum level of acceptable conduct set forth in the Rules of Conduct and are not intended to establish enforceable standards.

period of its professional engagement to examine the financial
statements being reported on, at the date of his report, or during
the period covered by the financial statements, he, his firm, or a
member of his firm was connected as a . . . director, officer or
employee.6

Over the past five to ten years, Congress, the Securities Exchange
Commission and many commentators have begun to question the inde-
pendence of accountants who perform non-audit services for a client in
addition to audit services. There is a concern that significant fees from
non-audit services, such as management advisory services performed by
the accounting firm, may destroy the actual independence or the appear-
ance of independence of the auditor.7 However, at the present time there
is no blanket prohibition against accountants providing both audit and
non-audit services for a client.8

B. Attorneys

Rule 1.7 of the American Bar Association Model Rules of Professional
Conduct provides that:

A lawyer shall not represent a client if the representation of that
client may be materially limited by the lawyer's responsibilities
to another client or to a third person, or by the lawyer's own
interests, unless: (1) the lawyer reasonably believes the represen-
tation will not be adversely affected; and (2) the client consents
after consultation . . . .9

The Comments to the ABA Model Rules state:

A lawyer for a corporation or other organization who is also a
member of its board of directors should determine whether the
responsibility of the two roles may conflict. The lawyer may be
called on to advise the corporation in matters involving actions of

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7 See R. Gormley, THE LAW OF ACCOUNTANTS AND AUDITORS: RIGHTS, DUTIES, AND LIABILITIES
2-32 (1981); Pany & Reckers, Auditor Independence and Nonaudit Services, 2 J. ACCT. & PUB.
8 Cowen, Nonaudit Services: How Much Is Too Much?, 150 J. ACCT. 51 (1980). However, when the SEC issued ASR No. 264 which expressed concern about auditor independence where the auditor also performed non-audit services, the AIRCPA felt that indirectly the SEC was prohibiting the performance of non-audit services. News Report, Institute Questions SEC's ASR No. 264 on Non-audit Services, J. ACCT., Sept. 1979, at 7; SEC Issues Release on Auditor's Independence, 51 J. TAX'N 155 (1979); Walker, SEC Commentary, 50 CP A J. 174 (1980). ASR No. 264 was subsequently rescinded.
9 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983).
the directors. Consideration should be given to the frequency with which such situations 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 a material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.10

The Model Code of Professional Responsibility provides:

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

A. A lawyer should decline proffered employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

B. A lawyer shall not continue multiple employment if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

C. In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.11

Basically, the ethical decision as to whether an attorney should serve on the Board of Directors of a client is left to the discretion of the attorney.

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11 Model Code of Professional Responsibility DR5-105 (1980). The ABA replaced the Model Code with the Model Rules in 1983. However, most states are still modeled after the Model Code. "DR" stands for Disciplinary Rules, which are mandatory rules that state a minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. "EC" stands for ethical considerations which are aspirational in character and represent the objectives toward which every member of the profession should strive. The Ohio Code of Professional Responsibility is modeled after the ABA Model Code. DR 5-105 of the Ohio Code of Professional Responsibility is very similar to the rule cited in the text.
At the Airlie House Conference on "Ethical Responsibilities of Corporate Lawyers" the participants considered proposing amendments to the ABA Code of Professional Responsibility to prohibit an attorney from serving as a director of a client. However, no action was taken.12

C. Comparison of Professional Regulation of Attorneys and Accountants

Recognizing the need for total independence in the accountant's expression of opinion on the client's financial statement, the American Institute of Certified Public Accountants (AICPA) has prohibited an accountant from serving as a director of a client which he or his firm audits.13 There is no discretion left to the accountant to judge whether or not his independence will be adversely affected.14

However, the ABA has not seen fit to impose a mandatory prohibition against attorneys serving as directors of clients. Some commentators feel that there is just as great a need for complete independence of an attorney in the expression of a legal opinion on his or her client's actions as for an accountant's opinion on a financial statement.15

Proponents of attorney-directors do not agree that attorneys have the same need for independence as do accountants. They note that a CPA must maintain total independence in order to give a disinterested opinion on the client's financial statements. However, an attorney serves many roles for a client by supplying legal advice to management on proposed actions and by helping design corporate action to comply with the law, in addition to rendering opinions.16 The corporate attorney has the duty to represent his or her client diligently as an advocate.17 Thus, the dual role of an attorney as advisor and advocate is much different than a CPA's singular role as an independent auditor, such that the attorney should not be limited to the relationship with the client in the same manner as the accountant.18

12 See Mundheim, Should Code of Professional Responsibility Forbid Lawyers to Serve on Board of Corporations for Which They Act as Counsel, 33 Bus. Law. 1507 (1978); See also Corporate Director's Guidebook, 33 Bus. Law. 1595, 1620 (rev. ed. 1978). The Guidebook notes that the issue of whether or not an attorney should serve on the client's board is not addressed.


14 But see supra notes 7-8 and accompanying text which discuss non-audit services and independence. In this area, it appears to be up to the discretion of the accountant to determine independence.

15 See supra note 7.

16 Quiat & Stephens, The Dual Role of Corporate Counsel Serving on the Board of Directors, 13 Colo. Law. 792 (1984)(attorneys who perform securities work for a client may have less of an advocate role).

17 Id. at 795.

18 Id. at 796.
Proponents of allowing attorney discretion in serving as director of a client note the advantages to be:

(1) by serving as director, the attorney obtains increased knowledge of the client's business, thus enabling the attorney–director to give more meaningful legal advice;

(2) the attorney–director is able to practice preventive law by learning of contemplated actions at an earlier stage than if he or she were not a member of the board;

(3) an attorney–director has direct communications with board members;

(4) an attorney's familiarity with a client's business, expertise and analytical skills will enable the attorney–director to function as an excellent monitor of management;

(5) an attorney–director has greater status, which gives more authority to his or her legal advice; and

(6) due to the attorney's greater risk of liability as a director, he or she will be more alert and diligent than otherwise.\(^\text{19}\)

Commentators have noted however, that if an attorney attended board meetings in the capacity of counsel without serving as a director, he or she would still be able to obtain many of the same benefits of an attorney–director. A few examples of these benefits are i) increased knowledge of the client's business, ii) the ability to practice preventive law by learning of contemplated board actions in their infancy, and iii) direct communications with directors.\(^\text{20}\) In addition, close corporations rarely hold board meetings with the formality of public companies. Thus, there is even less need for the attorney to serve as a director of a close corporation. Additionally, an attorney serving as a director of a non-client could provide many of the same advantages as the attorney of the client serving as a director. The attorney serving as a director of the non-client can ascertain legal problems in any contemplated action by the board and provide the same analytical skills as counsel to the client.

Opponents of attorneys serving as directors of clients note that significant problems arise as a result of the dual role. Set forth below is a


\(^{20}\) Thurston, supra note 19, at 827.
discussion of some of the difficult situations faced by the attorney who is also a director of a client.\textsuperscript{21}

A. Who is the Client?

Who is the client of the corporate attorney—the directors, management or the stockholders?

EC 5-18 of the ABA Code of Professional Responsibility states that corporate counsel owes allegiance to the entity, not to a stockholder, director, officer or employee.\textsuperscript{22} Some commentators assert that the shareholders are the real clients of the corporate attorney.\textsuperscript{23} Other commentators feel that the entity is represented by the board of directors, and thus the attorney's client is the board.\textsuperscript{24} Finally, some commentators feel that management is the client.\textsuperscript{25} A survey by Sloter and Sorenson found that 41\% of the attorneys surveyed felt that management was the real client of the attorney.\textsuperscript{26}

The issue of whether the client of corporate counsel is the corporation, management, directors or stockholders is beyond the scope of this outline. In a close corporation, the distinct roles of management, directors and shareholders tend to be less identifiable. Certainly, as a practical matter, counsel deals more frequently with management and may tend to perceive management as the client.\textsuperscript{27} However, since there is already significant confusion as to who is the client of the corporate attorney, it does not seem prudent to add additional confusion by having the attorney serve as a director of the client.

In contrast to a position as counsel for a corporation, it is clear that a director has a fiduciary obligation to the company and its shareholders and not to management.\textsuperscript{28}

If the view that the board is the attorney's client is correct, the conflict of an attorney–director is that as an attorney he or she should look to the board as his client, while as a board member, he or she is the client. The roles of director and attorney are not identical, and to the extent the one role is influenced by the other, there is a loss of professionalism, and ineffective fulfillment of both roles results.\textsuperscript{29}

\textsuperscript{21} An excellent article addressing these issues and the conceptual approach to an analysis of these issues used in this article is set forth in Knepper, \textit{Liability of Lawyer Directors}, 40 OHIO STATE L. J. 341 (1979).

\textsuperscript{22} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} EC 5-18 (1980).

\textsuperscript{23} \textit{See} Sloter & Sorenson, \textit{supra} note 19, at 632.

\textsuperscript{24} \textit{See} Thurston, \textit{supra} note 19, at 806.

\textsuperscript{25} \textit{See Mace, Directors: Myth and Reality - Ten Years Later}, 32 RUGERS L. REV. 293, 302 (1979); Riger, \textit{supra} note 13, at 2384.

\textsuperscript{26} \textit{See} Sloter & Sorenson, \textit{supra} note 19.

\textsuperscript{27} \textit{See id}.

\textsuperscript{28} \textit{Thurston, supra} note 19, at 801.

\textsuperscript{29} \textit{Id}.
The following are a few examples of such conflict:

**Management as Client vs. Shareholders as Client**

1. Assume the corporation receives a tender offer. An attorney who feels the client is *management* might feel the duty to help management formulate a plan to defeat the offer, but as a director, with a duty towards the shareholders, he or she might be obligated to accept the offer.\(^{30}\)

2. One commentator suggests the possibility that an attorney may have an obligation to report management's dereliction to stockholders despite any allegiance to his or her position in management as a director. This might result in an attorney-director disclosing his or her own transgressions as a director.\(^{31}\)

**Advocate of Client vs. Impartial Witness**

3. There is a possibility that if the individual directors and the corporation are defendants in the same suit, the attorney-director might be called as a witness.\(^{32}\) The role of the attorney as an advocate for the client conflicts with the witness's role to state facts objectively.\(^{33}\) The attorney might be in the position of giving testimony on his or her own behalf that will prejudice the position of his client. Such divergence of interests will result in possible ineffective advocacy for the client.\(^{34}\)

**Attorney's Defense vs. Corporate Defense**

4. Where members of the board are defendants, part of their defense might be reliance on counsel. This would, however, conflict with the attorney-director's possible defense of reliance on information furnished by the directors.\(^{35}\)

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**B. Attorney–Client Privilege**

"When the attorney and the client get in bed together as business partners, their relationship is a business relationship not a professional one, and their confidences are business confidences unprotected by a professional privilege."\(^{36}\)

An attorney who is also a director of a client adversely affects the use of the attorney–client privilege to the detriment of the corporate client. Traditionally, courts have assumed, *prima facie*, that communications to

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\(^{30}\) Id.


\(^{32}\) Thurston, *supra* note 19, at 801.

\(^{33}\) *Model Code of Professional Responsibility* EC 5-9 (1980).


\(^{35}\) Thurston, *supra* note 19, at 801.

an attorney are for legal advice. There is less possibility of this presumption in situations in which the attorney is also a director of a client. Consequently, the attorney serving as a director potentially endangers the availability of the attorney-client privilege to the corporation.

Some courts categorize the lawyer either as an attorney or a businessman based upon the time spent in each capacity. Once the court concludes that the lawyer functions primarily as a businessman, the attorney-client privilege is lost. Other courts will analyze each communication by counsel to determine whether or not it is legal advice and protected by the privilege.

Problems arise when disclosures are made to or by a lawyer-director during a board meeting. Many commentators believe that legal and business advice are indistinguishable in this setting, making it difficult to prove that particular advice is legal advice entitled to the attorney-client privilege. Thus, it will be very difficult to protect the attorney-client privilege in the situation where the attorney is also a director.

For example, in United States v. Vehicular Parking, the defendants in an antitrust case objected to the admission of communications between the lawyer-director and themselves. The District Court held that the memoranda were more like business communications than attorney-client communications thereby denying the availability of the attorney-client privilege.

The fiduciary obligation of the lawyer-director to shareholders will probably override the attorney-client privilege. This may mean that memoranda and opinions of the attorney might be treated as nonprivileged documents provided by a director rather than confidential advice furnished by a lawyer to a client. The potential loss of the attorney-client privilege is significant enough in itself to support arguments against lawyer-directors.

C. Increased Duty of Care

The Report of the Committee of Corporate laws suggests that "[T]he special background and qualifications a particular director may possess, as well as other responsibilities (or their absence) in the management of the business and affairs of the corporation, may place a measure of

37 Thurston, supra note 19, at 811.
38 Id.
40 H. Haynsworth, supra note 39.
41 Id.
43 Id.
44 Knepper, supra note 30, at 355.
responsibility upon such director . . . which may differ from that placed upon another director." 45

In Escott v. BarChris Constr. Corp., 46 an attorney–director was subject to a suit for damages under Section 11 of the Securities Act of 1933 for a misleading registration statement. The court stated, "[A] director who possesses some special expertise—such as a lawyer, accountant or real estate specialist—is expected to apply his expertise to those board deliberations involving his specialty." 47 Thus, an attorney would be expected to recognize legal problems and obligations of the corporation that a non-lawyer director might not be expected to recognize.

For example, in Feit v. Leasco Data Processing Equip. Corp., 48 involving a 1933 Act registration statement, the court noted that an attorney–director may be held to a very high standard of independent investigation because of his or her peculiar expertise and access to information.

In fact, an attorney–director may become so involved in the corporate affairs that he may be treated as an inside director and a participant in the transaction. 49 In Feit, the court treated the attorney–director as an inside director and imposed on the attorney the obligation of reasonable verification of the facts in the registration statement. 50

One commentator has concluded that an attorney–director’s duty of care may be far greater than the common law standard of reasonableness or the standards under the Code of Professional Responsibility. 51 The attorney–director will be expected to be more professional in his work than would the ordinary director without professional training, and will have a greater duty of investigation and verification than a non-lawyer. The knowledge of the attorney–director of the workings of the corporation, as both an attorney and director, will increase his or her duty of care. The attorney–director’s standard of care will be such care as the ordinary prudent attorney–director would use under similar circumstances. 52 Thus, the attorney–director, and the law firm 53 may be subject to greater liability than if the attorney had avoided the directorship. 54

47 Knepper, supra note 30, at 346-47.
50 Feit, 332 F. Supp. at 548.
51 See Knepper, supra note 30, at 348.
52 Ruder, supra note 48, at 55.
53 See text at part IV. G. regarding deputization theory.
54 W. Knepper, Liability of Corporate Officers and Directors, at 291 (2d ed. 1978).
D. Auditor's Requests for Information

Auditors of a corporation will request that corporate counsel submit a letter setting forth potential liability, such as pending or threatened suits. A lawyer has a duty to advise a client regarding the likelihood that a claim will be asserted. A director will have a duty to consider the possibility of the claim's unfavorable outcome and its materiality. Management must make a decision whether or not to disclose the unasserted claim to the auditor and its counsel. It is possible that management would not disclose all information to the attorney, thus relieving the attorney of the need for disclosure, but the attorney–director might be expected to know of the contingent claim. Thus, the attorney–director's duty of disclosure to the auditor may be significantly broadened beyond the duties imposed upon a corporate lawyer under a statement of policy and principals issued by the ABA and the AICPA.55

The lawyer–director, and his or her firm as a control person,56 could be liable for failure to disclose information to the auditor pursuant to a SEC regulation.57 This regulation states that no director shall make a misleading statement or omission to any accountant in connection with an audit.

The greater duty of disclosure to the auditor imposed on the attorney–director results in an increased potential liability for counsel and the firm for responses to an auditor's request for information.

E. Independence

Former SEC Chairman Harold Williams once wrote:

[T]he lawyer who is also outside counsel to a corporation, along with investment bankers, commercial bankers, and others who might be characterized as 'suppliers' to the corporation should be excluded from board membership... It is important that we come to grips with the conflict of interest problem created by the board membership of those whose income, in some significant measure, depends upon their business dealings with the management; with the obvious inhibitions on the other members of the board in terminating or criticizing the service rendered the corporation as a results of another director's business relationship; and with the public perception problem created by that conflict.58

55 Knepper, supra note 30, at 349.
56 See text at part IV. G.
57 See 17 C.F.R. 240.13(b)2-2 (1980).
58 Williams, Corporate Accountability and the Lawyer's Role, 34 Bus. Law. 7, 10 (1978). Other Chairman of the SEC have made similar comments. See Handleman, Composition of the Board of Directors, 4 Del. J. Corp. L. 770, 774 (1979).
Mr. Williams recognized the benefits of having the expertise of an attorney on the board, but felt that the significant conflicts of interest created by an attorney-director more than offset the benefits. Mr. Williams also expressed concern that the appearance of the lack of independence on the board is inconsistent with the need for an independent board of directors.

The concern for independence is twofold: independence as an attorney and as a director. The dual role of the attorney-director may be very disruptive to the board. The main duty of a director is to use his or her business judgment in making a decision for corporate action. Counsel must advise the board and management on the legal aspects of their actions. It may be very difficult for the attorney to distinguish between the legal and business basis for any opinions. For example, if he or she makes a decision as a director to vote for a proposition, he might have difficulty, as an attorney, persuading the client that a proposal should not be approved due to the adverse legal consequences. Likewise, if as a director the attorney votes against a proposition, such action may imply adverse legal implications.

Additionally, the attorney-director's independence as a director could be compromised. A director is free to disagree, even publicly, with corporation action, but an attorney must provide necessary legal services in support of legitimate corporation actions. Thus, the attorney-director's rights as a director could be limited. The attorney-director may lose independence as a director in order not to antagonize management and possibly lose a valuable client.

A director's independence might be questioned if the board is considering selling a division of the company that has provided significant business to the attorney's firm.

If the board is considering action that would entail significant legal fees, the attorney-director's vote may appear self-serving. Arguably, the attorney should not be entitled to participate in a business decision that may result in increased legal fees. Additionally, the board might want to consider using a different law firm with expertise to handle a particular matter. However, the board may find it more difficult to switch counsel or take away some business from counsel where counsel is represented on the board.

Attorneys should be concerned that the legal profession will be held in

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59 See Thurston, supra note 19, at 797.
60 See id.
61 See id.
62 See id.
63 See Engel & Peterson, Considerations for Attorneys Serving as Directors of Corporate Clients, 12 COLO. LAW. 1986 (1983).
64 Mundheim, supra note 12, at 1509.
lower esteem because attorneys are functioning in a situation where their independence is significantly in question.

F. Close Corporations

The consequences of the attorney-director in a closely-held corporation may be different than in a public corporation due to the fact that the management, the directors, and the shareholders may be almost identical in many situations.\(^{65}\)

The problem of who is the client\(^{66}\) may not be as difficult since in a closely-held corporation the shareholders, directors and management tend to be almost identical. Thus, there should be less concern by an attorney-director about his dual role. For the same reasons, the independence of the attorney-director may not be adversely affected by his role as a director. In many closely-held corporations, the attorney acts as an informal director, even if not officially on the board. However, all closely-held corporations are not alike, and many have shareholders who are active in management and shareholders who are passive investors, just as in a publicly held corporation. Then the independence of the attorney-director and the question of who is the client may be just as significant as in the publicly-held corporation. Even if all shareholders are active in management, they may have different interests as employees versus investors resulting in the need for an independent director.

In a closely-held corporation, the attorney-director will still possibly have the same increased disclosure requirements to an auditor’s request for information. Additionally, the attorney-client privilege could still be endangered by the attorney acting as a director of the closely-held client.

If one accepts the concept that attorneys should not be directors of publicly-held clients, but sees no problem with the one shareholder corporation, the question becomes: where in the spectrum of the one shareholder corporation to the public corporation does the problem of the attorney-director rise to a level requiring the attorney to refuse to participate on the board of a client? In order to avoid having to determine at what point a corporation becomes more like a public corporation than a close corporation, if a general prohibition against attorney-directors were adopted it should apply to all corporations except a one shareholder corporation.

Additionally, even if the attorney may properly serve as a director of a closely-held corporation, if the corporation subsequently issues shares to new investors or goes public, the attorney may have to resign as a director after the corporation is no longer closely held. However, many of the problems discussed earlier will not be eliminated by the attorney’s sub-

\(^{65}\) See Salter, Some Comments on Conflicts of Interest and the Corporate Lawyer, 12 Colo. Law. 60 (1983).

\(^{66}\) See supra part IV. A.
sequent resignation as a director. The corporation might still lose the services of the attorney's firm if the attorney is a defendant in a lawsuit resulting from prior actions as an attorney–director. Also, the attorney–client privilege for prior actions might still be lost. Finally, the attorney still might have information resulting from his tenure as a director which will have to be disclosed to the auditor even after the attorney is no longer the director.

G. Deputization

In *Feder v. Martin Marietta Corp.*, the court found that the President of Martin Marietta, who served on the Board of Sperry Rand Corporation, was representing the interests of Martin Marietta on the board, and was liable for short-swing insider profits. In essence, Martin Marietta had deputized the President to represent it on the Board, and as a result, Martin Marietta was deemed a director for purposes of the insider trading provisions of the Securities Exchange Act of 1934.

Some commentators have suggested that a law firm could incur liability from actions of a partner serving as a director of a client under the deputization theory. It is possible that a firm could be liable for short term trading on a corporate client's stock if a partner served as a director. Even if the lawyer–director, and not the firm, engaged in short term trading, the firm might incur liability.

There is also a possibility that in the proper case, a law firm could be held liable for the actions of a partner who is an attorney–director under either section 15 of the Securities Act of 1933 or section 20(a) of the Securities Exchange Act of 1934, based on the theory that the firm is a controlling person of the attorney–director and thus is jointly and severally liable for the actions of its partner.

H. Insurance Coverage

Generally, an attorney–director's law firm will have professional liability insurance for liabilities resulting from professional legal services rendered. A corporation will have directors' and officers' ("D&O") insurance protecting directors and officers from acts performed in their corporate capacities.
If an attorney-director is held to be a deputy for his law firm, there is a good possibility that the law firm's professional insurance policy will not cover liability imposed upon it because of acts of the attorney-director in his capacity as a director.75 Since the attorney-director’s D&O insurance would be personal to the attorney-director, any liability of the firm resulting from the attorney's actions as a director might be uninsured.

V. Statistical Data Regarding Trend Away From Attorney-Director

Based upon a statistical study performed by Baysinger and Butler on 266 major corporations from 1970 to 1980, the authors stated “that the governance structure of many American business corporations underwent evolutionary and significant changes between 1970 and 1980.”76 The authors concluded that the average board composition appears to have become more independent. This conclusion is confirmed by a study performed by Heidrick and Struggles which stated that, in 1982, outside directors comprised 74% of boards compared to 66% in 1979.77

Under the Baysinger and Butler study it appears that the percentage of outside attorneys on boards in the survey dropped from 5.2% in 1970 to 4.8% in 1980, a 10% reduction.78

A 1976 study reported that one out of every six companies filing with the SEC reported outside counsel serving on their boards, and a 1978 study reported a decline in companies using their counsel as a director.79 A 1984 Korn-Ferry study of 633 corporate boards reported a decline in the number of counsel serving as directors of clients.80

VI. Prediction

There is presently a trend towards reduction in the number of attorneys serving as directors of clients. This trend seems to be fueled by the practical aspect of increased potential for liability as an attorney–

75 Knepper, supra note 30, at 360.
77 Heidrick & Struggles, Director Data (1982). In this study, an attorney who is a director for a client would be considered an outside director. A 1984 study made a conclusion similar to the 1982 study that boards are becoming more independent.
78 Baysinger & Butler, supra note 75, at 571.
79 Id. at 570. The percentages differ from the Baysinger & Butler study cited above since the Baysinger & Butler study used a smaller sample of corporations and limited the sample to firms in industry, transportation or distribution.
80 Tarr, Are Board Memberships Becoming Too Risky?, The Nat'l L. J., June 17, 1985, at 1, col. 3.
director,\textsuperscript{81} plus an increasing awareness of the inherent conflict of interest of an attorney serving as a director of a client.

However, despite this trend, there appears to be only a small possibility of any change in the near future in the ABA Model Rules or state ethical codes that would restrict an attorney from serving as a director for a corporate client. A recent survey indicates that an overwhelming majority of attorneys responding to the survey oppose a complete prohibition in the Code of Professional Responsibility or the Model Rules.\textsuperscript{82} Apparently, even attorneys who do not support the practice of attorney–directors support voluntary individual regulation versus a blanket prohibition.

VII. Conclusion

Attorneys are beginning to recognize their increased duty of care as attorney–directors and the increased potential liability resulting from their dual role. Additionally, law firms may be increasing the firm's potential liability by having a partner serve as a director of a client.

Increasing numbers of commentators are noting the inherent conflict of interest of the dual role of the attorney–director and the possible loss of independence. Additionally, the attorney–director relationship may be detrimental to the attorney’s client by increasing the possibility of the loss of the attorney–client privilege.

As noted in part VI, there is a trend toward fewer attorneys serving as directors of clients. This trend should continue over the rest of the decade. No change is anticipated in the near future in the ABA Model Rules prohibiting attorneys from serving as directors of clients. However, the increased awareness of the problems associated with the attorney serving as a director of a client should result in more attorneys carefully considering whether or not to serve in that capacity. This heightened awareness may accelerate the present trend of fewer attorneys serving as directors of clients.

\textsuperscript{81} See Schatz, Directors Feel the Legal Heat, N.Y. Times, Dec. 15, 1985, at 3-12, col. 3.

\textsuperscript{82} Eighty-four percent of the attorneys responding opposed a complete prohibition against attorneys serving as directors of corporate clients in either the Code of Professional Responsibility or the Model Rules. Sloter & Sorenson, supra note 19, at 643.