LAWYERS AND NON-PROFIT BOARDS: AN ETHICAL REVIEW[1]

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1) LAWYER SERVING ON BOARD OF NON-PROFIT

A lawyer serving on a board of directors ("board") of a non-profit ("NP") should first clarify the lawyer's role within the organization. The concerns of a lawyer who represents a NP while also serving on the board differ from those of a board member who is educated as a lawyer but also who does not represent the NP. For any lawyer who is also a NP board member, if the lawyer actually or arguably also provides legal services to the NP, a dual role exists that can have serious potential repercussions. This is because providing legal services to the NP may inadvertently convert a board member—who happens to be a lawyer—into the NP's lawyer. Without clarification, such a dual role creates the potential for misunderstandings and conflicts, which may lead to unexpected consequences for the board, the lawyer, and the NP. The lawyer must also be diligent in ensuring that at all times he or she is able to exercise independent professional judgment as the NP's lawyer. Lastly, any lawyer board member should also consider the personal risks of the dual role, such as gaps in liability insurance and the increased exposure to professional malpractice or discipline because of conflicts and the lawyer's duties to the NP as a board member.

a) Board member who happens to be a lawyer vs. NP's lawyer as a board member

> A lawyer board member who agrees to act as counsel should consider and discuss with other board members the extent of the representation and the potential hazards of serving in such dual roles. The lawyer board member also should make clear to the board when he or she is acting as a board member or as the attorney for the organization.

WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 292 (3d ed. 2012).

Lawyers can, and often do, serve successfully as NP board members with no adverse professional consequences. With care and communication, the NP will not become the lawyer's inadvertent client. "[T]he mere fact that a person who serves on a board of directors is a lawyer does not make the corporation that lawyer's client." *Id.* at 289. But when a lawyer serves as a

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board member and gives legal advice or renders legal services, the lawyer may create an attorney client relationship and become the NP's lawyer. *See id.* at 292 ("[N]onprofits often will look to their lawyer board members for assistance on certain legal matters, such as preparation of articles of incorporation, by laws, tax returns, or employment agreements. By providing this assistance, the lawyer board member can be viewed as having established an attorney-client relationship and becoming the lawyer for the organization."). An attorney-client relationship between the lawyer and the NP imposes additional duties upon the lawyer and potential adverse consequences for the board. *Id.* at 289.

A lawyer representing a NP while serving on the board must ensure the NP understands that the lawyer owes his or her professional obligations to the NP as opposed to the board as a whole, or any individual director or officer. *Id.* at 293. Although Model Rule ("MR")[2] 1.13 establishes that the NP is the client, "the reality is that lawyers often give advice for the benefit of not only the nonprofit organization but also the individual officers, employees, and board members who are entrusted with caring for the nonprofit." Latresa D. McLawhorn, *Who is the Client: Nonprofits*, GPSOLO, Oct.– Nov. 2010, at 24, 24; *see also* Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/nonprofit Director*, 23 COLO. LAW., 2735, 2735 (1994) ("[I]t may not always be clear, either to the lawyer involved or to the board as a whole, whether the lawyer/director purposefully renders legal advice on a given occasion or merely speaks as a member of the board who incidentally possesses a legal background."). As with many situations, consistent and clear communication is key to avoiding issues, especially if a lawyer knows, or reasonably should know, that others might misunderstand the lawyer's role, not only as a general matter (i.e., as a board matter) but specifically with respect to any matter before the board.

b) Misconduct

A lawyer acting as a board member owes a fiduciary duty and a duty of loyalty to the NP. Knowingly breaching, attempting to breach, or assisting another to breach, a duty could result in discipline in his or her professional capacity. Even if a lawyer does not personally participate in, or commit criminal or fraudulent acts—due to the lawyer's status as a member of the bar—the lawyer nevertheless could face possible disciplinary action if the lawyer fails as a board member to take reasonable steps to prevent or rectify the conduct.

Of course, direct misconduct by a lawyer is far more likely to result in discipline. Crimes that "reflect[] adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer," are subject to discipline under MR 8.4. MODEL RULES PROF'L CONDUCT § 8.4(b), MODEL RULES PROF'L CONDUCT 8.4 cmt. 2. The lawyer may be disciplined even if the actions were taken outside of his or her capacity as a lawyer, and whether or not the lawyer was convicted.

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[2] American Bar Association's Model Rules of Professional Conduct. These rules are not the law. Each United States jurisdiction adopts its own rules governing lawyers' professional responsibility, which rules may vary from the model Rules. Accordingly, it is essential to consult the applicable rules and related law of the jurisdiction(s) in which a lawyer is licensed in order to determine his or her obligations.

Additionally, a lawyer who knowingly assists another to violate or attempt to violate the Rules of Professional Conduct is also subject to discipline. MODEL RULES PROF'L CONDUCT § 8.4(a).

c) Attorney-client privilege

A lawyer's communications are essential in order to (1) know whether an attorney-client relationship exists, and (2) if so, to assure the attorney-client privilege is preserved and not waived. "A confusion of roles may affect the lawyer's ability to assert, on behalf of the corporation, its right to confidential treatment of certain communications." WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 291 (3d ed. 2012). "[W]hen an attorney board member also acts as corporation counsel, it may be difficult to distinguish which 'hat' the director is wearing at any given time. What would otherwise be considered protectable attorney-client communication may become subject to discovery if characterized as discussion among board members." *Id.* at 292; *see, e.g.*, *United States v. Vehicular Parking*, 52 F.Supp. 751 (D.Del. 1943), (finding that correspondence that consisted mostly of business matters between board members was not legal advice and was not protected by the attorney client privilege).

A NP cannot assert the attorney-client privilege to protect a communication between the board and a board member who happens to be a lawyer, because the lawyer is not acting in his or her professional capacity. Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/nonprofit Director*, 23 COLO. LAW., 2735, 2736.

Even where an attorney-client relationship does exist, communications made in the presence of a third party, including "ex officio or honorary directors— who are not actual directors with a vote—but simply advisory," destroy the privilege. WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 290 (3d ed. 2012).

"Without endorsing the practice," the New York State Bar Association instructed lawyers to "disclose to the client the risk of loss of the attorney client privilege" before accepting such a dual role with the client organization. *See* New York State Bar Association Ethics Opinion 589 (03/18/88). Board members may be accustomed to the general idea that communications with a lawyer are privileged and may not understand that the privilege can only be asserted when the lawyer is acting in his or her professional capacity as a lawyer and the communication is for the purpose of legal advice. "As a result, it may be prudent for the lawyer/director who intends to function as just a director to caution the board that its discussions are not confidential and remain discoverable." Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/nonprofit Director*, 23 COLO. LAW., 2735, 2736.

d) D&O and malpractice insurance

Despite carrying multiple insurance policies, a lawyer's dual role may place him or her into an insurance "gray area." Most professional liability policies exclude coverage when a lawyer is acting in another capacity, such as a board member. Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/nonprofit Director*, 23 COLO. LAW., 2735, 2737.

> The fact that the lawyer is unpaid is immaterial in terms of professional malpractice liability of the individual involved and in terms of what the corporation is entitled to expect. Lawyers acting in an area outside their regular experience and expertise may expose themselves to heightened risks of professional liability.

WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 291 (3d ed. 2012). The exclusion minimizes the increase risk to the insurer by excluding activities that do not principally involve the practice of law.[3] *See* Karen Erger, *Look Before You Leap: The Dangers of Directorship*, 92 ILL. B.J. 217, 218 (2004).

On the other hand, some organizations carry Director and Officer ("D&O") insurance to protect board members from personal liability for activities of the board. Not all organizations carry D&O insurance, and even so, the D&O coverage may exclude a board member's conduct when it involves legal services. *Id.* A D&O policy that provides coverage for actions of board members "while acting 'solely' in their capacities as directors and officers," may conclude that a board member who provides legal advice is not acting solely in his or her capacity as a board member. *See* Micalyn S. Harris & Karen L. Valihura, *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service*, 53 BUS. LAW. 479, 493 (1998).

The coverage determination focuses on the action that gave rise to the liability, and in what capacity the lawyer was acting when performing the action. Whether the individual was wearing his or her "lawyer hat" or "board member hat" is subject to the insurance companies' interpretation of the lawyer's activities—which is determined after the claim is made. Karen Erger, *Look Before You Leap: The Dangers of Directorship*, 92 ILL. B.J. 217, 218 (2004). "[I]t is sometimes difficult to draw a line between the practice of law and non-legal services since the field of law encompasses such a large area, and the attorney is called upon to use his legal background in many situations." *Smith v. Travelers Indem. Co.*, 343 F. Supp. 605, 609 (M.D.N.C. 1972).

Insurers may conclude that the lawyer was acting in the capacity of a board member for purposes of the malpractice policy's exclusion, but not solely in the capacity as a board member to bring it within the scope of the D&O policy's coverage. *See, e.g.*, Karen Erger, *Look Before You Leap: The Dangers of Directorship*, 92 ILL. B.J. 217, 218 (2004); Micalyn S. Harris & Karen L. Valihura, *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual*

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[3] *See also* Mary E. McCutcheon, *Professional Liability Insurance Issues for Lawyers Sitting on Corporate Boards*, 25 BRIEF, Winter 1996, at 8, 11 ("The risk of uninsured exposures for attorney/directors extends far beyond the question of whether the D&O exclusion applies. As attorneys' liability exposures have increased, professional liability insurers have added other exclusions which may limit coverage for claims against attorney/directors. These include exclusions for: criminal acts or 'dishonesty;' a broad array of securities claims; personal injury (such as libel or slander); ERISA and other fiduciary activities; wrongful termination or discrimination; claims by regulatory agencies; and pollution.").

Service, 53 Bus. Law. 479, 494 (1998); Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/nonprofit Director*, 23 COLO. LAW., 2735, 2737. "These problems may be addressed by obtaining special riders or endorsements on policies; however, the need for clarification should be recognized by those individuals wearing multiple corporate hats." WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 263 (3d ed. 2012).

e) Conflict of interest

Several conflicts of interests may arise out of a lawyer's dual role as counsel and board member for a NP. Before accepting the additional role of board member, a lawyer who represents a NP should determine whether the responsibilities in the two roles will conflict. The lawyer should also consider the potential frequency of a conflict, the potential intensity of the conflict, the impact the lawyer's resignation would have on the board, and whether the NP is able to obtain legal advice from other counsel when conflicts arise. MODEL RULES PROF'L CONDUCT § 1.7 cmt. 14; ABA Ethics Opinion 98-410 (02/27/98). Additionally, a lawyer must ensure that his or her personal interests will not materially limit the client's representation. If there is a risk that the representation may be materially limited, the lawyer must assess the potential conflict to determine whether an actual conflict exists, whether it can be waived—and if so, consult with the affected clients and obtain their informed consent. MODEL RULES PROF'L CONDUCT § 1.7 cmt. 2. Depending on the nature of the conflict, it may not be appropriate for a lawyer to receive informed consent from the board acting on behalf of the NP.

A lawyer must be diligent in identifying and managing conflicts to protect the NP and to comply with the lawyer's ethical obligations. Conflicts that are more likely to arise when the lawyer undertakes a dual role include:

i) The lawyer's duties to the NP as a board member may conflict with the lawyer's duties to the NP as its lawyer.

A board member owes separate duties to a NP than those that a lawyer owes his or her client. Many of the duties overlap (duty of loyalty and fiduciary duties); however, a lawyer must consider whether the duties pose a conflict to either the lawyer's role as a board member or the NP's lawyer. *See* California Ethics Opinion 1993-132 (1993) ("The lawyer [acting as a board member] needs to consider the fiduciary duties owed to the client governed by corporate law."); *see also* MODEL RULES PROF'L CONDUCT § 1.7(a)(2) ("A concurrent conflict of interest exists 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.").

ii) The legal position of the NP and the board may conflict.

When the position of the NP conflicts with the position of the board (for example if the organization's fiduciary duty requires it to pursue claims against the board as a whole or certain board members) the lawyer should advise the board—and likely the NP—to seek independent counsel. *See* BOYD, WILLIAM L., GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 269

(3d ed. 2012). The lawyer owes his or her professional obligations to the NP and not the board, thus there is not a conflict involving adverse clients under MR 1.7(a)(1). Under MR 1.7(a)(2), however, the dual role may create a significant risk that the lawyer's representation of the NP would be materially limited by a third person or the lawyer's personal interest—even if the lawyer (as board member) is not implicated in the claim. A conflict under 1.7(a)(2) is waivable, but, as discussed *infra* Part 1(f), waiver by the board is likely problematic.

iii) The lawyer may be asked to pursue matters as a lawyer that he or she opposed as a board member.

A conflict may arise when a lawyer is asked to represent the NP in a matter that the lawyer opposed as a board member. "The lawyer's ability to negotiate on behalf of the corporation, as a professional facing another professional, is sometimes impaired by the ambiguity of roles." BOYD, WILLIAM L., GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 292 (3d ed. 2012). Whether the lawyer can accept—or continue—the representation, or whether the lawyer's firm may, depends on the nature of the conflict. Simply opposing the proposed action does not create a conflict. A conflict arises under MR 1.7(a)(2) when the lawyer determines that his or her opposition to the action may "materially limit" the lawyer's representation of the NP. MODEL RULES PROF'L CONDUCT §1.7; Willard L. Boyd III, *Lawyers' Service on Nonprofit Boards Managing the Risks of an Important Community Activity*, BUS. L. TODAY, Nov.– Dec. 2008, at 35, 36. *But see* American Bar Association Ethics Opinion 98-410 (02/27/98) ("However, for the lawyer-director, who is required as a director to make a business judgment, this calculus may be different, a fact the lawyer should recognize before she undertakes representing the corporation in the matter. When a lawyer has participated in the decision-making as a client, there may be an increased risk that she will be tempted to 'pull her punches' as she represents the corporation in going forward, or may be perceived by others as providing less than diligent representation.").

If the lawyer determines that the NP's representation may be materially limited, to proceed with representation, the lawyer must reasonably believe that the NP's representation will not be adversely affected, consult with the NP, and receive the NP's informed consent in writing. MODEL RULES PROF'L CONDUCT § 1.7(b). If the lawyer's conflict is based on a personal interest, then the conflict may not be imputed to the lawyer's firm. MODEL RULES PROF'L CONDUCT § 1.10. But, for example, an action that may create liability for the lawyer in his or her professional capacity is not purely a personal interest and the firm would have to comply with the requirements of MR 1.7(b) to represent the NP.[4] MODEL RULES PROF'L CONDUCT § 1.10(c).

iv) The NP client may request advice on a matter in which the lawyer was involved as a board member.

A lawyer must advise the NP to seek the advice of an independent lawyer when asked to opine on a matter in which the lawyer participated. Willard L. Boyd III, *Lawyers' Service on Nonprofit Boards Managing the Risks of an Important Community Activity*, BUS. L. TODAY,

[4] See *infra* Part 1(g).

Nov.–Dec. 2008, at 35, 36. The lawyer's ability to maintain independent professional judgment while representing the NP "may be at least somewhat impaired." WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 291 (3d ed. 2012); *see also* American Bar Association Ethics Opinion 98-410 (02/27/98) ("[I]t may prove difficult for the lawyer to speak independently as counsel to the corporation in light of her own interest as a director."); *see* Rule 1.7(b). "[I]f the opinion is sought in order to justify an action the board currently has before it, the advice-of-counsel defense to a later lawsuit may be undermined by the lack of independence of the lawyer-director and her firm." American Bar Association Ethics Opinion 98-410 (02/27/98).

v) The lawyer may be asked to take actions as a board member that involve the lawyer or the lawyer's firm.

A lawyer should abstain from voting as a board member in matters that directly affect the lawyer and the lawyer's firm. *See, e.g.*, Kansas Ethics Opinion 91-01 (12/10/91) ("The partner sitting on the board must abstain from voting on matters that involve action on legal advice offered by his firm and on the question of the board's contract for legal representation."); *ABA/BNA Lawyers' Manual on Professional Conduct (Ethics Opinions) (hereinafter, "ABA/BNA Manual")* at 901:3004 (lawyer may serve as director of a nonprofit property owners' corporation, but must abstain from voting on matters concerning own employment). Unlike the concern of independence with a lawyer opining on his or her actions as a board member, the concern here is whether the board member is able to exercise independent judgement when the decision could directly affect the lawyer or the lawyer's firm. American Bar Association Ethics Opinion 98-410 (02/27/98). The ABA recommends that—at a minimum—the lawyer should abstain from voting on issues such as engagement, performance, payment or discharge, and similar issues directly involving the NP's relationship with the lawyer's firm. ABA Ethics Opinion 98-410 (02/27/98). *See also* California Ethics Opinion 1993-132 (1993) ("If Corporation is deemed the attorney's client for any purpose, and if the attorney participates in board deliberations or voting relating to the transaction, the attorney has independent duties to obtain the informed consent of both Corporation and Client to the conflicting representation under rule 3-310(C)(1) for a potential conflict, or rule 3-310(C)(2) for an actual conflict. If Corporation is deemed attorney's client, rule 3-310(E) may apply even if attorney recuses herself from such board deliberations and voting.").

vi) The lawyer or lawyer's firm may be asked to represent the NP in litigation against the board and/or the organization.

The non-profit must have independent counsel in any controversy between the client non-profit and the board, including the lawyer. "When a situation arises that involves an actual or potential dichotomy of interests between the corporate entity and one or more directors, the affected directors should seek independent legal counsel, and the corporation's lawyer should so advise the directors." WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 293 (3d ed. 2012) ("In controversies involving corporate actions, a claimant may assert that both the corporation and one or more directors are accountable, or the corporation may wish to assert that certain directors bear the real responsibility for the controversial events.

A director should understand *that in such circumstances the corporation's lawyer does not and cannot represent both the corporation and the affected directors*. Among other things, this means that the corporation's lawyer cannot receive confidences from a director that are kept from the corporation."); *see also* Willard L. Boyd III, *Lawyers' Service on Nonprofit Boards Managing the Risks of an Important Community Activity*, BUS. L. TODAY, Nov.–Dec. 2008, at 35, 36; American Bar Association Ethics Opinion 98-410 (02/27/98).

f) Informed consent

A conflict of interest does not necessarily preclude a lawyer from representing the NP or remaining on the board. If a lawyer concludes that the conflict is waivable, MR 1.7(b) requires that the affected clients provide informed consent for the continued representation. The lawyer must consider whether it is appropriate to accept informed consent from the board on behalf of the NP. It may be appropriate for the board and the NP to waive a lawyer's personal conflict, but the lawyer should avoid accepting a waiver to continue representation when the conflict arises out of conflicting interests of the NP and the board. *See* ABA Ethics Opinion 98-410 (02/27/98). ("Moreover, seeking a waiver of the potential conflict is problematic because the very directors who would need to provide the waiver are themselves directly concerned by the question that is being raised.").

g) Disqualification

The lawyer's position as a board member increases the likelihood that the lawyer and the lawyer's firm may be precluded from representing the NP in an action. *see* Karen Erger, *Look Before You Leap: The Dangers of Directorship*, 92 ILL. B.J. 217 (2004) ("Some lawyers are eager to join client boards because they feel it solidifies their position with the client and keeps competitor law firms out. Paradoxically, service as a director can *disqualify* your firm from representing your client. . . . Sadly, the very trust that led your client to invite you to serve as a director may deprive the client of its trusted adviser at a time when the client needs you most." (internal citation omitted)). The lawyer's dual role increases the potential for conflicts, unwaivable conflicts, imputed conflicts, and the possibility that the lawyer may be a necessary witness in trial.

A conflict of interest that is not related to a lawyer's "personal interest" imputes to the lawyer's firm under MR 1.10, either baring the firm from representing the NP or requiring the NP to waive the conflict.[5] MODEL RULES PROF'L CONDUCT § 1.10; *see also* MODEL RULES PROF'L CONDUCT § 1.7(a)(2). Additionally, the lawyer's dual role may disqualify him or her from representing the NP when there is likelihood that the lawyer will be a necessary witness. MODEL RULES PROF'L CONDUCT § 3.7(a). A lawyer's disqualification under MR 3.7(a) does not impute to the lawyer's firm unless the firm is precluded from the representation under MR 1.7 or MR 1.9. MODEL RULES PROF'L CONDUCT § 3.7(b); *see* MODEL RULES PROF'L CONDUCT § 1.10; *see also Berry v. Saline Mem'l Hosp.*, 907 S.W.2d 736, 740 (1995) (holding that lawyer's position on a hospital's board during the approval of policies and procedures barred the lawyer's

[5] Potential conflicts of interest and issues with waiver are discussed *supra* Part 1(e) and (f).

firm from representing a plaintiff against the hospital because the litigation would necessarily involve issues of policy and procedure, thus the representation would be adverse to the lawyer's interest).

h) Questions for the lawyer to consider before accepting a dual role

- Am I asked to provide legal service or advice to the board?
- 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?
- 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?
- Has the extent of my representation been clearly defined?
- Does my professional malpractice insurance cover me?
- 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?
- 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?

WILLIAM L. BOYD, GUIDEBOOK FOR DIRECTORS OF NONPROFIT CORPORATIONS 276, 295 (3d ed. 2012).

2) PLANNED GIVING[6]

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[6] In response to specific questions posed in the email for the project:

- No, the lawyer is not required to advise the PD to consult with other beneficiaries. As discussed further in this section, the NP's lawyer should avoid giving any legal advice to the PD other than to consult with a lawyer.
- I did not come across any special confidentiality requirements for the lawyer representing the NP. If meeting with PDs and their counsel is within the scope of the lawyer's representation of the NP, then the lawyer presumably has implied consent to carry out the representation. If the NP did not want certain information revealed or asked the lawyer to relay specific information, the lawyer should ensure that the information is not misleading. It could invalidate the gift and subject the lawyer to discipline.
- The lawyer should not have to explain to the PD about the confidentiality of information the lawyer receives because the lawyer should not speak to the PD outside the presence of the PD's lawyer.
- The NP's lawyer needs to be concerned about MR 1.14 to the extent that the lawyer should avoid creating an attorney-client relationship with PDs because a PD with diminished capacity could create a unwaivable conflict requiring withdrawal from both

Competently (and ethically) representing and advising a NP[7] in planned giving matters involves an understanding of the complex legal and ethical issues that surround planned giving programs. Planned giving is a largely self-regulated industry that involves vulnerable donors and the potential for abuse. NPs are not obliged to follow an ethical code, but a NP that is exposed for unethical practices will undoubtedly face reputational, and thus, economic harm. A lawyer for a NP should be aware of the Model Standards of Practice for the Charitable Gift Planner, along with other ethical guidelines and urge the NP to adopt ethical practices. Planned giving donations are usually challenged under a claim of undue influence, duress, or both. Conflicts of interest, or perceived conflicts, cast doubt on the legitimacy of the gift. Competent representation of a NP requires a lawyer who aids the NP in the receiving of gifts to help ensure the validity of the gift.

a) Competency

A lawyer must be familiar with the general issues with planned giving programs and the relevant areas of law MR 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." "There is no separate or relaxed version of applicable ethical precepts for attorneys providing pro bono advice. Duties of competence, confidentiality, and conflict avoidance, for example, all remain fully applicable." New Jersey Ethics Opinion 671 (1993). Failure to provide competent advice to a NP that participates in planned giving may create unexpected legal issues for the client, invalidate the NP's gifts, and cause reputational harm that may destroy the NP.

Competent representation of a NP does not require the lawyer to be competent in every area of law that is potentially implicated by the program. The lawyer's required knowledge on planned giving varies depending on the scope of the representation. A NP's lawyer who is advising a potential donor ("PD") in the solicitation of gifts must possess different knowledge than that required to represent the NP in an estate dispute regarding a donor's gift. For example, a lawyer who aids the NP in soliciting the gift should be aware that a NP that promotes planned giving for its tax benefits rather than for the philanthropic purpose might have to register with the SEC. *See* Douglas K. Freeman, *Balancing the Scales: The Gift Planner's Dilemma*, PLANNED GIVING DESIGN CENTER NETWORK, http://www.pgdc.com/pgdc/balancing-scales-gift-planners-dilemma. At the least, to competently represent a NP that participates in planned giving, a

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representations (discussed further in this section); and that a PD with diminished capacity could invalidate the NP's gift. Competent representation of the NP includes ensuring that the PD's lawyer is competent to prevent the gift from later being deemed invalid. If the NP's lawyer suspects the PD may have a diminished capacity, the lawyer does not have a relationship with the PD and could advise the NP accordingly, or inform the PD's lawyer. Additional steps a NP could take to protect a gift would be recommending that a PD consults with a medical professional (as they would an accountant), or requesting that the PDs gift form include the PD's reason for the donation. Both could potentially be used as evidence should the gift later be contested.

[7] In this section a NP is assumed to participate in a planned giving program

lawyer must have an understanding of the limits of his or her knowledge. A lawyer may not have the requisite competence to advise the client on whether it needs to file for registration with the SEC, but the lawyer must recognize and explain to the NP that the planned giving plan may subject it to securities laws and that the NP should consult a professional in the area for further advice.

A competent lawyer should also be aware of the competence of the PD's lawyer. A PD's lawyer who lacks the requisite competence or provides an inadequate gift form could compromise the validity of the gift. *See* Kathrn W. Miree, Community Foundation of South Jersey, The Role of the Professional Advisor in Planned Giving: How to Help Clients Meet Charitable Goals, 8 (April 29, 2016) ("The attorney plays the most vital role in planning since she drafts the documents that create the gift.").

b) Attorney-client relationship[8]

A NP's lawyer should avoid meeting with a PD individually to discuss the NP's planned giving program. If a NP's lawyer meets with an unrepresented PD regarding the NP's planned giving program, and the NP subsequently accepts a gift from the PD, the lawyer is likely in violation of several ethical rules and has jeopardized the validity of the NP's gift.

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the

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[8] This section does not address when the lawyer also sits on the board, however, to the extent that it is relevant to the total discussion:

When a lawyer represents both the NP and the PD in a planned giving transaction, the conflict will likely not be waivable under MR 1.7. *See* Oregon Ethics Opinion 2005-116 ("Because of the potential for differing interests or the positions between Charity and Donor concerning the terms of the transaction, representation of both Charity and Donor in the transaction would similarly constitute a prohibited, nonwaivable conflict of interest. . . ."). The Oregon Opinion suggests that a lawyer who represents the NP in other matters—but not the transaction involving the PD—may serve on the board *and* represent the PD so long as the requirements of MR 1.7(b) are met. However, a Maryland opinion—which has since been withdrawn without comment—concluded that the lawyer's membership with a church's Legacy Committee could not meet the requirement of 1.7(b)(1) because in such a situation it is not reasonable for the lawyer to believe that he or she can competently and diligently represent each client. *See* Maryland Ethics Opinion 2003-09 ("The Committee believes that your role as Legacy Committee chair and/or your own interest in advancing the church's financial interests would be the sorts of responsibilities to a third person and/or personal interest that are governed by Rule 1.7(b)."). In most states, however, so long as the lawyer does not represent both the NP and the PD in the transaction, the lawyer may represent the client in giving to a NP even when the lawyer serves on the board. Richard C. Mills, *Doing Good, While Doing Right by Your Client a Guide to Ethical Considerations for Estate Planning Attorneys Serving on Charitable Boards*, PROB. & PROP., Nov.–Dec. 2015, at 56, 58.

> lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

MODEL RULES PROF'L CONDUCT § 4.3.

Furthermore, "an attorney-client relationship is presumed to exist" when "the legal counseling becomes particularized to an individual—eliciting facts and providing reaction and advice specific to the individual's situation." New Jersey Ethics Opinion 671 (04/05/93). Informing the client that the lawyer is representing the NP and not the PD will not prevent the creation the relationship.[9] *See id.*

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[9] In response to your question of whether a signed acknowledgment would prevent an attorney-client relationship from forming, likely not. New Jersey Opinion 671 focuses on the particularization of the legal advice to the individual's situation. The Opinion states that—

> when an attorney discusses a specific client's situation on an individual basis with that client, with or without the presence of a third party, most individuals would tend to assume that they were entitled to rely on the specific advice of that attorney as it applied to their situation, however that advice might be qualified.

New Jersey Ethics Opinion 671 (04/05/93). It further opines that—

> It is conceivable that in a unique circumstance no attorney-client relationship would develop. This could happen if the attorney only provided general legal information to the individual about the overall situation (*i.e.*, divorce, domestic violence), *not in any way tailored to the individual's particular circumstances.* It also might happen if the communication between the individual and the attorney was very brief and limited (*e.g.*, a single question during a telephone call), without really developing the factual setting of the particular case.

Id. (emphasis added). In 2008, New Jersey issued an opinion adding that advising a client in writing will also not prevent an attorney-client relationship from forming. It seems unlikely that the addition of a signature would change the outcome. New Jersey Ethics Opinion 712 (01/17/08). Based on Opinions 671 and 712, I believe it would be difficult to avoid an attorney-client relationship unless the communication was brief and not based on the PD's specific facts. Additionally, an unrepresented PD speaking with the NP's lawyer is risky for the NP because it may create the appearance of a conflict and/or undue influence. Because planned gifts are particularly susceptible to claims of undue influence, a NP's lawyer should be overly cautious to protect the client's interests and not act in a way that could jeopardize the validity of the gift.

A lawyer who believes that he or she can provide competent[10] and diligent representation to both the NP and the PD is not per se prohibited from undertaking the representations so long as the lawyer complies with the waiver requirements of 1.7(b).[11] *See* New Jersey Ethics Opinion 712 (01/17/08) (explaining that the less strict application of the conflict rules provided by MR 6.5 does not apply when there is a known conflict). Perhaps a NP that has adopted the Model Standards of Practice for the Charitable Gift Planner has interests that are aligned with the PD. The NP's practice may be to determine the best gifting technique for the PD and advise the PD accordingly. If the NP's giving program provides the technique that the client chooses after receiving all of the relevant information, then the NP's desire to be the recipient of the gift may not pose an unwaivable conflict.[12]

The potential for conflicts—or perceived conflicts—in a planned giving situation is great. Outside of the normal considerations (professional independence, personal conflict, etc.), a lawyer should consider the unique conflicts posed by planned giving programs including the

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The presentation by Kathrn W. Miree, The Role of the Professional Advisor in Planned Giving: How to Help Clients Meet Charitable Goals, implies that PDs should be independently represented. Given the context of the presentation, this advice may primarily apply to charities that receive substantial donations and it may not as practical for smaller gifts. But as a best practice, because of the risks associated, it is likely best to avoid a one-on-one conversation with an unrepresented PD (or a represented PD when the lawyer is not present, MR 4.2) even with a signed acknowledgment.

[10] Different issues may arise when dealing with planned giving from the PD's prospective rather than the NP's. Competent representation of PDs requires knowledge in estate and tax planning.

[11] MR 6.5(a) allows a lawyer to provide legal services through a non-profit on a limited basis—such as advice or the completion of legal forms—without being subject to a strict application of Rules 1.7, 1.9, and 1.10 in certain circumstances. Because an attorney-client relationship is created, the lawyer must clarify that there is no expectation of continued representation and the scope is limited. MR 6.5(a), and cmt.1 & 2; *see also* New Jersey Ethics Opinion 712 (01/17/08). Rule 6.5 does not apply if the lawyer is aware a conflict. In the present situation, the lawyer represents the NP, as opposed to the NP providing a disinterested lawyer for the benefit of the person receiving the lawyer's advice. Therefore, MR 6.5 does not apply and the lawyer must be aware of potential issues that are likely to arise under MR 1.7, MR 1.8, and MR 1.10.

[12] I am skeptical too. It seems virtually impossible in application, however, I think in theory the parties are not necessarily adverse like in a buyer/seller situation. The benefit of one party does not *have* to come at the expense of the other. An Oregon Ethics Opinion addressed whether a lawyer who serves on the board of a charity, and is the lawyer for the charity, could represent a donor in transaction with the charity. Oregon Ethics Opinion 2005-116 (2005). The Opinion concluded that the given scenario would create an unwaivable conflict, comparing it to a buyer/seller or lender borrower transaction. However, a lawyer can represent the donor in a transaction with the charity while remaining on the charity's board and continue to represent the charity in other matters. This would be a waivable conflict. *Id.* If the PD has a predetermined amount to give, there is no benefit to the PD giving less. And if the NP adopted ethical guidelines, then it benefits the NP to adhere to the standards that respect the PD. It seems like it could be more of a 1.8 conflict and thus waivable. That is my logic.

increased likelihood that the lawyer will have to withdraw in the event of a conflict and whether the PD would be able to provide informed consent. The elderly are "ideal prospects" for planned giving programs; however, "their age and infirmity make them vulnerable to loneliness, dependency, and undue influence." Douglas K. Freeman, *Balancing the Scales: The Gift Planner's Dilemma*, PLANNED GIVING DESIGN CENTER NETWORK, http://www.pgdc.com/pgdc/balancing-scales-gift-planners-dilemma. The Gift Planner's Dilemma.

For example, if a NP's lawyer—also representing the PD in an otherwise simple planned giving transaction—came to believe that the PD had a diminished capacity, the lawyer would need to consider whether the prior informed consent to waive a conflict was valid and whether the lawyer should continue representing the PD in connection with the gift. The lawyer's ability to reveal confidential information to the extent necessary to protect the PD does not apply to revealing confidential information to protect the NP client. *See* MODEL RULES PROF'L CONDUCT § 1.14. Where a lawyer believes that the PD has diminished capacity, but the PD wishes to participate in a planned gift to the NP client, the lawyer would be precluded from revealing to the NP client that the gift may later face a valid challenge. The lawyer may also be a witness. If the lawyer believes that the PD cannot provide informed consent to waive a conflict, the lawyer is obligated to withdraw from both representations. Additionally, if the lawyer wishes to take measures to protect the client, those actions may be adverse to the NP client's interests. Informed consent would require the lawyer to release the confidential information to the NP beyond what is necessary for the PD's protection and likely requires withdrawal.[13]

If a PD wishes to discuss a planned giving plan with the lawyer representing the NP, a prudent lawyer would advise the PD to consult with independent counsel. The inadvertent creation of an attorney-client relationship creates several conflicts of interest, which may or may not be waivable. The potential conflict could obligate the lawyer to withdraw from the NP's representation, invalidate the subsequent gift, and create liability for the lawyer.

Best practices to avoid an attorney-client relationship with a PD include:

- **Speak to PDs generally and in groups:** "In situations where a lawyer is providing general information to a group of people about the law or legal rights, such as discussing the grounds for divorce, an attorney-client relationship would not normally attach or develop." New Jersey Ethics Opinion 671 (04/05/93).

- **Only meeting one-on-one with PDs in the presence of their lawyer:** "Under the course of conduct which you propose, in which you would only represent the not-for-profit organization and only meet with potential donors in the presence of their separate

[13] Kathryn Miree states that the arrangement is outright prohibited by the Professional Code of Conduct. I disagree with her conclusion that the representation creates an unwaivable conflict, but agree that the arrangement can be very problematic. Kathryn W. Miree, Community Foundation of South Jersey, The Role of the Professional Advisor in Planned Giving: How to Help Clients Meet Charitable Goals, 8 (April 29, 2016).

counsel, and disclaim any representation of the potential donor, the Committee sees no impropriety under the RPCs." Washington Ethics Opinion 1789 (1997).

c) Referrals to other professionals

A lawyer who is diligent about representing his or her client should take proper precautions to ensure any gift to the NP is properly obtained and is in accordance with the NP's ethical standards. The lawyer should not misrepresent the program or its benefits to the PD. To increase the likelihood of a gift's validity, the lawyer should recommend that PDs consult other professionals to aid in an informed decision. Such professionals include accountants, financial planners, trust officers, insurance professionals, real estate agents, and stockbrokers. Kathrn W. Miree, Community Foundation of South Jersey, The Role of the Professional Advisor in Planned Giving: How to Help Clients Meet Charitable Goals, 8 (April 29, 2016). While there is nothing unethical about the NP providing—or even paying for—the professional advice, the farther the charity remains from the transaction, the less the likelihood of a perceived conflict of interest. *Id.* at 43.