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The Perils & Pitfalls of Lawyers as Board Members

Attorney Panel

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Summary: Attorneys who accept the honor and responsibility of board participation likely will face a wide variety of expectations about one's skills, expertise, and ability to contribute meaningfully. But serving on a church or other nonprofit organization board can create unintended issues warranting careful attention and discernment. What happens (or should happen) when one is asked about areas beyond their practice knowledge, when confidentiality concerns arise, or when lines blur about their governance role and related responsibilities? Through a panel presentation and participant engagement with hypotheticals, this workshop addresses best practices, ethical dynamics per the ABA Model Ethics Rules, and ways to reduce risks associated with such good intentions.

I. Introduction

- A. Brief attorney background
- B. Format today – Some background information, then hypotheticals addressed by the panel, with participant engagement too!

II. Consider Expectations and Accountability

- A. God's standard: "Do not think of yourself more highly than you ought, but rather think of yourself with sober judgment, in accordance with the measure of faith God has given you." (Romans 12:3)
- B. People expect that attorneys know more than average board members, especially about legal aspects of governance and operations.
- C. Attorneys have long enjoyed a general reputation as leaders.
- D. How do attorneys live into these expectations?
- E. When you agree to work with a nonprofit organization: _____
- F. Accountability?

III. Board Governance Generally (Before Attorney Overlay)

- A. Directors and officers – "fiduciary" role, bylaws
- B. Common law fiduciary responsibilities (care, loyalty, obedience)
- C. State law and federal tax law too
- D. A few words on personal liability and "founder's syndrome"

IV. Add Ethical Dimensions of Attorney Board Service (per ABA Model Rules and similar state rules)

A. Preamble Language:

1. “[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”
2. “[4] In all professional functions a lawyer should be competent, prompt and diligent... Maintain communications with client... keep in confidence information related to representation of a client...”
3. “[9] In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a living.”

B. Attorney’s Duty of Competence

***Rule 1.1:** A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.*

C. Attorney’s Duty of Diligent Representation

1. ***Rule 1.3: Diligence** - A lawyer shall act with reasonable diligence and promptness in representing a client.*

2. Specific applications of duty of care – e.g., active oversight, delegation, corporate documents, management of financial assets, contracts, supervision of charitable activities, employment.

D. Confidentiality of Information - Rule 1.6

1. ***Rule 1.6: Confidentiality of Information** - (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent to the disclosure. . .*

2. Questions may abound about existence of attorney-client privilege, with unfortunate implications regarding confidentiality, conflicts of interest, and other issues.

E. Conflict of Interest - Avoidance - Rule 1.7/1.8

1. ***Rule 1.7: Conflict of Interest** - . . . a lawyer shall not represent a client if the representation involves a current conflict of interest.*

2.. **Rule 1.8: Conflict of Interest** - (b) A lawyer shall not use information related to representation of a client to the disadvantage of the client unless the client gives informed consent. . .”

F. Lawyer’s Duty to Client/Organization

1. **Rule 1.13(a):** *A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.*

2. **Rule 1.13(b):** *If a lawyer for an organization knows that an officer, employee . . . intends to act in . . . violation of a legal obligation . . . or a crime, fraud . . . then the lawyer shall proceed as is reasonably necessary in the best interest of the organization . . . the lawyer shall refer the matter to higher authority in the organization . . .”*

3. **Rule 1.13 (f)** *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.*

4. **Rule 1.13 (g)** *A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of ER 1.7. If the organization’s consent to the dual representation is required by ER 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*

5. Consider “Upjohn” communications: An *Upjohn* warning is what an attorney representing an organization client gives to employees of the organization client to clarify and disclose the lawyer’s client and thereby manage expectations and avoid confusion about who the lawyer represents and where the lawyer’s duties lie. It arises from the United States Supreme Court’s decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981), in which the Supreme Court held that a company could invoke the attorney–client privilege to protect communications made between company lawyers and non-management employees.

G. Communications Concerning a Lawyer’s Services

Rule 7.1: *A lawyer shall not make a false or misleading communication about the lawyer or lawyer’s services. A communication is false or misleading if it contains a material misrepresentation or fact of law, or omits a fact necessary to make the statement considered as a whole not materially misleading.*

H. Dealing with Unrepresented Persons

1. **Rule 4.3:** *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 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.*

I. Voluntary Pro Bono Publico Service

1. Rule 6.1:

(a) A lawyer should voluntarily render public interest legal service. A lawyer may discharge this responsibility by:

(3) Providing professional or other law-related services at no fee or at a substantially reduced fee to charitable groups or organizations.

(4) When pro bono publico service is done at a substantially reduced fee, the fee shall be agreed to in writing at the inception of the representation and refer to this Rule.

2. How may this ethical obligation be helpful to attorneys serving on ministry boards?

HYPOTHETICALS

(Selected from the following, for panel to address and for participant discussion)

*Key Questions: What ethical issues arise in these situations?
How should each situation be resolved?*

A. From Coffee to Court

HYPOTHETICAL #1 One of the other friends you've made in the church's sports ministry approaches you after a game and asks "***Hey, you're a lawyer, right? Would you mind having coffee with me to talk about a legal matter?***" Your friend asks you for a business card, which you give to your friend and you both agree to have coffee. At coffee, your friend seems anxious and asks you "***What I tell you is protected by the attorney-client relationship, right?***" You assure your buddy that it is, and that you can be trusted to hold what you're told in confidence. Your friend then proceeds to tell you that (s)he works as a janitor at the Church and its Christian School and day care center, that (s)he was sexually abused as a child and has impulses to "inappropriately touch" children's private parts. (S)he's tried to get help, but to no avail. When you press for details, (s)he admits to recently "acting out" by fondling some of the young kids at the church's campus, including Gretchen, Sarah and Ben, but (s)he really wants to stop and get help. (S)he's worried (s)he may have committed some kind of crime. What's worse, (s)he tells you the compulsion is getting stronger, and (s)he can't stop acting out, but can't get a job anywhere else to avoid doing so. (S)he asks you what to do. ***Gretchen is your daughter.*** What result?

HYPOTHETICAL #2: Assume no attorney-client relationship existed with your janitor friend. You report the matter to local authorities under your state's mandatory reporting law, and your janitor friend is promptly arrested the following Monday. The parents of Sarah and Ben promptly file a civil lawsuit against the janitor the same week as the arrest. The church board holds an emergency board meeting on Saturday to discuss this crisis. Half of the parents have withdrawn their children from the school and day care center, which has resulted in a huge and immediate loss of revenue. Teachers must be laid off promptly because there's not enough money to pay them. Several church members, including major donors and "tithers," appalled at the scandal and not wanting to be associated with "THAT church..." have notified the church that they will no longer attend. At the board meeting everyone turns to you with LOTS of questions, such as "***Can they sue the Church, its school principal and the Church's corporate officers and board members too?***," "***How can we be sued – we didn't do anything wrong – we didn't even KNOW?!***" One board member asks you "***Can I lose my vocational license from being sued for such a matter?***" Another, who last month proudly reported that their negotiations with the church's insurance carrier had reduced the church's annual insurance premiums by half, now reports that the reduced premiums were a result of a negotiated reduction in the church's liability insurance coverage amounts, which are now much less than last year's and may not offer sufficient coverage to pay any judgment obtained in the lawsuit. They all ask you "***Can the plaintiff's lawyers actually sell off the church campus and assets to satisfy any judgment?***" You discuss these and other potential problems into the wee hours of the morning. Everyone present is taking copious notes because of the gravity of the matters discussed.

HYPOTHETICAL #3. The Plaintiffs' Lawyers for abused children Sarah and Ben serve a subpoena duces tecum ("SDT") on the Church and each of the Board members, individually, asking for various things, including "***All Board meeting minutes reflecting or discussing the known, suspected or reported abuse of Sarah, Ben and any other children at the Church and its school or day***

care center.” The Senior Pastor asks you to respond to it. You file objections to the SDTs based on the assertion of the attorney-client privilege and the attorney work product doctrine. The Plaintiffs’ Lawyers then file a motion to compel and ask for sanctions. They also serve an SDT on your law office professional corporation asking you to produce ***“Your engagement letter with the Church and its Board members, any written conflict of interest disclosure letter with the Church and its Board members, any timesheets, time entries or invoices for legal advice that you’ve sent to the church, evidence that you followed your normal and customary file opening procedures with respect to your alleged representation of the church in the Sarah and Ben lawsuit, any communications with Church Board members, staff or employees giving them an Upjohn warning concerning the same, and any conflict of interest disclosure/waiver letters with the multiple clients you purportedly represent.”***

HYPOTHETICAL #4. Your legal professional corporation objects to the SDT served on it based on the attorney-client privilege and attorney work product. The Plaintiffs’ Lawyers then files another motion to compel and asks for sanctions against your law firm, which is consolidated for hearing with their other motion to compel against the Church and its individual board members. At the hearing the judge inquires ***“Do you have any written engagement letter with your church and its board members for legal services? Do you have any written conflict of interest disclosure letter with the Church and its Board members? Have you ever prepared or sent any timesheets, time entries or invoices for legal advice to the church for this matter? Did you follow your normal and customary file opening procedures with respect to this matter? Have you given any Upjohn warnings to anyone about this matter?”*** When pressed by the judge, you honestly answer “No” to each of the above questions. The Plaintiffs’ Lawyers then argue to the judge that all of the above shows that there is NO ATTORNEY-CLIENT RELATIONSHIP between of you and anyone at the Church (except, perhaps, the janitor defendant), that any discussions or deliberations that you had with the board about such matters were therefore not privileged since no other lawyer was present for such meetings, and urges the judge to grant their motions to compel and award sanctions.

HYPOTHETICAL #5. The judge orders the church and its board members, including you, to produce some of the documents requested and immediately afterwards the Plaintiffs’ Lawyers amend the lawsuit against the janitor to include the Church, its school principal and the Church’s officers and board members as defendants. You discover that the Directors & Officers coverage of the Church’s CGL policy was another of the ‘give aways’ that the church had made to get cheaper insurance premiums this year, so there’s no D&O coverage. When you tender the matter to your law firms E&O Malpractice carrier they deny coverage because the judge has already ruled that there was no attorney-client relationship between of you and anyone else, so you were acting as a regular Church Board member and not as a lawyer in all of your actions and advice. You can’t afford to hire a lawyer to defend you in the lawsuit, so you represent yourself and your spouse in *pro se*. The Church and Sr. Pastor, Board members, staff members, employees, teachers, parents, students, your spouse and your family pet all think you have “a fool for a client and an idiot for a lawyer” representing you in the matter. You are thoroughly dejected and depressed.

B. Great Ambitions – Awful or Awesome?

Situation 1. An attorney, Awful Lawful (AL), is looking to build his law practice by volunteering to be on the board of directors of Good Time Charities (GTC), an Illinois Not for Profit Corporation, tax-exempt under IRC 501(c)(3). The Chairman of GTC thinks it would be great to have a lawyer on the board who would volunteer legal services to the corporation. AL speaks about his great experience with tax-exempt organizations (TEO) when in fact he has almost no knowledge of the related tax code provisions and little experience with corporations. AL concentrates his law practice on family law,

estate planning and probate law. The week after the initial meeting, the Chairman call AL to say the board of directors unanimously approved him to be a director for three years starting at the next meeting of the board on the first of next month. AL is delighted and will attend the meeting. At the meeting, the directors approve the purchase of a small office building in town. AL agrees to provide legal services in the transaction. It occurs to AL that his father-in-law owns the subject property.

Situation 2. AL is now a full-fledged director of GTC, attending monthly meetings, and has been elected Treasurer. The Chairman has asked AL to help with a little fundraising project. A faithful donor has expressed interest in giving GTC a bequest in her will. Now she needs a will to make the bequest. Thinking of a simple document, AL exclaims, “No problem, I can do it in my sleep”. The following week AL goes to the donor’s home and recognizes it to be the largest mansion in the community. Dollar signs begin to float in front of AL’s car as he anticipates developing an attorney client relationship with the wealthy widow.

Situation 3. For the past three years GTC has been developing a significant endowment fund including several significant charitable remainder trusts. The existing trust funds are all managed by Trustees appointed by the settlors. The trustees tend to be independent bankers or financial managers. AL’s special friend, the donor in Situation 2, has become very ill and her mental capacity is questionable. She calls AL at his office to talk about her plan to set-up a substantial charitable remainder trust for the lifetime benefit of her sole child and then a distribution to five charities including GTC. She wants AL to draft the documents and name himself her successor trustee. She does not know that AL is a director of GTC. AL starts drafting the trust agreement and includes a generous provision to compensate the trustees. AL also drafts a provision for GTC to receive 60% of the residue and 10% each to the four other charities. When AL goes to the donor’s mansion with the trust documents, she cannot remember who he is.

Situation 4. The Chairman of GTC is so impressed with AL’s insight into the operations of the endowment fund that he wants to hire him to represent the organization and to spearhead the capital development campaign next year. AL agrees to represent the corporation and will also remain as director. At the meeting of the board to decide the question of hiring AL, he attends the meeting to negotiate the terms of services and resulting fees. No one thinks that AL should leave the meeting or recuse himself from the decision process.

C. The Tale of Tom Trustworthy

Attorney Tom Trustworthy wants to serve First Church and make a living. Hank Hope wants to buy a building for Youth Development. Bob Beneficence wants to run his own youth charity, Kids First, preferably with Tom’s assistance but not with Nora Nohelp around. Help them sort through the attorney/client ethical and board governance issues implicated below.

A. Tom Trustworthy

Tom Trustworthy has been an attorney for five years. His legal practice is focused on residential real estate and estate planning. Tom is a member of First Church, Small Town USA, and he serves on its governing board. From time to time, he has provided informal legal advice to the Church on various matters. Tom keeps some notes, but he has never opened a pro bono client file for his legal services to the Church. It seems unnecessary, particularly since he has never charged the Church. The Church is certainly thankful to have him as a board member!

Questions

1. What is Tom’s relationship with the Church?

2. What would you recommend to Tom, to protect the Church and him ethically?
3. What are some key legal areas that Tom needs to be knowledgeable about, in order to meet the Church's apparent expectations of him?

B. Hank Hope and Youth Development: a Great Ministry Opportunity

A church member named Hank Hope has developed a separate section 501(c)(3) ministry named Youth Development. Hank loves serving as its Executive Director, and the ministry is flourishing. Many church members are excited to be connected with such a great ministry, especially since many of its youth participate in the Church. In fact, Tom's wife Terri (who is also his paralegal) has just joined Youth Development's board.

The Church moved into a new building a few years ago, across the street from its old building. Currently, Youth Development uses the Church's old building pursuant to an informal "handshake" arrangement, which Tom helped to work out before he joined the Church board. Hank just submitted a real estate contract (thanks to Terri's volunteer help) to buy the old church building for \$150,000, with a check made payable to Tom as escrow agent for \$5,000 in earnest money. Hank has not hired an attorney for this purchase, since he trusts Tom and the Church and has done some real estate work before.

The other Church board members are thrilled and want to move quickly to accept and close the deal. Tom would appreciate getting paid for this work, particularly since his billables have been low lately.

Questions

1. What are the ethical implications of Tom's prior services, helping the Church and Youth Development with its "handshake" deal?
2. What ethical issues are implicated by Terri's board service with Youth Development? Her paralegal work for Tom? Her status as Tom's wife?
3. Should Tom hold the escrow money? If so, what precautions should he take?

C. Bob Beneficence and Kids First: Old Client, New Client?

For several years, Tom has represented a wealthy individual named Bob Beneficence, handling his estate planning needs. Bob has used some of his money to start Kids First, a new public charity currently renting an office down the street from the Church. Seeking to impress Bob (and maybe increase his business), Tom has made occasional donations to Kids First.

Bob is duly impressed. In fact, he thinks Tom would make a great attorney for Kids First and maybe even for his other business needs. As President of Kids First's board and its chief funder, Bob knows the Board will vote for whatever he proposes.

Bob recently told Tom that he is interested in buying a nearby building for Kids First, and that Kids First is prepared to pay up to \$200,000. Bob does not know that Youth Development is prepared to buy the Church's old building for \$150,000.

Questions

1. May Tom represent Kids First? Should he?
2. Is Tom's donation "ethical"?
3. Who decides whether to hire Tom to represent Kids First? How much weight should Bob's opinion carry?

D. The Kids First Plot Thickens: Nora Nohelp

A few months ago, Kids First hired its first executive director named Nora Nohelp, who moved here from Phoenix. Bob is not so sure about Nora's suitability for Kids First, and so he has sought Tom's advice on some apparent problem areas.

For example, Nora asked for and received a board-approved zero-interest loan from Kids First for a house down payment (since her house in Phoenix hasn't sold yet), but she is driving a new car these days. In addition, Bob recently became aware of an influx of government notices addressed to Kids First from the IRS, the Attorney General's office, and even the secretary of state. Shouldn't Nora be on top of all that paperwork? Bob is also growing concerned that Nora has not provided any financials to the Kids First board, since she began working for Kids First. She says the work load is just too much right now, but hopefully she will have financials available soon.

Questions

1. What are some potential and practical legal issues facing Kids First, as a new organization (assuming relatively low revenues) involved in some fundraising work and having one employee? What can Tom do to help?
2. What should Tom advise the Board to do about Nora's loan?
3. What should Tom advise the Board about its responsibility for Kid First's financials?