



**LAWYERS
MUTUAL**

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RISK MANAGEMENT RESOURCES — ARTICLES

SERVING ON THE BOARD OF DIRECTORS - ARE YOU AWARE OF THE RISKS?

Many of our insureds serve as directors on the boards of various private and nonprofit institutions throughout the state. These lawyers are able to offer valuable insight and legal expertise to the board. Often times, lawyers are asked to serve as a director with the expectation that they will provide legal advice to the board. Serving in this dual role of legal advisor and board member can have detrimental consequences. Before accepting a position as a director, a lawyer should carefully consider the potential risks and do everything possible to protect himself and his firm.

The lawyer who serves as a director puts herself and her firm at an increased risk of being sued. Non-lawyer board members commonly ask the attorney/director for legal opinions prior to voting on matters before the board. By not only voting on board decisions but also giving legal advice to the board with respect to those decisions, the lawyer becomes a likely target for a claim by the corporation as well as third parties allegedly harmed by the board's decision. These parties will see the lawyer as a prominent deep pocket defendant, regardless of whether the lawyer has committed malpractice.

The risk to the attorney/director is increased where the attorney is sitting on the board of directors of a corporation that is also a client of the attorney's firm. The client is likely to believe that communications with the attorney/director are privileged. However, the attorney-client privilege might not be available to protect discussions between the attorney/director and the board, since the attorney might be considered to have been acting in his capacity as a director. A failure by the lawyer to disclose this risk could damage the client relationship and might even result in a claim from the client.

If a claim does arise as a result of the attorney/director's acts as a director, Lawyers Mutual's policy will not provide coverage for such a claim. Lawyers Mutual's policy specifically excludes coverage for "any claim or suit arising out of any Insured's act(s) or omission(s) in his or her capacity as an officer, manager, director, partner, trustee, employee, or fiduciary (other than as covered by the provisions of INSURING AGREEMENT, II. Coverage—Fiduciary) of a business enterprise."

Given this lack of coverage under our policy, we recommend to our insureds that they take certain precautions before accepting a position as a director. First, determine whether the corporation has in force a D&O policy with adequate coverage. If possible, avoid wearing two hats. Make it clear up front that you are not providing legal advice to the board. When legal issues arise, suggest to the board that it needs to retain counsel or go to its own corporate counsel. When the board votes on matters involving legal questions or litigation, it would be advisable to put into the minutes the fact that you have not provided legal advice. Where you know in advance that the board will be discussing matters with significant legal issues and consequences, suggest that the corporation's attorney attend the meeting. Be sure that the board keeps adequate minutes of the directors' meetings. Finally, consult with other members of your firm before accepting a position as director of any institution. By taking these precautions, you will substantially reduce the risk of exposure to you and your firm.