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Three Afterthoughts

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THREE AFTERTHOUGHTS

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I concur in all that Professor Weaver says and benefitted from her careful documentation, with three qualifications.

First, Ms. Weaver says that she "can envision no circumstances under which it would be advisable or prudent for corporate counsel to serve on the board of directors of the entities they represent."[1] I once held that view, but no longer do. Rather, I hold to the more indeterminate view set forth in Ms. Weaver's footnote. An in-house counsel should be very aware of the risks involved in that dual role and others of the kind that Ms. Weaver mentions.[2]

In this regard, I believe that serious risks lurk in the current fashion of designating the general counsel as a "Vice President." Such designation invites the question "vice president for what?" Still more problematic, in my opinion, is a title such as "Vice President for Public Relations and General Counsel." Such a title supplies an answer that can be a basis for a determination, made later in court, that the transaction in issue was undertaken in the capacity of "Public Relations" rather than as General Counsel. Many in-house lawyers, like their colleagues in independent practice, become tired of being "only" a lawyer and want greater challenge and (here is the unfortunate further step) recognition for assuming the greater challenge. Viewed dispassionately, a case can be made for some dual roles, specifically that of director as well as general counsel. However, the problem must be addressed dispassionately.

My view of a lawyer's serving as both a director and general counsel changed as a result of a conversation with a very good lawyer who held that dual role. The lawyer served as general counsel to a major corporation and, prior and subsequent to that engagement, practiced with a leading law firm in a major city. My colleague's proposition was this: The risk of a dual role as general counsel and director can sometimes be offset by the advantage that members of the board of directors will regard legal advice much more seri-

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[1] Sally R. Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023, 1039 (1997).

[2] *Id.* at 1039-40 n.74.

ously when it comes from a social equal in the corporate hierarchy than when it comes from someone who is in the hierarchy's second tier.

Those in the field universally recognize that the toughest problem for in-house counsel is that identified by Ms. Weaver: conflict with the chief executive officer (CEO) over policy or action where the CEO's personal conduct or interest is involved.[3] Here, when push comes to shove, the general counsel may have to take the matter to the board. In presenting the matter to the board, the lawyer has to have credibility. ("When you strike at a king . . . ."). Credibility is a function not only of being a lawyer and presenting legal advice but also of having personal force sufficient to carry the point at issue. A component of personal force is status. Directors tend to regard their fellow directors and the CEO as professional and social equals, whereas employees are regarded as having lesser standing. Whether the gain in status from being a director is worth the risks of confusion of roles as general counsel is a practical question, highly fact-specific, to which a categorical answer cannot be given.

Second, Ms. Weaver joins many other lawyers in lamenting the absence of guidance in Rule 1.13(b).[4] I sympathize with the wish for clearer guidance. I agree with Ms. Weaver's suggestion that in-house counsel in some of the cases she cites, particularly in that of Oracle Systems Corporation, would have been well-advised to have engaged outside counsel for the representation that was later drawn in issue.[5]

That said, I challenge the critics of Rule 1.13(b) to formulate language for a rule that would provide better guidance. I often have tried such formulations myself without success. The best that I have been able to do is to give advice in concrete cases. Such advice is inevitably fact-specific. However, fact-specific advice is different from general legal rules, such as 1.13(b), in character, language, and meaning. Lawyers who want general rules—which is the office of 1.13(b)—have to accept that such rules cannot descend to particulars that provide practical guidance except in the clearest and simplest cases. Thus, if the CEO proposes to take the company plane for an extended family holiday in Bali, we could be confident that the transaction involves a waste of corporate assets. I am not so sure about the transaction described by

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[3] *Id.* at 1025-26.
[4] *Id.* at 1032-35.
[5] *Id.* at 1041-46.

Ms. Weaver, where the CEO "paid" the corporation but with a promissory note instead of cash.[6] Was that a case where the lawyer was legally required to go to the board of directors, as distinct from handling it in some other way? An important reason why I am not so sure about the case described by Ms. Weaver is that we are not given enough specific facts, particularly "non-legal facts." This is my third point of disagreement with Ms. Weaver.

What was the human relationship between the CEO and the lawyer? Evidently, there was a newly-established relationship in the lawyer's role as house counsel, but what had gone on before? For example, was she the CEO's choice for the job or someone found by a corporate search? The answer to that question would provide clues about how the CEO would react to her approaching him about the problem. What was the relationship between the CEO and the board? Board members of a corporation whose CEO owns sixty-three percent of the stock are unlikely to be truly independent. It could make a difference, indeed, if any one of the directors is truly independent, for in a closely-held corporation that is often not the case. What was the CEO's position on the issue? Had the outside accountants known of the situation and approved it? If the outside accountants did not know about the uncashed check, could the lawyer resolve the problem by making disclosure to the outside accountants? The accountants would either approve the handling of the matter, in which event I do not see why the lawyer should feel compelled to press the matter further, or the accountants would disapprove it, in which case the accountants—outside professionals who could lose their client but not their jobs—would carry responsibility for forcing a resolution.

These specific nonlegal facts are what life is about beyond the limited domain of the law. They are the facts with which clients must deal outside the world implied in advice given by lawyers. Lawyers' failure to take such facts into account is a major source of friction with clients. These nonlegal facts may involve real opportunities for gain—the CEO in Ms. Weaver's case may have been legally misguided, but his skills may have been essential to the company's success. If the CEO had these kinds of skills, the directors would have to take that into account, and so should the lawyer in deciding whether this was a case that should go to the directors. The nonlegal facts may involve real risks of loss to the company, to the CEO, and—as in Ms.

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[6] *Id.* at 1025-26.

Weaver's case[7]—to the lawyer. I assume that the lawyer would take heed of the latter risk.

These are the kinds of specific facts to be learned at the water cooler. Lawyers in independent practice, to the extent that they become acquainted with facts of this kind, must also take them into account.

[7] *Id.*