

MIXED VIEWS ON THE ETHICS OF LAWYERS SERVING AS COMPANY DIRECTORS

Posted on 31/10/2006



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We asked our {overlib linktext="panel of experts" text="Iberian Lawyer's Group of Experts are 100 of the leading partners in law firms in Spain and Portugal. For every issue of Iberian Lawyer, we ask them a question relating to the practice of law or the management and development of their practice areas." title="Who are the Group of Experts?"} whether they were comfortable with their lawyers taking on additional duties as company directors and how remuneration for such work should be treated. The recent experience of Jorge Bleck, former managing partner for Linklaters in Portugal, among others, has caused debate. Shortly after Sonae announced their bid for PT, Linklaters were instructed by Sonae's financial advisers, Banco Santander. This surprised some as Bleck was a non-executive director with PT, although he had resigned from his position days earlier.

Consultamos al panel de expertos de Iberian Lawyer sobre si se sentian cómodos cuando sus abogados aceptaban tareas adicionales en calidad de miembro de los consejos de dirección de

empresas, y sobre cómo debía remunerarse esta labor. La reciente experiencia de Jorge Bleck, de Linklaters Portugal, quien fue instruido por Sonae en la compra de PT, empresa de la que Bleck había formado parte como miembro no-ejecutivo del Consejo, ha abierto el debate. Las opiniones son variadas, y en este artículo se plasman los argumentos más destacados.

The views of Iberian Lawyer's Group of Experts were quite wide ranging with there being no definitive conclusion. In outlining their arguments, our respondents differentiated between employed and non-executive roles as well as "firm-related" and an individual's "private" directorships.

António de Macedo Vitorino, founding partner at Macedo Vitorino e Associados believes that "lawyers should not serve as non-executive members when their respective firms are acting as legal counsel to those organisations." Antonio Hierro, Head of Litigation at Cuatrecasas agrees, it is not ethical for lawyers in private practice to be board members in client organisations. Luís Vinhas at Abreu & Marques, Vinhas sees it differently: "For many years now partners have held non-executive board seats in companies that we advise, and we have never felt there were situations of conflict of interest that could not be addressed using common sense."

In addition to these conflict issues, Paulino Fajardo at Davies Arnold Cooper noted that there are a significant number of hurdles to overcome before a lawyer can become a company director, including the need for specialist training as a general business adviser and the insurance issues.

Insurance is a key issue as there is always the risk that a claim against the partner for wrongdoing could damage the law firm's reputation. The firm's professional indemnity policies may very well not cover any liabilities arising and so law firms would be anxious to confirm the company's Directors & Officers (D&O) insurance.

Charles Coward, Uría Menéndez's Barcelona Managing Partner, noted that an outside lawyer serving as non-executive director could have a "chilling effect on the independence of any internal legal counsel." He adds "that such external lawyers must ensure they are remote from decisions taken on hiring law firms and also the functioning and organisation of the company's own legal department, which makes the lawyer a less useful member of the board. ."

For Javier Fernández-Samaniego, Managing Partner at Bird & Bird Madrid, executive positions compromise the requirement for the independence of a lawyer as expressed in Spain by the *Estatuto General de la Abogacía Española and the Código Deontológico de la Abogacía Española*.

Similarly for Portugal, Manuel P. Barrocas at Barrocas Sarmiento Neves says that while holding dual positions is not specifically forbidden by the profession in his country, it is specifically referred to in the Portuguese Bar's Deontological Code as "inappropriate conduct which may ultimately result in disciplinary sanctions by the Bar."

There was divided opinion as to whether the firm or the partner should keep the director's remuneration. Fernando Vives, Head of Corporate at Garrigues, sees fees being passed to the law firm when the lawyer is the secretary of the board since he is providing legal advisory work that would ordinarily be included in the scope of the services offered by the law firm.

There was more sympathy for private directorships to be allowed but even so not overtly encouraged. Individuals would have to make sure that at no time would they be representing their law firm or giving legal advice on behalf of it. This is the policy at Jones Day. As their Spanish Managing Partner, Luis Riesgo comments "Normally the lawyer would be entitled to any compensation, as we do not see that role as part of the business of the firm."