2.6 Removing an Unproductive Director

CONTRIBUTED BY
Jayne E. Juvan and Ashley E. Gault
Roetzel & Andress, LPA

Individual directors who are unproductive are at risk for violating the fiduciary duties owed to the corporation. While not all unproductive behavior rises to the level of a breach of fiduciary duty, the following are circumstances in which directors’ unproductive behavior may be harmful to the board or the corporation:

• When they fail to prepare for, attend, or meaningfully participate in board or committee meetings
• When they are disruptive in the boardroom or fail to be respectful of other members of the board
• When they fail to properly comply with policies adopted by the corporation

1. Jayne E. Juvan is a partner in the corporate and securities practice group at Roetzel & Andress, LPA. She focuses her practice principally on corporate governance, risk management, and compliance. She currently serves as the co-chair of the ABA’s Joint Task Force on the Handbook for the Conduct of Shareholder Meetings. She also serves as the co-chair of the Corporate Governance Committee’s (CGC) Task Force on Dealing with Director Misconduct and the co-chair of the ABA CGC Publications Subcommittee, which produces CGC In Sight, the official corporate governance publication of the ABA. Ashley E. Gault is an associate in the law firm of Roetzel & Andress, LPA, where she practices corporate law and regulatory compliance. Ms. Gault is a member of the ABA’s Corporate Governance Committee and has presented on corporate governance in an ABA seminar.
• When they fail to bring relevant information to the attention of directors
• When they engage in self-interested transactions
• When they fail to retain the confidentiality of sensitive information

Though a board with an unproductive director may desire to remove that director, many states and the Model Act vest the power of removal of corporate directors solely in the corporation’s stockholders, not the board of directors. When removal is necessary mid-term, stockholders must act at a special meeting or act by written consent to remove a director.

Additionally, although many jurisdictions allow a corporation to petition a court to remove a director for fraudulent or dishonest acts, gross abuse of authority, or breach of duty, court proceedings are often disruptive, costly, and inconclusive.

To address unproductivity, boards should consider appropriate training, education, director evaluations, and policies governing the conduct of directors. If these actions are not sufficiently effective, in some instances, it may be appropriate for the chairman of the board or the lead director to engage the problematic director so that the director understands his or her missteps and has an opportunity to cure it.

In the most egregious circumstances, though the board cannot remove a director on its own, the board may request that the director resign. If the director refuses to resign, the board may adopt resolutions creating one or more committees that exclude(s) a director from participation when the board is dissatisfied with the individual director’s conduct, though the board must still ensure that it does not violate the director’s legal rights to receive information regarding the board’s activities.

### Key Questions

In considering the performance and productivity of an individual board member, some questions to be considered include the following:

- Is the director regularly attending and actively participating in meetings, or is the director consistently absent?
- Is the director paying attention, asking questions and acting diligently in order to become and remain fully informed?
- Does the director bring relevant information to the attention of the other directors?
- Is the director knowledgeable about the corporation and the businesses it operates?
- Has the director conducted appropriate due diligence concerning matters before the board?
- Is the director intentionally making meetings unproductive with frivolous debate or conduct that is disrespectful to other board members?
- Has the director violated a policy adopted by the board or failed to properly disclose a conflict of interest?
- Has the director inappropriately disclosed confidential information?
- Does the director have “an agenda” that is personal or otherwise differs from that of the balance of the board?
Does the director have the appropriate training and education to know how to act effectively?

Would performance evaluations solve the problem of unproductiveness?

Has the chairman of the board or the lead director confronted the director about the unproductive behavior and corrective action? How should that occur?

Is the conduct sufficiently egregious that the board should request that the unproductive director resign? Be privately censored?

If the unproductive director refuses to resign, should the board form one or more special committees that exclude the unproductive director?

Additional Reading

1. Conscious Chief Executives e-Zine, Issue #005: How Do We Remove Unproductive Board Members?
   http://consciousgovernance.com/the-conscious-chief-executive

2. Reclaiming Board Effectiveness
   http://www.christianleadershipalliance.org/?boardeffectiveness


   http://www.jstor.org/stable/40687870

5. Director Performance, Corporate Ownership and Management Turnover

Notes