

## SUMMARY

The Committee acknowledges that lawyers will continue to be asked and many will accept engagements as directors of client business entities and that it is not unethical for them to do so. It nevertheless is essential that lawyer-directors and their clients continue to be sensitive to the issues discussed in this opinion.

Though a lawyer serving in the dual role of corporate counsel and director is not subject to discipline absent a violation of a specific Rule, the following suggestions, derived from the foregoing discussion, should help to avoid a disciplinary infraction. The lawyer-director should:

1. Reasonably assure that management and the board of directors understand (i) the different responsibilities of legal counsel and director; (ii) that when acting as legal counsel, the lawyer represents only the corporate entity and not its individual officers and directors; and (iii) that at times conflicts of interest may arise under the rules governing lawyers' conduct that may cause the lawyer to recuse herself as a director or to recommend engaging other independent counsel to represent the corporation in the matter, or to serve as co-counsel with the lawyer or her firm.

2. Reasonably assure that management and the board of directors understand that, depending upon the applicable law, the attorney-client evidentiary privilege may not extend to matters discussed at board meetings when the lawyer-director is not acting in her corporate counsel role and when other lawyers representing the corporation are not present in order to provide legal advice on the matters.

3. Recuse herself as a director from board and committee deliberations when the relationship of the corporation with the lawyer or her firm is under consideration, such as issues of engagement, performance, payment or discharge.

4. Maintain in practice the independent professional judgment required of a competent lawyer, recommending against a course of action that is illegal or likely to harm the corporation even when favored by management or other directors.

5. Perform diligently the duties of counsel once a decision is made by the board or management, even if, as a director, the lawyer disagrees with the decision, unless the representation would assist in fraudulent or criminal conduct, self-dealing or otherwise would violate the Model Rules.

6. Decline any representation as counsel when the lawyer's interest as a director conflicts with her responsibilities of competent and diligent representation, for example, when the lawyer is so concerned over her personal liability as a director resulting from the course approved by management or the board that her representation of the corporation in the matter would be materially and adversely affected.

MEMORANDUM

TO: Board of Directors [and General Counsel]  
of ABC Corporation

FROM: [name of attorney asked to serve as a  
director]

DATE: \_\_\_\_\_, 20\_\_

RE: Service on the Board of Directors

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I wish to bring the following matters to your attention in connection with [your request that I become a member of the Board of Directors] [my continued service on the Board of Directors]:

First, to the extent that I, or others in my firm, are asked to render legal services to ABC Corporation, our sole client will be ABC Corporation, acting through its board of directors and management, and not any individual director, officer or employee of the corporation, unless special arrangements are made for such additional or separate representation.

Second, while serving on the Board of Directors, views that I express during board or committee meetings concerning the corporation's business affairs (including votes taken at such meetings) will normally reflect my position as a director exercising my business judgment in the best interests of the corporation and its shareholders, and will not be subject to any attorney-client privilege. If I am (or my firm is) asked to render legal services to the Board of Directors, such advice will be rendered by me as an attorney, and not as a director, and will be specifically identified as such at the time the advice is rendered, in order to protect the confidentiality of our discussions under the attorney-client privilege. Because of the potential for confusion between my role as a director and my role as counsel, and the possible loss of the attorney-client privilege, I may ask another member of my firm, under appropriate circumstances, to be present at a board meeting to render legal advice. Services rendered to the corporation by our firm through other attorneys will, of course, constitute legal and not business advice.

Third, occasions may arise where I believe that a conflict of interest may be presented between the corporation and my firm, in which event I would recuse myself from any participation in the subject under discussion and/or suggest that the corporation retain other counsel to advise it. For example, actions of the board to employ or terminate our firm in connection with rendering legal services to the corporation and the terms of any such engagement present a conflict of interest for me that would require me to recuse myself.