# AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

**Formal Opinion 98-410** **February 27, 1998**
**Lawyer Serving as Director**
**of Client Corporation**

*The Model Rules of Professional Conduct do not prohibit a lawyer from serving as a director of a corporation while simultaneously serving as its legal counsel, but there are ethical concerns that a lawyer occupying the dual role of director and legal counsel should consider. The lawyer should reasonably assure at the outset of the dual relationship that management and the other board members understand the different responsibilities of legal counsel and director; understand that in some circumstances matters discussed at board meetings with the lawyer in her role as director will not receive the protection of the attorney-client privilege; and understand that conflicts of interest could arise requiring the lawyer to recuse herself as a director or to decline representation of the corporation in a matter. During the dual relationship, the lawyer should exercise reasonable care to protect the corporation's confidential information and to confront and resolve conflicts of interest that arise. From the discussion of these ethical concerns, the Committee derives general guidelines that a lawyer, once having agreed to serve on the board of a corporate client, should follow in order to minimize the risk of violations of the Model Rules.*

The Committee addresses in this opinion the propriety of a lawyer serving on the board of directors of a corporation that she or her firm represents as counsel.[1]

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1. The opinion has been prompted by the work of the Task Force on the Independent Lawyer of the Section of Litigation, which has been studying the role of lawyers serving as directors of their clients. *See The Lawyer-Director: Implications for Independence* (TASK FORCE ON THE INDEPENDENT LAWYER, A.B.A. SEC. LITIGATION, March 1998). *See also* Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, reprinted at 112 F.R.D. 243, 280-81 (1986) (identifying three areas of special concern for the legal profession and recommending further analysis by the bar, including lawyers serving on their clients' boards, lawyers investing in their clients' businesses and transactions, and lawyers' ancillary business activities).

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This opinion is based on the Model Rules of Professional Conduct and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, codes of professional responsibility and opinions promulgated in the individual jurisdictions are controlling.

Although some commentators have urged that the practice be prohibited,[2] the Model Rules of Professional Conduct (1983) (amended 1997) contain no such prohibition, but only a cautionary Comment that states:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment while acting as counsel, the lawyer should not serve as a director.[3]

The Committee is aware that it is common for lawyers to be invited to serve on the boards of directors of their clients. As the Rule 1.7 Comment suggests, ethical problems can arise when a lawyer serves as a member of the board of directors of a client. Because the Comment does not offer detailed guidance, the Committee in this Opinion discusses the problems a lawyer faces when serving in this dual role and suggests some measures that a lawyer should take in order to minimize the risk of Model Rules violations.

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2. *See, e.g.*, Dennis R. Block, George F. Meierhofer Jr. & Daniel L. Wallach, *Lawyers Serving on the Boards of Directors of Clients: A Survey of the Problems*, PRENTICE HALL LAW & BUS. INSIGHTS, April 1993, at 3 ("an outright prohibition on the practice would be appropriate"); Monroe Freedman, *You CAN Do It, But You Shouldn't*, AMERICAN LAWYER, Dec. 1992, at 43; Martin Riger, *The Lawyer-Director—"A Vexing Problem,"* 33 BUS. LAW. 2381 (1978); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 738-40 (1986) ("[a]t least the practice of serving as both counsel and director for a large corporate client is unsound and should be prohibited by law"). *But see* Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413 (1996) (concluding that prohibiting dual service in all circumstances is detrimental to clients' interests and both unwise and unnecessary).

3. Model Rule 1.7 Comment [14]. *See also* RESTATEMENT OF THE LAW GOVERNING LAWYERS §216, Comment *d* (Proposed Final Draft No. 1, March 29, 1996) (The dual relationship is permissible. "However, when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue to serve as corporate counsel without the informed consent of the corporate client. The lawyer may not participate as director or officer in the decision to grant consent.") During consideration of the Model Rules, the Kutak Commission viewed the dual role with ambivalence, initially approving lawyers' service on clients' boards only upon consent of all those having an interest in the enterprise. *See* January 25, 1979 Kutak Interim Revised Draft, Rule 1.12(e). The next draft allowed service as a director by lawyers who also are counsel for the corporation only (1) with approval of "all persons having an investment interest in the organization," and (2) when there was no "serious risk of conflict between the lawyer's responsibilities as general counsel and those as a director", apparently exempting from these requirements a lawyer whose "representation is occasional or limited to specific matters." *See* January 30, 1979 Kutak Discussion Draft, Rule 1.9(f) and Comment.

We emphasize that not every lawyer will confront the same ethical challenges when serving as a member of a client's board of directors. The issues to be faced will differ depending on the nature of the legal services to be provided by the lawyer-director or her firm, the nature of the client's business, and the nature of the representation which could range from serving as general counsel to handling a few discrete transactions. Thus, the advice that follows is general in nature and does not attempt to reflect the specific facts of every contemplated dual relationship.[4]

The issues raised when a lawyer serves concurrently as corporate director and counsel are analyzed[5] here in the following sections: (1) Advising the corporate management and board when the dual role commences; (2) Protecting confidences and the attorney-client privilege; and (3) Confronting and resolving conflicts and other ethical issues that arise in the course of the dual relationship. This analysis is followed by a Summary where good practice guidelines are enumerated.

## I. Advice to Clients Regarding the Dual Role

There are several broad categories of ethical concerns that exist when corporate counsel agrees to serve as director of her corporate client: (1) concerns that conflicts of interest will arise, causing reasonable parties to question the lawyer's professional independence and sometimes requiring the lawyer-director to decline representation in a matter or resign as a director;[6] (2) concerns that the lawyer,

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4. The Committee notes that law other than the Model Rules also may govern service of lawyers on boards of directors, including the laws relating to agents and fiduciaries, principles of corporate governance, stock exchange regulations, and rules of the Securities and Exchange Commission. Moreover, while it is permissible under the Model Rules for a lawyer to serve on her client's board of directors, additional risks may, depending on the circumstances, be associated with the dual relationship, especially in the case of public companies. The lawyer and her firm should consider the following risks: (1) possible exclusion of lawyer-directors from D&O policy coverage, except when acting solely as a corporate director; (2) possible exclusion from professional liability coverage, except when acting solely as legal counsel; (3) possible loss of indemnification under some statutes in minority shareholder and derivative actions; (4) possible exposure of the lawyer's firm to vicarious liability resulting from the lawyer's actions as a director, especially in securities offerings; and (5) increased likelihood of disqualification from representing the corporation in litigation. *See* Karen L. Valihura and Micalyn S. Harris, *Avoiding Pitfalls That Might Arise When Your Outside Counsel Serves as a Director* and Attorneys Liability Assurance Society, Inc., *Entrepreneurial Activities*, both reprinted in *The Lawyer as Director of a Client*, A.B.A. SEC. BUS. LAW (August 4, 1997); Albert, *supra* note 2, at 449-471. These risks are likely to be increased substantially when the lawyer-director serves also as an executive officer of her corporate client, or where the lawyer serves as an executive officer, but not as a director of her corporate client.

5. The analysis assumes that, while serving as corporate counsel, the lawyer is asked to join the corporate board, but substantially the same analysis must be made when a lawyer-director who never has performed legal services for the corporation is asked to do so.

6. Independence concerns beyond those found in all lawyer-client relationships and governed by Model Rule 5.4 applicable to lawyer conduct generally are seen by

other directors, and management will be confused whether the lawyer's views on a matter are legal advice or are expressed as the business or practical suggestions of a board member; and (3) concerns with protecting the confidentiality of client information, especially protecting the attorney-client privilege. While these concerns are real, many of the problems can be cured, or at least ameliorated, by full, free and frank discussions by the lawyer with the corporation's executives and the other board members. Ideally this discussion will occur before the lawyer becomes a board member. It is at this stage that the ethical lawyer should reasonably assure herself that those in authority understand the ethical and practical pitfalls that lie along the way. When in-house corporate counsel employed as a corporate executive is available, a discussion with him often will suffice. In other situations, the lawyer should take the time to explain the risks to the executive officers and other board members herself.

The explanation should describe the potential for conflicts of interest and how they might disable the lawyer from acting as either a director or a lawyer at some particularly critical time or require safeguards, such as engaging the services of counsel other than the lawyer or her firm. Similarly, the lawyer also should reasonably assure herself that the possible threat to the attorney-client privilege and consequent disclosure of confidential information are understood, either by discussions with employed corporate counsel or with the executive officers and other board members.[7] In situations where a substantial likelihood exists that a disabling conflict of interest will arise or that the attorney-client privilege will be lost in a pending matter, the lawyer should offer to continue as counsel, attend board meetings and preserve her role solely as corporate counsel until the risk abates.

If there is reasonable assurance that the client is informed of the potential issues that might arise and still wishes the lawyer to serve as a director, and if the lawyer concludes that no current disqualifying conflict of interest or other ethical impediment bars the dual role, then the lawyer may accept the directorship. This initial decision about the continuing role of lawyer as lawyer and lawyer as director must nevertheless be revisited as situations arise that call for further consultation with the client, and the lawyer may have to consider withdrawing from one position or the other if necessary. *See infra* Part III.

Because of the need for the lawyer and the corporation's management and board to give ongoing attention to potential conflicts, attorney-client privilege protection and other issues that may arise as a result of the dual role, the lawyer-director should consider providing a written memorandum in addition to an oral explanation. A written memorandum is of particular assistance in describing the lawyer's role as counsel for the corporate entity and not for its constituent officers or direc-

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some commentators on the lawyer-director role as the proper province, not of disciplinary rules, but of corporate law and SEC rules. *See, e.g.*, Robert H. Mundheim, *Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporation for Which They Act as Counsel*, 33 BUS. LAW. 1507, 1510 (1978).

7. *See* N. Y. State Bar Assoc. Comm. on Prof. Ethics, Op. 589, 1988 WL 236147 (1988) (lawyer-director must disclose to the client the risk of loss of the attorney-client privilege that results from the lawyer's involvement in the corporation's business decisions).

tors and in explaining the differences between serving as a director and serving as counsel. It is, of course, imperative that any standards specified in such a written memorandum be followed in practice.[8]

## II. The Lawyer-Director Must Exercise Reasonable Care to Protect the Corporation's Attorney-Client Privilege

Lawyers serving as directors have the same obligation as other lawyers to maintain confidentiality and avoid compromising the attorney-client privilege of the corporation. A lawyer's duty of confidentiality under Model Rule 1.6[9] is consistent with a director's duty of confidentiality that arises from her role as a fiduciary for the corporation, although the scope of these two duties is not precisely the same.

A problem arises, however, as the result of the inconsistent responsibilities of director and lawyer in the application of the attorney-client evidentiary privilege.[10] Because the lawyer-director provides the management and board with business advice as well as legal assistance, the lawyer, management and board members could find themselves forced to testify about conversations that would not be involuntarily disclosed if the lawyer-director had been acting only as a lawyer.

Several cases analyzing the attorney-client privilege in the corporate context strictly limit the subject matter protected by the privilege to purely legal advice even when other considerations affect management's decision, such as financial

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8. For a sample of the issues that a memorandum might discuss, see Susan R. Martyn, *Lawyers as Directors: Who Serves and Why?*, 1996 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER, 1996 A.B.A. CTR. FOR PROF'L RESP. 113-114.

9. Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
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> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
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> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
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> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

10. The privilege exists:

> (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from the disclosure by himself or by the legal adviser, (8) except the protection be waived . . . .

8 WIGMORE, EVIDENCE §2295 p. 554 (1961 rev.). The privilege extends to communications of the type described between a lawyer and her corporate client. *See* RESTATEMENT, *supra* note 3, §123 (Privilege for Organizational Client).

issues or corporate policy.[11] The fact that the lawyer is a director also increases the chances that the privilege may be lost even for purely legal advice.[12] More appropriately, other cases have analyzed the privilege applied to lawyer-director's communications according to whether business or legal advice was sought. In these cases, a claim of privilege has been rejected only when the communications related to the provision of purely business advice.[13]

Given the stricter limitations applied by some courts on the privilege for communications with a lawyer-director, it is vital that the lawyer who also serves as a director be particularly careful when her client's management or board of directors consults her for legal advice. The lawyer-director should make clear that the meeting is solely for the purpose of providing legal advice. The lawyer should avoid the temptation of providing business or financial advice, except insofar as it affects legal considerations such as the application of the business judgment rule. When appropriate, the lawyer-director should have another member of her firm present at the meeting to provide the legal advice.[14]

These procedures not only will provide the best support for a claim of privilege for the conversations, but also will alert board members who otherwise might mistakenly believe the lawyer-director is giving them business advice. The procedures also alert all involved to treat the information with the utmost care that normally is associated with confidential attorney-client communications.

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11. *See, e.g.*, United States v. Wilson, 798 F.2d 509, 573 (1st Cir. 1986) (no privilege because lawyer offered business advice); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (narrowing scope of privilege of a corporation's management vis-a-vis its shareholders); and Georgia Pacific Corporation v. GAF, 1996 U.S. Dist. Lexis 671 (S.D.N.Y. 1996) (denying privilege to in-house counsel about his recommendations to change contract provisions made to his client's officers under circumstances where, as a negotiator of environmental provisions in a contract, most courts would apply the privilege to outside counsel).

12. For example, a few cases have held that when the lawyer becomes a director the privilege essentially evaporates. *See* Federal Savings & Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 546 (D. Nev. 1972) ("When the attorney and the client get in bed together as business partners, their relationship is a business relationship, not a professional one, and their confidences are business confidences unprotected by a professional privilege."); *In re* Robinson, 125 N.Y.S. 193 (N.Y. App. Div. 1910) ("When the corporation made him a director . . . [it] removed him from the relation of attorney or counsel to its officers, so far as the corporate affairs were concerned.").

13. *See, e.g.*, United States v. Vehicular Parking Ltd., 52 F. Supp. 751 (D. Del. 1943) (no attorney-client privilege where memorandum from lawyer-director-promoter was essentially business advice).

14. Of course the customary measures to protect the privilege also should be taken. Corporate personnel outside the management group and all outsiders not essential to the legal advice should be excused from the meeting room. If regular minutes are prepared, they should reflect that the lawyer-director was consulted on a legal matter in executive session. Any minutes of the executive session should, along with all notes made by anyone present, be retained only in separate files marked "attorney-client privilege" and kept in a secure place. When written advice is to be protected, the memorandum should be limited to legal advice and be marked "attorney-client privilege."

The lawyer-director also should bear in mind that, although only the client (or a lawyer acting with the client's express consent) can waive the attorney-client privilege, the lawyer, because she also is director, may be found to have waived the privilege on behalf of the corporation without need of any further client consent. In *Vehicular Parking*, *supra* note 13, for example, the court found that a lawyer-director's voluntary disclosure of memoranda to the government in an antitrust case effected a waiver of the lawyer-client privilege because he produced the documents in his role as a "business manager" and not while "wear[ing] his lawyer suit."

Finally, a director, who also is the corporation's lawyer, may be under a duty to disclose information to third parties (such as in response to an auditor's request) that in her role as legal counsel to the corporation she could not disclose without specific consent.[15] Acts of a lawyer-director and her knowledge as a director may prove inseparable from the lawyer's acts and knowledge as member of a law firm. The director's fiduciary obligations as a director and her professional obligations as a lawyer cannot "be placed in convenient separate boxes."[16] The knowledge of a corporate director and officer, with respect to transactions in which she is authorized to act, is imputed to the corporation. Similarly, the knowledge of a partner in a law firm gained during confidential relationships with clients is imputed to the other partners in the law firm. There is a risk in some circumstances that the files and work processes of the law firm could become as available for discovery as are the files and records of the corporation itself.[17]

## III. The Lawyer-Director Must Confront and Resolve Ethical Issues that Arise During the Dual Role

The lawyer-director must be alert to ethical issues that can arise during the course of the dual relationship. The potential issues addressed here are: (a) serving as counsel in a matter that she opposed as a director; (b) opining on past board actions in which the lawyer-director participated; (c) acting as a director in corporate actions affecting her as a lawyer or her law firm; and (d) representing the corporation in certain types of litigation.

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15. A law firm normally responds to auditors asserting, in accordance with Auditor's Letter Handbook, *Statement of Policy Regarding Lawyers' Responses to Auditors' Request for Information*, 31 BUS. LAW. No. 3 (April 1976), that its engagement has been limited to specific matters and that there may exist other matters that could have a bearing on the company's financial condition with respect to which the firm has not been consulted. As the guidelines state:

> Unless the lawyer's response indicates otherwise, (a) it is properly limited to matters which have been given substantive attention by the lawyer in the form of legal consultation and, where appropriate, legal representation since the beginning of the period or periods being reported upon, . . . .

When a lawyer in the law firm is a lawyer-director, however, the law firm should expand the disclaimer to exclude any information the law firm's lawyer-director may have as a director.

16. Marco v. Dulles, 169 F. Supp. 622, 631 (S.D.N.Y.) *app. dismissed*, 268 F.2d 192 (2d Cir. 1959).

17. *See, e.g.*, Deutsch v. Cogan, 580 A.2d 100 (Del. Ch. 1990) (because of firm lawyer's directorship, firm owed fiduciary duty to minority shareholders claiming injury in merger in which firm represented company).

### A. Conflict in Pursuing Client Objectives that the Lawyer, as a Director, Opposed

An ethical issue arises when a lawyer-director is asked to represent the corporation in an undertaking that she, as a director, has unsuccessfully opposed. Should the lawyer undertake the representation? If the lawyer should not, may other lawyers in her law firm represent the corporation in the matter? Are there circumstances when the lawyer and her firm are precluded under the Model Rules from representing the corporation?

In this situation, the lawyer must determine whether her representation of the corporation may be "materially limited" by her opposition to the action the corporation has decided to undertake, such that Model Rule 1.7(b) applies.[18] Generally, when a lawyer counsels any client against a given course of action, but the client rejects that advice, the client's decision once made must be accepted by the lawyer. *See* Model Rule 1.13 Comment [3]. A lawyer by representing a client does not endorse "the client's political, economic, social or moral views or activities." Model Rule 1.2(b). And even after offering an opinion on such matters, it may be easy for a lawyer to conclude that, once the client has decided to pursue its chosen course, the lawyer can remain the lawyer for the client.

However, for the lawyer-director, who is required as a director to make a business judgment, this calculus may be different, a fact the lawyer should recognize before she undertakes representing the corporation in the matter.[19] When a lawyer has participated in the decision-making as a client, there may be an increased risk that she will be tempted to "pull her punches" as she represents the corporation in going forward, or may be perceived by others as providing less than diligent representation. *See* Model Rule 1.3.

If representation of the corporation may be materially limited by these factors, the lawyer then must also determine whether she reasonably believes the representation will not be adversely affected. *See* Model Rule 1.7(b). If she reaches

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18. Rule 1.7(b) states:

> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
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> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

19. As Illinois State Bar Assoc. Comm. on Prof. Ethics Op. 86-14, 1987 WL 383872, makes clear:

> [A]lthough it is not professionally improper for a lawyer to serve as a director of a business corporation and also to represent that corporation . . . he must be unusually vigilant to assure that he never allows his business function as a director to infringe upon the legal advice given to, and the representation of his corporation client.

that conclusion, which applies objectively, and the client consents after consultation, then the lawyer is not disqualified from the representation. Even so, if the lawyer continues to believe that the corporation's chosen course of action is imprudent, she may be unwise to undertake the representation personally; another lawyer in her firm would be permitted to represent the corporation under Model Rules 1.7(b) and 1.10(a).[20]

If, however, the lawyer-director concludes that under Rule 1.7(b) she personally is disqualified, her conflict is imputed under Model Rule 1.10(a) to the rest of her firm's lawyers, who also are disqualified from the representation. This could occur, for example, were she to conclude that she will face personal liability as a result of the course chosen by a majority of the directors over her objection. If so, she should consider resigning from the board if necessary for self-protection. Whether or not she resigns, the situation may create a nonconsentable conflict of interest under Rule 1.7 (b) because the representation would be adversely affected, thus disqualifying her law firm as well as herself from the representation. This would be true even if the corporation's actions are not criminal or fraudulent, *see* Model Rule 1.2(d), and do not violate a legal obligation owed by the directors or management to the corporation that is likely to result in substantial injury to it, *see* Model Rule 1.13(b).

### B. Conflict in Opining on Board Actions in which the Lawyer-Director Participated

A lawyer who serves as a director could be disabled from rendering opinions or offering her best legal judgment with respect to a specific matter because of her role as a director. For example, when the lawyer-director is asked to provide advice to the corporation on matters involving prior actions of the board, such as whether an incentive pay arrangement is lawful, she may in effect be advising on the legality of actions in which she herself has participated as a director. Under these circumstances, it may prove difficult for the lawyer to speak independently as counsel to the corporation in light of her own interest as a director. *See* Rule 1.7(b). Moreover, seeking a waiver of the potential conflict is problematic because the very directors who would need to provide the waiver are themselves directly concerned by the question that is being raised. Finally, if the opinion is sought in order to justify an action the board currently has before it, the advice-of-counsel defense to a later lawsuit may be undermined by the lack of independence of the lawyer-director and her firm. In some cases these concerns

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20. Rule 1.10(a) states:

> (a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

When the lawyer-director recuses herself from personal choice because of a concern that her personal views might be seen by some to cause her to pursue the selected course less vigorously, Rule 1.7(b) is not implicated, and hence Rule 1.10(a) does not apply to bar others in her firm from representing the corporation in the matter. *See also* Model Rule 1.16(b)(3) (lawyer may withdraw if no material adverse effect on client's interests when client pursues objective the lawyer considers repugnant or imprudent).

can be mitigated by the participation of other counsel to advise on the issue, without compelling the complete withdrawal of the lawyer-director as counsel.[21]

### C. Conflict Regarding Corporate Actions Affecting Lawyer or Her Firm

A conflict issue may also arise when a matter comes before the board of directors that will significantly affect the corporation's use of lawyers. For example, the corporation might consider a major purchase or merger, an initial public offering, or launching a new product that requires major regulatory approval. Is the lawyer-director able to exercise sound business judgment as a director when participating in the board's decision in circumstances where it is clear, *e.g.,* that (i) her firm will be engaged to perform the legal services, or (ii) her firm will be a candidate to do so, or (iii) another firm will be engaged to perform the services?

The analysis here differs from the conflict regarding legal advice discussed above in Part IIIB. To the extent that the lawyer is taking action as a director, the question here is whether she is able to exercise independent judgment *as a director* when the board's decision could significantly affect the director's law firm. The lawyer-director should consider whether, under the law of corporate governance, she should recuse herself as a director from consideration of the matter, or remove her firm from consideration to perform the legal services, or both, or whether she may participate after noting to the other board members (or to employed corporate counsel) her personal interest and its potential effects.

To the extent the lawyer is acting as a lawyer, the law governing lawyers applies. The Association of the Bar of the City of New York Professional Ethics Committee has said:

> The lawyer may not "tak[e] advantage of his or her position [as director] to procure professional employment for the lawyer or the lawyer's law firm," N.Y. State 589 (1988), or participate in the board's decision to retain the lawyer, N.Y. City 611 (1942). Indeed, the lawyer-director may not participate "in any decision of the [board] that will or reasonably may affect the lawyer's own personal or financial interests as counsel." N.Y. State 589 (1988). Finally, the lawyer-director must exercise his or her independent professional judgment "solely for the benefit of [the corporation] and free of compromising influences and loyalties," EC 5-1, that may arise out of his or her role as director (such as a desire to be re-elected to the board or concern for the lawyer's personal liability as a director).[22]

We do not believe that New York's blanket prohibition should apply to the situations just described. Nevertheless, the prudent lawyer should at a minimum abstain from voting as a director on issues which directly involve the relationship of the corporation with her law firm, such as issues of engagement, performance, payment or discharge.

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21. The RESTATEMENT, *supra* note 3, Illustration 3, finds rendering opinions in these circumstances permissible with the informed consent of the corporation's authorized agents, presumably the board of directors.

22. Comm. on Prof. Ethics of the Assoc. of the Bar of City of New York, Op. 1988-5 (1988) (under the N.Y. Code of Professional Responsibility).

If the lawyer-director's firm has been pre-selected to perform the services that will be necessary if the course of action is approved, the lawyer-director also should consider abstaining as a director from voting on the action, although the law of corporate governance requires to validate the corporate action only disclosure of such a conflict of interest, following which the director may participate.[23] If the board is closely divided on a matter of serious consequence to the corporation, however, the lawyer-director's recusal as a director could interfere with the corporation's selection of the best course to follow. In such a case, the lawyer-director may decide to withdraw her firm from consideration as counsel in the matter and participate fully in the board's decision-making process. We emphasize that, in our opinion, no violation of any Model Rule would result if the lawyer participates in corporate action as a result of which she or her firm is employed to perform legal services.

**D. Conflicts in Representing the Corporation in Litigation**

Ethical issues also may arise when the corporation, its directors and its officers find themselves all named as defendants in litigation and they desire to be defended by their long-standing law firm, the one whose partner sits on the board of directors.

First, the corporation and its directors obviously need independent representation in any controversy between the corporation and its lawyers, *see* Model Rule 1.7(a). The same ordinarily is true when representation of the corporation is required regarding a lawsuit involving the directors, one of whom is a lawyer in the corporation's law firm, if the corporation may assert a cross claim against the lawyer-director or a third party claim against her law firm.[24] Separate representation also would be required if the claims were derivative or there existed other potential conflicts between the corporation and its directors.[25]

Second, indirectly conflicting interests involving Model Rule 1.7(b) also may generate a need for independent representation. If independent representation is required under Rule 1.7(b), the law firm whose member is a defendant cannot represent the corporation, at least without independent co-counsel also serving.[26]

Third, prior representation of the corporation may prevent the firm from representing its own member under Model Rules 1.9(a) and 1.10(a), even if Rule 1.7(b) does not. Finally, as a general proposition, it is often awkward for a firm to represent one of the firm lawyers. Indeed, some professional liability carriers insist that law firms hire different counsel to represent them.[27]

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23. *See* Albert, *supra* note 2, at 443.

24. *See, e.g.*, Harrison v. Keystone Coca-Cola Bottling Co., 428 F. Supp. 149 (M.D. Pa. 1977) (lawyer-director's firm must not represent corporation in litigation if the lawyer also is a defendant).

25. *See* Model Rule 1.13, Comment [11] and N.Y. Ethics Opinion 589, *supra* note 7.

26. Model Rule 3.7 (Lawyer as Witness) also may preclude the lawyer-director's firm from representing the corporation in litigation as a result of the existence of a conflict of interest under Rule 1.7 or 1.9 when the lawyer-director is to be a necessary witness. *See* Comment [5].

27. Other types of representation of a corporation by a lawyer-director or her firm have the potential for conflicts of interest to arise. This is particularly true when the representation involves regulatory agencies in connection with public securities offer-

**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.

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ings or financial institution investigations. *See supra* note 15 and accompanying text; Alpert, *supra* note 2, at 433-35, 445-49, 457-62.