Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation

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DUAL IDENTITIES AND DUELING OBLIGATIONS:
PRESERVING INDEPENDENCE IN CORPORATE REPRESENTATION

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I. INTRODUCTION

The lawyer who is retained to represent an organizational entity, such as a large public corporation, faces many challenges. In order to fulfill the lawyer's professional responsibilities, the lawyer must determine not only who the client is, but also who speaks for the client when the client is a nonhuman entity. Rule 1.13 of the Model Rules of Professional Conduct, as promulgated by the American Bar Association (ABA),\(^1\) specifies that the "lawyer [who is] employed or retained by an organization represents the organization acting through its duly authorized constituents."\(^2\) Based on the entity theory of representation,\(^3\) Rule 1.13 makes clear that the corporate entity itself is the client,\(^4\) although the entity acts through its authorized

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1. The Model Rules of Professional Conduct, as adopted by the ABA in 1983, were the culmination of several historical efforts to develop a clear and concise statement of the law of professional responsibility. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING §§ 201-06 (3d ed. 2001); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 2.6.2–2.6.4 (1986). The Model Rules have been adopted in 41 states and the District of Columbia. GEOFFREY C. HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 15 (3d ed. 1999); see also HAZARD & HODES, supra § 4:107 app. 4 (listing states that have adopted the Model Rules). In the spring of 1997, the ABA launched a broad review of the Model Rules by establishing a special commission, the “Ethics 2000 Commission,” to engage in a comprehensive evaluation of the Model Rules in light of developments in the law and the legal profession since their adoption in 1983. See Margaret Colgate Love, Update on Ethics 2000 Project and Summary of Recommendations to Date, SYLLABUS, Winter 2000, at 19, 19.

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(a) (2000) [hereinafter MODEL RULES].

3. The entity concept has historically been an important feature of the law of corporations. See HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS 145 (3d ed. 1983). Corporations have long been recognized as fictional entities, or legal persons, with rights and obligations that are separate and apart from the individuals who make up the corporate person. See Sanford A. Schane, The Corporation Is a Person: The Language of a Legal Fiction, 61 Tul. L. Rev. 563, 563 (1987) (“The edification of the corporation to the status of person is one of the most enduring institutions of the law and one of the most widely accepted legal fictions.”). As an independent legal person, a corporation has the power to contract, to own and convey property, and to sue and be sued. See HENN & ALEXANDER, supra, at 148. See generally Walter Robert Goedecke, Corporations and the Philosophy of Law, 10 J. VALUE INQUIRY 81 (1976) (discussing the legal status of corporations). For a discussion of the entity theory of representation in the context of Rule 1.13, see infra Part II.B.

4. Rule 1.13 is broad in its application and is designed to apply not only to corporations, but also to other organizational entities such as unincorporated associations. See MODEL RULES, supra note 2, at Rule 1.13 cmt. 1; see also HAZARD & HODES, supra note 1, § 1.13:103 (Rule 1.13 “applies not only to corporations but to labor unions, unincorporated associations, governmental units and other formal organizations with established chains of command.”). The ABA has opined that a partnership, for example, is an organization within the meaning of Rule 1.13. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 361 (1991).
constituents including “officers, directors, employees, and shareholders.”

As a general matter, the lawyer may look to the authorized managers of the corporation, namely, the senior executive officers, to speak on behalf of the corporate client. Difficulties arise, however, when the interests of the managers and the corporation diverge. For example, if the managers are engaged in illegal conduct that will result in substantial injury to the corporation, they can no longer be perceived as speaking for the corporation. In such cases, the lawyer is authorized by Rule 1.13 to seek out the highest authority in the organization to review the matter and to take steps to prevent harm to the organization’s interests. The Model Rules recognize the board of directors to be the highest authority in the corporation. Because the

This Article is concerned primarily with the representation of organizations that fall within the category of large, publicly-held corporations. An analysis of Rule 1.13’s application to other types of organizational entities is beyond the scope of this discussion.

5. See Model Rules, supra note 2, at Rule 1.13 cmt. 1. The rule contains both affirmative and negative implications. In affirmative terms, it states that the organization is the client; in negative terms, it clarifies “that the corporate lawyer does not represent the constituent members of the corporation. See Geoffrey C. Hazard, Jr., Ethical Dilemmas of Corporate Counsel, 46 Emory L.J. 1011, 1013 (1997). When the interests of the corporation and any one of its constituents coincide, the lawyer may safely represent both simultaneously. See Model Rules, supra note 2, at Rule 1.13(e) (“A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7.”).

6. See John C. Taylor III, The Role of Corporate Counsel, 32 Rutgers L. Rev. 237, 246 (1979); Lewis H. Van Dusen, Jr., Who Is Counsel’s Corporate Client, 31 Bus. Law. 474, 477 (1975). For all practical purposes, “in the day-to-day representation of a corporation, the corporation is its ‘management,’ and it is with that management that the lawyer will initially consult with respect to legal matters.” Id. at 475.

7. The Model Rules state that if the interests of the corporation and the constituent diverge, the lawyer may be faced with a conflict of interest and must proceed in compliance with Rule 1.7, which explicitly addresses such conflicts. See Model Rules, supra note 2, at Rule 1.7.

8. Rule 1.13(b) provides a roadmap for corporate lawyers when faced with knowledge of constituent misconduct that is likely to result in substantial injury to the organization: the lawyer may “(1) ask . . . [the constituent for] reconsideration of the matter; (2) advis[e] that a separate legal opinion on the matter be obtained and presented to [the] appropriate authority in the organization; and (3) refer[] the matter to [the] high[est] authority” that can act on behalf of the organization. See Model Rules, supra note 2, at Rule 1.13(b) & cmt. 4.

9. See Model Rules, supra note 2, at Rule 1.13 cmt. 5. (“In an extreme case, it may be reasonably necessary for the lawyer to refer the matter to the organization’s highest authority. Ordinarily, that is the board of directors or similar governing body.”). The board of directors generally represents the final voice of the corporation because the board possesses the ultimate authority to manage the corporation. The board derives its plenary authority from the incorporation statute of the state in which the corporation is incorporated. See, e.g., Cal. Corp. Code § 300 (West 1999).

[T]he business and affairs of the corporation shall be managed and all corporate powers
corporate client usually makes and voices its final decisions through its board of directors, the corporate lawyer may rely ultimately on the board for guidance in the representation.\textsuperscript{10}

One of the most controversial issues arising out of the context of corporate representation involves the corporate lawyer's relationship vis-a-vis the board of directors. In particular, lawyers have often been invited to become members of the boards of directors of the very clients that they represent.\textsuperscript{11} In fact, many lawyers have welcomed the invitation because service on the board of directors naturally strengthens their own and their law firm's relationship with their corporate clients.\textsuperscript{12}

Twenty-five years ago, legal scholars and practitioners argued extensively about whether lawyers should be permitted to serve on the boards of directors of their corporate clients while serving simultaneously as legal counsel.\textsuperscript{13} At

shall be exercised by or under the direction of the board. The board may delegate the management of the day-to-day operation of the business . . . provided that the business and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.

\textit{id.}; see also \textsc{Del. Gen. Corp. L.} \$ 141(a) (1999) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors . . ."); \textsc{Revised Model Business Corporation Act} \$ 8.01(b) (1999) [hereinafter \textsc{RmBcA}] ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . .").

10. See Simon M. Lorne, \textit{The Corporate and Securities Adviser, the Public Interest, and Professional Ethics}, 76 \textsc{Mich. L. Rev.} 423, 436 (1978); see also Ralph Jonas, \textit{Who Is the Client?: The Corporate Lawyer's Dilemma}, 39 \textsc{Hastings L.J.} 617, 622 (1988) (suggesting that because corporate lawyers "have abstractions as clients," lawyers should for practical purposes regard themselves as "own[ing] their . . . loyalty to the boards of directors who hire them and . . . fire them").

11. Corporations ask their legal counsel to become board members because it is perceived to be beneficial to the company to have someone on the board who has "considerable knowledge of [both] the corporation's business . . . [and] its legal problems." William E. Knepper, \textit{Liability of Lawyer-Directors}, 40 \textsc{Ohio St. L.J.} 341, 341 (1979). For a discussion of the perceived benefits to the corporation of having corporate counsel on the board, see \textit{infra Part V.B.1}.

12. See James H. Cheek, III & Howard H. Lamar, III, \textit{Lawyers as Directors of Clients: Conflicts of Interest, Potential Liability and Other Pitfalls}, in \textsc{Twenty-Second Annual Institute on Securities Regulation}, at 461, 463 (PLI Corp. L. & Practice Course Handbook Series, No. B4-6940, 1990); see also Bernard S. Carrey, \textit{Corporate Lawyer/Corporate Director: A Compromise of Professional Independence}, 67 \textsc{N.Y. St. B.J.} 6, 6 (Nov. 1995) ("Lawyers, who understandably are anxious to solidify their relationship with valued clients and to retain or increase legal business from the corporation, are not only willing, but in some cases actively seek, to serve on their client's Board of Directors."). For a discussion of the perceived benefits to lawyers or their law firms, see \textit{infra Part V.B.2}.

13. See, e.g., Douglas W. Hawes, \textit{Should Counsel to a Corporation Be Barred from Serving as a Director?—A Personal View}, 1 \textsc{Corp. L. Rev.} 14 (1978); Knepper, supra note 11; Robert H. Mundheim, \textit{Should Code of Professional Responsibility Forbid Lawyers to Serve on
that time, Supreme Court Justice Potter Stewart referred to the issue of dual service as "a vexing problem of professional responsibility." On the one hand, lawyers possess unique qualifications that enable them to be very good directors. Their strong analytical skills, their inquisitive and probing nature, and their broad professional training and experience allow them to make significant contributions as directors of corporate enterprises. On the other hand, lawyers may find it difficult to exercise their independent professional judgment due to the potential conflicts generated by their dual service. If the lawyer’s role as the legal advisor to the corporation is to provide guidance and counsel to the board, and if the lawyer as a director of the corporation must make business decisions based on that very same advice, then the lawyer-director, in effect, has himself for a client. The danger of this type of blurring of roles prompted Justice Stewart to comment on "the need for the brightest possible line of demarcation between the function of a lawyer in giving professional counsel to his client, and the function of corporate management in carrying on the corporation’s business in the profit-making interests of its stockholders."

Many commentators agreed, noting that accountants as professionals are barred by their own code of ethics from serving as directors on the boards of their corporate clients. The accountants’ self-prohibition against such dual service was designed to preserve their independence in opining on their clients’ financial statements. Commentators saw a similar need for lawyers,

*Boards of Corporations for Which They Act as Counsel, 33 BUS. LAW. 1507 (1978); Martin Riger, The Lawyer-Director—”A Vexing Problem,” 33 BUS. LAW. 2381 (1978); Panel Discussion, Lawyers as Directors, 30 BUS. LAW. 41 (1975) [hereinafter Lawyers as Directors].


15. See Bryant R. Gold, Note, Should Lawyers Serve as Directors of Corporations for Which They Act as Counsel?, 1978 UTAH L. REV. 711, 723 n.48 (“[L]awyers make good directors because, for the most part, they are intelligent, well-trained, skeptical and conscientious.”); see also Lawyers as Directors, supra note 13, at 58 (“[L]awyers, by virtue of training and experience, can, and usually do, make good directors.”).

16. See Mundheim, supra note 13, at 1512 (questioning whether a corporation may “have a fool for a client when the person who in a sense is making the decision is also the legal advisor” (remarks of Sonde)); Gold, supra note 15, at 713; see also Cheek & Lamar, supra note 12, at 466 (noting that the board “direct[s] the business affairs of the corporation, . . . exercise[s] corporate power and evaluate[s] business risks on behalf of the corporation; whereas [the lawyer] . . . advise[s] . . . the board on the legal aspects of [the board’s] actions or proposed actions” (footnote omitted)).

17. Stewart, supra note 14, at 464.


as a matter of professional responsibility, to preserve their independence by
drawing that "brightest possible line of demarcation" between the lawyer's
role as advisor and the director's role as decision-maker. Indeed, the
sentiment of the time was that a rule prohibiting dual service would eventually
be promulgated for lawyers as well. This prompted one speaker at a
symposium on the dual service issue to make the bold prediction that within
twenty-five years lawyers would be expected to have the same level of
independence and detachment that accountants are required to have: "I think
the expectation is emerging that the lawyer will come closer to being required
to have the same measure of independence [as accountants]. We are not there
yet, but if we were having this meeting in the year 2000, I suspect we would be."22

The prediction proved to be false. Today, we have no ethical rule
prohibiting lawyers from serving as directors of the same corporations they
represent as counsel.23 To the contrary, the ABA Committee on Ethics and

GUIDE FOR PROFESSIONALS 35 (1990). The AICPA rule on independence prohibits transactions,
interests, and relationships that impair the member's independence; directorships are expressly
prohibited under the rule. Id. at 36. For the text of the AICPA rules on independence and a
discussion of the accountant's duty to avoid directorships, see infra notes 228-31 and
accompanying text.

20. See Stewart, supra note 14, at 464; see also Mundheim, supra note 13, at 1512-13
(questioning the discrepancy between ethical rules for accountants and ethical rules for lawyers
when the public relies equally on both professionals to be independent) (remarks of Sommer).
One lawyer-accountant phrased the issue: "Why should everybody expect the accountant not
to have stock in the client, nor to be on the board, to have all this independence, when the
lawyer is giving opinions and being relied upon by the public or affecting the public, but [the
lawyer] does not have all of those [same] prohibitions?" Id.; see also Riger, supra note 13, at
2386.

21. In the deliberations leading to the adoption of the Model Rules by the ABA, "a flat
prohibition against a lawyer's serving as director or officer of a corporate client" was
considered. HAZARD & HODES, supra note 1, § 1.13:110. In particular, in 1980, Professor
Monroe Freedman proposed the adoption of an ethical rule which would prohibit a lawyer from
serving "as an officer or director of a publicly held company that is a client of the lawyer, of the
lawyer's partners or associates, or of any firm or attorney with whom the lawyer has an of-
counsel relationship." Monroe Freedman, You CAN Do It, But You Shouldn't, AM. LAW., Dec.
1992, at 42, 42.

22. Mundheim, supra note 13, at 1513 (quoting the remarks of a Speaker).

23. Rule 1.13 says nothing about the dual service issue. See MODEL RULES, supra note
2, at Rule 1.13. Instead, only a cautionary note is contained in the comment following Rule 1.7,
which explicitly addresses conflicts of interest. See MODEL RULES, supra note 2, at Rule 1.7
cmt. 14. The comment assumes that dual service is permissible, but warns the lawyer who
engages in such service to beware of potential conflicts:

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
Professional Responsibility recently issued Formal Opinion 98-410, which expressly permits lawyers to serve simultaneously as directors and legal counsel for their corporate clients.\textsuperscript{24} The Formal Opinion notes that such dual service presents significant risks and many "ethical and practical pitfalls."\textsuperscript{25} Nonetheless, the Formal Opinion concludes that "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."\textsuperscript{26}

What has happened? How did the tide change so dramatically from a movement toward greater independence of the lawyer on the one hand, to an endorsement of closer identification with the corporate client on the other? The Formal Opinion allows corporate lawyers and their clients to weigh the costs and benefits of dual service and then determine together whether the lawyers can capably fulfill both the roles of lawyer and director without materially harming their clients' interests. One wonders whether a result that seemingly elevates the interests of lawyers who wish to solidify their financial relationships with their corporate clients is truly an appropriate resolution of the issue.

This Article provides a critical analysis of the Formal Opinion's conclusion and examines the dual service issue from broader corporate governance and public idealism perspectives. There is a tendency to view the issue as one strictly involving professional responsibility concerns alone, without understanding its critical link to larger corporate governance considerations relating to the essential nature, function, and role of the board of directors in the modern corporation. More importantly, however, the dual service problem raises certain theoretical questions about the role of the attorney as an administrator of public law and public ideals. As attorneys identify increasingly more with their clients' interests, there is a concern over whether that type of identification results in a corresponding erosion of the ideal of the lawyer as an independent steward of the legal system.\textsuperscript{27}

Part II of this Article begins with an overview of Model Rule 1.13 and the entity theory of representation. Although the entity theory simplifies the

\begin{thebibliography}{9}

\bibitem{2} Id. at 4.
\bibitem{3} Id.
\bibitem{4} The ideal of the attorney as an administrator of public law places the attorney in "an honorable position among the bar's traditions." David Luban, \textit{Asking the Right Questions}, 72 TEMP. L. REV. 839, 841 (1999). The lawyer is perceived as "serv[ing] a unique and indispensable social function by acting as a kind of mediator between private interests—those of the client—and the public interest, represented by the law." \textit{Id.}; see also discussion infra Part VI.
\end{thebibliography}
identification of the corporate client in most contexts, representation of the organizational client remains a complex undertaking. The corporate lawyer who engages in such representation must be aware of the complexities that are associated with treating a fictional person as the client.

Part III proceeds with a discussion of an important distinguishing feature of corporate lawyers themselves. One of the deficiencies in the Formal Opinion’s analysis is the failure to acknowledge the difference between the corporate lawyer who is employed full-time by the corporation (in-house or inside counsel) and the lawyer who is retained from a law firm outside the corporation (outside counsel). Unfortunately, commentators who have addressed the dual service issue in the past have also failed to address the difference between in-house lawyers and their outside counterparts, rendering such commentators’ analyses of the issue incomplete. Part III describes the role of in-house lawyers and the unique pressures and conflicts that they face. To answer the question of whether lawyers should be permitted to serve on the boards of their corporate clients, we must have an understanding of the special characteristics of in-house lawyers who, unlike lawyers from outside law firms, serve only one client and thereby depend on that single client for their livelihood.

Turning to broader corporate governance concerns, Part IV examines the nature and evolving role of the board of directors in the modern corporation. The modern board not only serves as a monitoring mechanism to ensure corporate managers are doing their jobs, but also acts as a participant in strategic planning with corporate managers. The trend has been toward increasing the presence of truly independent directors who can provide objective perspectives and render independent judgments. How to strengthen the board’s role and effectiveness has been the object of great concern; several measures have been proposed to effectuate board reform. Part IV addresses these trends with an eye toward understanding what corporate law really seeks to accomplish by placing corporate authority in the board of directors.

28. Most commentators have either explicitly limited their analysis to outside counsel or have assumed that the considerations for outside counsel apply equally to in-house counsel. See, e.g., Craig C. Albert, The Lawyer-Director: An Oxtymoron?, 9 GEO. J. LEGAL ETHICS 413, 416 n.3 (1996) (“Though this [a]rticle does not address the ethical concerns implicated where a corporation’s in-house general counsel also serves on the corporation’s board of directors, many of the issues discussed herein are equally applicable to in-house counsel.”); Carrey, supra note 12, at 6 n.1 (“While some of the issues discussed here relate primarily to outside legal counsel for a corporation, the concerns are applicable as well to in-house corporate counsel who may serve on its Board of Directors.”); Riger, supra note 13, at 2385 n.26 (clarifying that the author is “concerned only with the problem of retained [outside] counsel on the client’s board,” rather than with the role of “[i]nternal house counsel”); Thurston, supra note 18, at 791 n.3 (“This [c]omment . . . [addresses] the attorney who is a member of the law firm which serves as general counsel for the corporation. While the situation of . . . in-house counsel is different in several respects, many of the arguments presented are also applicable to the in-house counsel.”).
Part V directly addresses the dual service question and analyzes the Formal Opinion’s response. The practical advantages and disadvantages of dual service are spelled out in detail. Part V concludes that, from a practical standpoint, the risks of harm to both the corporation and the lawyer outweigh the benefits that dual service offers to both parties.

Part VI explores a deeper theoretical concern over the role of attorneys as representatives of the system of law. The dual service debate is a significant one because it raises more fundamental questions about the nature of loyalty and independence. One of the hallmarks of the legal profession “is the interplay of client loyalty and lawyer independence.”\(^\text{29}\) These two ideals can be at odds with one another. The demands of the client for the lawyer’s absolute loyalty must be balanced against the lawyer’s own independent obligations to the legal system and to the law’s pursuit of justice. The lawyer’s independent duties to these ideals are “what some would describe as the lawyer’s ‘public-regarding’ obligations.”\(^\text{30}\) There is a tendency to conflate the two ideals and mistakenly blur the distinctions between them. It is important to recognize that client loyalty deals primarily with the lawyer’s relationship with other parties. Lawyers must keep a safe distance from outside third parties who may interfere with the lawyer’s loyalty to the client.\(^\text{31}\) Lawyer independence, however, is concerned primarily with the lawyer’s relationship with the client. Lawyers must also keep a safe distance from their own clients because lawyers must maintain a separate identity if they are to render detached, objective advice.\(^\text{32}\) One scholar has argued that the first ideal, that of client loyalty, is subject to negotiation with the client to

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31. See Myers, *supra* note 29, at 861. Model Rule 1.8(f), for example, addresses this concern. It provides that “[a] lawyer [must] not accept compensation [from a third party] for representing a client . . . unless . . . the client consents after consultation,” the third party does not interfere “with the lawyer’s independent[] . . . professional judgment,” and the client’s confidential information will be protected. Model Rules, *supra* note 2, at Rule 1.8(f). The thrust of the rule is to “require[] disclosure [to the client] of the fact that the lawyer’s services are being paid for by” someone else. *Id.* at cmnt. 4. As a matter of client loyalty, the rule is designed to encourage lawyers to avoid non-client pressures that present a risk of interfering with the lawyer-client relationship and the lawyer’s independent judgment on behalf of the client.

32. See Myers, *supra* note 29, at 860. Model Rule 2.1 addresses the lawyer’s professional independence. Model Rules, *supra* note 2, at Rule 2.1. It provides that “[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice.” *Id.* Even if the advice is not what the client wishes to hear, the lawyer has an obligation to present an honest assessment of the client’s legal problem. Rendering such candid advice requires a certain measure of distance from the client.
a certain degree, however, the second ideal, that of lawyer independence, is nonnegotiable and nonwaivable because it is an absolute duty that the lawyer owes to the legal profession.

The dual service issue is often viewed in terms of client loyalty. So long as the client is made sufficiently aware of the risks involved, the client and lawyer may together agree to move forward with the representation until the conflicts become so severe that withdrawal of some kind is required. The Formal Opinion resolves the matter in exactly this way, and therein lies the problem. The dual service issue is not so much a matter of client loyalty as it is a matter of lawyer independence. Lawyer independence is not subject to negotiation and discussion with the client. Part VI argues that the appropriate resolution of the dual service issue must be centered on enforcing the ideal of lawyer independence. Based on these considerations, Part VII proposes that a new ethics rule regarding dual service be adopted. This Part also addresses potential counterarguments to the adoption of the proposed rule. Part VIII concludes that the recommended rule will preserve the lawyer’s role as a professional and will ultimately strengthen corporate lawyers’ ability to represent their corporate clients effectively.

II. MODEL RULE 1.13: ORGANIZATION AS CLIENT

A. Background

Early professional responsibility rules were designed to govern the provision of legal services to individuals rather than to organizations. The first code of professional ethics adopted by the ABA in 1908, the Canons of Professional Ethics (Canons), contained no reference to organizational entities and therefore provided no guidance to attorneys who represented large

33. See Myers, supra note 29, at 866. There may be times when “the client is in the best position to [decide] whether . . . the lawyer’s other obligations” may impair the lawyer’s duty to the client, or whether the client simply regards the costs of potential conflicts of interest to be outweighed by the benefits of having the lawyer continue the representation. Id. In these instances, we afford the fully informed client the opportunity to consent to potential impairments of loyalty. Id.

34. See id. at 863. The lawyer’s role as an officer of the court reflects the ideal of lawyer independence. As an officer of the court, the lawyer owes a special duty to the system of law. See MODEL RULES, supra note 2, at Preamble (describing a lawyer as “an officer of the legal system and a public citizen having special responsibility for the quality of justice”); see also WOLFRAM, supra note 1, § 1.6 (discussing officer of the court concept); Eugene R. Gaetke, Lawyers as Officers of the Court, 42 VAND. L. REV. 39, 43 (1989); L. Ray Patterson, Legal Ethics and the Lawyer’s Duty of Loyalty, 29 EMORY L.J. 909, 969 (1980). For example, the lawyer may not assist a client in committing perjury. See MODEL RULES, supra note 2, at Rule 3.3(a). The client’s wishes notwithstanding, the lawyer must abide by an obligation to the court and to the law as a public ideal.
corporations. The Canons were replaced in 1969 by the ABA Model Code of Professional Responsibility (Model Code). The Model Code, although designed to be much more specific than the Canons, contained only a short reference to corporate clients in Ethical Consideration 5-18: "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to" any constituent of the entity. The Model Code exhorts the lawyer not only to "keep paramount" the interests of the entity but also to avoid the impairment of the lawyer's professional judgment by any person connected with the entity. The Model Code's treatment of organizational representation, while an improvement over that of the Canons, still lacked the force of meaningful disciplinary review because the Ethical Considerations were only aspirational in nature. The Disciplinary Rules of the Model Code contained no reference to the representation of organizations; therefore, corporate lawyers still had little guidance with respect to representing corporate clients.

In 1983, the ABA adopted the Model Rules of Professional Responsibility to replace the Model Code. Model Rule 1.13, labeled "Organization as

35. See James R. McCall, The Corporation as Client: Problems, Perspectives, and Partial Solutions, 39 Hastings L.J. 623, 627 (1988). The Canons were written in broad language with a highly moralistic tone and lacked sufficient specificity to help lawyers understand their professional responsibilities. See HAZARD ET AL., supra note 1, at 13; see also WOLFRAM, supra note 1, § 2.6.2 (describing the background, adoption, and deficiencies of the Canons).

36. See HAZARD ET AL., supra note 1, at 13-14. The Model Code proved to be an almost immediate success as virtually every state adopted some version of the Code soon after its initial appearance. See HAZARD & HODGE, supra note 1, § 202; WOLFRAM, supra note 1, § 2.6.3.


38. Id. EC 5-18 suggests that occasionally a lawyer may also represent an individual constituent of the corporation so long as the lawyer is convinced that the interests of the constituent and the entity do not differ. Id.

39. The Model Code made clear that the Ethical Considerations were to be regarded as merely "aspirational in character," unlike the Disciplinary Rules, which were "mandatory in character." MODEL CODE OF PROFESSIONAL RESPONSIBILITY at Preamble and Preliminary Statement (1969). While the Ethical Considerations "represent the objectives toward which every member of the profession should strive," the Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Id. (emphasis added); see also WOLFRAM, supra note 1, § 2.6.3 (discussing the Model Code's differentiation between Disciplinary Rules and Ethical Considerations).

40. A commission appointed by the ABA to evaluate the Model Code specifically found the Code to be deficient in this regard. See McCall, supra note 35, at 628. "[T]he Model Code imagines a client as an individual, not a collection of individuals nor an inanimate legal entity such as a corporation . . . . Thus, the Model Code leaves a lawyer representing a corporation . . . . with little enlightenment on such basic issues as the identity of the client." HAZARD ET AL., supra note 1, at 15.

41. See WOLFRAM, supra note 1, § 2.6.4. The Model Rules were adopted after considerable debate and controversy. Id. Working drafts of the proposed rules were circulated.
Client," contains several paragraphs and significant commentary designed to
guide lawyers who represent organizational entities. At the outset, the rule
specifically identifies the organization as the client to whom lawyers owe their
professional duties: "A lawyer employed or retained by an organization
represents the organization acting through its duly authorized constituents." Thus, the lawyer who represents a large corporation must treat the corporation
itself as the client, even though the only way to communicate with the client
is through the individuals who make up its constituent parts. Rule 1.13 makes
no distinction between in-house lawyers who are employed by the corporation
and outside lawyers from law firms who are retained to represent the
corporation. Both inside and outside counsel must regard the corporate entity
as the client, and the obligations they owe to the corporate client are identical.

B. Entity Theory

Rule 1.13 is grounded in the entity theory of corporate representation.
The entity theory grants corporations independent status as separate legal
persons, distinct from their constituents. The entity concept has long been

for comment, and public hearings were held to debate significant portions of the rules. See id.
After undergoing several rounds of amendments, the Model Rules were finally adopted by the
ABA House of Delegates on August 2, 1983. Id.; see also HAZARD & HODES, supra note 1, §§
203-205; HAZARD ET AL., supra note 1, at 15. For an account of the political process by which
the Model Rules were adopted, see Ted Schnyer, Professionalism as Bar Politics: The Making
ABA Center for Professional Responsibility, The Legislative History of the Model
RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES

42. See MODEL RULES, supra note 2, at Rule 1.13 & cmts. 1-11.
43. MODEL RULES, supra note 2, at Rule 1.13(a). The Restatement's treatment of
organizational clients is similar: "When a lawyer is employed or retained to represent an
organization . . . the lawyer represents the interests of the organization as defined by its
responsible agents acting pursuant to the organization's decision-making procedures . . . ."

44. See HAZARD & HODES, supra note 1, § 1.13:102 (discussing entity theory). In
contrast to the entity theory, the aggregate or group theory regards corporations "as being
essentially mere clusters or aggregates of individuals." MEIR DAN-COHEN, RIGHTS, PERSONS,
AND ORGANIZATIONS 15 (1986); see also LARRY MAY, THE MORALITY OF GROUPS: COLLECTIVE
RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS 11-18 (1987) (discussing the
claim that social groups such as corporations are nothing more than the individuals who
constitute them). Under the aggregate view of corporations, one might argue that a corporation
cannot be separated from the natural persons who compose it and therefore should not be given
separate status as a person under the law. In that case, a lawyer retained by the corporation
would be regarded as owing duties to the group of individuals who are associated together in
the corporate enterprise. Although considered by the drafters of the Model Rules, the group
theory was rejected in favor of the entity theory. See Roberta S. Karmel, Duty to the Target:
Is an Attorney's Duty to the Corporation a Paradigm for Directors?, 39 HASTINGS L.J. 677, 681
an important feature of the law of corporations.\textsuperscript{45} As an independent legal person, the corporation "has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs."\textsuperscript{46} The corporation can therefore buy and sell property, owe and pay taxes, and sue and be sued.\textsuperscript{47} The corporate entity can even be held criminally liable for its conduct, separate and apart from any criminal liability of its individual constituents.\textsuperscript{48}

Because the corporation possesses "an identity apart from the individuals who comprise it, it can have separate status as a ‘client’ in the relationship with the lawyer."\textsuperscript{49} The entity theory thereby simplifies client identification in the organizational context. The entity-as-client concept recognizes that an organization can have goals and objectives that may, or may not, be identical to those of some or all of its members.\textsuperscript{50} The lawyer’s primary professional responsibility is to assist the organizational client to achieve its goals and objectives, even if those objectives are inconsistent with the wishes of particular individuals within the corporate enterprise.\textsuperscript{51}

\footnotesize{(1988); see also HAZARD & HODES, supra note 1, § 1.13:104 (contrasting group and entity theories).}

\textsuperscript{45} See HENN & ALEXANDER, supra note 3, at 145 (tracing "traditional corporate [entity] theory . . . to Roman and canon law, law merchant, and early common law"); Charles W. Wolfram, Corporate-Family Conflicts, 2 J. INST. FOR STUDY LEGAL ETHICS 295, 308 (1999) ("The entity-representation concept was new in the lawyer codes, but the entity concept of corporate existence was hardly new in the law."); see also ROBERT CHARLES CLARK, CORPORATE LAW §12.3, at 15, 17-21 (1986) (discussing the economic value of recognizing fictional legal entities or persons).

\textsuperscript{46} RMBCA, supra note 9, § 3.02.

\textsuperscript{47} See id.; ROBERT W. HAMILTON, FUNDAMENTALS OF MODERN BUSINESS: A LAWYER’S GUIDE § 13.9 (1989); HENN & ALEXANDER, supra note 3, at 132-38, 148.


\textsuperscript{49} HAZARD & HODES, supra note 1, § 1.13:103.


The organizational preferences and goals should not be characterized as merely an aggregate of individual preferences. See LANE TRACY, THE LIVING ORGANIZATION: SYSTEMS OF BEHAVIOR 33-46 (1989) (discussing the distinct nature of organizational values, purposes, goals and attitudes); see also DAN-COHEN, supra note 44, at 33, 36-38 (discussing an organization’s capacity for organizational preferences and goal orientation).

\textsuperscript{51} See George C. Harris, Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing, 11 GEO. J. LEGAL ETHICS 597, 636-43 (1998) (discussing a lawyer’s obligation to act in a manner loyal to the interest of the entity and without regard to the direction of agents of the organization who may be engaged in wrongdoing).
The entity theory of representation has its limitations. It may work for large, public corporations where the size and complexity of the organization give the corporation an identity that is greater than the sum of its individual parts.\(^{52}\) In the case of close corporations and partnerships, however, the lines between the entity and the individuals who own or control the entity become blurred.\(^{53}\) In those contexts, it is much harder for the lawyer to distinguish between the goals of the entity and the goals of the entity's individual constituents.\(^{54}\) The application of entity theory is also limited in the context of representing corporate families, such as parent-subsidiary corporations and brother-sister corporations.\(^{55}\) It is not always clear whether a corporation's affiliates should be treated as completely separate entities for purposes of

\(^{52}\) See Nancy J. Moore, *Expanding Duties of Attorneys to "Non-Clients": Reconceptualizing the Attorney-Client Relationship in Entity Representation and Other Inherently Ambiguous Situations*, 45 S.C. L. REV. 659, 674 (1994) ("The concept of entity representation has been generally accepted for large, publicly held corporations."); Wolfram, *supra* note 45, at 312 ("Rule 1.13(a) obviously assume[s] an organization of some size, significantly complex structure, relatively permanent form, and in general, some external set of features permitting the 'thing' to be identified as something other than a loose aggregation of individuals." (footnote omitted)); see also Harris, *supra* note 51, at 649 (asserting that reliance on entity theory is most supported when the lawyer is dealing with a "non-unitary" organization, that is, the organization has diverse constituents and management is separated from ownership). Professor Gillers puts it succinctly: "Size counts. At some point, practically and conceptually, the corporation becomes something greater than the sum of its parts. That 'something greater' is the client, with its own claim to the lawyer's loyalty and attention." Stephen Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289, 295 (1987).


\(^{54}\) Lawyers for close corporations and partnerships are "more likely to find individual participants attempting to realize their personal goals through the enterprise." Lawrence E. Mitchell, *Professional Responsibility and the Close Corporation: Toward a Realistic Ethic*, 74 CORNELL L. REV. 466, 479 (1989). Because these are the very same individuals who have the legal authority to direct the affairs of the business, counsel will find it difficult to distinguish between advising the entity and advising the individual constituents. See Moore, *supra* note 52, at 678. Professor Mitchell argues that the lawyer for the close corporation no longer has an entity interposed between the lawyer and the ultimate owners of the business, and therefore, the lawyer should owe professional duties to the individuals themselves. See Mitchell, *supra*, at 472-73.

client identification.\footnote{There are three general viewpoints on the issue of client identification in the corporate family context. See HAZARD & HODES, supra note 1, § 1.13:201. First, one may view the corporation and all of its affiliated entities as a single entity, in which case the lawyer who represents any one of the affiliates owes the same duties to all other affiliates. See id. Alternatively, one may argue that each corporate entity is separate, and therefore, a lawyer who represents one entity has no conflict of interest in suing any other affiliated entity. See id. Finally, one may view the corporate family as a single entity for most purposes, but require the lawyer to avoid conflicts of interest that will bring actual harm to one of the affiliate entities. See id. The ABA issued a formal opinion that attempted to strike a balance between the conflicting viewpoints. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 390 (1995). See also HAZARD & HODES, supra note 1, § 1.13:201 (discussing Formal Op. 390).}

In spite of its limitations, the entity representation concept has proven to be a malleable and workable doctrine that can be applied effectively in various organizational settings.\footnote{See Wolfram, supra note 45, at 310 ("No sustainable theory has been able to challenge the supremacy of the entity-representation concept."). Professor Wolfram notes the far-reaching applications of entity theory: "When pushed very hard, it appears that the entity-representation concept is quite plastic and could acceptably include any aggregation of people who, with their chosen lawyer, reach an understanding that the lawyer is to represent the collective as such rather than, or in addition to, its constituent elements." Id. at 313. Scholars have argued that entity theory can effectively be used in other nontraditional settings. See, e.g., Jeffrey N. Pennell, Representations Involving Fiduciary Entities: Who Is the Client?, 62 FORDHAM L. REV. 1319 (1994) (discussing advantages of using entity theory in the representation of fiduciary entities such as trusts and guardianships).}

For corporate lawyers, the entity concept as embodied in Rule 1.13 simplifies the identification of the client in most contexts.

\section*{C. Complexities of the Lawyer-Client Relationship in Corporations}

The charge of the corporate lawyer under Rule 1.13 is to represent the best interests of the client—the corporate entity. This is a complicated task because there are certain ambiguities that are inherent in representing a nonhuman client. While individual clients can assert their own autonomy and make their wishes known to counsel, corporate clients can do so only through their agents. The corporation depends on its individual constituents to communicate its interests. Therefore, the lawyer for the corporation must deal firsthand with persons who are not the client, but agents of the client.\footnote{See Hazard, supra note 5, at 1013 ("Put starkly, a lawyer for a corporation never deals with the client as such but only with what I call 'client-people,' the corporate managers who undertake to speak for the client."); see also WOLFRAM, supra note 1, § 13.7.2 ("In everyday life, a corporation's planning, buying and selling, producing and consuming, advice giving and advice seeking, record keeping, and similar dealings are all carried out not by fictive corporate personalities, but by individual persons. A corporation's lawyer necessarily maintains relationships with [these] individuals . . . ."). See generally Ellen A. Pansky, Between an}
triangular relationship between [the] corporate lawyer, the client's agents [or managers,] and the client itself accounts for many of the ethical complications in corporate representation."

It can be "psychologically awkward" to say that the corporate lawyer owes professional allegiances to the corporate entity, but owes no duties to the managers who have the power to select, retain, supervise, pay, and fire the lawyer.60 The lawyer maintains a close working relationship with the corporate manager who "is effectively the personification of the corporate client for most ordinary legal purposes."61 In order for the representation to be effective, the lawyer and the manager must be able to maintain a level of confidentiality and intimacy that replicates the relationship between counsel and an individual client. It seems disjunctive that "a person who is, in fact, a confidential intimate shall nevertheless be regarded in law as a total stranger."62

On a personal level, the corporate lawyer who has developed close friendships with managers in the organization over time may feel a personal sense of loyalty and obligation to these individuals. The manager who is a business friend of long standing and who has trusted the lawyer in the past may feel that the lawyer represents both the organization and the manager. The manager is likely to feel betrayed by the lawyer who indicates in times of crisis that the lawyer represents only the interests of the corporation.63

For example, the lawyer might face this dilemma when the lawyer learns confidentially from the chief executive officer (CEO) that the CEO and other

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60. See McCall, supra note 35, at 624; see also LEN BienNAT & R. HUNTER MANSON, LEGAL ETHICS FOR MANAGEMENT AND THEIR COUNSEL 86 (1995); Jonas, supra note 10, at 617.

61. Hazard, supra note 59, at 29. For the corporate lawyer, the primary professional relationships are usually with the chief executive officer or other senior management officials. See Stanley A. Kaplan, Some Ruminations on the Role of Counsel for a Corporation, 56 NOTRE DAME L. REV. 873, 876 (1980). Such "corporate officials often consider themselves to be indistinguishable from the entity." HAZARD & HODES, supra note 1, § 1.13:109. Because they are usually the ones who work most closely with the lawyer, they are even more likely to assume incorrectly that the lawyer acts as "their" attorney. Id.; see also BIERNAT & MANSON, supra note 60, at 86; WOLFRAM, supra note 1, § 13.7.2.

62. Hazard, supra note 59, at 29. One alternative is to recognize a special status for corporate constituents as "quasi-clients" or "derivative clients." See id. at 31. Such an approach, however, does not solve the complex problems associated with entity representation. See id. at 31-36, 39-41 (discussing limits of quasi-client concept); Moore, supra note 52, at 691 (discussing problems with using the derivative client approach).

63. See GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 50 (1978) ("If the lawyer refuses to listen [to the agent], he must appear to be violating a trusting relationship and to be abandoning a friendship.")
members of management have been involved in wrongdoing that will create liability for the corporation. The managers’ misconduct is clearly counter to the organization’s best interests. Rule 1.13 requires the lawyer to protect solely the interests of the corporation and to explain that fact to the managers. That may be particularly difficult to do if the lawyer and the managers have enjoyed close working and personal relationships in the past. Moreover, if the managers reject the lawyer’s recommendation to avoid future wrongdoing, the lawyer may need to reveal the misconduct to the highest authority in the corporation, the board of directors, to prevent the managers from continuing in the wrongdoing. Such extreme measures are necessary

64. See George D. Reyraft, Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel, 39 Hastings L.J. 605, 609-10 (1988). Reyraft discusses situations when corporate constituent interests diverge from the interests of the entity:

   When self-dealing or fraud is committed by management, the interests of management directly conflict with the interests of the shareholders . . . . The corporate lawyer . . . thus confronts a situation in which the entity’s constituent groups have sharply conflicting interests. The lawyer must determine what is in the entity’s best interest and how it can be achieved.

Id. at 609; see also WOLFRAM, supra note 1, § 13.7.2.

65. Rule 1.13(d) provides that in dealing with one of the organization’s constituents, “a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.” MODEL RULES, supra note 2, at Rule 1.13(d). The lawyer may have to consider giving a Miranda-type warning to constituents when it appears they will be disclosing information that the lawyer may later need to reveal in order to protect the organization’s interests. See HAZARD, supra note 63, at 50-51. The Miranda-type warning would alert the constituent to the fact that the lawyer represents the organization, not the constituent, and any disclosures the constituent makes to the lawyer could be revealed to higher authorities in the future. Id.; see also Taylor, supra note 6, at 253 n.48.

   Counsel should be careful to warn corporate employees, particularly middle and lower level managers, that counsel acts as counsel to the corporation, not as counsel to the individual employees. Such warnings are necessary to avoid an assumption by the employee that his communications are privileged and cannot be revealed without the employee’s rather than the corporation’s consent.

Id. WOLFRAM, supra note 1, § 13.7.2.

66. Rule 1.13(b) suggests a general process for dealing with the situation when a lawyer knows that an officer or employee of the organization is engaged in misconduct that is likely to result in substantial harm to the organization. MODEL RULES, supra note 2, at Rule 1.13(b). The rule instructs the lawyer to inform agents in the organization’s hierarchy as is reasonably necessary in the best interests of the organization. Id. Rule 1.13(b) further suggests, “Measures [that the lawyer] may [take] include . . . : (1) asking for reconsideration of the matter; (2) advising that a separate legal opinion on the matter be . . . [obtained]; and (3) referring the matter to [the] high[est] authority” that can act on behalf of the organization. Id. Then, “[i]f, despite [all of] the lawyer’s efforts . . . the highest authority . . . [in the organization] refus[es] to act [to stop the harm,] . . . the lawyer may resign.” Id. at Rule 1.13(c).

   The Model Rules identify the board of directors as the highest authority in the corporation. See id. at cmt. 5; supra note 9 and accompanying text. Thus, if the board of directors rejects the lawyer’s recommendation, the lawyer is not authorized to reveal constituent misconduct to
if the lawyer is to remain faithful to the interests of the entity. Thus, the triangular relationship between the lawyer, the client, and the client’s agents places an enormous amount of pressure on the lawyer when the interests of the client and its agents diverge.

Another situation where the triangular nature of the representation presents difficulties is during a battle for corporate control. Conflicts may arise when the corporation seeks to defend itself from an unfriendly takeover attempt. In the face of such an event, corporate managers may wish to “adopt defensive tactics with the intention to retain control [and remain in office,] rather than to benefit the corporation” and its shareholders.67 The attorney who is asked by managers to assist in the implementation of any number of the corporation’s shareholders or the public. The lawyer’s only remedy is to resign. See MODEL RULES, supra note 2, at Rule 1.13(c). An earlier draft of the Model Rules included a reference to shareholders as potentially the highest authority in the corporation. See Kaplan, supra note 61, at 884 (discussing proposed Model Rule 1.13 as it appeared in the 1980 Discussion Draft form). The Model Rules as adopted, however, omit any reference to shareholders as the highest authority and any discussion of going beyond the board of directors to disclose constituent wrongdoing. See McCall, supra note 35, at 635-36 n.42. Model Rule 1.13 is therefore not a whistleblower rule. See HAZARD & HODES, supra note 1, § 1.13:301. Critics have condemned Rule 1.13’s failure to mandate resignation or disclosure to outside third parties beyond the board. See generally Gillers, supra note 52; Harris, supra note 51; James P. Hemmer, Resignation of Corporate Counsel: Fulfillment or Abdication of Duty, 39 HASTINGS L.J. 641 (1988); McCall, supra note 35. But see Van Dusen, supra note 6, at 475 (arguing that the lawyer should not be required to disclose constituent wrongdoing to shareholders if the board refuses to act because shareholders “are stuck with the quality of the directors they elect, and ... a lawyer’s duty [should not] extend[] to advising the shareholders that they have made a bad choice”). Critics have argued that Rule 1.13 as finally adopted was the result of self-serving lobbying by special interest groups and by lawyers who did not want to be liable for failure to disclose constituent misconduct. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 201-05 (1990); Martin Riger, The Model Rules and Corporate Practice—New Ethics for a Competitive Era, 17 CONN. L. REV. 729, 729-42 (1985).

defensive devices, including poison pills,\textsuperscript{68} lock-ups,\textsuperscript{69} and golden parachutes,\textsuperscript{70} may wonder whether it is the interests of the corporation or the managers that are being served.\textsuperscript{71} The Model Rules do not expressly address corporate counsel's ethical duties in the corporate acquisition setting. The corporate lawyer, therefore, must be carefully aware of the serious conflicts of interest that may be present in this or any other context where the interests of the entity and the managers are dissimilar.\textsuperscript{72}

68. Poison pills are special types of preferred stock or debt securities issued by potential target corporations that are designed to make unfriendly takeover attempts extremely difficult. See Hamilton, \textit{supra} note 47, § 17.13. Additional rights are granted to shareholders when a hostile acquirer succeeds in acquiring a specified percentage of the target company's shares. See id. These additional rights may involve increased voting rights for target shareholders (voting poison pills), rights to purchase the target company's shares (flip-in poison pills), or rights to purchase the acquiring company's shares (flip-over poison pills). See id. Poison pills are usually created by the board without shareholder approval. See id.; see also Clark, \textit{supra} note 45, §13.6.1 (discussing poison pills).

69. Lock-up rights are granted to friendly entities to purchase valuable assets or additional shares of the target company at a low, locked-in price. See Clark, \textit{supra} note 45, § 13.6.1 (discussing lock-ups). Lock-ups increase the capital investment that must be made by the hostile acquirer in order to acquire the company. See Hamilton, \textit{supra} note 47, § 17.12.2 (discussing various defensive tactics including lock-ups). In certain situations, lock-ups merely prefer one bidder over another and thereby preclude a fair, price-maximizing auction of the company. See 1 William E. Knepper, \textit{Liability of Corporate Officers and Directors} § 14.06 (6th ed. 1998).

70. Golden parachutes are contracts between the corporation and its managers whereby managers receive large severance bonuses in the event of a successful takeover bid. Clark, \textit{supra} note 45, § 13.6.1. In golden parachutes, "[t]he main idea is that, if the managers are about to be blown out of their cockpits, they might as well float down in style." Id. This device is less a defensive measure than a form of insurance for managers. Id. The propriety of a golden parachute agreement may turn on the timing of its adoption and the amount to be paid out under its terms. See Knepper, \textit{supra} note 69, § 14.07.

71. See Jonas, \textit{supra} note 10, at 618-19. There is some authority to suggest that a corporate attorney may reasonably assist corporate managers in retaining power so long as it is in the corporation's best interests. See Karmel, \textit{supra} note 44, at 687-88 (discussing ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1056 (1968) (holding that a corporation's lawyer may assist managers in defeating a bid for power by minority shareholders in a proxy contest)).

72. There are certain situations involving changes in corporate ownership where the conflicts between corporate and constituent interests are readily apparent. The leveraged buyout and management buy-out situations, for example, present such conflicts. In these transactions, the corporation's public shareholders are cashed out and incumbent managers acquire all or significant ownership interests in the resulting private corporation. Managers purchase their interest through the use of borrowed funds secured by the corporation's assets and subject to repayment out of the corporation's future cash flow. See Hamilton, \textit{supra} note 47, § 17.16. The conflicts between constituent interests are clear: managers' interests are to buy at a low price, while shareholders' interests are to sell at a high price. See David B. Simpson, \textit{The Management Buyout: An Idea Whose Time May Have Passed}, 17 Seton Hall
What makes the lawyer-client relationship in the corporate setting even more complex is that the corporation itself is ultimately owned by shareholders who, according to Rule 1.13, are constituents of the corporation. One might argue that the shareholders, as residual owners of the corporation, are the actual clients to whom corporate lawyers should owe their professional obligations. Indeed, this argument has met with some success in certain circumstances. For practical reasons, however, it would be difficult for corporate lawyers to owe their duties directly to individual shareholders in the public corporation context. Rule 1.13 therefore rejects that proposition and retains the entity as the client with the board of directors as its highest authority.

LEGIS. J. 137, 139-49 (1993). In these buy-outs, "[b]ecause the insiders have a financial stake in the transaction, they no longer should be looked to as representing the corporate entity." Steinberg, supra note 67, at 598. See generally H. Peter Nesvold, Going Private or Going for Gold: The Professional Responsibilities of the In-House Counsel During a Management Buyout, 11 GEO. J. LEGAL ETHICS 689 (1998).

73. See MODEL RULES, supra note 2, at Rule 1.13(e) (including shareholders in the list of directors, officers, employees, members, and "other constituents").

74. See, e.g., Garner v. Wolfinarger, 430 F.2d 1093 (5th Cir. 1970) (holding that communications between a corporation's attorney and its officers were subject to discovery by shareholders in a shareholder suit charging the corporation and its officers with securities law violations). The Garner court stated: "Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders." Id. at 1101. But see Taylor, supra note 6, at 242-45 (arguing that the Garner holding is limited and that corporate lawyers as a general matter do not owe affirmative professional obligations to shareholders).

75. See Lome, supra note 10, at 477 ("It is easy . . . to argue that the shareholders are really the client. But the public nature of the shareholders is such that accepting them as the client renders a confidential relationship with the attorney impossible.""); Martin Lowy, A Bank General Counsel: Defining a Role as Lawyer to Board of Directors?, BANKING POLICY REPORT, June 3, 1996, 1, 15 n.1. Lowy states:

It also may be that the [lawyer] owes duties to the corporation's stockholders. At least in a public company setting, these duties cannot be defined by the stockholders because they are too numerous. The duties to the stockholders may be defined by the board of directors on behalf of the stockholders . . . .

Id; see also Wolfram, supra note 45, at 333-34.

76. See MODEL RULES, supra note 2, at Rule 1.13(a) & cmt. 5. The rule does suggest that there may be situations in which the highest authority of the corporation may be found in a subset of the board: "[A]pplicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation." Id. at cmt. 5. Some commentators have noted that this may produce awkward results. See, e.g., Kaplan, supra note 61, at 884 ("The difficulties are especially acute when, for example, the board consists of a dozen insider directors and one independent director. On this theory, the latter may constitute by himself the 'highest authority.'"). The rule as adopted rejects the proposition that the shareholders may be regarded as the "highest authority" of the corporation.
Thus, corporate lawyers’ professional responsibilities are quite complex: lawyers owe their duties to a nonhuman entity; they may look to corporate managers on a day-to-day basis to speak on behalf of that entity; however, if conflicts arise or managers cannot be trusted to represent the best interests of the entity, lawyers may consult the highest authority within the entity, namely the board of directors. Ultimately then, the final voice of the client resides in the board itself.

The complexity of this lawyer-client relationship in the organizational setting is even more pronounced when the corporate lawyer is an in-house attorney. Inside lawyers face unique pressures that complicate the nature of the representation. The following Part discusses these pressures and their effect on the in-house attorney’s relationship with the corporate client.

III. CORPORATE IN-HOUSE COUNSEL

One of the most significant changes in the practice of corporate law in recent years has been the rapid increase in the number of attorneys hired to work within corporations as full-time employees.\(^77\) Many corporations recognize the benefit of having in-house attorneys who are not only immediately accessible, but also intimately familiar with the management and business of the corporation.\(^78\) These inside lawyers provide the corporation

\(^{77}\) See Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of General Counsel*, 46 EMORY L.J. 1057, 1059 (1997) (citing reports that indicate the number of in-house lawyers quadrupled between 1962-1982). Many large corporations now have in-house legal departments that are larger than most law firms. For example, in 1999, Ford Motor Company had 345 in-house lawyers, Exxon Mobil had 626, General Electric had 697, State Farm Mutual had 740, and Citigroup had 1,200. *See NLJ Client List: Who Represents Corporate America*, NAT’L L.J., June 26, 2000, at C4, C4 [hereinafter NLJ Client List]; see also Harry S. Hardin, III & Andrew R. Lee, *Pitfalls for In-House Counsel*, BRIEF, Winter 1996, at 33, 33 (“[A]t many Fortune 500 corporations, the law department is a virtual law firm within the corporation, with separate departments and dozens, if not hundreds, of attorneys with an array of specialties.”). In 1982, the American Corporate Counsel Association (ACCA) was established as an independent professional organization for in-house lawyers. *See ACCA: Benefits and Services* (visited Mar. 30, 2001) <http://www.acca.com/a-join.html>. ACCA’s membership grew rapidly and the organization now boasts over 12,000 members. *Id.*

\(^{78}\) See Hardin & Lee, * supra* note 77, at 33; Hazard, * supra* note 5, at 1012. The need to have lawyers who are familiar with the business of the corporation has become increasingly more important as corporations face greater regulation by federal and state agencies. See Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1203-04 (1997) (noting that the “unparalleled growth in business regulation” by government agencies was one of the factors contributing to the increase in quality and number of in-house lawyers); *see also* HAMILTON, * supra* note 47, § 22.4; Daly, * supra* note 77, at 1061 (“As the scope of government
with "added-value" because their advice is more than strictly legal in nature; the advice is enhanced by in-house lawyers' direct knowledge of and involvement in the company’s business affairs.79 The status and prestige of in-house lawyers has grown as larger numbers of corporations seek to expand their in-house legal departments to capitalize on that "added-value."80

As the head of the legal department, the "general counsel" of the corporation is ultimately responsible for all legal matters affecting the corporation. The general counsel serves as the bridge between senior managers and the legal department and occupies a position of significant prestige.81 In fact, many general counsels are ranked as members of senior management and hold corresponding titles as executive officers in addition to their title as general counsel.82 General counsels for large corporations enjoy an elite status among the legal community and are often better compensated

regulation increased exponentially at the federal, state, and local level, so did corporate clients' need for lawyers who were well versed in all aspects of their clients' business operations and therefore equipped to advise clients on a daily basis with respect to compliance issues.

79. See Sally R. Weaver, Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis, 46 EMORY L.J. 1023, 1027 (1997) ("Corporate counsel can enhance their value to their client and their power within the organization when they are perceived as 'adding value' beyond traditional legal advice. The organization may similarly benefit from the perspective of corporate counsel on matters . . . raising issues that implicate both law and business."); see also Daly supra note 77, at 1060-61.

80. In the past, in-house lawyers were viewed as "second-class citizens" in the legal community. See Weaver, supra note 79, at 1031; Hazard, supra note 5, at 1011-1012. The perception was that all of the significant and interesting work was handled by outside lawyers and that in-house lawyers typically consisted of lawyers who failed to make partner at the better law firms. See HAMILTON, supra note 47, § 22.4 (explaining that corporations' "internal legal staff[s] had virtually no challenging work and became the backwater of the legal profession"); WOLFRAM, supra note 1, § 13.7.3 (noting that at one time the in-house lawyer position was one of lower prestige than the position of outside counsel). Today, in-house attorneys enjoy a significantly greater level of prestige as their practice has become as multifaceted and challenging as that offered in law firms. See Marc I. Steinberg, The Role of Inside Counsel in the 1990s: A View from Outside, 49 SMU L. REV. 483, 484 (1996). Indeed, in-house positions have grown to become some of the most coveted positions for many lawyers. See id. (observing that many attorneys seek opportunities to go in-house); WOLFRAM, supra note 1, § 13.7.3 (noting the "increased attractiveness of the [in-house] position as a career of first preference for many lawyers, including graduates of elite law schools").


82. For example, the general counsel will often act as senior vice president and secretary of the corporation. See NLI Client List, supra note 77, at C-4 to C-18; see also Abram Chayes & Antonia H. Chayes, Corporate Counsel and the Elite Law Firm, 37 STAN. L. REV. 277, 277 (1985) ("The General Counsel sits close to the top of the corporate hierarchy as a member of senior management."). Because the general counsel is usually the one in-house lawyer who is asked to serve on the board of the corporation, this Article focuses more closely on the general counsel's position.
than their outside counterparts. As an integral part of the corporate enterprise, the in-house legal department, under the leadership of the general counsel, plays a pivotal role in the success of the corporation.

A. Role of In-House Counsel

The in-house lawyer today is actively involved “in shaping corporate events, in assessing corporate policies, and in establishing the tone and standard for corporate conduct.” In-house lawyers serve as legal advisors to management on all transactions and matters that have significant legal ramifications for the corporation. The lawyers are consulted before these transactions occur and not merely after the fact; in other words, in-house lawyers practice preventive law. Because outside lawyers have no way of insisting that corporations involve them early in matters, the role of outside counsel is usually reactive. Inside lawyers, however, play a much more proactive role because they are involved in earlier phases of transactions.

The proactive, preventive legal services supplied by in-house counsel take various forms. With increased regulation of businesses by government agencies, in-house lawyers must take active steps to plan and implement

83. See Liggio, supra note 78, at 1206-07 (“[T]he compensation of this new breed of corporate counsel has exceeded the average compensation of retained counsel. . . . [M]any general counsel for major companies are now enjoying seven figure incomes.”).

84. Steinberg, supra note 80, at 484.

85. See Liggio, supra note 78, at 1208; Nesvold, supra note 72, at 711. In performing this function, lawyers must be able to discern future trends in the law and “predict how those trends will impact the company’s business over time.” Liggio, supra note 78, at 1208.

86. See HAZARD, supra note 63, at 142; see also Brian D. Forrow, The Corporate Law Department Lawyer: Counsel to the Entity, 34 BUS. LAW. 1797, 1804 (1979) (“If the practice of law is a prediction of what judges will do in practice, ‘preventive law,’ (i.e., a forward [sic] look in anticipation of and hopeful avoidance of future problems) is the essence of corporate law practice today.”). Preventive law in its purest form is grounded in the recognition that more time, effort, and money are saved in the long run by avoiding problems before they occur rather than trying to fix them afterwards. See BASRI & KAGAN, supra note 81, at 1-6.

87. See Chayes & Chayes, supra note 82, at 280-81. This proactive role stems from inside counsel’s “right and responsibility to insist upon early legal involvement in major transactions that will raise significant legal issues.” Id. at 281. Inside lawyers therefore are in a unique position to anticipate legal problems and help managers avoid them. This is an advantage that inside lawyers have over their outside counterparts who typically are not brought in until after legal issues arise. See BASRI & KAGAN, supra note 81, at 10-1 to 10-2. Inside lawyers “[p]ractic[e] preventive or anticipatory law [that] enables the law department to be on the cutting edge of corporate developments rather than spending time and effort on rearguard actions.” Id. at 10-2; see also HAMILTON, supra note 47, § 22.5.

88. The business activities of corporations today are more heavily regulated than they have ever been. See Michael Bradley et al., The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads, 62 LAW & CONTEMP. PROBS. 9, 24-29 (1999) (discussing numerous statutes that have been passed in the
programs to ensure corporate compliance with regulatory requirements. 89 The in-house legal department shoulders much of the responsibility for developing formal compliance programs and educating personnel to prevent noncompliance with the law.90 In conjunction with this compliance function, inside lawyers also conduct or lead internal investigations when there are allegations of noncompliance or suspected problematic activities.91

The general counsel and the inside lawyers are also involved in preventive law as it relates to strategic business planning.92 Inside lawyers are viewed as members of the corporate team and are therefore included in long-range planning efforts that require early legal counseling.93 Inside lawyers are

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89. See Richard S. Gruner, General Counsel in an Era of Compliance Programs, 46 Emory L.J. 1113, 1113-75 (1997). Increased criminalization of corporate activity also motivates corporations to put strong compliance programs into place. Effective compliance programs can influence a prosecutor's decision whether to indict the corporation. See Basri & Kagan, supra note 81, at 11-4. Studies have revealed that the government often chooses not to prosecute corporations for criminal conduct specifically because of their voluntary disclosure. Id. Under the federal sentencing guidelines, effective and operational law compliance programs can also constitute mitigating factors in determining corporate sentences for violations of criminal laws. See Steinberg, supra note 80, at 489; see also Basri & Kagan, supra note 81, at 11-4 to 11-5.

90. Chayes & Chayes, supra note 82, at 284-89 (discussing inside counsel's role in programmatic prevention). Programmatic prevention is largely a function of inside counsel's efforts, and outside lawyers do not perform that function to the same degree. See id. at 284-85. Knowledge of the corporation, its goals and objectives, and the industry in which it operates, is essential to developing an effective compliance program. Inside lawyers with that background knowledge and access to corporate sources of information are uniquely situated to create such programs. See Basri & Kagan, supra note 81, at 11-7. The variety of subject areas requiring defined programs of prevention are numerous and can demand a substantial portion of inside lawyers' time. See Chayes & Chayes, supra note 82, at 284-85. For example, compliance programs are critical in the antitrust, employment, environmental, health, intellectual property, and securities law areas, to name a few.

91. See Basri & Kagan, supra note 81, at 12-2 to 12-4; Nesvold, supra note 72, at 711. One of the advantages of having inside lawyers conduct the investigation is that they are already familiar with the corporation's business, its programs and policies, and its employee relations. The interviewing and fact gathering process is streamlined for this reason. See Basri & Kagan, supra note 81, at 12-3.

92. See Daly, supra note 77, at 1068-73; see also Chayes & Chayes, supra note 82, at 281-84. The inside lawyer's role shifts from resolving problems after the fact to alerting managers to legal trends and suggesting creative ways to avoid potential problems. See Basri & Kagan, supra note 81, at 5-11.

93. Lawyers are considered "part of the strategic business team on a particular project from the outset. They have input not only into the legal aspects of the deal, but also the strategic implications for the company as a whole." Daly, supra note 77, at 1072 (quoting Guy
brought into the business planning process in order to identify the legal consequences likely to result from implementing the company’s future business plans. “As [senior] management develops its strategic business plans,” inside lawyers provide input to ensure that the plans are legally feasible and within an appropriate level of legal risk.94

Because inside lawyers develop skills that are specialized to serve the corporation’s needs, they perform many functional legal services efficiently without consulting outside counsel. Inside lawyers negotiate, draft, and review legal contracts, and prepare periodic disclosure documents as required by securities laws.95 Litigation, to an increasing extent, is also being handled internally because the business sophistication and knowledge of inside lawyers give them an advantage over outside lawyers who do not have a comparable understanding of the business.96 When there is a need to retain outside counsel, inside lawyers play a significant role in managing the services of outside counsel. The inside lawyer is often responsible for selecting, retaining, and supervising outside counsel, and as a result, the inside lawyer acts as the conduit through which the outside lawyer communicates with the corporation.97

Fitzmaurice, Getting in with the In-Crowd, LAW., Dec. 17, 1996, at 15).

94. See Ligio, supra note 78, at 1209. In this context, the inside lawyer performs a “legal risk analysis” function. See Robert L. Nelson & David M. Trubek, Arenas of Professionalism: The Professional Ideologies of Lawyers in Context, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 177, 208-09 (Nelson et al. eds. 1992) [hereinafter LAWYERS’ IDEALS/LAWYERS’ PRACTICES]. In performing legal risk analysis, the lawyer assesses the legal risks of a proposed action and presents the analysis to the decision-maker but does not attempt to influence the decision. Id. at 209.

95. See Ligio, supra note 78, at 1205-06; Nesvold, supra note 72, at 710-11. Inside lawyers now handle much of the routine corporate work, such as filing 10-Ks and 10-Qs in compliance with Securities and Exchange Commission requirements. See Ligio, supra note 78, at 1205.

96. Inside lawyers will generally find it easier to respond quickly to lawsuits because they have “a broader understanding of the underlying facts [and] the context from which they arose.” See BASRI & KAGAN, supra note 81, at 14-3; Ligio, supra note 78, at 1205. Inside lawyers can be much more effective at devising litigation strategies because they do not need first to be educated on each particular issue raised by the lawsuit and every corporate policy that pertains to that issue. See BASRI & KAGAN, supra note 81, at 14-3.

97. See Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 IND. L.J. 479, 510-19 (1989); see also HAMILTON, supra note 47, § 22.6; Daly, supra note 77, at 1061-62; Forrow, supra note 86, at 1811-12; Ligio, supra note 78, at 1210. See generally RICHARD H. WEISE, REPRESENTING THE CORPORATION: STRATEGIES FOR LEGAL COUNSEL 15-1 to 15-35 (2d ed. Supp. 2000) (discussing the relationship between inside and outside counsel). Because the inside lawyer is the point of contact with the corporate entity, the outside lawyer may often treat the inside lawyer as the client or, more specifically, the voice of the client for purposes of the representation. See BASRI & KAGAN, supra note 81, at 15-2. In this regard, the inside lawyer wears multiple hats: sole counsel for
Thus, inside lawyers serve a number of important functions within the corporate setting. The inside lawyer’s close proximity to the corporate client allows the lawyer to engage in legal services that are fundamentally different from those provided by outside counsel. That proximity also presents inside lawyers with unusual pressures and dynamics that outside lawyers do not encounter.

B. Unique Characteristics and Conflicts

One of the most salient distinguishing features between inside and outside counsel for the corporation is the economic dependence of inside counsel on a single client. As a full-time employee of the corporation, the in-house lawyer’s career and economic fate are tied directly to a single employer. The outside lawyer who seriously offends or disagrees with managers of the corporation ultimately risks losing a client, but the inside lawyer who does the same thing risks losing a job and being professionally blacklisted.98 Therefore, inside lawyers face stronger pressures to conform to the wishes and objectives of managers who have the authority to hire and fire them. One might argue that pressures on outside counsel are not altogether very different. In today’s competitive environment for legal services, the loss of a client that accounts for a significant portion of the law firm’s business can have harmful effects on the law firm and produce similar pressures to conform to the whims and wishes of the client.99 The argument is well taken. Outside law firms clearly have strong economic incentives to accommodate their major corporate clients. That, however, does not diminish the severity of the all-or-nothing situation that inside lawyers must face if they are discharged by the corporation.

This all-or-nothing problem for inside lawyers is exacerbated in jurisdictions that refuse to recognize the right of inside lawyers to bring wrongful discharge claims against their corporate employers. For example, the corporate client on certain matters, co-counsel with outside lawyers for the corporate client on other matters, and the personification of the corporate client for the outside lawyer on still other matters. See Burlington Indus. v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974) (noting multiple roles that in-house lawyers play).

98. See Hazard, supra note 5, at 1015; see also Forrow, supra note 86, at 1802 (noting that “[w]ithdrawal in the corporate context poses unique problems for inside” lawyers who, unlike outside lawyers, “depend[] on one client for [their] livelihood”); Steinberg, supra note 80, at 484-85.

99. See Morris W. Hirsch, The Pendulum Swings Back: General Dynamics and Other Signs of Changing Fortunes of In-House Counsel, NEV. LAW., March 1995, at 13, 15 (arguing that in today’s competitive environment, law firm lawyers are reluctant to give unwelcome advice to major clients of the firm); Conflict of Interest and Corporate Counsel: Choosing the Best Path, ACCA Docket, Fall 1993, at 32, 47 [hereinafter Choosing the Best Path] (“In today’s economic times, for outside law firms to have a client that represents ten percent of their gross billings . . . that is a very significant client.”) (remarks of Norman Krivosha).
in Balla v. Gambro, Inc., the general counsel of a corporation that manufactured and distributed kidney dialysis equipment was terminated after the lawyer told his employer that he would do whatever was necessary to stop the employer's proposed sale of defective kidney dialyzers. The lawyer brought a retaliatory discharge claim against the employer, but the court held that in-house lawyers have no recognizable cause of action for such wrongful terminations. The court noted that, as a rule, clients may discharge their lawyers at any time, with or without cause, and therefore, the lawyer must bear the cost of complying with his ethical duties, even if that results in a loss of employment. Cases such as Balla illustrate the unique pressures felt by in-house lawyers when they are confronted with the choice between conforming to the demands of their employer or complying with their own ethical duties.

The close, day-to-day working relationship that inside lawyers share with management is another defining characteristic of in-house practice. This relationship poses greater risk of confusion and uncertainty about the role of

100. 584 N.E.2d 104 (Ill. 1991).
101. See id. at 106. The attorney advised the president of the company that the dialyzers did not comply with FDA regulations, but the president decided to sell them in spite of the attorney's advice. Id. A month after the attorney threatened to take whatever measures necessary to prevent the sale of the defective dialyzers, the president terminated him. Id.
102. Id. at 107.
103. See id. at 107-11. The court noted that the attorney had an ethical responsibility under the rules of professional conduct to protect the lives of citizens and therefore must be treated differently from other non-lawyer employees of the corporation. Id. at 108-09. The court saw nothing wrong with requiring in-house lawyers to bear the risks of losing their jobs and having no remedy for wrongful discharge when they act in accordance with their ethical obligations. The court considered such risks to be a part of professional life. Id. at 110.
104. See Weaver, supra note 79, at 1029-30 (noting that courts traditionally denied inside lawyers the right to bring retaliatory discharge claims against corporate employers for terminations based on actions taken by lawyers in the course of rendering legal services). More recently, courts have begun to recognize the impropriety of treating in-house lawyers exactly like outside lawyers who may be discharged by their clients at any time and for any reason. See, e.g., General Dynamics Corp. v. Superior Court, 876 P.2d 487 (Cal. 1994). The General Dynamics court noted the difference between the two types of attorneys: "Unlike the law firm partner, who typically possesses a significant measure of economic independence and professional distance derived from a multiple client base, the economic fate of in-house attorneys is tied directly to a single employer, at whose sufferance they serve." Id. at 491. General Dynamics and other similar cases have held, therefore, that in-house lawyers should have the right to bring retaliatory discharge claims against their employers when the lawyers are fired for acting in accordance with their duties to the public. See id. at 495-96; see also Parker v. M & T Chems., Inc., 566 A.2d 215 (N.J. Super. Ct. App. Div. 1989). See generally H. Lowell Brown, Ethical Professionalism and At-Will Employment: Remedies for Corporate Counsel When Corporate Objectives and Counsel's Ethical Duties Collide, 10 GEO. J. LEGAL ETHICS 1 (1996); Sara A. Corello, Note, In-House Counsel's Right to Sue for Retaliatory Discharge, 92 COLUM. L. REV. 389 (1992).
the lawyer in the representation of the corporate entity.\textsuperscript{105} The development of mutual trust and confidence between the managers and the inside lawyer may lead them to believe that the lawyer represents their interests.\textsuperscript{106} Inside lawyers must be exceptionally vigilant in setting limits and reminding corporate constituents that the lawyer ultimately represents the corporation.

The close working relationships between inside lawyers and managers create uncertainties not only for the managers, but also for the lawyers themselves. The tie between the general counsel and the CEO of the corporation is often a particularly close one that lends itself to the risk of role confusion. Typically "the general counsel is personally selected by the [CEO], reports directly to" the CEO, and remains the close confidante of the CEO.\textsuperscript{107} Thus, there is a strong tendency to view the general counsel as the CEO's lawyer.\textsuperscript{108} The relationship between the CEO and the general counsel may be particularly beneficial to the general counsel who has been informally tapped by the CEO to be the CEO's eventual successor. In light "of the close relationship[] that often develop[s between the two], it is not uncommon for the general counsel to move into the executive suite and ultimately become the [CEO] of the corporation."\textsuperscript{109} The external and internal motivations for the general counsel to carry out the objectives of the CEO are, therefore, not identical to those experienced by outside counsel.

The differences between the internal motivations and attitudes of inside lawyers as opposed to outside lawyers should not be discounted. Inside lawyers tend to feel as though they are integral members of a team, and their

\textsuperscript{105} See HAZARD, supra note 63, at 49-51; Weaver, supra note 79, at 1028.

\textsuperscript{106} See H. J. Aibel, Corporate Counsel and Business Ethics: A Personal Review, 59 Mo. L. Rev. 427, 428, 435-36 (1994). "The legitimacy of a client's expectations is . . . [significant] in the conflicts area." See Hemmer, supra note 66, at 665. For example, if an outside lawyer were retained only for a very limited purpose, the claim to the lawyer's undivided loyalty would be weak. \textit{Id.} at 666. If, however, the lawyer is retained to serve as general counsel and is privy to every secret and confidence, the claim to the lawyer's undivided loyalty would be much stronger. \textit{Id.} The conflict for the lawyer would be much more stark in that case.

\textsuperscript{107} See HAMILTON, supra note 47, \textsection 22.3. When the internal legal department is large, it is more likely that the general counsel reports directly to the CEO. See BASRI & KAGAN, supra note 81, at 2-2. Many general counsels actually welcome the opportunity "to become counsel, advisor, and confidant to the CEO" because the development of such a "relationship enhance[s] the general counsel's authority in the company." \textit{Id.} at 2-1.

\textsuperscript{108} HAMILTON, supra note 47, \textsection 22.3; see also HAZARD & HODES, supra note 1, \textsection 1.13:109; \textit{Choosing the Best Path}, supra note 99, at 36 ("[T]he CEO truly thinks of you as being his or her lawyer, personal or otherwise. Every once in a while I've had to point out that I'm not their personal lawyer but the lawyer for the corporation.") (remarks of Don Walsh, former General Counsel of Sunoco).

\textsuperscript{109} HAMILTON, supra note 47, \textsection 22.3. Many lawyers actively seek to join the ranks of senior management and leave the legal department altogether. Studies have revealed that in recent years, there has been a 100% increase in the number of CEOs who began their careers as lawyers. See Daly, supra note 77, at 1073. One survey found that "73 of the 800 chief executives of the largest public corporations in the United States hold law degrees." \textit{Id.}
goals are centered on furthering the long-term success of the corporate enterprise. These lawyers "view themselves as facilitators and expeditors of their employer's goals to a greater extent than many outside lawyers would."110 Inside lawyers are often reminded that they are part of the corporate team and rewarded when they act as "team players." The ideal lawyer is the one who has a "can do" attitude,111 and many inside lawyers strive to achieve that ideal. While outside lawyers face similar performance pressures, they generally are not perceived by managers to be core team members in the same way, nor do outside lawyers tie their personal success to the success of the corporate team to the same degree that inside lawyers might.

The close proximity of the inside lawyer to the corporate client compounds the difficulty for the lawyer who is faced with the constituent misconduct situation discussed previously.112 If it is the general counsel, rather than an outside lawyer, to whom the CEO and other senior managers reveal that they have been involved in wrongdoing, the general counsel encounters a much more troublesome dilemma. The general counsel, as the attorney for the corporation, owes every loyalty to the corporate entity, even though long years of service may have resulted in strong personal and professional associations with senior management. Under Rule 1.13, the general counsel must proceed in the best interests of the corporation, which may ultimately mean that the general counsel must disclose the wrongdoing to the board of directors as the highest authority in the organization.113 For the general counsel who occupies a position of significant prestige, who enjoys a very comfortable level of compensation, who plans to succeed the CEO into office, and who feels a strong sense of personal loyalty to senior management, the prospect of withdrawing from representation or being terminated for acting in compliance with ethical duties is certainly dismaying. The lawyer who is a member of the corporate team must be particularly sensitive to these tensions and potential conflicts because they are an important aspect of

110. HAMILTON, supra note 47, § 22.5. The "corporate team" concept places pressures on inside lawyers that make their position more sensitive with respect to ethical issues than that of outside lawyers. See Mendes Hershman, Special Problems of Inside Counsel for Financial Institutions, 33 BUS. LAW. 1435, 1448-49 (1978).
111. See Hershman, supra note 110, at 1435. The "can do" attitude is characterized by finding ways to accomplish corporate objectives by alternative, unconventional means: [W]hat corporations do not want is an attorney who views a particular situation or proposal and says "you cannot do that because it is illegal, period." We want attorneys that start by saying "Maybe," followed by, "Have you looked at a different approach?" The attorney who works with you and suggests alternatives so you can still get your end result is the one who is providing quality legal services.
Daly, supra note 77, at 1062-63 (quoting Management Wants Alternatives from Its Attorneys, CORP. LEGAL TIMES, July 1992, at 23).
112. See supra notes 64-66 and accompanying text.
113. See MODEL RULES, supra note 2, at Rule 1.13.
organizational representation. 114

Although Rule 1.13 makes no distinction between in-house and outside lawyers, in-house lawyers are confronted with additional pressures that make representation quite complex. In-house lawyers, however, are no different from outside lawyers in terms of their duty of devotion to the client's interests. On a day-to-day basis, both sets of lawyers may look to the managers to voice those interests on behalf of the client. When the interests of the entity and the managers diverge, however, the lawyers must look elsewhere for direction. Rule 1.13 guides the lawyer up the chain of corporate hierarchy to the board of directors. Thus, the corporate lawyer may safely regard the board of directors as the ultimate voice of the client. If the lawyer is to represent effectively the interests of the client, the lawyer must then have a clear understanding of the nature, role, and authority of the board of directors.

IV. CORPORATE BOARD OF DIRECTORS

A. Role of the Board

The board of directors plays a central role in corporate governance. Although elected and subject to removal by shareholders, the board possesses the ultimate authority to manage the corporation. 115 The plenary powers of the board are derived from the state: "All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation

114. These inherent tensions and conflicts are taken very seriously in European countries that do not consider in-house attorneys to be legal professionals at all. Several "European countries take the position that an employed lawyer, who by definition has only one client, cannot maintain the required independent professional judgment and is, in essence, in a permanent conflict of interest situation." Laurel S. Terry, An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct, 7 GEO. J. LEGAL ETHICS 1, 20 (1993). These countries include Belgium, France, Italy, and Luxembourg. Id. at 20 n.68. The reasoning is that financial dependence on a single employer necessarily strips the in-house attorney of professional independence and autonomy. See Daly, supra note 77, at 1102. Therefore, an in-house lawyer is not considered a lawyer at all in these countries, and an outside lawyer who moves in-house is automatically disbarred. See Ted Schneyer, Professionalism and Public Policy: The Case of House Counsel, 2 GEO. J. LEGAL ETHICS 449, 481 (1988). On a practical level, this means that "client communications with [in-]house counsel are not protected by the attorney-client privilege, while communications with outside counsel are protected." Id.; see also Daly, supra note 77, at 1103.

115. See 2 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 505 (perm. ed. 1998). Shareholders retain the power to make certain fundamental decisions concerning the corporation such as amending the corporate charter, increasing or reducing the capital stock, reorganizing or reincorporating, and dissolving or winding up the corporation. See id. §§ 540-45. Shareholders do not have the power, however, to bind the directors as agents of the shareholders. See id. § 507. Once elected, the directors become fiduciaries of the corporation, not the personal representatives of the shareholders who chose them. See id.; HENN & ALEXANDER, supra note 3, § 207.
managed under the direction of, its board of directors." The board may appoint executive officers to manage the day-to-day operations of the business, but the board does not have the power to delegate to others those duties that are fundamental to the management of the corporation. The ultimate responsibility for corporate activity lies with the board of directors, and this final responsibility cannot be delegated.

The modern board of directors has several primary functions. The first is to monitor the performance of management. The board itself cannot manage the daily activities of the corporation, but it can monitor those who do, ensuring that they are performing their jobs well and not shirking their responsibilities to the shareholders. One of the most important elements of the monitoring function is to select, regularly evaluate, and replace the CEO if warranted. An effective CEO is critical to the success of the corporation.

116. RMBCA, supra note 9, § 8.01(b). The shareholders themselves cannot confer or revoke these powers. See 2 FLETCHER, supra note 115, § 507; HENN & ALEXANDER, supra note 3, § 207.

117. 2 FLETCHER, supra note 115, §§ 496, 507.

118. See id. § 496; STANLEY C. VANCE, CORPORATE LEADERSHIP: BOARDS, DIRECTORS, AND STRATEGY 13 (1983); see also Business Roundtable, The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation: Statement of the Business Roundtable (1978), reprinted in 33 BUS. LAW. 2083, 2097 (1978) [hereinafter Role and Composition] ("[A]part from matters requiring shareholder approval, the board is the ultimate corporate authority. . . . [I]t is also universally accepted that the statutory language does not mandate that the board conduct day-to-day operations.").


120. See Francis v. United Jersey Bank, 432 A.2d 814, 822 (N.J. 1981) ("Directorial management does not require a detailed inspection of day-to-day activities, but rather a general monitoring of corporate affairs and policies."); see also Eisenberg, supra note 119, at 238; Charles M. Elson, Director Compensation and the Management-Captured Board—The History of a Symptom and a Cure, 50 SMU L. REV. 127, 160 (1996) ("Management operates; boards monitor.").

121. See 1 PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 3.02(a)(1) (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE] (stating that one of the board’s functions is to “select, regularly evaluate, fix the compensation of, and where appropriate, replace the principal senior executives”); ABA Section of Business Law, Corporate Director’s Guidebook—1994 Edition, 49 BUS. LAW. 1247, 1249 (1994) [hereinafter Corporate Director’s Guidebook] (listing oversight responsibilities of the board, including “evaluating the performance of the corporation and its senior management and taking appropriate action, including removal, when warranted”); Business Roundtable, Corporate Governance and American Competitiveness, 46 BUS. LAW. 241, 246 (1990) [hereinafter Corporate Governance and American Competitiveness] (stating that the first function of the board is to “[s]elect, regularly evaluate, and, if necessary, replace the chief executive officer”). Established in 1972, the Business Roundtable is an association composed of 200 CEOs, many from Fortune 500
The board’s responsibility is to see that the company has a CEO and senior management team that is of the highest quality. The board therefore evaluates and determines the compensation of the CEO and the managers in light of their performance. As a corollary of this task, the board must have a plan in place for deciding who the next CEO should be, if and when the current CEO can no longer serve in that capacity. The board’s plan of succession involves identifying potential candidates within the company, reviewing their career paths and performance, measuring achievements against defined goals, and choosing the best successor to lead the company forward.

As a monitor of the senior managers’ activities, the board’s role is to ask tough questions and to work with managers to find appropriate answers. This does not mean that the relationship between the board and the managers is adversarial or characterized by distrust. The goal is to produce a measure of accountability, not hostility. The role of the board as monitor includes

companies. See id. at 241 (ed. note). Corporate Governance and American Competitiveness was the Business Roundtable’s second statement on the role of the board; the first was its 1978 statement in Role and Composition, supra note 118.

122. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 3.02(a)(1); Corporate Director’s Guidebook, supra note 121, at 1249; Corporate Governance and American Competitiveness, supra note 121, at 246. Typically, a compensation committee of the board of directors is established to handle this function. See infra note 143 (describing compensation committees).

123. See Corporate Director’s Guidebook, supra note 121, at 1249, 1274; Corporate Governance and American Competitiveness, supra note 121, at 246. There are any number of reasons why the current CEO may need to be replaced: the CEO may have reached retirement age, suffered an incapacitating illness or accident, or provided such ineffective leadership that the company’s performance has deteriorated. In any case, the board should stand ready to have a back-up succession plan that will make the transition to the new CEO as smooth as possible. See CHARLES A. ANDERSON & ROBERT N. ANTHONY, THE NEW CORPORATE DIRECTORS: INSIGHTS FOR BOARD MEMBERS AND EXECUTIVES 23-24, 64-68 (1986) (discussing the board’s responsibilities for replacement of the CEO).

124. Role and Composition, supra note 118, at 2097-98. The planning naturally requires a long-range outlook on the company’s performance. In most cases, recommendations of candidates to replace the CEO and to fill other positions in senior management will be initiated by the CEO. The board, under normal circumstances, is entitled to, and often does, rely on such recommendations. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 3.02 cmt. e; ANDERSON & ANTHONY, supra note 123, at 3 (noting the board’s duty to ensure that the current CEO has identified the CEO’s successor and is grooming that person for the job).


126. See Harold M. Williams, Corporate Accountability and Corporate Power, in HAROLD M. WILLIAMS & IRVING S. SHAPIRO, POWER AND ACCOUNTABILITY: THE CHANGING ROLE OF THE CORPORATE BOARD OF DIRECTORS 9, 21 (1979). The board must be capable of working in conjunction with managers rather than in constant suspicion of managers. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 3.02 cmt. d ("The board’s obligation to oversee the performance of the principal senior executives does not imply an antagonistic relationship
providing the managers with meaningful advice and direction and then evaluating the response of the managers to that advice. In this regard, the board and the managers achieve a valuable system of checks and balances. The board’s monitoring function also involves oversight of the corporation’s policies and procedures regarding compliance with the law. The board must be assured that appropriate legal compliance systems in the corporation have been established and are working effectively. See, e.g., WILLIAM G. BOWEN, INSIDE THE BOARDROOM: GOVERNANCE BY DIRECTORS AND TRUSTEES 146 (1994) (“Board members should be good critics as well as compatriots. Strong CEOs and strong boards can complement each other in any number of ways, and both are necessary for an enterprise to function at its best. A healthy, friendly, tension is appropriate.”).

In addition to its role as a monitor, the board serves an important function between the board and the executives. Rather, it contemplates a collegial relationship that is supportive as well as watchful.”). Commentators have noted that a certain level of healthy tension between the board and the managers is an essential feature of the board’s monitoring function. See, e.g., CORPORATE DIRECTOR’S GUIDEBOOK, supra note 121, at 1249, 1251, 1267; CORPORATE GOVERNANCE AND AMERICAN COMPETITIVENESS, supra note 121, at 246, 248. The Delaware Chancery Court’s well-known decision, In re Caremark International, Inc., suggests that a director’s failure to do so may constitute a breach of the director’s fiduciary duty to the corporation. See In re Caremark Int’l Inc., 698 A.2d 959, 967 (Del. Ch. 1996). In Caremark, shareholders brought a derivative suit alleging that Caremark’s directors breached their fiduciary duty by failing to implement a compliance system that would have alerted directors to widespread employee misconduct that eventually exposed the company to criminal liability, huge legal fees, and significant business losses. Id. at 968-70. The employee misconduct involved payments to physicians who recommended Caremark’s healthcare services and products to patients. Id. at 961-62. The court held that the board’s fiduciary obligation “includes a duty to attempt in good faith to assure that [an adequate] corporate information and reporting system . . . exists, and that failure to do so under some circumstances may . . . render a director liable for losses caused by non-compliance with applicable legal standards.” Id. at 970. The holding in Caremark indicates that the supervisory duties of boards may be violated if the board fails to take the steps necessary to ensure corporate compliance.

As a general matter, directors are subject to a fiduciary duty of care. See HENN & ALEXANDER, supra note 3, at 621. That standard is met if the director exercises that degree of skill, diligence, and care that a reasonably prudent person would exercise in similar circumstances. See CLARK, supra note 45, § 3.4 at 123. See generally BRANSON, supra note 119, §§ 6.01-6.23 (discussing directors’ duty of care).

See Elson, supra note 120, at 160. It is clear that the board’s duty to monitor is an important element of the board’s general fiduciary duty of care. See Eisenberg, supra note 119, at 259. Chancellor William Allen, the writer of the opinion in Caremark, has elsewhere emphasized the importance of the role of the board as an active monitor: “Men and women who as directors are passive; who view their role as mere advisors; who are pliant and pleasant, but who do not insist upon a real monitor’s role, do small service to anyone and deserve little respect.” BOWEN, supra note 126, at 34 (quoting Chancellor Allen).
as the ultimate decision-making authority for the corporation. In this capacity, the board reviews and approves the corporation's financial objectives and major corporate plans and actions. For example, the board is responsible for deciding such actions as adopting a merger or consolidation agreement, recommending to the shareholders the sale of all or substantially all of the company's assets, or proposing that the company be dissolved. The board may also be asked to approve the implementation of defensive devices during a battle for corporate control or to make decisions regarding litigation matters that might expose the corporation to significant liability. In practice, the board will rely on the managers to formulate major plans and suggestions for actions. The ultimate responsibility for approving the major plans and actions, however, is vested in the board.

Beyond the board's monitoring and decision-making functions, the board also plays an increasingly significant role in strategic business planning. Although the board is not in a position to construct the strategic business plan, the board's review and approval of the plan can be an appropriate matter for board and management interaction. The input of directors who are themselves senior managers of other companies, and who have a wide range of business experience, can be very valuable in the strategic planning process. The board can consider the elements that are required for a sound strategic plan and then help the CEO and management team refine their long-term business strategies for the corporation. The board thereby influences the strategic planning process and ensures that it reflects sound business choices.

129. See Principles of Corporate Governance, supra note 121, § 3.02(a)(3); Corporate Director's Guidebook, supra note 121, at 1249; Corporate Governance and American Competitiveness, supra note 121, at 246.

130. See RIMBCA, supra note 9, §§ 11.01, 12.02, 14.02; see also Ira M. Millstein, The Professional Board, 50 Bus. Law. 1427, 1431-32 (1994) (discussing the board's role in making major policy decisions).

131. See Principles of Corporate Governance, supra note 121, § 3.02 cmt. f.

132. See Millstein, supra note 130, at 1434; see also Anderson & Anthony, supra note 123, at 25-27; Bowen, supra note 126, at 27-31.

133. Basic elements of the strategic planning process include an identification of existing and potential business rivals, an appreciation for the external economic, social, and political factors that may affect the business, and an understanding of the internal structure, goals, and policies of the corporation. See Millstein, supra note 130, at 1434.

134. The board may rely on management to take the initiative in devising the strategic plan, but the board has a responsibility to assure itself that the plan is sensible. See Thomas L. Whisler, The Rules of the Game: Inside the Corporate Board Room Rule II(D) (1984). The board's participation in the development of the strategic plan provides the board with greater assurance of the plan's validity: "A responsible and effective board should require of its management a unique and durable corporate strategy, review it periodically for its validity, use it as the reference point for all other board decisions, and share with management the risks associated with its adoption." Anderson & Anthony, supra note 123, at 25. The board may fulfill this responsibility through decisions at regular board meetings or at meetings focusing...
As the foregoing discussion suggests, the board of directors serves several critical functions in the corporation. Modern boards act as monitoring agents, decision-making authorities, and participants in the strategic planning process. In order to fulfill these roles effectively, the board must have a certain level of independence. Market forces in recent years have increased the pressure on the board to be more independent and more proactive. The following Section discusses the trend toward greater board independence and describes various measures taken to achieve that goal.

B. Board Independence

Board composition is an important aspect of board independence. It is well recognized that inside directors—board members who are also members of management—are less likely to exercise independent judgment in the board setting. Inside directors tend to have close, day-to-day working relationships with the CEO, who usually acts as the board chairperson as well. Not only are the inside directors economically dependent on the CEO for their employment, but they are also likely to have developed a strong sense of individual loyalty to the CEO and other senior managers based on the close working relationships they share. Thus, inside directors will have difficulty fulfilling their monitoring role on the board. During the normal working specifically on corporate strategy. Id.; see also Role and Composition, supra note 118, at 2098-99 (discussing the board’s role in the strategic planning process). But cf. John F. Lubin, A Managerialist’s Perception: How the Board Really Operates, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE 85, 87 (Donald E. Schwartz ed., 1979) (noting that the board does not have the time or information to participate effectively in the strategic policymaking area of the business).

135. To be sure, commentators and board reformists have argued that the board may serve other functions as well. See, e.g., Lynne L. Dallas, The Relational Board: Three Theories of Corporate Boards of Directors, 22 J. CORP. L. 1, 10-13 (1996) (arguing that the board has a relational role as a bridging strategy).

136. See BOWEN, supra note 126, at 45-46; Melvin Aron Eisenberg, Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants, 63 CAL. L. REV. 375, 381 (1975).

137. Studies indicate that the substantial majority of public corporations currently have a CEO who also serves as the chair of the board. See Ira M. Millstein & Paul W. MacAvoy, The Active Board of Directors and Performance of the Large Publicly Traded Corporation, 98 Colum. L. Rev. 1283, 1287 & n.18 (1996) (citing Korn/Ferry Board Study indicating that 76% of survey respondents in 1992 reported that their chairperson was also the CEO and only 6% of respondents in 1996 reported having a separate chairperson who was neither a current nor a former employee of the corporation).

138. See CHARLES N. WALDO, BOARDS OF DIRECTORS: THEIR CHANGING ROLES, STRUCTURE, AND INFORMATION NEEDS 27-29 (1985); Williams, supra note 126, at 16-19. Inside directors are said to be in a Catch-22: If the inside director acts in opposition to the CEO’s wishes, “he will surely get into trouble with the CEO and will probably jeopardize, if not lose, his own position.” WALDO, supra, at 28. If the inside director does conform to the
day, the CEO is the inside director's superior, but in the board setting, the inside director is technically the CEO's superior. It would be extremely uncomfortable for the inside director to monitor objectively the performance of the CEO and fire the CEO if warranted. It would not only be extremely uncomfortable, it would simply be improbable.

Therefore, in recent decades there has been a strong consensus among the legal and business communities for reducing, if not eliminating, the number of inside directors on the board. The American Law Institute, the ABA, and the Business Roundtable all agree that at least a majority of the members of the board should be independent of management. Individuals who are executive officers or full-time employees of the corporation, such as the general counsel, would not be considered independent for purposes of board membership. Individuals outside the corporation who have material or ongoing business or professional relationships with the corporation or its management usually are not considered to be independent either. Thus, if the corporation's outside lawyers or investment bankers were to serve on the board, they might not be treated as independent directors because of their ongoing professional relationships with the corporation and its management. These individuals presumably have the same incentives as inside directors to conform to the wishes of the CEO who ultimately retains their services, and therefore they cannot be considered truly independent.

Many corporations are moving toward the appointment of more directors

CEO's point of view, "he could be severely criticized by the outsiders and, possibly, sued by stockholders, if the problem gets large or emotional enough." Id.

139. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 3A.01(a) ("The board of every large publicly held corporation . . . should have a majority of directors who are free of any significant relationship . . . with the corporation's senior executives . . ."); Corporate Director's Guidebook, supra note 121, at 1257 ("If the board of directors is to function effectively, it must exercise independent judgment in carrying out its responsibilities. . . . To encourage an environment likely to nurture independence. . . ., at least a majority of the members of the boards of publicly held corporations should be independent of management."); Corporate Governance and American Competitiveness, supra note 121, at 249 ("Boards of directors of large publicly-held corporations should be composed predominantly of independent directors who do not hold management responsibilities within the corporation.").

140. See Corporate Director's Guidebook, supra note 121, at 1257-58; see also PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 1.34 & cmt. b, § 3A.01(a) & cmt. d (defining individuals who have "significant relationships" with the corporation's senior executives and including the corporation's lawyers in that definition). The Working Group on Corporate Governance, also known as the Roots Group, concludes that the key criterion for consideration as an outside director is "effective independence" and therefore excludes individuals who are employed by or have any significant economic relationship with the corporation. See James M. Tobin, The Squeeze on Directors—Inside Is Out, 49 BUS. LAW. 1707, 1748-49 (1994). Under this definition, a corporation's bankers, lawyers, suppliers, and customers would not be treated as independent directors. See id. at 1749.
who are independent of management. Corporations have set up independent board committees, such as the audit committee, the compensation committee, and the nominating committee, to fulfill the board’s monitoring role. The emphasis on independent directors is reflected in various statutes and regulations that govern the activities of corporations as well. Under securities law, a corporation must disclose certain business relationships and transactions involving the corporation’s directors, including those situations where a director is also a lawyer or investment banker of a firm retained by the corporation. The New York Stock Exchange requires the boards of all listed companies to establish and maintain an audit committee consisting of at least three directors, all of whom are independent.

141. Various surveys have revealed that a large majority of corporations have fewer inside directors than independent directors. See Heidrich & Struggles, The Changing Board 3 (1988) (indicating that 71.7% of respondents’ boards were composed of independent directors); Waldo, supra note 138, at 6 (stating that 60% of large public companies have a majority of outside directors); Bradley et al., supra note 88, at 68 n.359 (citing study indicating that almost two-thirds of directors in Standard & Poor’s 500 companies are independent); James D. Cox, The ALI, Institutionalization, and Disclosure: The Quest for the Outside Director’s Spine, 61 Geo. Wash. L. Rev. 1233, 1235 (1993) (citing study indicating 86% of public corporations have a majority of nonemployee directors).

142. The audit committee’s principal functions are to select the company’s outside auditors, review the results of each external audit, ensure that the company’s annual financial statements are accurate, and consult with the external and internal auditors to ensure that the company’s financial and accounting control systems are adequate. See Corporate Director’s Guidebook, supra note 121, at 1265-66; Vance, supra note 118, at 66-73; Waldo, supra note 138, at 66-69. The audit committee essentially acts as the “busy watchdog” of the corporation. See Ralph D. Ward, 21st Century Corporate Board 207-13 (1997). Today, virtually all public companies have an audit committee. See Vance, supra note 118, at 66; Waldo, supra note 138, at 66.

143. The compensation committee’s responsibility is to review and determine the annual compensation and benefits of the CEO and senior executives, establish and administer stock option and salary bonus plans, and review and recommend compensation arrangements for the board. See Corporate Director’s Guidebook, supra note 121, at 1269-70; see also Anderson & Anthony, supra note 123, at 111-25; Vance, supra note 118, at 73-78; Waldo, supra note 138, at 69-70; Ward, supra note 142, at 214-25; Williams, supra note 126, at 20. As is the case for audit committees, almost all large companies have a compensation committee. See Waldo, supra note 138, at 69.

144. The nominating committee’s function is essentially to fill vacancies on the board. The nominating committee recommends to the board (1) the slate of candidates to be elected to the board by the shareholders and (2) the directors to be selected for membership on various board committees. See Corporate Director’s Guidebook, supra note 121, at 1272; see also Waldo, supra note 138, at 71-73; Ward, supra note 142, at 226-33; Williams, supra note 126, at 19-20. Over two-thirds of all major companies have a nominating committee. See Ward, supra note 142, at 226.

145. See 17 C.F.R. § 229.404(b)(4)-(5) (2000). The dollar amount of the fees paid to the director’s law firm or investment banking firm must also be disclosed if the amount is greater than five percent of the firm’s gross revenues for the firm’s last fiscal year. Id.
from management. Federal tax laws prohibit companies from deducting certain levels of compensation paid to the CEO and other executive officers unless the compensation is based on predetermined performance goals established by a compensation committee comprised solely of two or more independent directors.

Some evidence suggests that these measures have been beneficial because corporations with independent, proactive boards tend to perform better than corporations without such boards. Baysinger and Butler found that corporate financial performance increases up to a point as the number of independent directors on the board increases. Similarly, Millstein and MacAvoy's research demonstrated a significant correlation between active, independent boards and superior corporate performance. These and other empirical studies indicate that independent outside directors provide some measure of value to the corporation.

146. See New York Stock Exchange, Listed Company Manual § 303.01(B)(2)(a) (1999) [hereinafter NYSE Manual]. The NYSE Manual defines independent directors as persons who "have no relationship to the company that may interfere with the exercise of their independence from management and the company." Id. Lawyers and other consultants who serve as directors may not serve on the audit committee unless the board determines that the business relationship between these directors and the company will not interfere with their independent judgment. See id. at § 3.03.01(B)(3)(b). Companies whose securities are quoted on the NASDAQ Stock Market must have an audit committee of at least three members, comprised solely of independent directors. See NASDAQ Stock Market, Nat'l Ass'n of Sec. Dealers Man. (CCH) Rule 4310(c)(26)(B) (2000); see also id. at Rule 4200(a)(14) (defining independent director).


149. See Millstein & MacAvoy, supra note 137, at 1312-18. Corporate performance was measured by earnings in excess of costs of capital over the industry average. See id. at 1302-12.

150. For example, Brickley, Coles, and Terry determined that the average stock market reaction to the announcement of anti-takeover devices such as poison pills is positive when the board consists of a majority of outside directors and negative when the board does not. See James A. Brickley et al., Outside Directors and the Adoption of Poison Pills, 35 J. Fin. Econ. 371, 372 (1994); see also Paula L. Rechner et al., Corporate Governance Predictors of Adoption of Anti-Takeover Amendments: An Empirical Analysis, 12 J. Bus. Ethics 371, 375 (1993) (finding some relationship between adoption of anti-takeover measures and a higher proportion of inside directors on corporate boards). See notes 67-72 and accompanying text (discussing conflicts of interest associated with the adoption of anti-takeover defenses, including poison pills). Weisbach found that outsider-dominated boards are more likely than insider-dominated boards to replace the CEO when the corporation is performing poorly. See Michael S. Weisbach, Outside Directors and CEO Turnover, 20 J. Fin. Econ. 431, 432 (1988). Weisbach therefore concluded that "[o]utsiders-dominated boards tend to add to firm value.
Other studies, however, have found no relation between board independence and improved corporate performance.\textsuperscript{151} One of the reasons for mixed results may be that many studies do not distinguish between truly independent outside directors and other outside directors, such as lawyers and investment bankers, who have significant professional or business relationships with the corporation or its management. Directors with such relationships may be less likely than truly independent directors to monitor effectively the senior managers of the corporation who control those business relationships.\textsuperscript{152} Several commentators have argued that outside directors may also be inherently biased toward the senior managers on whom they depend for their retention as directors;\textsuperscript{153} therefore, outside directors may have difficulty serving as effective monitors.\textsuperscript{154} Some have suggested that the remedy is to require boards to consist entirely of truly independent outside directors, except the CEO, who would not serve as the chair of the board.\textsuperscript{155}

\begin{thebibliography}{99}
\bibitem{151} See \textit{Laura Lin}, \textit{The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence}, 90 NW. U. L. REV. 898, 925 & n.147, 962 (1996) (citing studies suggesting no relation between board composition and firm performance); \textit{see also Cox, supra note 141, at 1240 & n.36 (same).}
\bibitem{152} See \textit{Dallas, supra note 135, at 18; Eisenberg, supra note 136, at 382} (noting that a corporation’s outside lawyers or investment bankers “are suppliers of services to the corporations on whose boards they sit, and are, therefore, highly interested in retaining the good graces of the chief executive, who normally has control over the purchase of such services”).
\bibitem{153} See \textit{Elson, supra note 120, at 161-62; Steinberg, supra note 67, at 589. See generally James D. Cox & Harry L. Munsinger, \textit{Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion}, 48 LAW & CONTEMP. PROBS. 83 (1985).}
\bibitem{155} Former Securities and Exchange Commission Chairman Harold Williams advocated this position. \textit{See Harold M. Williams, Corporate Accountability—One Year Later, Address at the Sixth Annual Securities Regulation Institute 13 (Jan. 18, 1979); see also COURTNEY C. BROWN, PUTTING THE CORPORATE BOARD TO WORK 15-21, 41-61, 112-15 (1976) (discussing the importance of separating the board entirely from management and separating the roles of the CEO and the board chairperson such that the same person would be prohibited from serving simultaneously in both capacities); MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS 172-74 (1976) (discussing the virtues of having a board comprised wholly of independent directors). But see Irving S. Shapiro, \textit{Corporate Governance, in Power and Accountability: The Changing Role of the Corporate Board of Directors, supra note 126, at 32, 50} (noting the dangers of having a board that consists entirely of outside directors); \textit{see also Lin, supra note 151, at 966-67} (discussing the advantages of having inside directors on the board). Large institutional investors recently have voiced
Indeed, board reformists have called for a variety of changes in the structure of the board and the manner in which it is elected. Proposals for reform are plenteous and range from imposing term limits on board members to adding government-appointed representatives to the board. While varied in their approach, what links all of these board reform proposals together is a desire to strengthen the board's independence as the governing body of the corporation. The underlying concern is that a compromise of support for the separation of the roles of CEO and board chairperson. See Millstein & MacAvoy, supra note 137, at 1287 n.18 (citing corporate governance principles issued by CalPERS in 1998 that recommended that when boards select a new CEO, they should reexamine the traditional combination of the CEO and board chairperson positions).

156. See, e.g., Lynne L. Dallas, Proposals for Reform of Corporate Boards of Directors: The Dual Board and Board Ombudsperson, 54 WASH. & LEE L. REV. 91, 114, 130-31 (1997) (proposing two reform measures: first, adopting a dual board structure in which one board consists entirely of independent directors to handle conflicts issues and another board consists of a mix of directors to handle business issues; second, appointing a full-time board ombudsperson who is independent from management and responsible for gathering information and making recommendations to the independent directors); Elson, supra note 120, at 164-66 (proposing that directors be compensated with equity interests in the corporation in order to better align directors' interests with shareholders and ensure greater independence from management); Gilson & Kraakman, supra note 154, at 883-92 (proposing that institutional investors create a core of full-time professional independent outside directors who would actively monitor corporations and thereby assure greater director independence); Martin Lipton & Steven A. Rosenblum, A New System of Corporate Governance: The Quinquennial Election of Directors, 58 U. CHI. L. REV. 187, 224-52 (1991) (proposing that directors be elected for five-year terms and that the board consist of a majority of outside directors who have no other affiliation with the company, thereby strengthening the board's independence); Lawrence E. Mitchell, A Critical Look at Corporate Governance, 45 VAND. L. REV. 1263, 1302-08 (1992) (proposing that shareholder election of directors be eliminated and that boards be composed of completely independent members who elect themselves to ensure total independence from management); Henry L. Tosi et al., The Separation of Ownership and Control: Increasing the Responsiveness of Boards of Directors to Shareholders' Interests?, 4 U. FLA. J.L. & PUB. POL'Y 39, 55-56 (1991) (proposing that managers be removed from the process of selecting directors and that shareholders instead select directors through independent officers or agents who would have no other business or professional relationships with the corporation and who would manage the election of directors on behalf of the shareholders); see also Eisenberg, supra note 155, at 150-56 (discussing proposals for adding professional directors, full-time directors, and board staff); Ward, supra note 142, at 173-78 (discussing the concept of retaining a full-time professional director for the corporation).

157. See Bowen, supra note 126, at 68-74 (discussing advantages of having board term limits and performance reviews); Tobin, supra note 140, at 1715 (discussing Ralph Nader's proposal to limit board membership to outside directors who would be limited to eight-year terms).

158. See Victor Brudney, The Role of the Board of Directors: The ALI and Its Critics, 37 U. MIAMI L. REV. 223, 237 (1983); see also Vance, supra note 118, at 55-58 (discussing proposals for adding full-time public directors to the board who would have their own small staff of consultants to gather information).
independence prevents the board from fulfilling effectively its monitoring, decision-making, and strategic planning roles. Boards dominated by directors who are also members of senior management or who otherwise have significant business or professional affiliations with the corporation cannot be expected to be vigilant monitors of managerial performance. Such boards are deserving of much less deference when voting on any number of important corporate decisions, whether it is to sell the company, to resist a takeover of the company, to disclose certain matters in public disclosure documents, or to settle substantial litigation against the company and its managers. The board, as the ultimate decision-making authority in most matters, must possess a level of independence and objectivity if its decisions are to be well-reasoned and worthy of respect. The board's participation in strategic planning requires the same level of independence so that the board can provide managers with detached, objective advice. Efforts to strengthen the board's independence reflect a clear recognition that the board plays a critical role in the governance of the corporation.

The issue is not so much whether the board frequently abuses its corporate power to the detriment of shareholders and the public, but whether the public and those affected by the board's decisions can reasonably perceive that to be the case. As the ABA has stated, "It is . . . important that the board not only exercise independent judgment, but also be perceived by shareholders and other corporate constituencies to be doing so."159 The appearance of independence is as essential as independence itself. In the midst of this growing concern for greater board independence, the ABA Committee on Ethics and Professional Responsibility recently issued Formal Opinion 98-410,160 which expressly permits inside and outside lawyers of corporations to serve simultaneously as directors and legal counsel for their corporate clients.161 The debate over the dual service of lawyers and directors ties together two very important themes: the theme of independence as it relates to the effective functioning of the board and the theme of independence as it relates to the effective performance of the lawyer. The preceding discussion addressed the first theme; the following Sections will discuss the second.

V. LAWYER-DIRECTOR DUAL SERVICE DEBATE

A. ABA Formal Opinion 98-410: Preliminary Remarks

The topic of dual service received significant attention when the ABA Commission on Professionalism, chaired by Justin Stanley, presented its report, "... In the Spirit of Public Service: A Blueprint for the Rekindling of

159. Corporate Director's Guidebook, supra note 121, at 1257.
161. Id. The Formal Opinion authorizes such dual service under the professional responsibility rules.
Lawyer Professionalism" ("Stanley Commission Report"), in 1986. The Stanley Commission Report discussed the practice of lawyers engaging in certain business activities and identified the dual service issue as an area of particular concern: "[W]hen a lawyer serves as a member of the board of directors of a corporate client, other potential conflicts of interest may be created. The problems of the lawyer-director have long been recognized and do not seem to be decreasing." The Stanley Commission Report recommended that the issue be the subject of further study. The ABA Task Force on the Independent Lawyer was subsequently appointed to consider the dual service problem, and the Task Force issued its report, "The Lawyer-Director: Implications for Independence," in 1998. The Task Force concluded that because of the pitfalls that confront lawyers who serve on the boards of their corporate clients, dual service should be discouraged in most cases.

Shortly after the Task Force released its report, Formal Opinion 98-410 was issued by the ABA Committee on Ethics and Professional Responsibility. The Formal Opinion concludes that, as a matter of professional responsibility, it is not improper for lawyers to serve as directors for their corporate clients. The Formal Opinion acknowledges at some length, however, that such dual service presents serious "ethical and practical pitfalls." After outlining several recurring problem areas, the opinion summarizes several precautionary steps that the corporate lawyer should take.


163. Id. at 281. The Stanley Commission Report was "disturbed by what it perceive[d] to be an increasing participation by lawyers in business activities." Id. at 280. In addition to the dual service issue, the report found problematic the practice of lawyers investing in the activities of their clients and lawyers providing ancillary business services, such as real estate development or investment banking, to their clients. Id. at 280-81. The Stanley Commission was troubled by the conflicts these practices impose on lawyers: "It seems clear to the Commission that the greater the participation by lawyers in activities other than the practice of law, the less likely it is that the lawyer can capably discharge the obligations which our profession demands." Id. at 281.

164. Id. at 281 ("The Commission views the trend as disturbing and urges the American Bar Association to initiate a study to see what, if any, controls or prohibitions should be imposed.").


166. Id. at 63-64. The Task Force Report stops short of recommending the adoption of a rule prohibiting dual service because of various legal, ethical, and practical considerations. Id. at 63.


168. Id. at 2.

169. Id. at 4.
to avoid ethical violations: the lawyer should (1) reasonably assure that the corporate managers understand, first, that the lawyer will have differing responsibilities as legal counsel and as director, and second, that conflicts may arise at times requiring the lawyer to either step down as a director or withdraw as legal counsel; (2) reasonably assure that the corporate managers understand that the attorney-client privilege may be lost for certain communications made during board meetings; (3) recuse herself as a director from any discussions or deliberations relating to the corporation’s relationship with the lawyer or her law firm; (4) render independent professional judgments, even when contrary to managers’ wishes; (5) diligently implement the decisions of the board once they are made, even if the lawyer disagrees with the decisions; and (6) decline to serve as the corporation’s lawyer when there are conflicts between the lawyer’s role as a director and the lawyer’s obligation to provide appropriate legal representation.\textsuperscript{170}

The Formal Opinion’s extensive cautionary warnings and guidelines leave one wondering why the opinion simply does not find dual service to be ethically improper. As discussed below, the problems associated with dual service are manifold, and the Formal Opinion’s attempt to resolve the problems seems unsatisfactory. The opinion fails to make the important distinction between in-house and outside lawyers who engage in dual service. It also lacks sufficient emphasis on the importance of lawyer independence as a critical component of professional responsibility. The following discussion reveals that, from a practical standpoint, dual service creates significantly greater burdens than benefits for the corporation and its counsel.

B. Advantages of Dual Service

Before discussing the problems with dual service, this Section describes some of the benefits that are said to flow from dual service.\textsuperscript{171} Proponents of dual service contend that the practice provides substantial benefits to both the lawyer and the corporate client.

1. Benefits to the Corporation

It is argued that the corporation receives several benefits from having its

\textsuperscript{170} Id. at 12.

\textsuperscript{171} Several corporations perceive the benefits to be sufficient to invite the service of lawyers on the board. Approximately 76 of the 250 largest corporations in the nation have private lawyers serving on their boards of directors. See NLJ Client List, supra note 77, at C-4-C-18; see also TASK FORCE REPORT, supra note 165, at 5. It is not clear from the NLJ survey how many of these lawyers serve as the main outside counsel for the corporation on a regular basis, nor is it clear how many corporations have their inside counsel serving as members of the board. Some surveys indicate that approximately 17.5% of all public corporations have corporate counsel acting as directors. See id.
own counsel on the board. The lawyer is already familiar with the corporation’s business and its management; therefore, the lawyer brings greater knowledge and resources to the directorship than other directors. This is particularly true for in-house lawyers such as the general counsel who have much more familiarity with the day-to-day affairs of the corporation. The lawyer who serves on the board will be better able to spot potential legal problems before they arise and provide helpful guidance to the board at earlier stages of a transaction.\footnote{173}

Proponents of dual service also argue that the corporation benefits by knowing that the corporate lawyer is on the hook as a board member. Corporate clients feel comforted when their lawyer serves on the board because the other directors know that the lawyer is subject to the same risk of personal liability that they bear as directors.\footnote{174} Recognizing that they are at risk of personal liability as directors, lawyers presumably are likely to be more alert and diligent than they might otherwise be, and fellow board members are more likely to heed the lawyer’s advice as a consequence.\footnote{175} Outside directors in particular will find it easier to give weight to the legal opinions of someone who is taking the same risks that they are.\footnote{176}

It is also argued that lawyers’ analytical nature and strong organizational

\footnote{172. See Albert, supra note 28, at 416; Mundheim, supra note 13, at 1508 (noting the argument that “counsel brings to his board role significant resources and opportunities to know what is going on in the company”); Gold, supra note 15, at 722.}


\footnote{174. One client clearly articulated this reason for urging the corporation’s lawyer to join the board:

I would like you [the lawyer] to go on the board because I know that if you are on the board you are going to worry about . . . your own liability as well as our liability; and if you are worried about your own liability, I know you will try to get us to do the right thing. So I want you there, worrying . . . If you yourself are worrying, I will feel a lot better about it.

Mundheim, supra note 13, at 1513 (remarks of Bialkin) (internal quotation marks omitted); see also Cheek & Lamar, supra note 12, at 464.}

\footnote{175. See Thurston, supra note 18 at 793-94; see also Dennis J. Block et al., Lawyers Serving on the Boards of Directors of Clients: A Survey of the Problems, INSIGHTS, Apr. 1993, at 3, 3 (noting the argument that “an attorney acts more effectively, and has more credibility with board members, when ‘at risk’ of personal liability as a director”); Lawyers as Directors, supra note 13, at 59; Sogg & Solomon, supra note 173, at 153.}

\footnote{176. See Hawes, supra note 13, at 16. Presumably the risk of personal liability enhances the lawyer-director’s incentives to fulfill the monitoring, decision-making, and strategic planning functions of the board. The lawyer-director who is at risk of liability will be motivated to be a vigilant monitor of managerial conduct, make well-reasoned decisions for the corporation, and provide sound advice during the strategic planning process.}
skills make them uniquely suited to be effective directors. The lawyer's tendency to ask probing questions and to scrutinize proposed plans provides value to the board. 177 As skilled problem solvers, lawyers possess "creativity, common sense, practical wisdom, and . . . good judgment." 178 A lawyer's presence on the board can therefore enhance the board's deliberations in significant ways.

In the case of the corporation's outside lawyers, an often unstated reason for urging them to join the board is the anticipation of "free" legal advice during board meetings. 179 The expectation would not be the same for in-house lawyers who are paid a fixed salary to provide legal advice on a continuing basis. In-house lawyers, however, are more likely to be asked to serve on the board of the corporation's subsidiaries or affiliated entities. 180 Presumably the corporation benefits by having an inside person on the subsidiary's board who will make decisions that favor the parent corporation.

2. Benefits to Counsel

Outside lawyers who engage in dual service benefit monetarily by solidifying their or their law firm's business relationship with their corporate clients. The corporation that has its outside corporate lawyer on the board is more likely to retain the services of the lawyer's law firm to handle the corporation's litigation or other legal matters. 181 In light of the substantial fees generated by corporate clients, outside lawyers naturally have a strong

177. See Albert, supra note 28, at 417; Dominic Bencivenga, Corporate Boards: ABA Sees Inherent Risks in Lawyers' Dual Role, N.Y. L.J., July 17, 1997, at 5, 5 ("A lawyer's training in asking probing questions, negotiating contracts and evaluating situations can help the other directors."); Thurston, supra note 18, at 794-95.

178. Paul Brest & Linda Hamilton Krieger, Lawyers as Problem Solvers, 72 TEMP. L. REV. 811, 812 (1999); see also R. Peter Fontaine, Mending the Split Personality, ACCA DOCKET, Sept.-Oct. 1995, at 68, 69 ("[L]awyers possess highly developed analytical, communication, advocacy, organizational, and negotiation skills and are adept at synthesizing information, formulating conclusions and recommendations, and clearly articulating them in a way that is valuable, meaningful, and persuasive.").


180. See Daly, supra note 77, at 1098; TASK FORCE REPORT, supra note 165, at 6.

181. See Lorne, supra note 10, at 493 ("The client on whose board the lawyer sits is less likely to cease being a client."); see also Block et al., supra note 175, at 3; Carrey, supra note 12, at 6. In today's competitive business environment, law firms must exploit every opportunity they have to strengthen their ties with their corporate clients. See Albert, supra note 28, at 419. Law firms recognize that having one of the firm's lawyers serve "on a client's board is a particularly effective method of maintaining the attorney-client relationship because the dual role enables the attorney-director to cement personal alliances with the board and with the members of senior management who generally select outside counsel." Id.
interest in furthering the life of the relationship with the corporation, and service on the corporation's board is a means to achieve that longevity.\footnote{\ref{182}}

For the inside lawyer who is interested in transitioning into a purely management position,\footnote{\ref{183}} service on the board is particularly useful. Not only does the inside lawyer gain greater business experience by acting as a director, but the other board members who are responsible for appointing the executive officers of the corporation have the opportunity to evaluate the lawyer and form a positive opinion of the lawyer's business skills. This is particularly important for the general counsel who may have aspirations to be the eventual successor of the CEO.\footnote{\ref{184}} The board will be closely evaluating the inside directors as potential candidates for the next CEO of the company.\footnote{\ref{185}} The general counsel who makes a strong impression on the board increases the likelihood that the board will elevate the general counsel to the chief position.

Proponents of dual service argue that another one of the principal advantages of giving the corporate lawyer a seat on the board is the immediate status it affords the lawyer. The lawyer who serves on the board is viewed by the other board members as a fellow partner in the corporate enterprise, and this perception enhances the influence of the lawyer.\footnote{\ref{186}} The other board members perceive the lawyer to be an equal in their midst and therefore are

\footnote{\ref{182}} See Thurston, supra note 18, at 794. In 1981, more than 30 lawyers served as directors of public corporations that paid in excess of $1 million in fees to the lawyer-directors' law firms. See The Lawyer/ Director: A Rewarding Relationship, BUS. & SOC. REV., Fall 1982, at 50.

\footnote{\ref{183}} Many inside lawyers do wish to make this transition from the law to the business side. In-house lawyers frequently comment on the personal satisfaction they derive from the business side of their work, and eventually many of them gladly join the ranks of senior management. See Daly, supra note 77, at 1072; see also Joseph Auerbach, Can Inside Counsel Wear Two Hats?, HARV. BUS. REV., Sept-Oct. 1994, at 80, 84 (noting that it is natural for "in-house lawyers to become convinced that their future is in management and the law, in that order, rather than in the law alone").

\footnote{\ref{184}} Although personal career objectives vary, it is not uncommon for general counsels to seek such advancement.

[O]nce an attorney has achieved the office of corporate counsel, there is no further advancement possible as a lawyer within the corporation. Subject to [various conditions], the same aspirations and abilities that carried the lawyer into the position of chief counsel may lure the climber to the higher peak of senior management.

\footnote{\ref{185}} Planning for the CEO's succession is one of the main functions of the board. See supra notes 123-24 and accompanying text. One commentator suggests that the selection of the CEO is usually the most important decision a board makes: "As soon as one CEO has been elected, the effective director starts thinking about that CEO's successor. Although directors usually must rely on the CEO to identify individuals within the company who are potential candidates, each director forms a personal opinion about the relative merits of each individual so identified." ANDERSON & ANTHONY, supra note 123, at 23.

\footnote{\ref{186}} See Cheek & Lamar, supra note 12, at 464; Sogg & Solomon, supra note 173, at 153.
more willing to listen to the lawyer than would otherwise be the case. For inside lawyers, including the general counsel in particular, it is argued that without the board seat, the inside lawyer is regarded as having lesser standing, even that of a “hired hand.” Because the board will not heed the lawyer’s legal advice unless the board views the lawyer as a social equal, “[t]hat kind of standing is required for a lawyer to do a professional job.” Query whether a board that refuses to listen to a lawyer’s legal admonitions simply because the lawyer is not a director has greater problems than an obsession with social status.

Finally, the lawyer benefits directly by the prestige and the personal income that flow from being a board member. Lawyers recognize that “[t]here is a substantial sense of self-worth associated with being asked to serve a client as a director.” The directorship may be viewed as evidence of the personal and professional success and achievement of the lawyer. Moreover, the lawyer who serves as a director is entitled to the substantial

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187. See Harris & Valihura, supra note 173, at 483 (arguing that “a lawyer speaking as a board member speaks not merely as an advisor but as an equal, potentially giving greater weight to the views expressed”); Micalyn S. Harris & Karen L. Valihura, Is Dual Service Unethical?, PROF. LAW., Fall 1998, at 2; see also Gold, supra note 15, at 722; Thurston, supra note 18, at 793.

188. See Geoffrey C. Hazard, Jr., Is It Smart to Sit on a Client’s Board?, NAT’L L.J., Jan. 23, 1989, at 13, 14. Professor Hazard argues that in the typical corporate hierarchy, the general counsel stands beneath the CEO, and from this position, is less likely to be afforded professional recognition by the board. Id. at 14.

189. Id. The argument stems from the premise that “[d]irectors tend to regard their fellow directors and the CEO as professional and social equals, whereas employees are regarded as having lesser standing.” Geoffrey C. Hazard, Jr., Three Aftershocks, 46 EMORY L.J. 1053, 1054 (1997). Thus, directors will be less likely to take legal advice seriously from someone who is in the corporate hierarchy’s second tier rather than someone who is a social equal in the corporate hierarchy. Id. at 1053-54. There are at least two responses to this argument. First, if the board will not accord the corporate lawyer the respect of a professional because the board regards the lawyer as a second-class citizen, then that is a problem with the board itself. One wonders whether a corporation whose board has difficulty heeding the advice of a nondirector lawyer will succeed very long in the marketplace. It seems likely that those who do not appreciate objective legal advice set themselves up for a fall. Second, the premise upon which the argument is based may not be sound. It seems plausible that most boards are made up of honest, competent, and committed individuals who sincerely want to fulfill their fiduciary duties effectively. See Anderson & Anthony, supra note 123, at 2. Such directors are careful to heed legal advice that is meant not only to protect the best interests of the corporation, but also to prevent the directors from making decisions that eventually may result in their own personal liability.

190. Lorne, supra note 10, at 493. For the inside lawyer in particular, the board position grants the lawyer a special sense of recognition: “An inside board member gains a special status within the company. The board position is prestigious, meaningful to the person, to the organization, and to the outside world.” Anderson & Anthony, supra note 123, at 89.

191. See Task Force Report, supra note 165, at 3; Thurston, supra note 18, at 791.
director fees and benefits that the corporation pays annually to its board members.\textsuperscript{192}

\textbf{C. Disadvantages of Dual Service: Risks for Corporations}

In spite of the actual and perceived benefits of dual service, the practice poses serious problems for both the corporation and its counsel. The lawyer who represents an organizational client is already faced with the complexities that accompany the representation of a nonhuman entity. Although Model Rule 1.13 expressly instructs the lawyer to represent the interests of the entity, the entity itself can only act and speak through its individual constituents.\textsuperscript{193} As we have seen, the lawyer for the entity faces greater uncertainty when the interests of the entity and the constituents diverge.\textsuperscript{194} Because organizational representation by itself carries inherent ambiguities, it seems altogether unwise to exacerbate the uncertainty by having the lawyer for the organization serve simultaneously on the board. The dual roles have dissimilar purposes. Lawyers are called upon to be independent, objective advisors who identify potential legal problems and, if necessary, firmly discourage proposed courses of action that are improper in the lawyer’s legal judgment. The board, however, makes the final business decisions, which may involve the undertaking of significant business risks in spite of the lawyer’s warnings and advice. When the lawyer for the corporation serves simultaneously as a director, the confusion of roles raises the risk of harm to both the lawyer and the corporation. The practical risks of harm to the corporation fall into five broad categories: (1) loss of independence and effectiveness as a director, (2) detrimental effects on the board, (3) loss of independence and effectiveness as a lawyer, (4) conflicts of interest, and (5) loss of attorney/client privilege. Taken together, these risks make a good case for prohibiting lawyers from engaging in dual service.

\textsuperscript{192} The fees and perquisites given to directors for their board service may be extremely generous. A 1999 survey indicated that the average total remuneration for board service for large public corporations was approximately $83,194. See NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, 1999-2000 DIRECTOR COMPENSATION SURVEY 6 (2000). The figure for the 200 largest corporations was $135,207. \textit{Id.} From an industry standpoint, board compensation can reach very high levels. For example, the highest ranking average total remuneration for the top 200 technology companies was $280,505. \textit{Id.} at 12; see also James R. Ukropina, \textit{Director Compensation: What Is a Good Director Worth?}, ALI-ABA COURSE OF STUDY (SE39 ALI-ABA 161), Oct. 7, 1999, at 161, 164 (noting that “the largest successful companies are now paying directors a total annual pay package that may range from $100,000 to $200,000”). In addition to cash retainers, directors may receive substantial pensions, company-sponsored health and life insurance, and significant donations to charitable organizations in the directors’ names. See Elson, \textit{supra} note 120, at 132 & n.11.

\textsuperscript{193} See discussion of Rule 1.13 and entity theory of representation \textit{supra} Part II.B.

\textsuperscript{194} See discussion of complexities of organizational representation \textit{supra} Part II.C.
1. Loss of Independence and Effectiveness as a Director

To fulfill their monitoring, decision-making, and strategic planning functions, directors must possess the appropriate level of independence from management. Lawyers who are economically dependent on the corporation’s business will be less likely to have the independence required to serve most effectively as directors. For inside lawyers, such as the general counsel, who serve on the board, the loss of independence as a director is evident. Because they are closely associated with corporate managers or serve as members of senior management themselves, inside lawyer-directors are unable to monitor management in any meaningful sense. At risk of losing their only client and sole source of employment, inside lawyers experience immense pressure to avoid making business decisions as directors that would antagonize the CEO and put their career in jeopardy, even if they believe those business decisions are in the best interests of the corporation. Thus, under corporate governance rules, inside lawyer-directors are not treated as independent members of the board.

For outside lawyers, their significant economic interest in maintaining the corporation as a client also affects their judgment: they may avoid expressing their views as directors in an objective manner for fear of losing a valued

195. See discussion of the role of the board and the importance of director independence supra Part IV.

196. See supra notes 105-09 and accompanying text (discussing in-house lawyers’ close working relationships with managers). The importance of being a team player is particularly poignant for inside lawyers. See supra notes 110-11 and accompanying text. This additional pressure makes it more difficult for inside lawyer-directors to step out of their roles as members of the corporate management team and into their roles as objective evaluators of the management team’s performance.

197. See Timothy P. Terrell, Professionalism as Trust: The Unique Internal Legal Role of the Corporate General Counsel, 46 EMORY L.J. 1005, 1007 (1997) (noting that “the in-house general counsel has . . . a single client who occupies all of his or her attention and completely controls his or her immediate economic fate”); see also Knepper, supra note 11, at 353 (questioning whether a lawyer-director can remain dispassionate and unbiased when “confronted with the risk of losing . . . his only client”); Weaver, supra note 79, at 1032 (discussing difficulty for in-house lawyers who face “career threatening situations” when there are tensions in the relationships between lawyers and their clients); supra notes 98-104 and accompanying text (discussing unique pressures on in-house lawyers).

198. See ANDERSON & ANTHONY, supra note 123, at 88; Corporate Director’s Guidebook, supra note 121, at 1273. The in-house lawyer’s dependence on a single client may produce a “chilling effect on the eloquence with which he presents a legally-oriented dissent if the proposal has the explicit or even implicit approval of the [CEO].” Hershman, supra note 110, at 1439-40.

199. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, § 3A.01(a); Corporate Director’s Guidebook, supra note 121, at 1257-58; Corporate Governance and American Competitiveness, supra note 121, at 249; supra notes 136-39 and accompanying text.
The substantial amount of fees that lawyers stand to gain from their sustained relationship with the corporate managers who hire the lawyers may give the lawyers a "pre-conditioned management view." This lack of independence compromises their ability as directors to monitor managers and fulfill their directorial obligations. Although technically an outsider, the outside lawyer who serves as a director is "really an insider in outsider's clothing." Therefore, the lawyer-director will be considered non-independent for corporate governance purposes. Both the outside and

200. See Lawyers as Directors, supra note 13, at 52; see also Cheek & Lamar, supra note 12, at 470 (noting that the prospect of losing significant fees may place pressure on the lawyer to avoid voicing disapproval as a director of certain actions); Mundheim, supra note 13, at 1509 ("The worry will always be that the director cannot act independently as long as he is trying to protect an important economic interest, namely maintaining the client for the firm."); Sogg & Solomon, supra note 173 at 159 ("The attorney-director may lose independence as a director in order not to antagonize management and possibly lose a valuable client."); Thurston, supra note 18, at 799.

201. See Riger, supra note 66, at 746 ("With annual fees that may run to seven or more figures, the law firm's urge—some may say the need—to hold on to major corporate clients takes precedence over other considerations, including professional responsibility."). The media drew attention to the significant fees paid by corporations to the law firms of their lawyer-directors when it was reported that Hillary Rodham Clinton "used her board seat at TCBY Enterprises, Inc. to help her and her then-partners at the Rose Law Firm, in Little Rock, Ark., land $1.2 million of [TCBY's] legal business in 1991-'92." Gail Diane Cox, For Lawyers, Lure of the Boardroom Has Its Perils, NAT'L L.J., July 1, 1996, at B1; see also supra note 182 and accompanying text.

202. Harold M. Williams, Corporate Accountability and the Lawyer's Role, 34 BUS. LAW. 7, 11 (1978); see also Stephen M. Bainbridge, Independent Directors and the ALI Corporate Governance Project, 61 GEO. WASH. L. REV. 1034, 1059 (1993) (noting that lawyer-directors who wish to provide continued services to the corporation and its managers are "unlikely to bite the hand that feeds them"); Mundheim, supra note 13, at 1518 (observing that the outside lawyer who serves on the board is necessarily "under the thumb of management; even if he consciously is not, he is subconsciously, because in any dispute he loses, his firm loses the corporation's business") (remarks of Hershman); Steinberg, supra note 80, at 485-86 (identifying the potential risk that if the lawyer or law firm "derives a substantial amount of revenue from the enterprise, such outside counsel may lose objectivity and render advice to the liking of the [CEO] or other high-level executive rather than for the benefit of the client, which is the corporate entity.").

203. Hawes, supra note 13, at 19. One commentator finds suspect the motivations of managers who ask outside lawyers to serve on the board: "[M]anagement asking a corporate adviser to serve on the board is often not expecting that counsel will fulfill the duties of a director. Rather, management frequently views counsel as another 'inside' director with an appearance of being independent." Lorne, supra note 10, at 491; see also Hawes, supra note 13, at 18 ("The [outside] lawyer-director is not, and should not pretend to be, an outside director.").

204. See Principles of Corporate Governance, supra note 121, § 1.34; Corporate Director's Guidebook, supra note 121, at 1257-58; Cheek & Lamar, supra note 12, at 471-75; Knepper, supra note 11, at 352; supra note 140 and accompanying text. To address the
inside lawyer-directors will be excluded from serving on important committees such as the audit, compensation, and nominating committees. Reducing the number of directors who can serve on important committees may then leave the board short-handed in accomplishing the tasks it is obligated to do.

The detrimental effects on the independence of lawyer-directors prevent them from effectively fulfilling their decision-making role as board members. The board bears the responsibility for making decisions on major corporate plans and actions. If, for example, the board is called upon to decide whether to adopt anti-takeover devices during a hostile battle for corporate control, the lawyer-directors are likely to be influenced by the desires of the CEO and managers to resist a takeover of the corporation. To the extent the lawyer-directors' independent judgment is affected by such influences, their ability to make sound decisions in the best interests of the corporation is compromised.

The merging of the dual roles creates internal conflicts for the lawyer-directors that may adversely affect their behavior in board meetings. As a director, the lawyer should feel free to oppose a board decision that seems imprudent in the lawyer's eyes. Yet the lawyer may feel stifled in vigorously voicing objections to that decision on the record because of the concern that the lawyer, as corporate counsel, may later have to defend the board's decision in court. Thus, the lawyer is not able to be as effective a director as might otherwise be the case. The lawyer faces a similar conflict when the lawyer makes a business decision as a director and then must opine on its validity as a lawyer at a later time. The lawyer will be hard-pressed to argue that the business judgment was right, but that as a legal matter, the judgment was wrong.

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independence issue, the National Association of Corporate Directors has suggested that boards simply adopt a policy that the corporation "should not hire a director or a director's firm to provide professional . . . services to the corporation." See Millstein, supra note 130, at 1437 (citing BLUE RIBBON COMMISSION, NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, PURPOSES, PRINCIPLES AND BEST PRACTICES 9-18 (1995)).

205. See PRINCIPLES OF CORPORATE GOVERNANCE, supra note 121, §§ 3.05, 3A.04, 3A.05; Corporate Director's Guidebook, supra note 121, at 1264-65, 1268, 1271; Riger, supra note 13, at 2385-86 (discussing the impropriety of having lawyer-directors serve on independent board committees such as the audit, compensation, and nominating committees); supra notes 142-44 and accompanying text.

206. See Albert, supra note 28, at 442.

207. See supra notes 129-31 and accompanying text.

208. See Robert P. Cummins & Megyn M. Kelly, The Conflicting Roles of Lawyer as Director, Litigation, Fall 1996, at 48, 49; see also Sogg & Solomon, supra note 173, at 159; Thurston, supra note 18, at 798.

209. See Discussion by Participants and Panel, 33 BUS. LAW. 1469, 1470 (1978) (remarks of Mendes Hershman) [hereinafter Discussion by Participants]. From a psychological perspective, once the lawyer makes a set of business judgments as a director, the decisions
lawyer as corporate counsel must nonetheless implement the decisions of the board. These conflicts place the lawyer in a difficult psychological position that weakens the lawyer's ability to perform either role well.

2. Detrimental Effects on the Board

For the outside lawyer, service on the board as a director may have adverse effects on the ability of other directors to fulfill their decision-making functions. The board, for example, may be inhibited in its decision to use the services of a law firm different from that of the lawyer-director for a major corporate transaction or litigation matter. The fellow board members may feel uncomfortable voting against retaining the lawyer-director's firm, even if the lawyer-director does not participate in the discussion or vote on the decision. Similar concerns might be raised for the inside lawyer who serves on the board. If the inside lawyer-director expresses an interest in taking a lead role in handling a certain litigation matter for the corporation, the board may feel inhibited in retaining outside counsel to provide that service, even if the board believes that outside counsel would be better qualified to handle it. Even the monitoring function of the rest of the board in assessing the performance of the lawyer can be made more difficult because the lawyer is a fellow director. The other board members may not be as critical of the lawyer who serves on the board because they accord the lawyer a status as an equal and do not wish to offend the lawyer by criticizing the lawyer's skills.

The dual roles assumed by the inside or outside lawyer at board meetings may make it difficult for the board to know when the lawyer-director's vote is based on a legal determination, a business decision, or both. The board may be confused about whether the lawyer-director's stated opinion during the meeting is a legal opinion that the board should heed carefully, or simply an opinion that has business elements that the board may accept or reject. If themselves may create an unconscious bias toward their justification. See Donald C. Langevoort, The Epistemology of Corporate-Securities Lawyering: Beliefs, Biases and Organizational Behavior, 63 BROOK. L. REV. 629, 674 (1997). After having participated in the decisions, the lawyer then would find it even more difficult to analyze objectively their legal status for purposes of opining on their validity or otherwise. Id.

210. See Cummins & Kelly, supra note 208, at 48. The sense of loyalty that the other board members have for their fellow director may cause them to send the corporation's legal business to the lawyer-director's firm even though that firm is not the best choice for the representation. Id.; see also Mundheim, supra note 13, at 1509 ("There is also the problem of the freedom of corporation to be able to switch counsel, or to switch some business from counsel, where counsel is represented on the board. The lawyer-director role makes such changes more difficult."); Sogg & Solomon, supra note 173, at 159.

211. See Hershman, supra note 110, at 1450; Discussion by Participants, supra note 209, at 1470 ("The ethical problem arises when the client thinks he is getting legal advice, but in fact he is getting business judgment, which may be a totally different thing.") (remarks of Hershman). Indeed the distinction between a legal and business opinion may not be altogether
the lawyer-director votes in favor of a certain action based purely on the lawyer-director's business judgment, the other directors may mistakenly infer from the lawyer-director's vote that the proposed action is legally sound and free of litigation risks. Likewise, if the lawyer-director votes against a course of action, even though it is based solely on business considerations, the other directors may wrongly believe that the proposed course of action is legally improper.\textsuperscript{212} Even if the lawyer-director attempts to clarify the reasons for the lawyer-director's vote, the board members' ability to make appropriate decisions may still be hampered by their uncertainty over the nature of the lawyer-director's advice.\textsuperscript{213}

The confusion of roles may even lead board members to argue defensively in future litigation that they relied on the lawyer-director's legal advice in making their decisions, when in fact, the lawyer-director was giving only business advice.\textsuperscript{214} Whether the lawyer-director's fellow board members will

clear in the lawyer-director's own mind. The opinion that the lawyer-director forms may be a mixture of the two, and it would be difficult to tease out the various elements for separate evaluation by the board. See infra notes 256-60 and accompanying text (discussing the difficulty in separating legal advice from business advice for purposes of the attorney-client privilege).

212. See Cheek & Lamar, supra note 12, at 469; Cummins & Kelly, supra note 208, at 49; Thurston, supra note 18, at 797; see also Block et al., supra note 175, at 5-6.

Other board members may mistakenly believe that the lawyer's business advice constitutes a legal opinion which they may feel obliged to follow, or they may conclude that an attorney's opposition to a proposed action (solely for business reasons) means that there may be adverse legal implications to the proposed actions.

Id.\textsuperscript{213} One commentator suggests that one of the most detrimental effects dual service may have on the board is that directors will become so accustomed to viewing the lawyer-director as an equal, and therefore treating the lawyer-director's advice as nonlegal business advice, that they will not heed the lawyer's legal advice when it really counts. See Lawyers as Directors, supra note 13, at 51-52. The lawyer-director's regular participation in the business atmosphere of the board setting, which "involve[s] predominantly] nonlegal considerations may make it less likely that his fellow directors will heed his legal advice when the occasion for a strong position arises." Id. Contrary to the arguments of dual service proponents, giving the lawyer equal status on the board will decrease rather than increase the lawyer's influence and status as legal counsel for the corporate entity. The dilemma for the lawyer-director "is that if he participates too strongly as a businessman his ability to press for legally oriented decisions may be reduced." Id. at 52. The corresponding concern is that if the lawyer-director refrains too much from exercising his business judgment for fear that his fellow directors will forget that he is the lawyer for the corporation, his ability to fulfill his normal director's role will be diminished. See id.

214. Directors are entitled to rely on the advice of counsel, management, and other experts in making their decisions. See Joseph F. Troy & William D. Gould, Advising and Defending Corporate Directors and Officers §§ 3.24, 3.25 (1999). The directors therefore may raise the defense of reliance on counsel if the directors, individually and collectively, and the corporation are named as defendants in a lawsuit. See Cheek & Lamar,
be successful in such a defense will depend on whether they were entitled to think they were getting legal advice when they really were not. The underlying question will be whether the lawyer-director's business advice may have been influenced by the lawyer-director's own legal opinion. Answering that question in hindsight during heated litigation will not be easy.

3. Loss of Independence and Effectiveness as a Lawyer

The role of the lawyer for the corporation is to advise the board on the legal aspects of its business decisions and to analyze the legal risks that are involved in any proposed course of action.215 The lawyer's primary responsibility to the client is to provide objective, independent legal advice.216 To be able to render such advice, the lawyer must maintain a certain measure of distance from the client. When the lawyer for the corporation serves simultaneously on the board, the distance between the lawyer and the client is eliminated. The lawyer typically looks to the board as the highest voice of authority for the corporate client.217 When the lawyer joins the board, the lawyer in effect becomes the client.218 The lawyer acts as advisor to the board and then simultaneously makes decisions as a board member based on that

supra note 12, at 468. If the board members acted in reliance on what they perceived to be the lawyer-director's legal advice, they may blame the lawyer-director for the consequences of that reliance and perhaps sue the lawyer-director in an action for malpractice based on what they believe to be faulty legal advice rendered at the board meeting. See Cummins & Kelly, supra note 208, at 49. The situation may be made even more contentious if the lawyer-director raises the conflicting defense of reliance on information furnished by the other board members to the lawyer-director. See TASK FORCE REPORT, supra note 165, at 42; Thurston, supra note 18, at 808.

215. See Thurston, supra note 18, at 795-96. Some commentators have argued that the advisory function is the only proper role for the corporate lawyer. See Taylor, supra note 6, at 245 (arguing that the lawyer's proper role should involve assistance and counsel rather than monitoring and supervision). One viewpoint is that "[a]ny definition of counsel's role should not depart from the basic premise that, to use military parlance, counsel performs a staff function, not a command function." Id. at 240.

216. Model Rule 2.1 reflects the lawyer's duty of professional independence: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." MODEL RULES, supra note 2, at Rule 2.1.

217. See supra notes 8-10, 66 and accompanying text.

218. See Robert E. O'Malley & Harry H. Schneider, Danger: Lawyer on Board, ABA J., July 1993, at 102, 102 ("In a very real sense, the lawyer who serves as a director and continues to act as lawyer for the corporate client has become both client and lawyer."); see also Mundheim, supra note 13, at 1512 (questioning whether "the corporation is getting effective legal advice, or whether it might not have a fool for a client when the person who in a sense is making the decision is also the legal adviser") (remarks of Sonde); Carrey, supra note 12, at 6 (arguing that the lawyer who also serves as a director crosses the line between being an independent legal advisor to being an interested principal); Gold, supra note 15, at 713; Thurston, supra note 18, at 807.
very same advice. The merging of the roles compromises the lawyer’s independence.\footnote{219}

The blended role adversely affects the lawyer’s ability to exercise the requisite independent professional judgment because the lawyer is too close to the situation to have an objective perspective. As one commentator explained: “\[W\]hen I am personally affected by something I do not want to give myself legal advice. I go to another lawyer and get his judgment as to how to come out on the situation\[\] because I may be too close to the situation or too emotionally involved.”\footnote{220} Proponents of dual service argue that the corporation benefits by having its lawyer on the board because the lawyer knows he is at risk of personal liability as a director.\footnote{221} That fact, however, may actually increase the threat to the lawyer’s independence. Because the lawyer-director has placed himself in a position of being personally affected by the legal advice he renders, self-protection concerns may affect the lawyer-director’s ability to render objective, detached advice.\footnote{222} The result may be that the lawyer-director’s opinion is far “more cautious than it would otherwise be.”\footnote{223} The corporate client suffers because it does not get the detached, objective, legal perspective it would normally receive from its counsel.

\footnote{219} See Eisenberg, supra note 155, at 173 (arguing that dual service compromises the lawyer’s objectivity because the lawyer becomes simultaneously attorney and client); Cheek & Lamar, supra note 12, at 466; Haynsworth, supra note 179, at 55; see also Cummins & Kelly, supra note 208, at 50 (“It is the ability of an attorney to separate himself from the activities of his client that preserves his independence and makes his services as counsel uniquely valuable.”). For the in-house lawyer in particular, joining the board places the lawyer in the uncomfortable position of effectively “rendering legal advice to himself or herself.” Terrell, supra note 197, at 1006-07. But see Hazard, supra note 188, at 13, 14 (acknowledging that there is a conflict when the lawyer who engages in dual service gives legal advice to herself as a director but arguing that the lawyer can be professionally objective if special care is taken).

\footnote{220} Mundheim, supra note 13, at 1514-15 (remarking on Sonde).

\footnote{221} See supra notes 174-76 and accompanying text.

\footnote{222} See Cummins & Kelly, supra note 208, at 50. If the lawyer’s own interests conflict with the best interests of the client, the lawyer may ultimately be faced with a disabling conflict under Rule 1.7: “A lawyer shall not represent a client if the representation of that client may be materially limited . . . by the lawyer’s own interests,” unless the lawyer gets the client’s informed consent and reasonably believes the representation will not be adversely affected. MODEL RULES, supra note 2, at Rule 1.7(b).

\footnote{223} Mundheim, supra note 13, at 1509; see also Block et al., supra note 175, at 5 (“Because of these liability risks, attorney-directors may be inordinately conservative when rendering legal advice and in exercising their business judgment in an effort to protect themselves, at the possible expense of the client’s best interests.”). It is also feasible that the opposite result will occur. The lawyer-director’s continual interaction with other board members in the nonlegal business setting may cause the lawyer-director to be more willing to take business risks over time, and the lawyer-director’s advice would then be far less cautious than it would otherwise be. See Bencivenga, supra note 177, at 5 (“Becoming more familiar with the needs of business helps a lawyer overcome an aversion to taking risks”).
To the extent the board is called upon to participate in the strategic planning process, the lawyer-director’s dual identity can be problematic. The lawyer’s task is to provide detached legal analysis of the risks associated with implementing the company’s proposed business plans, while the board’s role is to make the final business decisions with respect to those future business plans. 224 Once the lawyer assumes the role of business visionary and decision-maker, the lawyer loses in part the objectivity that comes from acting solely as detached counsel. This is particularly true for inside lawyers who work closely on a day-to-day basis with the managers who start the formulation of the strategic business plans. Therefore, some have argued that corporate lawyers should not be involved at all in strategic planning as decision-makers because of the adverse effects it has on the exercise of the lawyers’ independent professional judgment. 225

The lawyer for the corporation must stand apart from the client in order to fulfill the lawyer’s obligations to the client. The lawyer who engages in dual service is caught in a struggle to be a psychological and psychologically distant at the same time. 226 This struggle is likely to affect the lawyer’s independent judgment as a professional, particularly when such judgment may be contrary to the prevailing views of the senior managers or other board members. 227 As noted previously, accountants are barred by their own code of professional ethics from serving on the boards of their corporate clients. 228 Accountants are not given the discretion to determine whether or

224. See supra notes 132-34 and accompanying text (discussing the role of the board in the strategic planning process).

225. See Auerbach, supra note 183, at 80-86 (arguing that inside counsel should not be involved in strategic planning because of the loss of objectivity that results when counsel serves simultaneously as legal advisor and business decision-maker). One commentator maintains that “giving [legal] advice must be distinguished from the making of the business decision. From the professional viewpoint, the corporate lawyer should not make business decisions even with the consent of the client.” John H. Ogden, Legal and Business Functions: Corporate Counsel Juggling Multiple Roles, ACCA DOCKET, Fall 1992, at 22, 22-23 (quoting Robert S. Banks, Professionalism in the Corporate Environment, ACCA DOCKET, Summer 1986, at 6-9).

226. See Hazard, supra note 188, at 13, 14.

227. See Ralph C. Ferrara & Marc I. Steinberg, The Role of Inside Counsel in the Corporate Accountability Process, 4 CORP. L. REV. 3, 22 (1981). The difficulties for inside lawyers in particular are heightened by serving on the board. In fact, some have argued that inside lawyers who engage in dual service have an inherent conflict between their status as lawyers for the corporation, which requires the exercise of independent legal judgment, and their status as directors, which calls for very different responsibilities and obligations. Id. at 21.

228. See supra notes 18-19 and accompanying text. Rule 101 of the AICPA Code of Professional Conduct provides: “A member in public practice shall be independent in the performance of professional services . . . .” AICPA CODE OF PROFESSIONAL CONDUCT Rule 101 (1988). Under the rule, the accountant’s “independence shall be considered to be impaired” if the accountant acted as a director or officer of the company “during the period covered by the financial statements, during the period of the professional engagement, or at the time of expressing an opinion.” Id. at Interpretation 101-1; see also Sogg & Solomon, supra note 173,
not their professional independence may be impaired by dual service. In the performance of their duties, they are required to maintain "objectivity and integrity . . . free of conflicts of interest." 229 The accountants' rules underscore the importance of maintaining "both independence in fact and independence in appearance." 230 A comparable rule seems prudent for lawyers who, like accountants, are professionals and are required to render independent judgments on behalf of their clients. 231 If the lines between the roles of the lawyer and the client are blurred, the lawyer stands to lose a measure of effectiveness as a legal counselor.

4. Conflicts of Interest

Dual service involves various conflicts of interest for the lawyer-director and the corporation. For the outside lawyer, fee considerations raise a conflict when the board is considering a course of action that may generate substantial legal fees for the lawyer's firm. If the lawyer-director supports the proposed action, others may question whether the lawyer-director's self-interest is the reason for that support. 232 For example, the board may be contemplating

at 148-50 (discussing the AICPA rule).

229. AICPA Rule 102 provides: "In the performance of any professional service, a member shall maintain objectivity and integrity, shall be free of conflicts of interest, and shall not knowingly misrepresent facts or subordinate his or her judgment to others." AICPA CODE OF PROFESSIONAL CONDUCT Rule 102 (1988).


231. See Riger, supra note 13, at 2386 ("The lawyer is in no less need of complete independence in the expression of his legal opinion regarding his clients' programs and actions."). Some commentators have argued that the distinction between accountants and lawyers is justified "because fewer people rely on legal opinions provided by corporate attorneys" than on opinions provided by the company's auditors. See, e.g., Albert, supra note 28, at 423. That type of utilitarian analysis, counting up the total number of people who stand to be harmed, seems to miss the issue. What is at stake is the lawyer's responsibility as a professional and the importance to the public of the appearance of independence. Moreover, it is by no means clear that fewer people stand to rely on the opinions rendered by lawyers. When corporations file registration statements to issue shares to the public, for example, the lawyers' opinions regarding the legality of the shares must be attached along with the accountants' reports and consents. See Regulation S-K, Item 601(b)(5).

232. See Cheek & Lamar, supra note 12, at 475 ("Should the lawyer-director support the
whether to commence litigation and to use the services of the lawyer-director’s law firm, or the board may be thinking about selling a subsidiary that happens to provide substantial legal business for the lawyer-director’s firm. The Formal Opinion suggests that the lawyer-director faced with such a conflict should abstain from voting on the matter.

In doing so, however, the lawyer-director may deprive the corporation of the benefit of the lawyer-director’s business advice. As mentioned previously, even the lawyer-director’s abstention from voting on the matter may not remedy the problem for the other board members who do not feel comfortable making decisions that would divert legal fees from their fellow director. For the inside lawyer, such as the general counsel who serves on the board, conflicts arise when the board considers and fixes the compensation of the senior managers, including the general counsel. The inside lawyer-director would presumably be precluded from participating in such determinations because of the clear conflicts that are involved.

Conflicts can also arise when a lawsuit is brought against the corporation and its directors. The interests of the corporation may conflict with those of the directors, rendering the lawyer-director unable to continue representing the corporation. In fact, the mere presence of the lawyer on the board increases

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alternative generating significant legal work, he invites the appearance of promoting self-interest and a claim that he is not acting in the best interests of the corporation."); Sogg & Solomon, supra note 173, at 159. In one extreme example, a lawyer-director was accused of urging other board members to approve risky or illegal loans in order to generate fees for the lawyer-director’s law firm on the loan closings. See FDIC v. Mmabat, 907 F.2d 546 (5th Cir. 1990).

233. See TASK FORCE REPORT, supra note 165, at 39-40; see also Sogg & Solomon, supra note 173, at 159; Gold, supra note 15, at 714; Thurston, supra note 18, at 803. Conflicts involving fee considerations may also arise when the board is evaluating the amount of fees paid to the lawyer-director’s law firm or whether to retain the law firm as outside counsel. See Cummins & Kelly, supra note 208, at 48; see also Harris & Valihura, supra note 173, at 491.


235. Indeed, the Formal Opinion recognizes that “the lawyer-director’s recusal as a director could interfere with the corporation’s selection of the best course to follow.” Id. at 11; see also TASK FORCE REPORT, supra note 165, at 40; Cheek & Lamar, supra note 12, at 475.

236. See supra note 210 and accompanying text; see also TASK FORCE REPORT, supra note 165, at 40 (“[T]he lawyer’s presence on the board may sub silencio influence the other directors to favor the lawyer’s firm or its interests, whether to avoid friction, or create a situation where the lawyer-director ‘owes me one.’”).

237. See supra notes 122, 143 and accompanying text (discussing the role of the board and the compensation committee in setting the compensation of the CEO and the senior executives of the corporation).

238. As a general rule, the lawyer is prohibited from representing a client if the representation may be materially limited by the lawyer’s own interests. See MODEL RULES, supra note 2, at Rule 1.7(b). If the lawyer-director is potentially liable to the corporation, the interests of the two would clearly conflict and would preclude continued representation. See Knepper, supra note 11, at 358.
the likelihood that all directors will be named as defendants in a lawsuit because plaintiffs often strategically seek to disqualify the lawyer-director and the lawyer-director’s firm from representing the corporation.\textsuperscript{239} Even if the plaintiffs are unsuccessful in their attempt to disqualify the lawyer-director from representing the corporation, the lawyer-director may still have conflicts in advising the corporation during litigation. As a co-defendant in the matter, the lawyer-director’s advice on such issues as settlement may appear to reflect self-interest rather than the interests of the corporate client.\textsuperscript{240}

If not sued directly, the lawyer-director may nonetheless be called as a witness in a lawsuit because of the lawyer-director’s extensive knowledge as both the lawyer for the corporation and one of its directors. This situation poses another conflict that constitutes grounds for disqualifying the lawyer from representing the corporation. Under Rule 3.7, a lawyer is prohibited from acting as an advocate in a trial in which the lawyer is likely to be a witness.\textsuperscript{241} In \textit{Harrison v. Keystone Coca-Cola Bottling Co.},\textsuperscript{242} for example, a lawyer-director who was called as a witness and named as a co-defendant in a lawsuit was disqualified from representing the corporation in the matter.\textsuperscript{243} The court found that the lawyer-director’s intimate connection with the corporation, both as a director and as a testifying co-defendant, rendered it highly unlikely that he would be able to try the case with the degree of detachment required by the applicable rules of professional responsibility.\textsuperscript{244}

Lawyers who engage in dual service face greater risk of being disqualified as witnesses than lawyers who do not take on such dual roles simply because plaintiffs know that lawyer-directors can testify to matters involving their role as directors.\textsuperscript{245} In-house lawyers in particular are more likely to be targeted

\textsuperscript{239} See Albert, supra note 28, at 434. Disqualification works in favor of the plaintiff because the corporation must then seek new counsel who will not be as familiar with the corporation’s business and will require much more time to be brought up to speed. See id.; see also Cheek & Lamar, supra note 12, at 489; Block et al., supra note 175, at 4.

\textsuperscript{240} See Block et al., supra note 175, at 4.

\textsuperscript{241} Rule 3.7(a) provides: “A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness . . . .” Model Rules, supra note 2, at Rule 3.7(a). The comment to the rule explains that the combination of “the roles of advocate and witness . . . can involve a conflict of interest between the lawyer and the client.” Id. at Rule 3.7 cmt. 1; see also Biernat & Manson, supra note 60, at 168 (discussing the possibility that the lawyer-director will be disqualified from representing the corporation under Rule 3.7 if the lawyer-director is called as a material witness to actions taken by the board).


\textsuperscript{243} Id. at 152.

\textsuperscript{244} Id. The court disqualified the lawyer-director notwithstanding the fact that he and his corporate client were relying on the same defense. Id.

\textsuperscript{245} See Block et al., supra note 175, at 4; see also Basri & Kagan, supra note 81, at 16-12; Albert, supra note 28, at 434 (“The increased frequency of suits against directors multiplies the possibility that the attorney-director will be called as a witness and, therefore, the likelihood of disqualification.”).
for depositions than their outside counterparts, and therefore, the risks of conflicts are even greater for inside laywer-directors. Inside lawyers are more susceptible to being called as witnesses because, as employees of the corporation, they have access to and acquire more confidential, corporate information on a daily-basis than outside lawyers do.

The Formal Opinion's treatment of these conflicts concludes with the admonition that the lawyer-director may simply need to withdraw from representing the corporation when the conflicts become too severe. Resignation of counsel, however, can work tremendous hardship on the corporation because the corporation loses its counsel of choice. At least in the context of large public corporations, the corporation may need to expend considerable time and money bringing new counsel up to speed. In some instances, resignation of counsel can involve adverse publicity and send negative signals to the market that can hurt the corporation's interests. For the inside lawyer who must withdraw from representing the corporate client, the retention of independent outside counsel as a substitute is not always a solution because "[o]utside counsel may not be able to be deployed quickly enough to avoid serious damage to the company's interests." In the long run, the best solution is to avoid these conflicts altogether by keeping the roles of the lawyer and the director distinct. To be sure, conflicts cannot be eliminated in their entirety and the lawyer who does not engage in dual service may likewise encounter conflicts in representing the corporate client from time to time. The lawyer who acts simultaneously as a director for the corporate client, however, is much more likely to face disabling conflicts of interest for the reasons discussed above. As a result, this "seems to be one of

247. See id. Inside lawyers, such as general counsel who are part of senior management or who engage in dual service, are much more likely to be subject to disqualification motions based on attempts to call the inside lawyer as a witness. One general counsel explained the problem based on his own experience:

I'm the executive vice president of the company; I am part of management. That's a whole different issue than when I'm functioning as general counsel. I try lawsuits for the company, and there's a motion to disqualify me in almost every case because they want to depose me; they want to have me testify about conversations that took place with regard to business decisions that were not legal. We've been successful thus far, but it is not as simple as if I was simply the general counsel and my function was limited to legal.

Choosing the Best Path, supra note 99, at 43 (remarks of Norman Krivosha).
249. See Hemmer, supra note 66, at 662-63. Clients are generally entitled to be represented by counsel who will defend the client's interests competently, without improper conflict of interest, and through to completion. See MODEL RULES, supra note 2, at Rule 1.6 cmt. 1.
250. See HAZARD, supra note 63, at 55.
those situations where an ounce of prevention should be a mandatory professional responsibility."^251

5. Loss of Attorney-Client Privilege

Dual service increases the risk that confidential client communications relating to the provision of legal services will no longer be protected by the attorney-client privilege. Under normal circumstances, the corporate client is entitled to the protection of the attorney-client privilege.\(^2^{22}\) The privilege covers only those communications made between the corporate lawyer and the client that are intended to be confidential and are made for the primary purpose of obtaining legal advice or assistance, as opposed to business advice.\(^2^{23}\) The lawyer for the corporation who also acts as a director on the board regularly provides the corporate client with both legal and business opinions and perspectives. It will be difficult for the corporate client who wishes to preserve the attorney-client privilege for communications made between the client and the lawyer-director to prove that those communications were strictly legal in nature. Because business advice is not protected by the privilege,\(^2^{24}\) courts deny corporate claims to the privilege when communications made by a corporation's lawyer-director appear to be

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251. Lorne, supra note 10, at 492.

252. See Upjohn Co. v. United States, 449 U.S. 383, 389-90 (1981); Radiant Burners v. American Gas Ass'n, 320 F.2d 314, 322 (7th Cir. 1963). Because the corporate client is a nonhuman entity and can speak only through its employees or agents, it is not always clear who in the corporation may communicate as the client for purposes of the privilege. Courts have applied different approaches to resolve that problem. See John E. Sexton, A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege, 57 N.Y.U. L. REV. 443, 449-56 (1982) (discussing various tests for applying the attorney-client privilege, including the "control group" and "subject matter" tests). A comprehensive discussion of the nature of the attorney-client privilege as it relates to corporations is beyond the scope of this Article. For a good overview of the subject, see John William Gergacz, Attorney-Corporate Client Privilege (2d ed. 1990).

253. See 1 Paul R. Rice et al., Attorney-Client Privilege in the United States § 2.1 (2d ed. 1999). Professor Wigmore's classic definition of the privilege includes eight elements:

(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 disclosure by himself or by the legal adviser, (8) except the protection be waived.


business communications rather than legal ones.\(^{255}\)

At board meetings, the lawyer-director often contributes a mixture of both legal and business advice. In that setting it may be impossible for the lawyer-director and the other board members to distinguish clearly between communications that constitute purely legal advice, communications that constitute purely business advice, and communications that involve a combination of the two. Unless those distinctions can be made, all of the statements are potentially subject to compelled disclosure for failure to classify them as legally-related confidential communications. The Formal Opinion acknowledges that the danger of losing the attorney-client privilege is a serious one and, therefore, urges lawyer-directors to make clear to the client at the onset of making any legally-related statements that the communications are for the sole purpose of providing legal advice.\(^{256}\) The Formal Opinion’s solution, however, fails to recognize the practical realities of boardroom discussions and the lawyer-director’s limited ability to separate legal and business communications. One corporate lawyer explained the difficulties involved in distinguishing between legal and business advice and documenting that distinction for purposes of the attorney-client privilege:

The problem of being careful and documenting isn’t so easy because the conversation is always muddled: there’s a legal answer and then there’s ten minutes of business answers and then there’s five minutes of legal answers and then there’s seven minutes of business answers, and so on. You can’t try to sit there with two hats, taking them off and putting them on and taking them off and figuring out how you are going to document [the distinction].\(^{257}\)

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255. See, e.g., United States v. Vehicular Parking Ltd., 52 F. Supp. 751, 753-54 (D. Del. 1943). In Vehicular Parking, the court rejected a claim for protection of the attorney-client privilege for communications made by a corporation’s lawyer-director. Id. The court found that in his capacity as a director, the lawyer’s communications involved business rather than legal advice, and therefore, the privilege did not apply. Id.; see also SEC v. Gulf & W. Indus. Inc., 518 F. Supp. 675, 683 (D.D.C. 1981) (holding that communications made by a corporation’s lawyer-director were not protected by the privilege because the lawyer arguably received information in his role as a director, rather than in a professional legal capacity, and his views and business advice were voiced in his role as a director).

256. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 410, at 6 (1998) ("[I]t 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 Formal Opinion further recommends that the lawyer-director assure that management and the board understand that the attorney-client privilege "may not extend to matters discussed at board meetings when the lawyer-director is not acting in her corporate counsel role." Id. at 9.

257. Choosing the Best Path, supra note 99, at 42 (remarks of Norman Krivosha). Another lawyer has similarly commented on the difficulty with distinguishing between legal and business advice in the lawyer’s own mind: "I envy the people who seem to have such a clear distinction between when they are giving legal advice and when they are giving management advice. Most of the time, I frankly do not know when I am doing either." Discussion by Participants, supra
Because the lawyer-director offers both business and legal opinions, the other board members can easily be misled into believing the lawyer-director is giving them business advice when in fact that is not the case.\textsuperscript{258} Wearing two hats at once, the lawyer-director may jeopardize the protection of an important privilege that belongs to the corporate client. Inside lawyers in particular will have a harder time preserving the attorney-client privilege because their communications with clients involve business elements much more frequently.\textsuperscript{259} Courts have treated inside lawyers differently from outside lawyers when analyzing claims of attorney-client privilege because of the perception that inside lawyers are more likely to abuse the privilege.\textsuperscript{260}

Moreover, the privilege can easily be compromised if the lawyer-director's communications are not kept sufficiently confidential. For example, if the lawyer-director expresses opinions at a board meeting without clarifying that they are strictly legal in nature, and the remarks are then

\textsuperscript{258} This confusion has led some ethics committees who have considered the issue to require lawyers who serve as directors for their corporate clients to specifically warn the clients of a risk of loss of the attorney-client privilege. \textit{See}, e.g., N.Y. St. Bar Ass'n Comm. Professional Ethics, Op. 589, 1988 WL 236147, (Mar. 18, 1988). Some have argued that this "Miranda-like warning [may] stifle candor between the attorney and client," in which case the lawyer will be deprived of important information that is needed to provide effective legal advice. \textit{See} Cummins & Kelly, \textit{supra} note 208 at 50. The warning may also cause the board to question whether having the corporation's lawyer serve simultaneously as a director is truly a good idea. \textit{Id.}

\textsuperscript{259} \textit{See} Steinberg, \textit{supra} note 80, at 494 (noting that the attorney-client privilege may be determined on an ad hoc basis for inside lawyer-directors depending on whether they were acting as lawyers or directors); Weaver, \textit{supra} note 79, at 1038-40 (discussing greater risks of losing the protection of the privilege when inside lawyers are involved); \textit{see also} Robert M. Craig III, \textit{Dual Role of In-House Counsel (Attorney and Client) . . . and Other Aspects of a "Split Personality" Profession}, in \textit{CORPORATE COUNSEL'S GUIDE TO LAWYERING LAWS}, at 1.201, 1.205 (William A. Hancock ed. 1996); David G. Keyko, \textit{Privilege for Inside Counsel Communications: The Problem of Dual Roles}, \textit{INSIGHTS}, July 1996, at 30; Pope & Lee, \textit{supra} note 246, at 298.

\textsuperscript{260} \textit{See} Grace M. Giesel, \textit{The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations}, 48 MERCEER L. REV. 1169, 1206-08 (1997) (arguing that courts have an “anti-in-house counsel bias” when applying the attorney-client privilege); ABA/BNA \textit{LAW. MANUAL ON PROF'L CONDUCT} 91:2203 (2000) (noting that “in-house counsel are alarmed by a trend among courts to scrutinize claims of privilege for communications with lawyer-employees more closely than communications with outside corporate counsel”); \textit{see also} Alison B. Brozman & John H. Ogden, \textit{In-House Counsel: Managing the Split Personality}, ACCA DOCKET, May-June 1995, at 34, 36 (noting that rightly or wrongly many courts treat inside lawyers differently than outside lawyers when it comes to issues of privilege).
included in the minutes of the meeting, the privilege may be lost because shareholders have access to the minutes.261 The risks of waiving the privilege are also greater in this context. The board members may perceive the lawyer-director’s remarks to be business advice and disclose the communications to others, thereby waiving the privilege.262 Alternatively, the lawyer-director may inadvertently waive the privilege by discussing with others communications made at the board meeting. Although only the client can waive the privilege, the lawyer-director as a member of the board acts as the client and, therefore, is capable of waiving the privilege on behalf of the client.263

The devastating consequences that can occur from the loss of the corporate attorney-client privilege have prompted some commentators to argue that dual service should be banned for that reason alone.264 Although there are extreme precautions that can be taken to minimize as much as possible the risks of losing the privilege, it seems that corporate lawyers better serve their clients by not placing them in such a delicate position in the first place.

D. Disadvantages of Dual Service: Risks for Counsel

Dual service poses significant problems for lawyers themselves. The corporate lawyer who takes on the additional role as director also takes on additional exposure to personal liability. Lawyer-directors are held to a higher standard of care and are less likely to be protected by indemnification and insurance.

A lawyer-director is held to a higher standard of care than either the director who is not a lawyer or the lawyer who does not serve simultaneously as a director.265 As a general matter, states require that directors discharge their duties with the care that an ordinarily prudent person in a like position

261. See Albert, supra note 28, at 447; Thurston, supra note 18, at 811-12; Cummins & Kelly, supra note 208, at 50. In fact, disclosure of only a part of the lawyer-director’s communications could possibly result in a loss of the privilege with respect to everything that was discussed at the board meeting. See Albert, supra note 28, at 447.

262. See Harris & Valihura, supra note 173, at 485. A client’s subsequent disclosure to a third party of a communication with the client’s attorney waives the attorney-client privilege because the communication is no longer secret. See Gergacz, supra note 252, at 5-16, 5-19.

263. See Rice et al., supra note 253, § 4.25; Cummins & Kelly, supra note 208, at 49-50. The risks of waiver are clear for inside lawyers such as the general counsel who typically occupy positions as executive officers as well and therefore serve as agents of the corporation capable of waiving the privilege. See Pope & Lee, supra note 246, at 299.

264. See, e.g., Sogg & Solomon, supra note 173, at 156 (“The potential loss of the attorney-client privilege is significant enough in itself to support arguments against lawyer-directors.”).

would use under similar circumstances. Because lawyer-directors have special backgrounds, qualifications, and access to corporate information, courts have scrutinized the conduct of lawyer-directors more strictly. For example, in Escott v. Barchris Construction Corp., a court held a lawyer-director to a heightened standard of care in the investigation and preparation of an allegedly misleading corporate registration statement. The court found that the director’s peculiar expertise and access to information as corporate counsel increased his responsibility to exercise due care in fulfilling his directorial obligations. Thus, the lawyer-director faced greater exposure to liability than the other defendant directors. Extending this reasoning, Barchris and other cases have held that inside lawyer-directors are subject to an even higher standard of care than their outside counterparts.

266. See, e.g., CAL. CORP. CODE § 309(a) (West 1999) (“A director shall perform the duties of a director . . . in good faith, in a manner such director believes to be in the best interests of the corporation, . . . and with such care . . . as an ordinarily prudent person in a like position would use under similar circumstances.”); N.Y. BUS. CORP. LAW § 717(a) (West Supp. 2001) (“A director shall perform his duties as a director . . . in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.”).


268. Id. at 690-92.

269. See id. Serving as the company’s outside counsel, the lawyer-director had extensive knowledge of the company and drafted the registration statement in question. Id. at 689. He and his fellow directors were sued in their capacity as directors, but the court treated him differently because of his additional role as the company’s lawyer. Id. at 690. Based upon his direct involvement and responsibility for the registration statement’s accuracy, the court found that more was expected of the lawyer-director than was required of a director who did not have the same level of involvement. Id. In rejecting the lawyer-director’s due diligence defense, the court explained that the “unique position which he occupied cannot be disregarded.” Id. If the lawyer-director had acted only as counsel for the company, he would not have been subject to suit under the statute at issue in the case. See Thursto, supra note 18, at 816-17; see also George W. Coombe, Jr., Lawyers as Directors: Application of Statutory Standard of Care, 30 BUS. LAW. 41 (1975) (discussing Escott v. Barchris Constr. Corp.).

270. In Barchris, another defendant in the case was a lawyer-director who acted as in-house counsel. 283 F. Supp. at 687. The court rejected his due diligence defense because he failed to meet a higher standard of care: “As a lawyer, he should have known his obligations under the statute. He should have known that he was required to make a reasonable investigation of the truth of all the statements in the unexpertised portion of the document which he signed.” Id. In another case, an outside lawyer-director was so intimately involved in the company and in the preparation of a registration statement that the court found he should be regarded as an “insider.” See Feit v. Leasco Data Processing Equip. Corp., 332 F. Supp. 544, 576 (E.D.N.Y. 1971). The court held him to a more stringent standard of care as an insider and found that the liability of an insider approaches that of a “guarantor of the accuracy” of the registration statement. Id. at 578; see also Blakely v. Lisac, 357 F. Supp. 255, 266 (D. Or. 1972) (holding a lawyer-director liable because his role was “beyond a lawyer’s normal one” and is therefore “held to even a higher standard of care”) (citing SEC v. Fronk, 388 F.2d 486, 489 (2d Cir. 1968)).
In addition to facing personal liability for failures to meet the heightened standard of care, lawyer-directors are also more likely to be sued for malpractice than corporate lawyers who do not act simultaneously as directors.\textsuperscript{271} Due to the confusion of roles, these cases are much more difficult to defend and insure.\textsuperscript{272} In fact, there is a strong possibility that the lawyer-director will be denied insurance coverage by both the corporation's directors' and officers' ("D&O") liability insurance and the lawyer's own professional malpractice liability insurance. The D&O policy protects directors from liability arising out of acts performed in their directorial capacity.\textsuperscript{273} Professional malpractice insurance, however, protects lawyers from liability arising out of their legal services.\textsuperscript{274} Because of the difficulty in distinguishing between professional legal advice and directorial business advice, the two insurers may simultaneously deny coverage: the D&O insurer insists that the lawyer-director was acting in the capacity of a lawyer at the time of rendering the advice, while the malpractice insurer claims that the lawyer-director was acting in his capacity as a director.\textsuperscript{275} Therefore, the lawyer-director may be left vulnerable to considerable liability without any insurance protection whatsoever. The corporation's indemnification policies may also prove to be unhelpful to the lawyer-director.\textsuperscript{276} These problems are

\textsuperscript{271} See O'Malley & Schneider, \textit{supra} note 218, at 102 ("All other things being equal, the lawyer who serves as a director is much more likely to be sued for legal malpractice than the lawyer who is not a director.").

\textsuperscript{272} See Cox, \textit{supra} note 201, at B1 (noting the frequency with which these types of cases settle due to the difficulty of defending conflict of interest claims against lawyer-directors); O'Malley & Schneider, \textit{supra} note 218, at 102 (noting that defenses to malpractice suits are compromised when the lawyer also sits on the board). Many insurers discourage lawyers from serving on the boards of client corporations. See Rian D. Jorgensen, \textit{Lawyers' Professional Liability: Overview and Current Issues}, in 563 PL/LIT at 89, 99 (PL Litig. & Admin. Practice Course Handbook Series No. H4-5259, May 1997); see also Albert, \textit{supra} note 28, at 465-66 (noting that some insurers refuse to underwrite policies for lawyers who serve as directors of client financial institutions). Law firms also recognize the dangers of having law firm partners serve as lawyer-directors for client corporations. One survey indicated that many law firms now prohibit or require prior approval for their lawyers to engage in dual service. See Susan Saab Fortney, \textit{Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture}, 10 GEO. J. LEGAL ETHICS 271, 282-83 (1997).

\textsuperscript{273} See Knepper, \textit{supra} note 11, at 359; \textit{Lawyers as Directors, supra note} 13, at 49-50 (1975).

\textsuperscript{274} See Cheek & Lamar, \textit{supra} note 12, at 499; Harris & Valihura, \textit{supra} note 173, at 494 ("Almost every professional liability policy for lawyers excludes conduct outside the practice of law... Accordingly, any time a lawyer assumes some role other than as lawyer, insurance coverage is an issue.") (quoting Thomas L. Browne, \textit{Lawyers Who Act as Other than Lawyers Enter a Danger Zone}, CHI. LAW., Nov. 1994, at 11)); see also 4 RONALD E. MALLEN & JEFFREY M. SMITH, \textit{LEGAL MALPRACTICE} § 33.8 at 301-05 (4th ed. 1996).

\textsuperscript{275} See Troy & Gould, \textit{supra} note 214, § 2.24; Block et al., \textit{supra} note 175, at 8.

\textsuperscript{276} See Albert, \textit{supra} note 28, at 453-55 (discussing the limits on indemnification when the corporation is insolvent or the suit against the lawyer-director is a derivative suit or alleges
compounded for inside lawyer-directors who face greater exposure to malpractice liability because of the expansion of third-party claims against them. For outside lawyers, the risks that liability will also attach to their law firms increase when the lawyers engage in dual service.

E. ABA Formal Opinion: Concluding Remarks

As the preceding discussion indicates, dual service creates a myriad of practical problems and hazards for the corporate client. On balance, the harms associated with dual service seem to outweigh the potential benefits that may be gained. The ABA Formal Opinion acknowledges that problems exist, attempts to address some of the problems, and poses possible solutions. The proposed solutions, however, are inadequate, and the opinion’s ultimate conclusion in favor of dual service seems inappropriate. The opinion assumes that issues arising for outside lawyers are the same as those for inside lawyers. As discussed previously, however, in-house lawyers for the

277. Brian E. Fliflet, Third-Party Suits May Leave In-House Counsel Liable, CORP. LEGAL TIMES, Oct. 1995, at 26, 26. In-house lawyers typically believe they are less likely to be sued for malpractice because they have only one client, the corporation. However, in-house lawyers face greater exposure to outside third parties, and “the courts have expanded both the types of claims that can be brought against corporate attorneys for legal malpractice and the categories of plaintiffs who are permitted to bring such claims.” Id. See generally Stephen M. Honig, Some Practical Perspectives on Liability of In-House Counsel, in CORPORATE COUNSEL’S GUIDE TO LAWYERING LAWS, at 8.201 (William A. Hancock 1998).

278. Law firms can be held vicariously liable for the actions of members who serve on the boards of corporate clients. See Albert, supra note 28, at 467-71 (discussing various theories under which law firms can be held liable).

279. The opinion states that it addresses “the propriety of a lawyer serving on the board of directors of a corporation that she or her firm represents as counsel.” ABA Comm. on Ethics and Professional Responsibility, Formal Op. 410, at 1 (1998). The opinion acknowledges that some of the issues may “differ depending on . . . the nature of the representation which could range from serving as general counsel to handling a few discrete transactions.” Id. at 3. It is not clear from this statement whether the term “general counsel” refers specifically to the chief in-house lawyer or to the outside lawyer who handles all of the corporation’s legal business. In a footnote, the opinion lays out various risks of harm that dual service creates for the lawyer as an individual, and states that the “risks are likely to be increased substantially when the lawyer-director serves also as an executive officer of her corporate client.” Id. at 3 n.4. This distinction addresses only those hazards that confront lawyers directly, such as increased exposure to liability and exclusion under professional liability policies. Id. The opinion does not provide a substantive analysis of the difference between inside and outside lawyer-directors for purposes of the risks of harm to the client. Much of the opinion appears to be focused on the outside lawyer as evidenced by the opinion’s frequent reference to the lawyer’s “firm.” See,
corporation are distinguishable from outside lawyers in a number of important ways, and treating them as if they are identical renders the analysis incomplete. Moreover, the opinion attempts to remedy most conflicts and problems by recommending that the lawyer continue to act solely as the corporation's lawyer and not as a director until the risks abate. In the face of certain conflicts or the prospect of losing the attorney-client privilege, the lawyer, according to the opinion, should make clear that the lawyer's advice is strictly legal and should "avoid the temptation of providing business or financial advice." These recommendations are not very helpful. A director is supposed to be present to give business advice, not avoid giving it. When the lawyer continues solely as counsel and not as a director whenever potential problems may arise, it deprives the board of the benefit of having an active, contributing member. The board must have a stable composition of diligent, independent, and insightful members to effectively fulfill its significant role in corporate governance.

The Formal Opinion finds that many of the problems associated with dual service can be cured by "full, free and frank discussions" between the lawyer and the corporate client. The opinion suggests that the lawyer provide the client with a written memorandum that explains the issues and presumably spells out the ethical and practical pitfalls of dual service. The opinion further suggests that if the lawyer and the informed client come to a consensus on the issue and then move forward with dual service, the decision "must nevertheless be revisited as situations arise that call for further consultation with the client." By approaching the problem in this manner, the Formal Opinion essentially treats dual service as a matter that is open to negotiation and discussion with the client. Dual service, however, has important implications for lawyer independence as an ethical responsibility and a fundamental ideal—a matter that should never be subject to consultation and compromise. From a deeper, theoretical perspective, dual service blurs the lines between client and lawyer in a manner that is antithetical to lawyer independence and professionalism. The following discussion addresses this concern and explores the concept of independence in relation to the dual service issue.

e.g., id. at 3.
280. See id. at 4.
281. Id. at 6.
282. See discussion of the essential functions of the board, supra Part IV.A.
284. Id.
285. Id.
VI. LAWYER INDEPENDENCE

To serve the corporate client in the most effective manner, the lawyer for the corporation must maintain a certain measure of independence and objectivity. With respect to the provision of legal services, objectivity involves "the ability to distance oneself from personal and client desires in order to evaluate the effect of potential actions on clients, third parties, and the legal system."286 When the corporate lawyer joins the board, the lawyer closes the distance between the lawyer and the client and thereby makes objectivity much more difficult. One important function of the board is to serve as the ultimate decision-maker for major corporate plans and actions.287 For example, the board may be called upon to decide whether to adopt a merger or consolidation agreement with another large corporation, or to approve the sale of one of the corporation's subsidiaries. The lawyer who serves simultaneously as a director goes beyond merely advising the board as to the legal risks involved; the lawyer-director also assumes the role of decision-maker with respect to these major corporate actions, thereby losing "the objectivity that comes from not being himself the author of the transaction in hand."288 The preservation of objectivity and independence is essential to the provision of effective legal services for the client.

At a more fundamental level, the preservation of independence is what defines the lawyer as a professional. The lawyer is more than an agent of the client who merely executes the client's will. The lawyer is an officer of the court, or more particularly, an officer of the legal system, who owes an obligation to represent the viewpoint of the legal system to the client and to uphold the integrity of the system of justice.289 In the litigation setting, for


287. See supra notes 129-31 and accompanying text (discussing the decision-making function of the board).

288. Ogden, supra note 225, at 24 (quoting L.E. Birdzell, Ethical Problems of Inside Counsel, BUS. LAW MONOGRAPHS 6-1 (1990)). The lawyer-director who takes part in these major corporate decisions may retain considerable satisfaction from having the opportunity to exercise business judgment. In fact, the lawyer-director may be commended by the other board members for "thinking like a businessman." Forrow, supra note 86, at 1805. However, the "lawyer must never forget that he is retained to think like a lawyer, and if he does not, perhaps no one will." Id. (emphasis omitted).

289. See MODEL RULES, supra note 2, at Preamble (describing a lawyer as "an officer of the legal system and a public citizen having special responsibility for the quality of justice"); Deborah A. DeMott, The Lawyer as Agent, 67 FORDHAM L. REV. 301, 301 (1998) (noting that as officers of the court and members of a profession, lawyers are subject to duties that go beyond mere agency principles); Stanley Commission Report, supra note 162, at 278.
example, lawyers are constrained in the pursuit of their clients’ interests by
ethics rules that require lawyers to be candid with the court when candor is
necessary to avoid assisting fraudulent acts by clients.290 Lawyers, therefore,
are prohibited from complying with client requests for assistance in
committing perjury.291 Notwithstanding lawyers’ loyalty obligations to their
clients, lawyers must reject the pursuit of client interests that undermine
lawyers’ primary duties to the rule of law. In the corporate setting, lawyers
bear the unique responsibility of “bring[ing] a troublingly expansive sense of
the law and our legal system constantly into consideration when corporate
decisions are made.”292 There are limits on the lawyer’s obligation to the
client, and these limits reflect an important aspect of lawyer independence.
Lawyers must avoid identifying too closely with their clients, lest lawyers lose
the ability to identify themselves as members of an autonomous profession
that upholds certain societal interests above and beyond those of the
immediate client.293

Lawyers have two co-existing sets of duties that raise independence
concerns. On the one hand, lawyers must be independent from outside
influences that may induce them to be disloyal to their clients’ interests. On
the other hand, lawyers must independently assess their clients’ actions to
ensure that they do not improperly interfere with the lawyers’ obligations to
the system of justice.294 The first duty is more a matter of client loyalty and,
therefore, reflects a concern for the protection of private interests. The second
duty focuses on lawyer independence from the client, which involves a much
more public-oriented concern for upholding the rule of law. Thus, the private
loyalty purchased by the client is limited by the lawyer’s professional
obligation to public purposes.295

290. See Model Rules, supra note 2, at Rule 3.3(a)(2).
291. See Model Rules, supra note 2, at Rule 3.3(a)(4) & cmt. 6, 11.
292. Terrell, supra note 197, at 1009.
293. See Milton C. Regan, Jr., Law Firms, Competition Penalties, and the Values of
Professionalism, 13 Geo. J. Legal Ethics 1, 36-37 (1999) (noting that the exercise
of independent judgment in the service of justice is one of the values implied in the notion of
lawyer professionalism). When the lawyer has an unqualified commitment to client interests,
there is a “danger of excessive responsiveness” that threatens lawyer independence. See id. at
40. Sociologists have shown that professional distance of lawyers from their corporate clients
tends to promote ethical behavior. See Jeffrey S. Slovak, The Ethics of Corporate Lawyers:
(1988) (discussing the ideal of law as a public profession and the corresponding independence
of lawyers from their clients); see also Archibald Cox, The Conditions of Independence for the
Legal Profession, in The Lawyer’s Professional Independence: Present Threats/Future
Challenges 53, 53 (Robert S. Alexander et al. eds., 1984) [hereinafter Present
Threats/Future Challenges]; Roger C. Cramton, The Lawyer’s Professional Independence:
One scholar separates these dual obligations into "two-party" versus "three-party" models. 296 In the three-party situation, the interests of an outside third party may present a risk of interference with the lawyer's independent judgment on behalf of a client. 297 The lawyer must remain detached from third-party influences that may potentially undermine the lawyer's ultimate loyalty to the client. For example, the Model Rules of Professional Conduct prohibit lawyers from accepting compensation from a third party for representing a client unless the client consents and the third party does not interfere with the lawyer's independent professional judgment. 298 The rationale is to avoid compensation structures that involve a three-way relationship between the lawyer, the client, and a non-client payor. The concern is that the third-party payor's financial interests will draw the lawyer away from the client and interfere with client loyalty. Thus, the three-party model involves the lawyer's obligation to remain loyal to the client. 299

The two-party model, however, concerns the lawyer's obligation to retain a certain level of independence from the client, rather than from outside third parties. 300 Only two parties, the lawyer and the client, are involved. The lawyer's professional duty is to stand apart from the client and provide objective, independent advice. This type of independence is similar to that required of accountants as professionals. 301 The accountants' independence rules are concerned with two-party independence in the sense that they prohibit accountants from getting too close to their own clients. 302 For lawyers, Rule 2.1 addresses this concern: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." 303 At times, lawyers must tell their clients what they do not want to hear, that the clients cannot do what they want to do because it is against the law. The lawyer's independence in this context is unconditional:

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Memories, Aspirations, and Realities, in THE LAWYER'S PROFESSIONAL INDEPENDENCE: AN IDEAL REVISITED 49, 50 (John B. Davidson ed. 1985) [hereinafter AN IDEAL REVISITED].
296. Myers, supra note 29, at 861.
297. Id. The three-party model focuses on the lawyer's ability to remain free from third-party, non-client pressures that may draw the lawyer away from the client. Such pressures may involve financial or personal concerns, such as continued employment, that adversely affect the exercise of the lawyer's independent legal judgment. Id.
298. MODEL RULES, supra note 2, at Rule 1.8(f).
299. Professor Myers focuses more closely on Model Rule 5.4 to illustrate her point about the three-party model. See Myers, supra note 29, at 865. Model Rule 5.4 generally prohibits lawyers from sharing fees and delivering legal services in partnership with nonlawyers. See MODEL RULES, supra note 2, at Rule 5.4 & cmt. ("These limitations are [designed] to protect the lawyer's professional independence of judgment.").
300. See Myers, supra note 29, at 860.
301. See supra notes 228-31 and accompanying text (discussing accountants' ethical obligations to maintain independence in fact and appearance).
302. See Myers, supra note 29, at 860.
303. MODEL RULES, supra note 2, at Rule 2.1.
Professional independence in the two-party sense is absolute. It inheres in the structure of the American legal profession. This obligation is non-waivable by the client and non-negotiable. Indeed, two-party independence is not a duty to the client at all—it is a responsibility of lawyers to the legal profession.\textsuperscript{304}

Thus, while the three-party situation prohibits lawyers from getting too close to outside third parties, two-party independence prohibits lawyers from getting too close to their own clients, and this type of independence is absolute.\textsuperscript{305}

As members of a public profession, lawyers have obligations that stem from the mere fact that they are lawyers, and these obligations are unlike those

\footnotesize{304. Myers, \textit{supra} note 29, at 863. Independence in the three-party sense, according to Professor Myers, is not necessarily absolute. Because the three-party model is actually more a matter of client loyalty, a client may consent to certain arrangements that may affect the lawyer's commitment to the client so long as the client is fully informed and understands the risks. \textit{Id.} at 866-67. In some cases, the client may be in the best position to decide whether it will be harmed by the lawyer's obligations to outside third parties, or whether the client is willing to accept a potential impairment of loyalty in exchange for a savings in cost. \textit{Id.} at 866. Therefore, unlike two-party independence, the three-party situation lends itself to negotiation, consultation, and consent. \textit{Id.} at 867. There is a point, however, when the risk of disloyalty is so great that clients may not waive the conflict. For example, if the lawyer reasonably believes the representation of a client will be adversely affected by the lawyer's responsibilities to a third person, the lawyer may not continue with the representation. \textit{See Model Rules, supra} note 2, at Rule 1.7(b) (1999).

305. Interestingly, Professor Myers suggests that independence of in-house lawyers involves two-party rather than three-party independence concerns. From a two-party perspective, the in-house lawyer's independence may be compromised because the lawyer depends entirely on one client, the corporation, and experiences economic pressure to conform to the client's wishes. \textit{See Myers, supra} note 29, at 862-63. However, three-party independence problems may also arise because the in-house lawyer experiences pressures from individuals who are not exactly the client, namely, corporate constituents such as individual senior managers. These individuals can be characterized as third parties whose interests may not always conform with the best interests of the client. From a three-party perspective, the lawyer must be careful not to allow the interests of these third parties to draw the lawyer away from the lawyer's loyalty to the client. Professor Myers argues that this is not truly a three-party problem because the corporate constituents and the lawyer owe the corporation the same loyalty duties, and therefore, the corporate constituents will not divert the lawyer's loyalty away from the client in the same way that outside third parties might. \textit{Id.} at 863 n.29. It is true that the same client loyalty obligations are owed by the lawyer and the corporate constituents, but that does not mean that the corporate constituents will always fulfill those obligations. Their individual interests may be very different from those of the corporate client, and they may consequently place pressures on the lawyer to conform to their own interests. In this sense, they can be viewed as third-party constituents whose interests may divert the lawyer's attention away from the best interests of the client. Perhaps it is safest to say that the in-house lawyer may be subject to both two-party and three-party independence problems depending on the circumstances.
of any other profession. The legal profession serves as a link between private interests, as embodied in the client, and public interests, as represented by the law. As Talcott Parson has stated, "the lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interest." Viewed in this manner, lawyers have special obligations to the system of law to reject the pursuit of client interests that violate the integrity of the system. These special obligations are not intended to reflect a condescension of sorts but a recognition of the lawyer's role as a public figure in some qualified sense:

If lawyers have special responsibilities to legal justice, that is not because they are divinely elected, or better and holier than the rest of us. It is because of how their role fits into an entire division of social labor. Lawyers represent private parties before public institutions, or advise private parties about the requirements of public norms, or reduce private transactions to a publicly-prescribed form, or ratify that transactions are in compliance with public norms.

Thus, the lawyer acts in the public interest as a representative of the law, and by doing so, the lawyer "mediate[s] among contending interest groups and thus bind[s] society together." This is not to say that lawyers are or should be concerned exclusively with the public good. Lawyers play a vital role as unflagging champions of client interests, and that role should not be minimized. At the same time, however, lawyers stand in a unique position to guide their clients toward legally justifiable ends, or at the very least, to prevent clients from rushing headlong into illegitimate pursuits. Corporate lawyers in particular have the unique ability to represent the legal system to the client and thereby fulfill their public-oriented functions.

306. David Luban, The Noblesse Oblige Tradition in the Practice of Law, 41 VAND. L. REV. 717, 724 (1988). An examination of the content and parameters of this public interest duty are beyond the scope of this Article. At the very least, the duty involves the lawyer’s responsibility to uphold the rule of law when the client desires to do otherwise. See, e.g., MODEL RULES, supra note 2, at Rule 1.16(a) (prohibiting the representation of a client when the representation will result in a violation of the law).

307. TALCOTT PARSONS, A Sociologist Looks at the Legal Profession, in ESSAYS IN SOCIOLOGICAL THEORY 370, 384 (rev. ed. 1954). Parsons maintains that the "interstitial" position of the legal profession in the social structure is one of the most important features of the profession. See id. at 375. Drawing on the concept of the lawyer as an officer of the court, Parsons describes the legal profession as "an entity which ... penetrates the boundary between public and private capacities and responsibilities. Its members act in both capacities and the profession has major anchorages in both." Id. at 378.

308. Luban, supra note 27, at 849-50.

309. Cramton, supra note 295, at 51; Joseph L. Rauh, Jr., The Lawyer’s Obligation to the Public Interest, in AN IDEAL REVISITED, supra note 295, at 9, 15 (noting that lawyers “are licensed to practice law because permitting [them] to do so serves the public interest”).

310. See Robert W. Gordon, Corporate Law Practice as a Public Calling, 49 MD. L. REV.
When corporate lawyers perform their duties responsibly, corporations can function more effectively, and given the central role that corporations play in society, the effective performance of the corporation results in a greater public good. That good cannot be achieved unless lawyers maintain the independence that enables them to balance the private and the public interests of their clients and the law. The lawyer's public-oriented obligations that arise simply by virtue of the lawyer's status as a professional reflect a measure of distance between the client and the lawyer. Without that distance, the lawyer may be an effective representative of the client's interests but is not a correspondingly effective representative of the interests of the system.

From this perspective, the dual service of a lawyer as counsel and director for a corporate client is deeply problematic because it eliminates the critical distance between the lawyer and the client. The independence of the lawyer in this two-party situation is absolute and nonnegotiable. Lawyers have an obligation to avoid identifying too closely with their clients in order to preserve the independence that makes their legal services uniquely valuable. The moment the lawyer joins the board, the lawyer takes on all of the crucial functions of the board and in a sense assumes the role of the client. The merging of identities shifts the balance from lawyer independence toward client loyalty. Although client loyalty and partisanship may be strengthened when the lawyer identifies with the corporate client, the cost of that identification is the diminishment of lawyer objectivity and independence. Because lawyer independence in the absolute two-party sense is an essential value in our system of law, that cost is simply too high a price to pay.

The in-house lawyer in particular stands in a precarious position. The concept of in-house lawyering itself involves a reduction of the distance between the lawyer and the client. The lawyer's economic dependence on a single client has the capacity to affect the lawyer's independent judgment. The close, day-to-day working relationships that inside lawyers develop with corporate constituents and the personal feelings associated with being a valued member of a corporate team produce a deeper and ongoing identification of the lawyer with the client. This is why in-house lawyers in certain European countries are presumed to have less independence and are


311. See Victor Palmieri, Lawyers Are the Key to Corporate Governance, in COMMENTARIES ON CORPORATE STRUCTURE AND GOVERNANCE, supra note 134, at 365, 365-68 (arguing that corporate counsel can play a key role in preventing corporate misconduct and ensuring that corporate governance systems work properly). Professor Gilson has argued that in-house corporate lawyers in particular are best situated to serve as mediators between the private interests of their clients and the public interests of the legal system because inside lawyers have the market power to exercise such professionalism. See Ronald J. Gilson, The Devolution of the Legal Profession: A Demand Side Perspective, 49 MD. L. REV. 869, 913-16 (1990).
classified differently than outside lawyers for purposes of bar membership.\textsuperscript{312} In this country, we do not make such distinctions, but we should at least acknowledge that in-house lawyers start out with less distance between them and their clients. We must recognize that the blurring and thinning of role boundaries can have a profound impact on lawyer independence.\textsuperscript{313} Blurring the lines even more by having in-house lawyers serve on the corporate board demonstrates a disregard for the value of separate lawyer and client identities. If the ideal of lawyer independence in the two-party sense is not preserved, lawyers cannot fulfill their essential functions as guardians of the law. When that happens, the only intellectually honest solution is to move to a regime like that imposed in Europe,\textsuperscript{314} an approach that would most likely meet with considerable opposition in this country. To avoid that result, the best approach is to resist practices such as dual service that significantly blur the distinctions between the lawyer and the client.

VII. RECOMMENDATION AND COUNTERARGUMENTS

On balance, dual service creates risks of harm to the corporation and to the lawyer as a professional that outweigh any benefits that may result from the practice. In light of the adverse effects of having lawyers serve simultaneously on the boards of their corporate clients, this Article recommends that a rule be adopted prohibiting dual service as a matter of professional responsibility. Such a rule should be included as an amendment to the Model Rules of Professional Conduct.\textsuperscript{315} The rule would specifically prohibit a lawyer from serving on the board of directors of a corporation for which the lawyer acts as counsel, whether in an in-house capacity or as an outside lawyer. The commentary to the rule should explain that even though lawyers are prohibited from serving formally as directors for their corporate clients, lawyers should attend all board meetings in their capacity as corporate counsel in order to provide the board with legal advice when appropriate.\textsuperscript{316}

\textsuperscript{312} See Luban, supra note 27, at 853 (describing Germany’s distinction between in-house lawyers and other lawyers); see also supra note 114 (discussing the distinction between in-house and outside lawyers in other European nations).

\textsuperscript{313} In-house lawyers are often warned to “undertake specific measures to ensure [their] independence from extreme business pressures as a prerequisite to maintaining objectivity.” See Brotman & Ogden, supra note 260, at 35. Brotman and Ogden remind in-house lawyers that the loss of objectivity can be subtle and gradual and that in-house lawyers would do well to perform periodic “self-audits,” stepping back from the situation and evaluating what has occurred. Id. at 35-36.

\textsuperscript{314} See supra note 114 (discussing European treatment of in-house lawyering).

\textsuperscript{315} Now is an opportune time for such amendments to the Model Rules. The Ethics 2000 Commission is currently engaged in a comprehensive evaluation of the Model Rules in order to assess their adequacy and to propose needed amendments. See supra note 1.

\textsuperscript{316} Many commentators have recognized the importance of having corporate counsel attend board meetings as a matter of general practice. See, e.g., Lawyers as Directors, supra
The adoption of a rule forbidding dual service is preferable to the current approach taken by the Formal Opinion. Despite taking great pains to warn of the dangers involved in dual service, the Formal Opinion essentially suggests that lawyers and clients assess the situation and tread carefully when they decide to proceed with dual service. From a practical standpoint, the ambiguities inherent in organizational representation, along with the added uncertainties imposed by dual service, are likely to cause the parties to make incorrect assessments of the “ethical and practical pitfalls that lie along the way.” 317 Therefore, a clear rule that provides the parties with guidance in structuring their relationships in advance benefits the parties in the long run. 318 At a more fundamental level, the client consultation and consensus regime contemplated by the Formal Opinion is inappropriate because two-party independence concerns are at stake. The lawyer’s independence in this context is absolute and not open to discussion. The lawyer’s distance from the client is essential, and therefore, it is fitting to have a rule that preserves that distance.

Such a rule will have the added benefit of strengthening the corporate board. As previously discussed, there has been a strong trend toward increasing the independence of the modern board of directors. 319 Proposals for board reform are driven by the recognition that the board plays a central role in corporate governance, and any measures that can be taken to increase its effectiveness are beneficial to society in the long run. Efforts to preserve the appearance of independence of the board are just as important as efforts to preserve independence itself. The proposed rule prohibiting dual service not only helps to protect the independence of lawyers but also helps to preserve the independence of the board. 320 Critics may have a range of

318. When there are uncertainties in representation, lawyers and clients are likely to structure their relationships based on immediate, short-term needs while losing sight of the long-term problems that may be created. See Fischer, supra note 53, at 985. Although parties are often in the best position to determine their own needs, the parties may require information that they are unable to acquire due to financial restraints or a lack of knowledge or time. Id. When the risks are high that parties will incorrectly assess ambiguous situations, the adoption of clear rules to guide behavior is a better choice than utilizing a case-by-case approach. See id.
319. See supra Part IV.B.
320. Board reformists may argue that the rule recommended by this Article does not go far enough to assure the independence of the board. In other words, prohibiting corporate counsel from serving on the board, while a good start, will not solve all of the problems associated with the management-dominated board. The proposed rule, however, is not intended to provide the sole remedy for those problems. It is aimed more specifically at separating the role of the corporate lawyer from the role of the board. The goal is to strengthen the effectiveness of the
objections to the adoption of such a rule. The following discussion addresses several of the counterarguments that might be lodged against the proposed rule.

Opponents will argue that the dual service problem is not a matter for the ethics rules to address; rather, corporate governance laws, securities laws, or stock exchange rules are the proper forum for dealing with the ultimate composition of the corporate board.\textsuperscript{321} Lawyers can simply wait for substantive rules to regulate this matter and provide lawyers with appropriate guidance. In other words, the issue of who should or should not serve as a director ought to be left up to other areas of substantive law rather than professional responsibility rules.\textsuperscript{322}

Part of the problem with depending on other areas of the law to define what lawyers can and cannot do is that it leads to a withering of interest and concern for ethics.\textsuperscript{323} By turning the focus increasingly to other substantive rules, lawyers assume that if other laws do not forbid a particular action, it must be appropriate. The result is a growing dependence on other substantive laws to define the limits of lawyer behavior without giving any serious consideration to the ethical ramifications.

The proper approach is to have ethics rules lead the way rather than waiting for other substantive laws to instruct lawyers on how to conduct themselves. As professionals, lawyers have the power of self-regulation.\textsuperscript{324} In comparison to all other professions, the legal profession is the most free of external governmental control.\textsuperscript{325} Given the enormous amount of independence that is afforded to lawyers in this context, they have a special responsibility to the public and to the system of law to regulate their behavior in the public interest.\textsuperscript{326} “Lawyers’ codes are rooted in a set of core values, lawyer’s legal services and the effectiveness of the board. Although the proposed rule alone cannot solve the question of how to maximize the modern corporate board’s efficacy and productivity, the rule is a step in the right direction.

\textsuperscript{321} See Albert, \textit{supra} note 28, at 472; Mundheim, \textit{supra} note 13, at 1510.

\textsuperscript{322} There has already been movement in corporate governance laws, securities laws, and stock exchange rules toward establishing stricter parameters on board composition. For example, rules in these substantive areas now define which directors can be considered “independent” for purposes of board committee service. \textit{See supra} notes 139-47 and accompanying text.

\textsuperscript{323} See Williams, \textit{supra} note 202, at 8. Williams noted that increasingly in today’s society, “the notion that the law sets the floor rather than the ceiling receives little currency.” \textit{Id.}

\textsuperscript{324} \textit{See Model Rules}, \textit{supra} note 2, at Preamble ¶¶ 9-10 (discussing the self-governing nature of the legal profession).

\textsuperscript{325} \textit{See} Robert B. McKay, \textit{The Future of Professional Independence for Lawyers, in Present Threats/Future Challenges}, \textit{supra} note 295, at 39, 40-41 (“No other profession has traditionally been allowed such independence from external regulation.”).

\textsuperscript{326} \textit{See Model Rules}, \textit{supra} note 2, at Preamble ¶ 11 (discussing the special responsibilities of the legal profession “to assure that its regulations are conceived in the public
which comprise the foundation of the profession’s unique role in society. These core values include . . . independence of professional judgment.”

The detrimental effect that dual service has on lawyer independence calls for the adoption of an ethics rule that prohibits the practice as a matter of professional responsibility. For lawyers to sit on their hands and claim that other substantive laws should be the first to regulate this area is an abdication of lawyers’ responsibility to regulate themselves in the interests of their clients and the public.

The ethics rules should reflect the legal profession’s concern for self-discipline rather than self-interest. Unfortunately, history indicates that some of the rules came about as a result of lawyer groups lobbying for language that served their own interests. The historical treatment of the dual service issue reflected a self-serving bias on the part of lawyers who wished to strengthen their connection with corporate clients. The Formal Opinion’s recent conclusion in favor of dual service appears to continue in this same vein because it serves ultimately to solidify the financial relationship between lawyers and the corporations they represent. As previously discussed, the personal and financial benefits that flow directly to lawyers as a result of dual service can be substantial. A more appropriate resolution would be to implement a rule that demonstrates lawyers can discipline themselves and are prepared to subordinate their interests to the interests of the public. The legal profession enjoys the privilege of self-regulation, and it must exercise that privilege judiciously or risk losing it altogether:

interest and not in furtherance of parochial or self-interested concerns of the bar”); Robert B. McKay, Commentary, in AN IDEAL REVISITED, supra note 295, at 33, 35 (“The obligation is to keep our own house in order. We must make sure that we do not regulate in behalf of ourselves and the organizations we represent, but in behalf of the true public interest . . . ”).


328. See Riger, supra note 66, at 731-42 (describing the fierce lobbying process that preceded the adoption of Rule 1.13); Theodore Schneyer, Professionalism as Politics: The Making of a Modern Legal Ethics Code, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES, supra note 94, at 95, 95-143 (discussing the influence of various bar groups on the making of the Model Rules); see also Stephen Gillers, What We Talked About When We Talked About Ethics: A Critical View of the Model Rules, 46 OHIO ST. L.J. 243 (1985) (arguing that various provisions in the Model Rules demonstrate lawyers’ use of self-regulation to protect themselves rather than the public interest); Wolfram, supra note 45, at 308 n.45 (noting that ethics codes have often placed a “spin” on the formulation of a rule to favor the interests of lawyers).

329. See Riger, supra note 66, at 743-46. The initial draft of the Model Rules included a rule on dual service under the heading of “Prohibited Transactions” and permitted the practice under restricted conditions. See id. at 744. The rule was revised in various iterations of the Model Rules, and by the time the final draft was adopted, the rule was completely eliminated. Id. The apparent rationale for the elimination was that it would enhance “the firm’s ability to retain a client’s legal business if the lawyer sits on the board.” Id. at 745.

330. See supra Part V.B.2.
In the final analysis, professionalism and independence are synonymous. If the American bar does not do its duty to the public good, the administration of justice, and the aspirations of the profession, then its trust will be taken away and public regulation will soon be making decisions for the profession which the profession should be making for itself.331

Thus, the ethics code can and should play an important role in the context of lawyers’ relationships with their corporate clients.332 Because the legal profession at times has given the public reason to doubt its integrity of purpose when adopting certain ethics rules in the past, the legal profession today should be vigilant to regulate itself in a manner worthy of public trust.

Proponents of dual service may argue that the adoption of an ethics rule prohibiting the practice is unnecessary, and perhaps insulting, because lawyers themselves are fully capable of deciding if and when their independence is being compromised by serving on the board. This mentality might be reflected in the statement, “I can keep this straight, I’m a good lawyer and person, and ethical rules are only for unethical people...”333

Although it may be true that an individual lawyer who engages in dual service can rise above conflicts and resist certain pressures to compromise the lawyer’s independence, it is the preservation of the appearance of independence, along with independence itself, that is at issue.334 The point is


332. To the extent that corporate lawyers do recognize the problem with dual service and wish to avoid it, but are reluctant to offend clients by declining clients’ invitations to serve on the board, an ethics rule prohibiting the practice is beneficial. See Murray L. Schwartz, The Professionalism and Accountability of Lawyers, 66 CAL. L. REV. 669, 682 (1978) (noting that the ethics rules serve a useful reinforcement function because they enable “lawyers who do not [wish] to assist clients in questionable transactions to decline on the grounds that the [rules do] not permit them to go forward, and thus to avoid the unpleasantness of refusing to assist on a basis that is seen by the client as a personal condemnation”).

333. David Kairys, Some Concerns about Context and Concentration of Power, 72 TEMP. L. REV. 1019, 1020 (1999). Scholars who have analyzed the dual service issue from psychological and sociological perspectives have cautioned lawyers against placing too much confidence in their ability to remain cognitively independent. See, e.g., Langevoort, supra note 209, at 673-74. Because the pressures on the lawyer-director are “strong, subtle and largely unconscious[,] a belief that they can easily be resisted is more likely to reflect hubris and self-serving inference than candid self-reflection.” Id. at 674. Lawyers’ tendency to view themselves as “exceptional judges of character, ... strong in the face of pressure” can blind them at times to the cognitive and social pressures that can compromise judgment. Id. at 676. Professor Langevoort suggests that perhaps the remedy for this problem can be found in a recognition of lawyers’ own frailty: “In this sense, the journey toward cognitive independence for a lawyer best begins with her—and her profession’s—own humility.” Id.

334. See BOWEN, supra note 126, at 60; Williams, supra note 126, at 18 (arguing that dual service raises the issue of whether corporate counsel’s ability to contribute to both the reality
to avoid placing the lawyer or the board in awkward situations that may create the appearance of impropriety or cast a shadow on board actions. The legal profession as a whole must be sensitive to "the potential erosion of confidence in the profession that may occur if its members are seen in situations that carry the potential for improper conduct even if in particular cases there is no actual misconduct."335 The privilege of self-regulation requires lawyers to act so that the public will perceive them as deserving of the wide latitude that they are given in governing their behavior. A rule prohibiting dual service would not denigrate the individual lawyer's strength of character or professional integrity, but instead would strengthen the appearance of independence and the image of the profession as a whole.

Another counterargument that might be raised against the proposed rule is that corporate lawyers, particularly in-house lawyers, face the same pressures to conform to the wishes of their clients, whether or not the lawyers serve on the board. Adopting a rule that prohibits dual service will not eliminate the threats to professional independence that exist simply because lawyers may have a tendency to align themselves with the senior managers who retain their services.

While the lawyer for the corporation may be subject to similar pressures by the client without regard to the lawyer's simultaneous service as a director, the stakes are very different once the lawyer joins the board. As a voting member of the board, the lawyer-director is vested with the final decision-making power of the client. The distance between the lawyer and the client is reduced significantly as the lawyer's identity merges with that of the client. Compromises of the lawyer's professional independence at this point have detrimental effects on the interests of the client that go beyond the loss of objective, detached legal advice. Once the lawyer assumes the role of a voting director, the lawyer is in a position to make decisions for the client based on the lawyer's own advice. The hazards associated with that scenario are best remedied by a rule that prohibits lawyers from being in that position in the first place. Although lawyers for the corporation may face threats to their professional independence regardless of their board service, it is folly to exacerbate the problems by allowing lawyers to act as directors.336

Critics may argue that banning lawyers from serving on the boards of their corporate clients would ultimately be a disservice to corporations and society because lawyers have many talents and skills that they can offer to corporate boards. One commentator has argued that many lawyers are not only great lawyers, but also great business minds, "and to deprive the business

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336. See Model Rules, supra note 2, at Rule 1.13 cmt. 5.
community of the opportunity to use those people's services in both roles... would be a terrible mistake.\textsuperscript{337}

The response to that argument is that lawyers may freely sit on the boards of corporations and exercise their business talents and skills for the benefit of such boards, so long as it is not the board of the lawyer's own client corporation. With their analytical nature and strong organizational skills, lawyers have much to contribute to the corporate community. Lawyers' training and experience give them a unique ability to benefit corporations in need of strong board leadership. Moreover, lawyers may be motivated to serve on boards simply because lawyers derive immense personal satisfaction from engaging in business activities and exercising skills that take them away from the everyday practice of law. Prohibiting lawyers from serving on the boards of their corporate clients does not prevent lawyers from serving on the boards of other corporations and thereby continuing to gain the personal satisfaction that lawyers seek from such service. Non-client corporations will continue to be the beneficiaries of these lawyers' contributions. The only board service that is prohibited is that involving the lawyer's own client.\textsuperscript{338}

For the reasons discussed previously, the merging of the roles of the lawyer and the client creates harms that cannot be justified by the perceived benefits of dual service.

Finally, critics may argue that the problems associated with dual service should simply be characterized as business risks, and corporations should be able to evaluate the risks for themselves and make their own judgments.\textsuperscript{339} Corporate America, as sophisticated as it is, can decide for itself how it wishes to utilize its attorneys and directors, even if conflicts are inevitable.

It is the contention of this Article that dual service involves more than what can be classified merely as business risks; dual service raises fundamental issues regarding the independence of lawyers as members of a public profession. The issue is not client autonomy or even client loyalty.

\textsuperscript{337} Mundheim, supra note 13, at 1516 (remarks of Speaker).

\textsuperscript{338} See Thurston, supra note 18, at 829-30. Some have suggested that a rule prohibiting dual service could conceivably stop lawyers from serving on boards completely because a lawyer will be unwilling to join a board if doing so will prevent the lawyer or the lawyer's firm from doing legal work for the corporation. See Mundheim, supra note 13, at 1510. The implicit assumption in this argument is that lawyers join corporate boards precisely because lawyers seek the fees these corporate clients will generate. This underscores the importance of adopting the proposed rule banning dual service. To the extent that the implicit assumption is untrue, i.e., that lawyers enjoy board service for reasons other than fee-related concerns, it seems entirely likely that lawyers will continue to serve on boards for non-client corporations, despite the adoption of the proposed rule. Such service allows lawyers to stretch their business muscles, so to speak, to meet new people, to engage in intellectual activities that give them a respite from the normal practice of law, and to receive the prestige and substantial director fees that flow from their directorships. Therefore, the fear that the proposed rule will stop lawyers from serving on corporate boards altogether seems exaggerated.

\textsuperscript{339} See Albert, supra note 28, at 436.
The concerns that are at stake—lawyer independence as an absolute value, the privilege of self-regulation, the public-oriented obligation of the legal profession as a steward of the system—are not matters that corporations are entitled to analyze as business risks. These are matters that are integral to the preservation of the legal profession itself and must be regarded as public values. The dual service question should not be viewed as one that can be resolved simply by disclosure and consent. It is a question that should be resolved by the legal profession as a self-governing body that acts in the public interest. Under that framework, the adoption of the rule recommended by this Article would demonstrate the legal profession's commitment to independence and self-discipline.

VIII. Conclusion

Dual service raises independence concerns both from a professional responsibility standpoint for lawyers and from a corporate governance standpoint for directors. In both contexts, the value of independence is clear: the corporate board as the highest authority in the organization must have a measure of independence in order to fulfill effectively its governance obligations; the corporate lawyer must also maintain a level of independence that allows the lawyer not only to render detached, objective advice, but also to act as an effective representative of the system of law. When the lawyer takes on the dual identities of corporate counsel and corporate director, the gap between the lawyer and the client closes. Something must give when that type of gap-closing occurs—it is likely to be the independence of the lawyer-director.

This Article recommends that dual service should be prohibited. The representation of a corporation as a nonhuman entity is already a complex undertaking for lawyers, particularly for those who are employed in-house. It seems altogether imprudent to complicate further the representation by allowing lawyers to engage in dual service. Lawyers who attempt to fill both roles simultaneously risk a loss of professional independence that can impair their ability to perform either role well. If independence obligations are to be taken seriously, there must be a clear differentiation in role between lawyers and their clients. The rule recommended by this Article preserves that role differentiation and thereby strengthens lawyers' abilities to serve their clients most effectively.