# The Ethical Landmines of Dual Service: *United States v. Holmes*

Sabrina Elliott*

## Introduction

The legal profession has long debated whether lawyers should be allowed to engage in dual service, or represent corporations and also serve on their boards of directors.[1] In ABA Formal Ethics Opinion 98-410 (Opinion 410) issued in 1998, the Formal Committee on Ethics and Professional Responsibility held that there is no prohibition against lawyers serving on the board of directors of a corporation that they, or their firm, represents.[2] Indeed, the *ABA Model Rules of Professional Conduct* ("*Model Rules*") allow for this dual service.[3] While Opinion 410 does include a cautionary comment that a lawyer must evaluate whether the responsibilities of the two roles might conflict, neither the opinion nor the *Model Rules* provide clear guidance for lawyers about how to handle such conflicts. While there are benefits to this dual service, including the ability of the attorney to offer more comprehensive legal advice, this practice still warrants concern because of its vast ethical implications. Nonetheless, it is still a widespread practice.[4] Robert Swaine of New York's Cravath, Swaine & Moore once notably stated that while "most of us would be greatly relieved if a canon of ethics were adopted forbidding a lawyer in substance to become his own client through

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* J.D., Georgetown University Law Center (expected May 2023); B.A. University of California, Los Angeles (June 2020). 

1. *See, e.g.*, Micalyn S. Harris & Karen L. Valihura, *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service*, 53 A.B.A. Bus. Law. 480 (February 1998).

2. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 98-410 (1998).

3. *See* Model Rules of Prof'l Conduct R. 1.7 cmt. 35 (2018) [hereinafter Model Rules]:

> A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

4. *See* Craig C. Albert, *The Lawyer-Director: An Oxymoron*?, 9 Geo. J. Legal Ethics 413, 415 (1996) ("Outside counsel serve as directors of more than one in six public companies in the United States.").

acting as a director or officer of a client . . . the practice is too widespread to permit any such expectation."[5] And yet, as former Supreme Court Justice Potter Stewart warned, "there are significant ethical issues implicated by such dual service's intertwining 'the function of the lawyer in giving professional counsel' and 'the function of corporate management . . . in the profit-making interests of its stockholders.'"[6] While the ABA has yet to, and likely will not, ban the practice, it has consistently skirted the issue of what to do when inevitable conflicts arise as a consequence of this dual service.[7] Some of these conflicts include privilege and confidentiality challenges, which can lead to potential conflicting duties owed to the corporation.

The debate surrounding dual service has recently been reinvigorated given a notable case in the media: *United States v. Holmes*.[8] Elizabeth Holmes founded and served as chairman of the board of directors of Theranos, a now defunct health technology company.[9] She was convicted of wire fraud and conspiracy, and her trial ended in January 2020 after nearly four months of testimony.[10] David Boies, prominent litigator, and chairman of his own law firm, both served on the board of Theranos and as the company's attorney.[11] At trial, Boies was called to testify, and Holmes argued that all communication between Boies and herself was privileged under the doctrine of attorney-client privilege.[12] This controversy reminded those in the legal profession of the vast attorney-client privilege issues that arise when a lawyer both represents a company, either private or public, and serves on its board of directors.

This Note will argue that the ABA needs to provide updated *practical* guidance on how lawyers should ethically navigate the attorney-client privilege and confidentiality challenges that emerge when serving as both legal counsel and as a

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5. Robert T. Swaine, *Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 170 (1949).

6. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382 (2021) (citing Potter Stewart, *Professional Ethics for the Business Lawyer: The Morals of the Market Place*, 31 BUS. LAW. 463, 464 (1975)).

7. *See* Albert, *supra* note 4, at 425 ("When the American Bar Association (ABA) was reformulating the rules governing lawyer conduct in the late 1970s and early 1980s, 62 members of the bar debated whether the new rules should contain a provision prohibiting the dual role as an impermissible conflict of interest. Not surprisingly, the successive drafts of the *Model Rules of Professional Conduct* (*Model Rules*) paint a telling picture of pressure within the bar to bury the issue"); *see also* Martin Riger, *The Model Rules and Corporate Practice – New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 743 (1985).

8. United States v. Elizabeth A. Holmes, 18-CR-00258-EJD (N.D. Cal. 2022).

9. Theranos "was a private health care and life sciences company with the stated mission to revolutionize medical laboratory testing through allegedly innovative methods for drawing blood, testing blood, and interpreting the resulting patient data." Holmes was charged with two counts of conspiracy to commit wire fraud and nine counts of wire fraud. It is alleged that she "engaged in a multi-million-dollar scheme to defraud investors, and a separate scheme to defraud doctors and patients." *United States v. Elizabeth Holmes, et al*., DEPT. OF JUSTICE, https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al [https://perma.cc/ATJ7-LDXU].

10. *Id*.

11. Steven Davidoff Solomon, *David Boies's Dual Roles at Theranos Set Up Conflict*, N.Y. TIMES (Feb. 2, 2016), https://www.nytimes.com/2016/02/03/business/dealbook/david-boiess-dual-roles-at-theranos-set-up-conflict.html?ref=dealbook&r=0 [https://perma.cc/LZ7C-UBRK].

12. Order Granting Pl. ['s] Mot. to Determine that Def. Lacks Individual Privilege Interest in Disputed Doc. 1, ECF No. 812.

member of the board of directors for a corporation. Despite extensive scholarship and debate within the legal profession about the subject, the ABA's guidelines for handling such conflicts have remained unchanged for more than two decades. Given the changes in the legal profession, especially the increase in lawyers serving on boards[13] and the lack of distinction between business and legal advice,[14] the ABA should adopt reform that provides greater clarity and uniformity for lawyers. Part I of this Note discusses the background of dual service, including benefits and drawbacks of the practice. Part II explores the attorney-client privilege and duty of confidentiality issues that arise out of dual service in the case of potential illegal activity by corporate officers, as demonstrated in *United States v. Holmes*.[15] Finally, Part III considers Opinion 410 and why it is insufficient to guide lawyers who serve on boards, then considers other State Bar Opinions, including the D.C. Bar Ethics Opinion 382, which, as a local ethics opinion could provide a model for the ABA to adopt,[16] and finally, offers a call for reform.

## I. BENEFITS AND DRAWBACKS OF DUAL SERVICE

### A. THE ROLE OF A CORPORATION'S LAWYER VERSUS ITS BOARD OF DIRECTORS

To understand the nuances of dual service, the role of both the corporate attorney and the board of directors needs to be addressed. According to Model Rule 1.13, a lawyer for a corporation represents only the organization itself.[17] Since a corporation is a distinct legal entity, a lawyer who represents a corporation "owes his allegiance solely to that [legal] entity" and not to the corporation's officers,

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13. *See*, *e.g.*, Lubomir P. Litov, Simone M. Sepe, & Charles K. Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, 102 GEO. L.J. 413, 415 (2014) ("The result has been an almost doubling in the percentage of public companies with lawyer-directors from 2000 to 2009. The percentage of public companies with lawyer-directors was 24.5% in 2000, up to 47.5% in 2005, and 43.9% in 2009.").

14. *See*, *e.g.*, Wilton S. Sogg & Michael L. Solomon, *The Changing Role of the Attorney with Respect to the Corporation*, 35 CLEV. ST. L. REV. 147, 156 (1987); Albert, *supra* note 4, at 446 (stating "since legal and business advice may be indistinguishable in these settings"); Bethany Smith, *Sitting on vs. Sitting in on Your Client's Board of Directors*, 15 GEO. J. LEGAL ETHICS 597, 597 (2002) ("For instance, when a lawyer-director gives advice to the board, is he giving legal advice or business advice? How do you tell? These questions do not always have clear-cut answers, yet the distinction is important.").

15. While this Note will primarily focus on confidentiality and attorney-client privilege issues for lawyers-directors in the case of illegal activity of corporate officers, there are other scenarios in which this is a problem, several of which include a change in corporate control which can involve both mergers and hostile takeovers. *See* Kas v. Financial Gen. Bankshares, 796 F.2d 508, 510–11 (D.C. Cir. 1986) (court recognized a duty to disclose, in proxy materials for cash-out merger, a lawyer's conflicting roles as both counsel and director of the corporation). *See also* Stephen M. Zaloom, *Legal Status of the Lawyer-Director: Avoiding Ethical Misconduct,* 8 U. MIAMI BUS. L. REV. 229, 236 (2000) ("Certainly, all discussions with an attorney-director present should not benefit from privilege. The dilemma becomes much more problematic in complex business issues where legal issues are inherently implicated.").

16. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382 (2021) ("The purpose of this Opinion is to create a roadmap for practitioners to navigate the ethical and practical issues of such dual service.").

17. MODEL RULES R. 1.13 ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.").

directors, or shareholders.[18] The attorney's duty is to the corporation itself.[19] In some cases, this results in a complete lack of disclosure to shareholders about potential violations of fiduciary duty, or even legal violations.[20] Thus, while the corporate attorney communicates with corporate officers and the board of directors representing an organization, these individuals are not the client in the eyes of the law. This is an especially crucial distinction for the doctrine of attorney-client privilege.[21] The attorney for a corporation only retains attorney-client privilege with the corporation as an entity, not the individual corporate officers or the board of directors.[22] The corporation itself owns the privilege and retains the right to waive it.[23]

The board of directors of a corporation has many responsibilities and ultimately retains the authority to manage the corporation.[24] Among other roles, the board "acts as monitoring agents, decision-making authorities, and participants in the strategic planning process."[25] Because of this vast authority, directors are subject to the fiduciary duties of care and loyalty, which include "the subsidiary duties of good faith, oversight, and disclosure."[26] As such, the role of a

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18. Miriam P. Hechler, *The Role of the Corporate Attorney Within the Takeover Context: Loyalties to Whom?,* 21 DEL. J. CORP. L. 943, 954-55 (1996); *see also* George D. Reycraft, *Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel*, 39 HASTINGS L.J. 605, 609–10 (1988); Egan v. McNamara, 467 A.2d 733, 739 (D.C. App. 1983) (stating that the obligation of corporate attorney in drawing up a buy-sell agreement was to the corporation regardless of the impact on individual shareholders); Wayland v. Shore Lobster & Shrimp Co., 537 F. Supp. 1220, 1224 (S.D.N.Y. 1982) (finding no conflict of interest for general counsel as he represented the corporation, not individual shareholders); Bobbitt v. Victorian House, Inc., 545 F. Supp. 1124, 1126 (N.D. Il. 1982) (stating that representing a corporation does not mean also acting as attorney to individual directors or shareholders); Meehan v. Hopps, 144 Cal. App. 2d 284, 290 (1956) (finding the attorney for a corporation does not represent corporate officers personally).

19. *See* Hechler, *supra* note 18.

20. *Id*.

> It is clear that if the corporation's management intends to engage in illegal conduct, the attorney may appeal to the board, and if that fails, the attorney may resign from his position. However, if the board of directors wishes to engage in action that violates its fiduciary duties to shareholders, the attorney is at a loss to determine a proper course of action. Rule 1.13(b) allows him to appeal to the board, but Rule 1.13(c) seemingly does not give him enough latitude to resign, and Rule 1.6 may keep him from revealing the intended harm to shareholders.

21. ABA Formal Op. 98-410 at n. 10:

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

22. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 36 (12th ed. 2020).

23. *In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333, 335 (4th Cir. 2005).

24. *See* Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 208 (2001).

25. *Id*. at 213.

26. *See* Peter A. Atkins, Marc S. Gerber & Edward B. Micheletti, *Directors' Fiduciary Duties: Back to Delaware Basics,* HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Mar. 10, 2020), https://corpgov.law.harvard.edu/2020/03/10/directors-fiduciary-duties-back-to-delaware-law-basics/ [https://perma.cc/ME75-9D2P].

corporation's attorney and members on its board of directors differ in a crucial way: a "director owes a duty of loyalty to shareholders and other corporate constituents, while a lawyer owes a duty of loyalty only to the corporation."[27] A Report prepared by the ABA Section of Litigation's Task Force noted the "inherent conflict that often exists between a corporation's attorney and a corporation's board of directors."[28] A director is required to "'exercise an unbiased judgment in the management of a corporation's affairs . . . in the honest belief that the action taken is in the corporation's best interests,' while an attorney may make more 'conservative assessment[s] of the legal risks involved and thus [will] oppose corporate action that is otherwise perfectly warranted for legitimate business reasons.'"[29] While these duties might not always diverge, there are a few situations that commonly cause these two roles to be at odds, one of which will be discussed in Part II of this note.

### B. BENEFITS OF DUAL SERVICE

Proponents of dual service offer many reasons why the practice should not only be permissible but also encouraged as it is beneficial to both the corporation as a client and the attorney.[30] One dominant benefit to both parties is that lawyers serving on a board of directors gain insight "into the 'ins-and-outs' of the client's business, enabling the attorney-director and his or her law firm to render more meaningful legal advice."[31] Further, attorneys will naturally point out legal issues in a proposed course of action before they even become legal issues, which can help directors make better strategic decisions.[32] Lawyers also bring a specific set of analytical skills, like their ability to inquire and critique proposed plans, that many corporate directors find useful in guiding the board.[33] Finally, dual service often results from a close relationship between a corporation and its lawyer; thus,

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27. Smith, *supra* note 14, at 601 (citing Zaloom, *supra* note 15, at 232).

28. Patrick W. Straub, *ABA Task Force Misses the Mark: Attorneys Should Not Be Discouraged from Serving on Their Corporate Clients' Board of Directors*, 25 DEL. J. CORP. L. 261, 264 (2000).

29. *Id.* at 264 (citing Peter B. Nagel, *Ethical Dilemmas of the Volunteer Lawyer/Nonprofit Director*, 23 THE COLORADO LAWYER 2735, 2736 (1994)).

30. *See* Litov, *supra* note 13 ("A lawyer-director increases firm value by 9.5%, and when the lawyer-director is also a company executive, the firm's value increases by 10.2%.").

31. Albert, *supra* note 4, at 416; *see also* Sogg & Solomon, *supra* note 14, at 153 (providing an overview of the dilemmas that face attorney-directors).

32. However, the attorney-director needs to be careful when offering legal, as opposed to business, advice in a board meeting, as the notes of such meetings are often discoverable in litigation and not covered under attorney-client privilege. *See* D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382. The distinction between "legal advice" and "business advice" will be discussed in Part II of this note.

33. Albert, *supra* note 4, at 417 (citing Carolyn T. Thurston, *Corporate Counsel on the Board of Directors*, 10 CUMB. L. REV. 791, 795 (1980)) (arguing that attorneys should serve their clients solely as counsel due to the ethical dilemmas associated with the dual role of lawyer-director).

this close relationship is both maintained and strengthened when a lawyer assumes a role on the board.[34]

### C. DRAWBACKS OF DUAL SERVICE

Of course, there are strong opponents to dual service, who argue that a *per se* rule banning such practice is necessary to protect the independent judgment of corporate attorneys.[35] First, dual service might result in a threat to the independence of the individual as both an attorney and a director.[36] Recent developments in corporate governance emphasize the importance of independent directors on a board, especially to limit conflicts of interest and maintain strong oversight over the actions of corporate officers.[37] An attorney-director would not be considered an independent director.[38]

Further, since conflicts of interest are inevitable in dual service, the corporation could lose their most trusted legal advisor at critical points if the "lawyer-director is disqualified from representing the corporation in a given matter or has to recuse himself from participating in debate in the boardroom due to conflict of interest."[39] And, finally, perhaps the strongest argument against dual service is the threat to attorney-client privilege and confidentiality. Opinion 410 set out a general rule for attorney-directors to follow: "*legal* advice is protected by the attorney-client privilege and Rule 1.6, but *business-related advice* is not always protected and is potentially discoverable in litigation."[40] However, the distinction between legal advice and business advice is rarely clear-cut.[41] Many courts have held that, because attorney-directors owe fiduciary duties to the shareholders,

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34. Straub, *supra* note 28, at 263 (citing Robert P. Cummins & Megyn M. Kelly, *The Conflicting Roles of Lawyer as Director*, 23 LITIG. 48, 48 (1996)) ("The dual role apparently provides substantial benefits because it: (1) strengthen[s] the firm's ties to the client; (2) keep[s] the firm better informed of the client's business affairs; (3) improve[s] [the attorney's] credibility with the client; (4) result[s] in prestige for [the attorney] and his firm; and (5) assists [the attorney] in developing corporate contacts outside [of the corporation for which he or she serves as a director], which will likely generate business for his firm.").

35. *See, e.g.*, Albert, *supra* note 4, at 421.

36. *See, e.g.*, Kim, *supra* note 24, at 227–29 ("The detrimental effects on the independence of lawyer-directors prevent them from effectively fulfilling their decision-making role as board members.").

37. *See id.*

38. *Id.* at 214.

> 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.

39. Smith, *supra* note 14, at 607.

40. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382; *see, e.g.*, ABA Formal Ethics Opinion 98-410 at 5–6.

41. *See* Straub, *supra* note 28, at 267 ("this vague, often theoretical distinction, parties to litigation have frequently seen documents and conversations unexpectedly admitted into evidence.").

there "would be no privilege as to certain communications between the lawyer's firm and the corporation."[42] Further, as a director, the attorney-director might be required to disclose certain material to third parties, which may inadvertently waive the privilege.[43] The issue of confidentiality and attorney-client privilege will be discussed further in Part II.

## II. DUAL SERVICE

### A. THE DUTY OF CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE

The lawyer's duty of confidentiality and the right to attorney-client privilege are two important pillars of the justice system, even for corporate clients. While all privileged information is inherently confidential, not all confidential information is privileged.[44] Only communications between a lawyer and a client are privileged, while a lawyer's confidentiality applies more generally to information relating to the representation of a client.[45]

The duty of confidentiality is outlined in Model Rule 1.6(a).[46] There are several exceptions to the duty of confidentiality, several of which are outlined in Rules 1.6(b),[47] 1.13(c),[48] and 3.3(c).[49] Some of these exceptions include self-defense and legal claims, waiver, or consent (which can be either express or implied), and exceptions for crimes and frauds and to prevent death and bodily harm.[50] In the case of a corporate client, Rule 1.13(c) establishes when an attorney can break confidentiality.[51] The rule related to exceptions for corporate clients will be discussed in greater detail in Section B.

The right to attorney-client privilege is an important common law evidentiary privilege. The common law elements of attorney-client privilege are as follows: "(1) There must be a communication (2) between counsel and client (3) in confidence (4) for the purpose of seeking, obtaining or providing legal assistance to

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42. C. Evan Stewart, *Ethical Issue for Business Lawyers: Lawyers-Directors: Just a Bad Idea*, 13 N.Y. BUS. L. J. 1, 31 (2009). *See id*. at 32 n. 5 ("AOC Ltd. Partnership v. Horsham Corp., 1992 Del. Ch. LEXIS (Del. Ch. 1992); Deutsch v. Logan, 580 A.2d 100 (Del. Ch.1990); Securities and Exchange Commission v. Gulf & Western Ind., Inc., 518 F. Supp. 675 (D.D.C. 1981); Valente v. PepsiCo, Inc., 68 F.R.D. 361 (D. Del. 1975); U. S. v. Vehicular Parking Ltd., 52 F. Supp. 749 (D. Del. 1949). Some of the issues inherent in this area are highlighted by the ongoing criminal and civil litigations involving AIG. In one manifestation, two former senior AIG officers and directors under indictment (who also have civil disputes with their former company) were allowed by the Appellate Division, First Department, to inspect privileged legal memoranda that were prepared for AIG during their tenure on the board of directors.").

43. Straub, *supra* note 28, at 268 ("it is clear that every time an attorney concurrently serves as a director of a corporate client, the attorney-client privilege is put in jeopardy").

44. Gillers, *supra* note 22, at 32.

45. *Id*. at 31–32.

46. *Id*. at 32.

47. MODEL RULES R. 1.6(b).

48. MODEL RULES R. 1.13(c).

49. MODEL RULES R. 3.3(c).

50. Gillers, *supra* note 22, at 43–48.

51. MODEL RULES R. 1.13(c).

the client."[52] In the context of a corporation as a client, the privilege belongs to the company and "protects communications between the company's constituents and its inside and outside counsel."[53] Although there are debates surrounding the justifications of privilege in the context of corporate clients,[54] it remains an important right in our legal system. In *Upjohn Co. v. United States*, the Supreme Court declared that the purpose of the privilege is "to encourage full and frank communication between attorneys and their clients, and thereby promote broader public interests in the observance of law and administration of justice."[55] In the corporate context specifically, attorney-client privilege is important as it incentivizes clients to fully disclose all actions to their attorney, thereby improving the sound legal advice that corporate attorneys can offer their clients.

There are few exceptions to attorney-client privilege. Privilege can be waived through consent or waiver, either explicitly or implicitly.[56] Waiver of privilege can include a client's disclosure of all or part of a communication to a third party.[57] This is an especially important consideration in the context of a corporation, as the corporation owns the privilege and the right to waive it. Thus, any corporate constituent, including a director, can waive privilege by sharing information with a third party. Another exception to privilege is the crime-fraud exception: "Communications between a client and counsel are not privileged when the client has consulted the lawyer in order to further a crime or fraud, regardless of whether the crime or fraud is accomplished and even though the lawyer is unaware of the client's purpose (as we must presume) and has done nothing to advance it."[58] Applying this exception can be difficult. Courts have generally applied a lower burden of proof to invoke the crime-fraud exception and ultimately, it is the Judge's determination whether the crime-fraud exception to the privilege is present.[59]

As mentioned in Part I.C. of this Note, dual service poses a serious risk to confidentiality and attorney-client privilege. While the ABA has previously instructed attorney-directors to distinguish between legal advice and business advice, it is often "unclear whether communications with the lawyer-director were made while he was acting in his capacity as a lawyer."[60] Only the communications with the attorney-director in their official capacity as a lawyer are

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52. Edward B. Micheletti, Sonia K. Nijjar, & Patrick G. Rideout, *Just Between You and* Us, SKADDEN, ARPS, SLATE, MEAGHER, & FLOM, (Apr. 13, 2021), https://www.skadden.com/insights/publications/2021/04/the-informed-board/just-between-you-and-us [https://perma.cc/7GSB-RVCA].

53. Gillers, *supra* note 22, at 37.

54. *See, e.g.*, Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157, 158, 162 (1993).

55. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

56. Gillers, *supra* note 22, at 44.

57. *Id.*

58. *Id.* at 45.

59. *Id.* at 47.

60. *See* Albert, *supra* note 4, at 446.

privileged. Conversely, because directors owe fiduciary duties to shareholders, "there is no privilege as to certain communications between the lawyer, his firm, and the corporation."[61] Thus, dual service results in "confusion. . .regarding which hat the lawyer–director is wearing; under which circumstances, in his role as lawyer, he is obligated to protect certain private information; and when, in his role as director, he is required to make disclosures."[62] As D.C. Bar Ethics Opinion 382 notes, "some courts have even gone so far as to hold that the attorney-client privilege for communications between a lawyer and the lawyer's corporate client dissolves entirely when the lawyer becomes a director for the entity."[63]

The potential loss of confidentiality attorney-client privilege is extreme, and yet the ABA has provided no practical guidance on how to handle such issues. The following section will evaluate the ethical issues related to confidentiality, attorney-client privilege, and dual service in the case of illegal activity from a corporate officer, as illustrated by *United States v. Holmes*.

### B. CORPORATE FRAUD: THE DUTY OF LAWYERS AND THE DUTY OF DIRECTORS

Ordinarily, when an attorney's client is a corporation and constituents of that corporation make decisions for it, the decisions "must be accepted by the lawyer even if their utility or prudence is doubtful."[64] In the case of potential fraud by an officer, Rule 1.13(b) dictates how a lawyer can handle information that she "perceives to be 'a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization.'"[65] An attorney's course of actions generally depends on the severity of the officer's conduct, but her choices include asking the officer to reconsider, disclosing the matter to a higher authority within the organization—often the board—or, in extreme cases, withdrawing from representation.[66] Attorneys are directed to act "as is reasonably necessary in the best interest of the organization."[67]

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61. Evan Stewart, *USA v. Holmes: Why Lawyer-Directors Are a Bad Idea*, N.Y. STATE BAR ASS'N (Oct. 5, 2021), https://nysba.org/usa-v-holmes-why-lawyer-directors-are-a-bad-idea/ [https://perma.cc/79UD-RXJN] [hereinafter *Why Lawyer-Directors Are a Bad Idea*].

62. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382.

63. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382 (citing Fed. Sav. & Loan Ins. Corp. v. Fielding, 343 F. Supp. 537, 546 (D. Nev. 1972)) ("When a lawyer 'gets into bed together' with the entity by serving also as a director, the lawyer converts the relationship into strictly a business relationship, rendering all communications between the lawyer-director and the entity as 'business communications' unprotected by the attorney-client privilege.").

64. MODEL RULES R. 1.13 cmt 3.

65. Hechler, *supra* note 18, at 956.

66. *Id.*

67. MODEL RULES R. 1.13.

The duty of a director in the case of fraud might be different. Directors of corporation have a fiduciary duty to shareholders. As previously mentioned, this fiduciary duty includes a duty of care and oversight.[68] Thus, when "a red flag or warning sign appears, this duty of care requires reasonable investigation and diligence."[69] The directors owe this duty to the shareholders, and when "directors have actual knowledge of illegal or improper conduct or have knowledge of facts that should put the director on notice of such conduct, the directors must take good faith steps to remedy the problem."[70] So, "[i]f a non-lawyer corporate director learns of corporate conduct amounting to fraud . . . the director would have a wide range of options including, of course, informing the victim or the court that the fraud had occurred."[71] And, while an attorney is able to withdraw from representation in the case of managerial fraud, a director could be held personally liable for failing to rectify the conduct.

While the best course of action as either an attorney or a director separately might overlap, they have the potential to differ because of the contrasting interests at play with the varying corporate constituents. In the case of fraud by management "the interests of management directly conflict with the interests of the shareholders, limited partners, or other investors in the entity."[72] And, during litigation, communication that might have been privileged will likely be revealed in testimony if there was an attorney-director. Specifically, "[b]ecause the lawyer-director provides the management and board with business advice as well as legal assistance, the lawyer, management and board members could find themselves forced to testify about conversations that would not be involuntarily disclosed if the lawyer-director had been acting only as a lawyer."[73] This is just one example of the type of conflict that can arise out of dual service.

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68. Jeremy S. Piccini, *Director Liability, the Duty of Oversight, and the Need to Investigate*, AMERICAN BAR ASSOCIATION, Apr. 30, 2011.

> In reaction to such corporate scandals and regulatory actions, corporate boards are being held accountable for the failure to adequately oversee an institution's compliance function. For background purposes, a corporate board of directors is primarily responsible for overseeing the company, and in exercising these responsibilities, directors are charged with the fiduciary duties of care and loyalty. The duty of care mandates that a director act in good faith and use the degree of care that an ordinary person would exercise in a similar situation. The business judgment rule protects directors' decisions as long as the decision is informed, made in good faith, and with the honest belief that the action taken is in the company's best interest.

69. *Id.*

70. *Id. See* Stone v. Ritter, 911 A.2d 362, 365 (Del. 2006) (affirming the oversight standard of *In re Caremark* and emphasizing that directors must exercise "good faith" in dealing with potential or actual violations of the law or corporate policy).

71. § 3:32. Ethical limitations on the attorney as director, 1 Corporate Counsel Guidelines § 3:32 (2020).

72. Reycraft, *supra* note 18.

73. ABA Formal Op. 98-410 at 5. There are also situations in which a director, who also is the corporation's lawyer, "may be under a duty to disclose information to third parties (such as in response to an auditor's request) that in her role as legal counsel to the corporation she could not disclose without specific consent." ABA Formal Op. 98-410 at 7.

### C. AN ILLUSTRATIVE CASE: *UNITED STATES v. HOLMES*

The case of Theranos is a contemporary example that represents the dilemmas previously outlined. Theranos, a Silicon Valley-based company, became infamous when an investigative journalist uncovered that the company was lying to investors about what its blood-testing machine could do.[74] While the company itself settled with investors, lab regulators, and the Securities and Exchange Commission, Elizabeth Holmes, the former founder and CEO of Theranos, faced trial for eleven counts of fraud. The *Holmes* trial has uncovered several untruths told to investors,[75] and on January 3rd, 2022, Holmes was convicted on four counts of fraud.[76] David Boies was both an attorney for Theranos and served on its Board of Directors.[77] Many legal scholars have all pondered the same question: what hat was he wearing when he gave certain advice and how did it affect his legal advice?[78] The answer is important, especially when it comes to what communications, if any, were privileged in the *Holmes* case.[79]

In the case of Theranos, it is unclear if, or what, Boies knew about Holmes' fraud during the course of his representation.[80] But, his position as a director made it likely that much of the communication between himself and Holmes would be discoverable during litigation as he might not have been acting in his capacity as an attorney in certain situations. As he told *The New York Times*, he advised Holmes to get an independent verification of Theranos' technology after

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74. *See* John Carreyrou, *Hot Startup Theranos Has Struggled with Its Blood-Test Technology*, WALL ST. J. (Oct. 16, 2015), https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901 [https://perma.cc/GA8Y-ETFJ].

75. Heather Somerville, *Prosecutors in Elizabeth Holmes Trial Revealed Untruths, but Did They Prove Intent?,* WALL ST. J. (Nov. 21, 2021), https://www.wsj.com/articles/prosecutors-in-elizabeth-holmes-trial-revealed-untruths-but-did-they-prove-intent-11637499600 [https://perma.cc/K78T-LC83]. Among the evidence shown at trial was a forged document that indicated to investors that Pfizer, a large pharmaceutical company, supported the start-up and the technology.

76. Sara Randazzo, Heather Somerville, & Christopher Weaver, *The Elizabeth Holmes Verdict: Theranos Founder is Guilty of Four of 11 Charges in Fraud Trial,* WALL ST. J. (Jan. 3, 2022), https://www.wsj.com/articles/the-elizabeth-holmes-verdict-theranos-founder-is-guilty-on-four-of-11-charges-in-fraud-trial-11641255705?mod=hp_lead_pos7 [https://perma.cc/P4QA-2YZ5].

77. Solomon, *supra* note 11 ("Mr. Boies is taking on two different roles at Theranos. A lawyer represents a client—here Theranos—while a director, even at a privately held company like Theranos, represents the company's investors.").

78. Alaina Lancaster, *What Other Firms Can Learn From Boies Schiller's Role in the Elizabeth Holmes Saga* (Aug. 27, 2021), https://www.law.com/therecorder/2021/08/27/what-other-firms-can-learn-from-boies-schillers-role-in-the-elizabeth-holmes-saga/ [https://perma.cc/2ZBW-EYRA] ("It doesn't mean that a lawyer who is on the board can never have confidential, privileged communications, but it just makes it more complicated.").

79. Aside from confidentiality and attorney-client privilege issues, there are many other ethical issues related to the dual service of Boies, including his lack of independence as a director. *See* Solomon, *supra* note 11 ("Governance matters most in crisis times, and Theranos lacks it, to the chagrin of its investors.").

80. Model Rule 1.2(d) states that a lawyer cannot counsel clients to take actions that the lawyer knows are criminal or fraudulent. MODEL RULE 1.2(d). However, as Model Rule Comment 9 notes, the fact "that a client uses advice in a course of action that is criminal or fraudulent of itself [does not] make a lawyer party to the course of action." MODEL RULE 1.2 cmt 9.

*The Wall Street Journal* published their first article claiming the entire company was a sham.[81] While Holmes followed this advice, she began relying on outside lawyers and fired Theranos' general counsel, a former Boies Schiller attorney.[82] Boies claims that at this stage of their relationship, he wanted to resign as a director.[83] However, he was dissuaded from doing so as both fellow directors and his own outside counsel warned him that "he couldn't resign in a way that might damage shareholders."[84] Nonetheless, Boies ended his representation of Theranos after Holmes "made an overly optimistic presentation to shareholders without consulting Mr. Boies" in August 2016.[85] Now, the jury is in: Holmes was found guilty of three counts of wire fraud and one count of conspiracy to commit wire fraud by lying to investors to raise money for Theranos.[86]

After he withdrew from representation, Boies continued to be a director.[87] Since Theranos was a former client, Boies still had certain ethical obligations as an attorney related to confidentiality and attorney-client privilege. However, for those six months, he solely served as a director. Boies gave up his seat on the board in February 2017.[88] Throughout the tumultuous relationship between Holmes and Boies, his role as attorney-director and the conflict of interest may have been the "impetus for Boies's aggressive and distasteful defense of the company."[89] Often known as a lawyer with a propensity for bending the rules, some in the legal community have critiqued Boies throughout his representation of Theranos, commenting that "[h]e worked to intimidate whistleblowers, running up their legal bills and threatening litigation, and acted in a manner that Wall Street Journal reporter John Carreyrou, who exposed both Theranos and Boies, described as 'thuggish.'"[90] While nothing has been proven to indicate that Boies committed a disbarring offense, legal observers have noted that Boies represented Theranos in ways that helped "prolong their misdeeds."[91] The ethical concerns are clear: if Boies knew about the fraud, did he violate his fiduciary duty as a

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81. James B. Stewart, *David Boies Pleads Not Guilty,* N.Y. TIMES (Sept. 21, 2018), https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html [https://perma.cc/86WN-D7W6] [hereinafter *David Boies Pleads Not Guilty*].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Erin Griffith & Erin Woo, *Elizabeth Holmes is found guilty of four counts of fraud*, N.Y. TIMES (Jan. 3, 2022), https://www.nytimes.com/2022/01/03/technology/elizabeth-holmes-guilty.html [https://perma.cc/V5MQ-7VCY].

87. The six months that Boies remained on the board, despite having fired Theranos as a client, also raises questions about his ability to serve as an independent director.

88. Stewart, *David Boies Pleads Not Guilty*, *supra* note 81.

89. Scott Alan Burroughs, *David Boies's Fall from Grace,* ABOVE THE LAW (Sept. 26, 2018), https://abovethelaw.com/2018/09/david-boiess-fall-from-grace/l [https://perma.cc/Q2YL-9ZWN].

90. *Id. See generally* JOHN CARREYROU, BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP (2018).

91. Stewart, *Why Lawyer-Directors Are a Bad Idea*, *supra* note 61.

director by staying quiet? According to the ABA *Model Rules*, he did everything by the book.[92]

In Boies' defense of his fierce representation as attorney for Theranos, he points to an attorney's duty of loyalty to their client: "A lawyer is duty- and honor-bound to represent a client effectively and aggressively, within the bounds of the system itself. And once a lawyer takes on a client, you do not have the right to abandon that client under fire, except in extraordinary circumstances."[93] This statement emphasizes the loyalty that an attorney owes a client, but it also exposes some of the ethical concerns of an attorney-director: can the duty to the shareholders always co-exist with the zealous representation of a corporate client? *The New York Times* aptly notes that this "added another level of ethical complexity. As a board member, Mr. Boies assumed a fiduciary duty to shareholders. Now he was obliged to act in the best interest of two different parties: investors and company management. What if one—i.e., Ms. Holmes—acted in a way that harmed the other?"[94] In his capacity as an attorney, Boies had no ethical obligation to report Holmes' fraud, if he knew about it, to anyone outside of the company. However, in his capacity as a director, the answer is not as clear. He might have had a duty to disclose her actions to other directors to satisfy the duty of oversight. This duty of oversight includes an obligation to act in good faith and, when necessary, investigate a potential problem further.[95]

In Holmes' trial, there was another layer of privilege issues, as Holmes tried to argue that Boies was her personal attorney, and therefore all communication between her and Boies was privileged. However, when the government subpoenaed certain files related to their relationship, the court ruled that, since Boies was Theranos' attorney and not Holmes', the documents were admissible at trial.[96] Even without that ruling, when the government presented information

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92. Although this is not a case in which there was a public securities offering, note that "the lawyer may also have a duty to investigate a client before assisting in a securities offering. In such cases, the lawyer's failure to discover fraud or self-dealing has been held to be actionable if a reasonable investigation would have uncovered the fraud." Reycraft, *supra* note 18, at 610.

93. Stewart, *David Boies Pleads Not Guilty*, *supra* note 81.

94. *Id*.

95. *See* Piccini, *supra* note 68.

96. *See* Stewart, *Why Lawyer-Directors Are a Bad Idea*, *supra* note 61:

> The magistrate judge ruled that, out of the five *Graf* prongs, Holmes failed on the second, fourth, and fifth. The second prong is that Holmes could not demonstrate that she made it clear to Boies that she was seeking his legal advice as an individual rather than as the CEO of Theranos. Key to the magistrate judge's determination was the fact that there was no Holmes-Boies engagement letter. The fourth prong is that Holmes could not demonstrate that her communications with Boies were confidential because the 13 documents reflect communications "between Holmes or other senior Theranos employees, Theranos in-house attorneys, and [the Boies law firm]." And the fifth prong is that Holmes could not demonstrate that the communications "did not concern matters within. . . . the general affairs of the company." Based upon those determinations, and the fact that the entity now in charge of Theranos (the "Assignee") was waiving the corporate privilege, the documents were ruled admissible.

related to Boies and Holmes at the trial,[97] "a fair amount of the 'advice of a seasoned lawyer' was already fair game, and Boies was always going to be a factual witness based upon his director status."[98]

This complicated case highlights some of the ethical issues and questions that arise related to confidentiality and attorney-client privilege when an attorney is allowed to serve on the board of a corporation while serving as their outside counsel. Despite the clear conflicts, the ABA provides very little guidance for how to handle such a situation.

## III. PUBLISHED ETHICS OPINIONS AND POTENTIAL SOLUTIONS

### A. ABA FORMAL ETHICS OPINION 98-410

The most recent ABA Ethics Opinion to address the ethical dilemmas of an attorney-director was published in 1998.[99] This twelve-page opinion emphasized the precarious nature of dual service, especially the ABA's "concerns with protecting the confidentiality of client information, especially protecting the attorney-client privilege."[100] And yet, the opinion provides negligible practical advice for attorneys who opt to serve in both roles. The opinion emphasizes "full, free and frank discussions by the lawyer with the corporation's executives and the other board members" before the lawyer accepts dual service.[101] Specifically, the ABA recommends that in situations where the "attorney-client privilege will be lost in a pending matter, the lawyer should offer to continue as counsel, attend board meetings and preserve her role solely as corporate counsel until the risk abates."[102] Finally, Opinion 410 suggests the attorney provide a written memorandum explaining the difference between her role as a director and an attorney[103] and have another attorney present at meetings strictly related to legal matters.[104]

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97. *See* Order Granting Pl. ['s] Mot. to Determine that Def. Lacks Individual Privilege Interest in Disputed Doc. 2, ECF No. 812. ("In June 2020, the government served Holmes with its Exhibit List for trial, which included thirteen documents that Holmes claims implicate her attorney client privilege.").

98. Stewart, *Why Lawyer-Directors Are a Bad Idea*, *supra* note 61 (citing AOC *Ltd. Partnership v. Horsham Corp*., 1992 Del. Ch. LEXIS 110 (Del. Ch. 1992); *Deutsch v. Logan*, 580 A.2d 100 (Del. Ch. 1990); *S.E.C. v. Gulf* & Western Ind., Inc., 518 F. Supp. 675 (D.D.C. 1981); *Valente v. PepsiCo, Inc*., 68 F.R.D. 361 (D. Del. 1975); *United States v. Vehicular Parking Ltd*., 52 F. Supp. 749 (D. Del. 1949)).

99. ABA Formal Op. 98-410 at 4.

100. *Id*.

101. *Id*. (stating that "[w]hen in-house corporate counsel employed as a corporate executive is available, a discussion with him often will suffice. In other situations, the lawyer should take the time to explain the risks to the executive officers and other board members herself").

102. *Id*. ("[T]he lawyer also should reasonably assure herself that the possible threat to the attorney-client privilege and consequent disclosure of confidential information are understood, either by discussions with employed corporate counsel or with the executive officers and other board members.").

103. *Id*. at 4-5 ("A written memorandum is of particular assistance in describing the lawyer's role as counsel for the corporate entity and not for its constituent officers or directors and in explaining the differences between serving as a director and serving as counsel.").

104. *Id*. at 6 ("The lawyer-director should make clear that the meeting is solely for the purpose of providing legal advice. The lawyer should avoid the temptation of providing business or financial advice. . . When

Opinion 410 is criticized by many legal scholars.[105] While it provides cautionary warnings, "the mandated warnings are likely to be heavily discounted by the client who views the very generalized events alluded to in each of the preceeding warnings as unlikely to occur."[106] Further, while Opinion 410 has addressed what a law firm or attorney-director should do in some situations related to disclosure of confidential information,[107] it "provides no additional specificity regarding the conflicts that will cause the attorney to withdraw from either serving as the company's director or its lawyer"[108] and "does nothing to clarify the ambiguity of what constitutes a conflict or what is the appropriate response to a conflict of the director-lawyers' roles."[109] One of the most common conflicts, the potential loss of attorney-client privilege, is not mentioned in Opinion 410 at all, let alone does it provide a proper course of action. It simply advises the attorney to "exercise reasonable care to protect the corporation's confidential information and to confront and resolve conflicts of interest that arise."[110] This standard gives great weight to the attorney to determine whether dual service is appropriate and this "lenient self-policing leaves too much room for abuse."[111]

### B. STATE ETHICS OPINIONS

There are several prominent state bar ethics opinions that address the precarious position of attorney-director, with the most recent released by the D.C. Bar Ethics Committee in August 2021.[112] Some of these opinions essentially mimic

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appropriate, the lawyer-director should have another member of her firm present at the meeting to provide the legal advice.").

105. *See, e.g.*, Smith, *supra* note 14, at 601.

> There are several flaws in Formal Opinion 98-410. First, it fails to address the concerns about the potential loss of professional judgment or the threat of liability for the lawyer-director and his firm. Second, the opinion advocates inviting another lawyer to the board meetings. This would be very costly to the client who will now have to pay two outside lawyers for attending the board meeting, instead of just one. Third, if the lawyer-director will be stepping down from either of his roles due to conflicts, this will pose a hardship on the client who now may be short staffed on the board. The loss of an attorney intimately familiar with a client's legal problem will be costly in both time and money. Finally, the opinion has been criticized because the standard proposed by the ABA is weak and leaves the decision to the attorney to determine whether his representation will be materially hindered. This lenient self-policing leaves too much room for abuse.

*See also* Reycraft, *supra* note 18, at 615 ("[T]here are no clear-cut guidelines for resolving many of the complex ethical dilemmas that arise for corporate counsel.").

106. James D. Cox, *The Paradoxical Corporate and Securities Law Implications of Counsel Serving on the Client's Board*, 80 WASH. U. L.Q. 541, 545 (2002).

107. ABA Formal Op. 98-410 at n.15 ("A law firm normally responds to auditors asserting . . . that its engagement has been limited to specific matters. . . When a lawyer in the law firm is a lawyer-director, however, the law firm should expand the disclaimer to exclude any information the law firm's lawyer-director may have as a director.").

108. Cox, *supra* note 106, at 545.

109. *Id*.

110. ABA Formal Op. 98-410 at 1.

111. Smith, *supra* note 14, at 613; *see* Zaloom, *supra* note 15, at 238.

112. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382.

Opinion 410 from 1998, while others, like D.C. Opinion 382, take Opinion 410's guidelines one step further. For example, New York mandates that "the lawyer must disclose to the client the risk of loss of the attorney-client privilege."[113] This Opinion is very similar to Opinion 410. The California Bar emphasizes an attorney's confidentiality duties and attorney-client privilege over the fiduciary duties of her position as a director.[114] It states that duty of confidentiality and attorney-client privilege "may prevent her from fulfilling her fiduciary obligations to Corporation,"[115] but provides inadequate guidance on what to do when the two conflict. Even though these two states are usually the first to deviate from the mold and adopt their own guidelines, both opinions essentially replicate ABA Opinion 98-410 and leave attorney-directors without guidance, further indicating the need for reform.

D.C. Opinion 382 adopts the recommendations of ABA Opinion 410, mentioning that there should be adequate warning about the differences between business and legal advice, and recommends hosting separate meetings for purely legal advice that other attorneys from the law firm should attend.[116] While the opinion still does not clearly delineate between business and legal advice, it does go one step further and provides more practical advice to attorney-directors. First, it states that when a lawyer is providing business advice along with legal advice, they will be subject to Model Rule 5.7, which explicitly states that lawyers are subject to the Rules of Professional Conduct if the law-related services (in this case, the business advice) is provided either "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services" or "if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist."[117] Additionally, D.C. Opinion 382 specifically suggests that "the lawyer-director might consider the crafting of meeting minutes so as to avoid revealing client confidential information in privileged discussions with entity counsel."[118] The recommendation about meeting minutes, even though a very minor update from 1998, demonstrates the kind of practical advice that should be coming from the ABA and other state bar associations.

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113. N.Y. Op. 589 at 2 (1988).

114. Cal. Formal Op. No. 1993-132 ("The attorney has a duty 'at every peril to himself or herself to preserve the secrets of his or her client . . . if Corporation is the attorney's client . . . her duties . . . would preclude the attorney's disclosure or misuse of such information received in the course of any of her activities on behalf of Corporation.").

115. 115. Cal. Formal Op. No. 1993-132.

116. 116. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382.

117. 117. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382.

118. D.C. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 382.

### C. POTENTIAL REFORM: THE NEED FOR PRACTICAL AND SPECIFIC ABA GUIDELINES

The ABA has largely left this problem untouched since 1998—leaving state bar associations and law firms to solve the problem. However, as demonstrated, state bar opinions as recent as 2021 have yet to make significant progress in helping attorneys navigate the ethical dilemmas. And, while many large firms have policies on this issue, these policies scantly address the frequent problems that arise, like the loss of attorney-client privilege.[119]

There are significant benefits to dual service that make a *per se* rule undesirable. Moving forward, Model Rule 1.7, which governs conflicts of interest, and Comment 14 should be amended [120] to outline common conflicts that arise during practice, including illegal activity from corporate officers as demonstrated in *Holmes*, and to provide specific guidelines for attorney-directors to follow. Additionally, the ABA should provide some type of instruction related to what is considered "business" advice and what is considered "legal" advice. In particular, the ABA should consider including a list of what they consider purely legal advice, and state that anything not included within the list is designated as business advice. For situations where the two get too muddled to clearly delineate, like a case of criminal conduct by a corporate officer, the ABA should provide clear, feasible steps that the attorney-director should take when moving forward with representation. As this distinction is of the utmost importance for attorney-directors and a client's right to privilege, it is necessary that there be some uniformity among the legal profession to protect privileged information more adequately. Without such, the convoluted roles of attorney-directors will continue to cause ethical issues and result in the demise of many pillars of our justice system, including confidentiality and attorney-client privilege.

## CONCLUSION

In a perfect world, a corporate attorney would be able to serve on the boards of directors of their corporate clients without conflict, especially because so many attorneys see directorships as a valuable accomplishment in their careers. But the ethical landmines of dual service are everywhere and "to the extent a lawyer-director's obligations as a director are inconsistent with his or her ethical obligations as a lawyer, the lawyer-director cannot maintain the independence that the legal profession demands."[121] Despite the inherent and frequent conflicts, the

119. Smith, *supra* note 14, at 614.
120. *Id*. at 618.
121. Albert, *supra* note 4, at 472.

ABA and state ethics opinions have provided very little, if any, practical advice for attorney-directors. *United States v. Holmes*, a timely case, has only highlighted the ethical dilemmas facing the attorney-director. As the practice becomes more widespread, the debate surrounding this dual service will only continue, making it all the more dire that the legal ethics community adopt revised and practical guidelines.