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## **Attorney Liability After Sarbanes-Oxley**

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In addition to his University appointments, Professor Steinberg has lectured extensively both in the United States and abroad, including at The American Bar Association's Annual Meeting, the PLI Annual Institute on Securities Regulation, the University of Texas Annual Securities Law Conference, the Aresty Institute of Executive Education at the University of Pennsylvania, the International Development Law Institute in Rome, the Hong Kong Securities and Futures Commission, the Taiwan "SEC" in Taipei, the New Zealand Securities Commission, the Australian Law Council Section on International Law in Melbourne, the David Hume Institute in Edinburgh, the German-American Lawyers' Association in Munich, the International Law Society of South Africa, the Buenos Aires Stock Exchange, the Finnish Banking Lawyers Association in Helsinki, the Swedish Banking Lawyers Association in Stockholm, and the Ministry of Internal Affairs, Economic Crimes Department of the Russian Federation in Moscow. He currently serves as a member of the FINRA National Adjudicatory Council (NAC).

Professor Steinberg received his undergraduate degree at the University of Michigan and his law degrees at the University of California, Los Angeles (J.D.) and Yale University (LL.M.). He clerked for Judge Stanley N. Barnes of the U.S. Court of Appeals for the Ninth Circuit, extern clerked for Judge Anthony J. Celebrezze of the Sixth Circuit, was legislative counsel to U.S. Senator Robert P. Griffin and served as the adviser to former U.S. Supreme Court Justice Arthur J. Goldberg for the Federal Advisory Committee Report on Tender Offers.

Professor Steinberg was an enforcement attorney at the U.S. Securities and Exchange Commission, and thereafter became special projects counsel. In that position, he directly assisted the SEC's General Counsel in a wide variety of projects and cases and served as the General Counsel's confidential legal adviser.

Professor Steinberg has authored more than 125 law review articles as well as 28 books, is co-editor-in-chief of *The International Lawyer*, editor-in-chief of *The Securities Regulation Law Journal*, and is an adviser to *The Journal of Corporation Law* and *Law and Business Review of the Americas*. Professor Steinberg is a member of the American Law Institute.

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# ATTORNEY LIABILITY AFTER SARBANES-OXLEY

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## § 9.06 Counsel Conflict Dilemmas in Mergers and Acquisitions

This section analyzes an important dilemma that raises liability and ethical concerns: attorney conflicts of interest in the specialized setting of corporate acquisitions and mergers.<sup>1</sup> The ensuing discussion seeks to present a concrete analysis in conjunction with a recommended framework for attorney conflicts of interest in the publicly-held corporate acquisition context. First, these conflicts issues will be addressed in the corporate takeover setting, followed by an examination of such conflicts in parent-subsidiary mergers and leveraged buyouts, in which incumbent management obtains a substantial equity interest in the entity. Second, the section will focus on counsel's conflicts of interest in the corporate acquisition context when advising committees of the board of directors.<sup>2</sup> Thereafter, the substantive impact of various procedural mechanisms will be explored.

### [1]—Takeover Bids

#### [a]—General Rule

Courts and commentators generally agree that, in the absence of a disabling conflict of interest (which includes, in this context, the perpetration of illegal conduct), the incumbent board of directors may

<sup>1</sup> See, e.g.: Steinberg, *Lawyering and Ethics for the Business Attorney* (3d ed. 2011); Steinberg and Ferrara, *Securities Practice: Federal and State Enforcement* § 10:1 *et seq.* (2d ed. 2001 and Ann. Supps.); Illig, "A Business Lawyer's Bibliography: Books Every Dealmaker Should Read," 61 J. Leg. Ed. 585 (2012); sources cited N. 2 *infra*.

<sup>2</sup> See generally: American Law Institute (ALI), *Restatement of the Law: The Law Governing Lawyers* § 131, comment h (2000); Alberts and Thompson, "Ethical Issues Faced by Lawyers and Investment Bankers in Mergers and Acquisitions," 54 U. Miami L. Rev. 697 (2000); Jenson, "Deals May Backfire for Firms," *National Law Journal*, Jan. 16, 1989, at p. 1; Kim, "Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation," 68 Tenn. L. Rev. 179 (2001). See also, Baker, Butler, and McDermott, "Corporate Governance of Troubled Companies and the Role of Restructuring Counsel," 63 Bus. Law. 855 (2008).

For case law, see:

*Second Circuit*: United States v. Branson, 658 F.2d 920, 928 (2d Cir. 1981).

*Third Circuit*: Eckerd v. Dart Group Corp., 621 F. Supp. 725 (D. Del. 1985).

*District of Columbia Circuit*: Kas v. Financial General Bankshares, 796 F.2d 508, 513-515 (D.C. Cir. 1986); Financial General Bankshares, Inc. v. Metzger, 680 F.2d 768, 771 (D.C. Cir. 1982).

**State Courts:**

*Oregon*: In re Kinsey, 294 Or. 544, 660 P.2d 660 (1983).

*District of Columbia*: Egan v. McNamera, 467 A.2d 733 (D.C. App. 1983).

<sup>3</sup> On this subject, see generally:

*Fifth Circuit*: Garner v. Woifinbarger, 430 F.2d 1093 (5th Cir. 1970).

*Securities and Exchange Commission*: In re Carter & Johnson, [1981 Transfer Binder] CCH Fed. Sec. L. Rep. H 82,847 (SEC 1981).

*State Court*:

*Iowa*: Rowen v. LeMars Mutual Insurance Co., 282 N.W.2d 639 (Iowa 1979).

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