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**The Corporate/Securities Attorney  
as a “Moving” Target:  
Ethical and Liability Dilemmas**

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## **The Corporate/Securities Attorney as a “Moving” Target: Ethical and Liability Dilemmas**

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### **Attorney Liability After SOX**

For the author’s recent treatise on this subject, see Steinberg *Attorney Liability After Sarbanes-Oxley* (Law Journal Press 2005) (to order: (800) 603-6571).

### **The Attorney/Director**

Courts have recognized that the counsel/director may be held to a higher standard. For example, in *In re Rospatch Securities Litigation*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,939 (W.D. Mich. 1992), the court stated: “In these circumstances, [counsel’s] knowledge as a director cannot be separated from the knowledge of his law firm. In addition, the lawyer-director may also be held to a higher standard of care.” See generally, M. Steinberg, *Attorney Liability After Sarbanes-Oxley* (Law Journal Press 2005); M. Steinberg, *Corporate and Securities Malpractice* (PLI 1992); Harris & Valihura, *Outside Counsel as Director: The Pros and Potential Pitfalls of Dual Service*, 53 Bus. Law. 479 (1998); Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 Tenn. L. Rev. 179 (2001); Peloso & Warren, *The Lawyer-Director: Implications for*

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*Independence*, 1998 A.B.A. Sec. Litig. Task Force Rep. on the Indep. Law. (1998); Comment, *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 (2000). Cf. Finkelstein, Raju & Ladig, *Attorney-Client Privilege: Potential Dangers of Having Corporate General Counsel Perform Multiple Roles*, 33 Rev. Sec. & Comm. Reg. 49 (2000).

### **Applicability of Securities Act Section 12(2) [12(a)(2)]**

In *Gustafson v. Alloyd Company*, 513 U.S. 561 (1995), the Supreme Court construed the term “prospectus” in Section 12(2) [now Section 12(a)(2)] so as to limit that statute’s applicability to public offerings by issuers or their controlling shareholders. See generally Kerr, *Ralson Redux: Determining Which Section 3 Offerings Are Public Under Section 12(2) After Gustafson*, 50 SMU L. Rev. 175 (1996).

### **Due Diligence Defense**

For more recent decisions construing the “reasonable care” defense of Section 12(a)(2) or the “due diligence” defense of Section 11 of the Securities Act, see, e.g., *In re Software Toolworks, Inc. Securities Litigation*, 38 F.3d 1078 (9<sup>th</sup> Cir. 1994); *Ambrosino v. Rodman & Renshaw, Inc.*, 972 F.2d 776 (7<sup>th</sup> Cir. 1992); *Dennis v. General Imaging, Inc.*, 918 F.2d 496 (5<sup>th</sup> Cir. 1990); *In re Worldcom, Inc. Securities Litigation*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004); *Weinberger v. Jackson*, [1990-1991

Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,693 (N.D. Cal. 1990); *In re Donaldson, Lufkin & Jennrett Securities Corp.*, [1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85,035 (SEC 1992).

### **Legal Opinions**

See *Kline v. First Western Government Securities, Inc.*, 24 F.3d 480 (3<sup>rd</sup> Cir. 1994); *Ackerman v. Schwartz*, 947 F.2d 841 (7<sup>th</sup> Cir. 1991); *Dean Foods Company v. Pappathanasi*, 2004 WL 3019442 (Mass. Super. 2004). See generally American Bar Association, Section of Business Law, *Annual Review of the Law on Opinion Letters*, 60 Bus. Law. 1057 (2005); Glaser, Fitzgibbon & Weise, *Legal Opinions* (2d ed. 2004); Rice & Steinberg, *Legal Opinions in Securities Transactions*, 16 J. Corp. L. 375 (1991).

### **Fees Paid in Stock**

See American Bar Association, Committee on Ethics and Professional Responsibility, Formal Opinion 00-418 (2000) (stating that attorneys who enter these fee arrangements “inform the client that events following the stock acquisition could create a conflict between the lawyer’s exercise of her independent professional judgment as a lawyer on behalf of the corporation and her desire to protect the value of her stock,” and that “the best way to comply with the requirements of Rule 1.8(a) is to set forth the salient terms of the transaction in a document written in a language that the client can easily understand, and after the client has had an opportunity to

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