

## There's Illegality? There's Impropriety? "What Now" for a Director

Following up on [my blog about the "leaving the board" roadmap](#), if you counsel directors as I have for many years, you're familiar with that frantic call from a newbie director when they first learn about some illegal - or improper - activity at their company. They're freaked. Justifiably so. After all, we all learn from an early age that "the buck stops here." The playbook for this is fairly straight-forward. Unfortunately, there can be human dynamics that serve as potential obstacles to hewing to the playbook. High emotions. Fast-moving developments. Conflicting - and perhaps even misleading - communications. First and foremost, you should establish a clear record that you - and any other resigning directors - have done all that you can possibly do to address the malfeasance, illegality or impropriety. This is especially true for an audit committee member. Under basic *Caremark* duties, and Section 10A of the Securities Exchange Act of 1934, once an independent director suspects - or becomes aware of - corporate malfeasance, the director's duties, obligations, and responsibilities include: 1. First, take reasonable steps to stop any ongoing legal or ethical violations. 2. Consider engaging the board in discussions with attorneys and accountants to uncover the apparent violations and figure out the steps that need to be taken by the company and the board. As these decisions involve legal judgments, directors should have access to expertise of independent counsel in making decisions. 3. Take steps to provide that the board's discoveries and actions are accurately and appropriately recorded in minutes of the audit committee and the board. Try to have any director concerns recorded consistently as the matter unfolds, to avoid any retrospective appearance that the director, or all independent directors, or all audit committee members, or the board as a whole, might have acted inappropriately once the issue was discovered. 4. Consider if the audit committee can rely on corporate counsel or should consider retaining its own counsel.

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