Opening Remarks on the Role of Directors

By MARTIN LIPTON*

THE BASIC THEME of the discussion this morning will be a tripartite analysis of the role of directors in American corporations. We will look at the popular conception of the Director's role, what Directors do in actual practice, and the legal duties imposed on Directors by statute and case law and how to comply with those duties.

First, Professor Detlev Vagts of the Harvard Law School will discuss the basic theme of the Myth and Reality of Directors' Roles as it has developed in recent years. Sam Harris will continue the analysis with major emphasis on industrial companies. John Austin, a Past Chairman of this Section, will cover the special problems faced by directors of banks. Mendes Hershman, immediate Past Chairman of this Section, will consider the special problems of insurance company directors. William Williams will discuss the difficulties of functioning as a director of a large, multi-national corporation. I will discuss the topic from the standpoint of directors of investment companies.

While much of what will be said this morning will revolve about the traditional analysis of the duties of loyalty and care, you will hear a number of fresh insights into procedures to meet those duties and, of equal importance, to prove in court that they have been met.

Since *BarChris*, much has been said and published about the potential liabilities of Directors. We continue to hear that the SEC and the courts are discouraging from serving as directors the people who can contribute the most. Indeed, the original title of this program was the "Crisis in the Boardroom." There may be a crisis. However, in my opinion, it is not a crisis of the boardroom, but of confusion caused by some bad cases. I think you will find that after this morning's discussion that, upon close analysis, the SEC and the courts are not insisting on impossible standards of director conduct. They are merely asking for the minimum that reasonable people should expect. The standards demanded by the recent SEC report in the *Stirling Homex* case are the best illustration of this point. The four principal standards were:

(1) Outside directors violate their duty to protect shareholders if their presence has *no impact whatever* on the company's operations or affairs.

(2) Outside directors can not *blindly rely* on the fact that the Company employs accountants, lawyers, investment bankers, and other professionals.

(3) Directors should familiarize themselves with the company's

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business and question management in *more than a perfunctory manner*.

(4) Management must make available to outside directors *sufficient information* concerning corporate affairs to enable them *adequately to discharge* their responsibilities.

These are not that stringent a set of standards.