Inadvertent disclosure

The Ryan *case is a reminder of the need for board policies on the handling and communicating of privileged information.*

BY DOUG RAYMOND

There has been a steady increase in litigation over conflicts of interest and allegations of wrongdoing involving officers and directors of public companies. In addition, there certainly is greater scrutiny of possible misdeeds, including corporate investigations of alleged misconduct, which have dramatically increased. When a board decides to launch an investigation (a topic for another day), a well-advised board often will form a special committee of disinterested directors to investigate the allegations of potential wrongdoing, and the committee will engage outside counsel to assist.

The lawyers review the relevant documents, interview employees and others, and then make their determinations. They, of course, report their findings to the special committee. Their report, whether written or oral, may contain confidential and sensitive information about the company and the alleged misconduct. Boards will almost always want to keep this sensitive information away from potential (or actual) plaintiff class action attorneys by relying on the attorney-client privilege.

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If done right, the attorney-client privilege will usually protect much of the sensitive communication between the special committee and its counsel, as well as the results of the investigation. However, if the privilege cannot be assured, the plaintiffs may get access to extremely damaging information, and the company will find that it has done their work for them.

The recent Delaware case of *Ryan v. Gifford* reminds us that it can be very easy to lose inadvertently the protection of the attorney-client privilege.

In *Ryan*, the board of directors of Maxim Integrated Products Inc. formed a special committee to investigate alleged wrongful stock option backdating, including grants made to some of the directors. The committee and its counsel conducted a thorough investigation and prepared and delivered a comprehensive oral report to the committee and subsequently to the entire board — including the directors under investigation.

In the securities class action brought against Maxim, the plaintiffs claimed that the lawyers' presentation to the full board had waived the attorney-client privilege over the findings, and they sought discovery of all of the materials relating to the investigation, as well as all of the communications between the special committee and its counsel and between the special committee, its counsel, and the full board. The defendants claimed that these communications were protected by an attorney-client privilege between the special committee and its counsel and by a joint privilege between the company and the counsel.

Normally, the attorney-client privilege is waived if communications between the lawyer and the client are made in the presence of third parties, unless they are for the purpose of seeking legal advice (which was not the situation in this case). When the special committee and its counsel made their presentation to the Maxim board, it was to advise the full board of the results of the committee's investigation. The court found that the directors under investigation, and the company's counsel, who were present at this meeting, did not have the same interest in the findings as did the special committee. (The company counsel was also involved in representing the defendant directors.) The court therefore agreed with the plaintiffs' claim that the attorney-client privilege had been waived. When the special committee and its lawyers disclosed the results of their investigation to the directors under investigation and their lawyers, the company waived any privilege it may have had. In the end, the company was forced to turn over all communications about this highly sensitive matter to the plaintiff.

Ryan v. Gifford serves as an important reminder for directors when conducting an investigation. While it is a common and usually commendable practice for directors on a committee to share information with the other directors, that candor and transparency needs to be balanced against the very significant detriment that can occur if the information is obtained by persons who are hostile to the company. The *Ryan* case reminds us that it can be dangerous to share privileged information with others, even other directors who are, or in the future may be, caught up in shareholder or other litigation.

Boards should establish a communication policy for special committees conducting internal investigations. These policies should set the expectations for what information will be shared with the full board and the subjects of the investigation, and should establish firewalls to prevent unauthorized persons from having access to privileged information. Ultimately, the goal is to prevent an inadvertent waiver of their attorney-client privilege that compromises the investigation and results in the committee's work being done for the benefit of their adversaries in litigation. ■

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