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Privilege Considerations in Special Board Committee Representations

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Internal investigations are a staple in today's corporate environment. Often, when the conduct under investigation involves senior management or sensitive issues, a company's board of directors will authorize and form a special committee of directors to oversee and direct the investigation. To ensure that the ensuing investigation is independent and thorough, the special committee will engage outside counsel. (Moreover, to prevent even the appearance of impropriety or conflict, special committee counsel should not typically be the company's regular counsel or counsel who has performed recent, material work for the company. See, e.g., *Lahm v. Tremont*, 694 A.2d 422, 426, 429-30 (Del. 1997) (applying the same logic in the adviser and expert context).) Of the many important issues arising during such investigations, protection of privileged material is paramount. This article explores the contours of the attorney-client privilege as it applies to special committees' internal investigations, including with respect to employee interviews and board briefings.

The Attorney-Client Privilege and Work Product Protection. Courts acknowledge that the attorney-client privilege exists between a special committee and its separately-retained counsel because the special committee is seeking legal advice. See, e.g., *In re OM Group Sec. Litig.*, 226 F.R.D. 579, 587 (N.D. Ohio 2005) (stating, in the special committee context, "Where a client seeks legal advice from a professional legal advisor, the communications relating to that purpose made in confidence are protected by the attorney-client privilege."). Similarly, the work product protection extends to documents prepared by counsel for the special committee in the course of its investigation. See *In the Matter of Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1314 (7th Cir. 1984) (assuming work product immunity where report was prepared by special litigation committee and counsel); *In re LTV Sec. Litig.*, 89 F.R.D. 595, 620 (N.D. Tex. 1981) (work product of special counsel to audit committee protected because investigation and report required legal acumen and expertise).

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As in other contexts, these privileges belong to the special committee (the client), and its counsel, and *not* the board, the company, the legal department, the C-suite, or any other individual employee. In *In re BCE West LP*, the court ruled that:

It is counterintuitive to think that while the Board permitted the special committee to retain its own counsel, the special committee would not have the benefit of the attorney-client privilege inherent in that relationship or

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that the Board of Directors or management, instead of the special committee, would have control of such privilege.

In re BCE West LP, 2000 WL 1239117, at *2 (S.D.N.Y. 2000). See also *Ryan v. Gifford*, Civ-2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007); 2008 WL 43699 (Del. Ch. Jan. 2, 2008) (stating, "There appears to be no dispute that, absent waiver or good cause, the attorney-client privilege protects communications between [outside counsel] and its client, the special committee."). Although these privileges exist in special committee representations, there are certain potential pitfalls to keep in mind in the context of witness interviews and briefings for the board.

Privilege Considerations: Witness Interviews. As with any internal investigation, the special committee's counsel will likely conduct witness interviews with current and former employees. Such interviews are protected by the attorney-client privilege because they are conducted in confidence in order to provide legal advice to the special committee regarding company business. *In re OM Group Sec. Litig.*, 226 F.R.D. 579, 588 (N.D. Ohio 2005).

To ensure the privilege attaches to the interview, special committee counsel should deliver the standard *Upjohn* warning to witnesses that plainly and clearly articulates counsel's role: Special committee counsel is separate from any individual counsel and does not represent the witness; special committee counsel is separate from any company counsel; the interview is confidential and being conducted so that counsel can provide legal advice to the special committee; the interview is therefore subject to the attorney-client privilege; and, the special committee owns and controls the privilege, and may choose, at the special committee's discretion, to disclose facts learned during the interview to third parties, including government regulatory agencies. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Finally, any notes or memoranda prepared by special committee counsel of the witness interviews are protected by the attorney-client privilege (id.) as well as the work product doctrine. See *In re Grand Jury Subpoena*, 357 F.3d 900, 906 (9th Cir. 2004) (quoting *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1989)) ("The work product doctrine, codified in Federal Rule of Civil Procedure 26(b)(3), protects 'from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation.'").

Privilege Considerations: Board Briefings. Whenever multiple corporate constituencies are involved, it is important for counsel to remember who the client is. In special committee representations, this is perhaps most critical when briefing the board of directors, who may require regular updates on the investigation.

At the outset, it should be noted that the special committee can provide the board with investigation briefings without waiving privilege. In *In re BCE West LP*, the court found that communications with the board—when in a non-adversarial context—did not destroy the special committee's privilege. 2000 WL 1239117, at *2 (S.D.N.Y. 2000). Similarly, in *Picard Chemical Profit Sharing Plan v. Perrigo Co.*, the court held that the disclosure of the special committee's written report to the board did not waive privilege or attorney work product protection. 951 F. Supp. 679, 689 (W.D. Mich. 1996).

However, such disclosure *can* result in waiver of the attorney-client privilege and/or the work product protection if certain best practices are not followed. This is especially true where conflicted or defendant board members attend meetings in which disclosures are made. Although generally speaking, directors must be given equal access to corporate information (see *Moore Business Forms v. Cordant Holdings*, Civ. A. Nos. 13911, 14595, 1996 WL 307444 at *4 (Del. Ch. June 4, 1996)), the special committee can exclude certain directors—if conflicted—from such briefings. See Sparks et al., "Special Committee of Directors—When Does the Business Judgment Rule Apply and to What Extent Are Committee Proceedings Confidential?" SE39 ALI-ABA 275, 296 (Oct. 7, 1999) ("[T]he committee device can … be used to exclude others, including excluded directors, from information protected by the attorney-client privilege.").

Ryan v. Gifford, a 2007 decision by the Delaware Chancery Court,

considered the issue of privilege waiver in a case involving an investigation conducted by a special committee into alleged backdating of stock options. Certain of the directors had been named as defendants in a derivative suit over the same conduct. The court found privilege was waived when the special committee delivered its findings at a board meeting attended by defendant directors and their attorneys. *Ryan v. Gifford*, Civ-2213-CC, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007). The court focused on the fact that at this particular meeting, the directors were acting in their personal, and not their fiduciary, capacity (as evidenced by the presence of their attorneys, who would not normally attend a board meeting). Indeed, the court later stated that such waivers "would not apply to a situation … in which board members are found to be acting in their fiduciary capacity, where their personal lawyers are not present, and where the board members do not use the privileged information to exculpate themselves." *Ryan v. Gifford*, Civ-2213-CC, 2008 WL 43699, at *5 (Del. Ch. Jan. 2, 2008).

In *SEC v. Roberts*, the court assessed privilege and work product protection issues in connection with an internal investigation of possible options backdating at McAfee conducted by counsel on behalf of a special committee. 254 F.R.D. 371 (N.D. Cal. 2008). One of the missions of the special committee was to ascertain whether board members had engaged in misconduct. The court found that when the special committee's counsel "detailed for the Board the various … issues [and] improprieties … that were discovered in the investigation … it waived the work product privilege with respect to its conclusions." Id. at 378. Similarly, the court found that counsel waived any privilege over a written "executive summary of the Special Committee's preliminary findings from its investigation" which it distributed at a meeting of the full board. Id. at 376. The court explained that "not only is the Board not [counsel's] client such that the attorney-client privilege does not attach, the Board also does not have a common interest with the special committee since it was the special committee's mandate to ascertain whether members of the Board may have engaged in wrongdoing." Id. at 378 n.4. Notably, these waivers did not extend to notes of interviews conducted during the investigation because "there [was] no evidence that the substance of the interviews or [counsel's] work product were mentioned by [counsel] during the Board meetings." Id. at 378.

'Ryan' and 'Roberts' serve as a reminder that special committees and their counsel must evaluate the composition and investigative posture of the board at the time any periodic briefings or ultimate findings are delivered.

Ryan and *Roberts* may be unusual in that most often, any directors who may have exposure should be excluded from briefings on the special committee's investigation. But *Ryan* and *Roberts* serve as a reminder that special committees and their counsel must evaluate the composition and investigative posture of the board at the time any periodic briefings or ultimate findings are delivered.

Key Takeaways

The attorney-client privilege and work product protections exist between a special committee and its separately-retained counsel.

To preserve the attorney-client privilege and work product protection:

- Provide a clear *Upjohn* warning at the outset of witness interviews that identifies the client and states, *inter alia*, that the interview is confidential and is being conducted so that counsel can provide legal advice to the special committee (and is therefore privileged); and,
- Be vigilant and thoughtful when disclosing special committee findings and/or conclusions to the board, and take care to ensure that directors in attendance are acting in their capacity as fiduciaries as opposed to in their personal capacities.