It’s a Privilege, Not a Right: Best Practices for Board Minutes and Attorney-Client Communications

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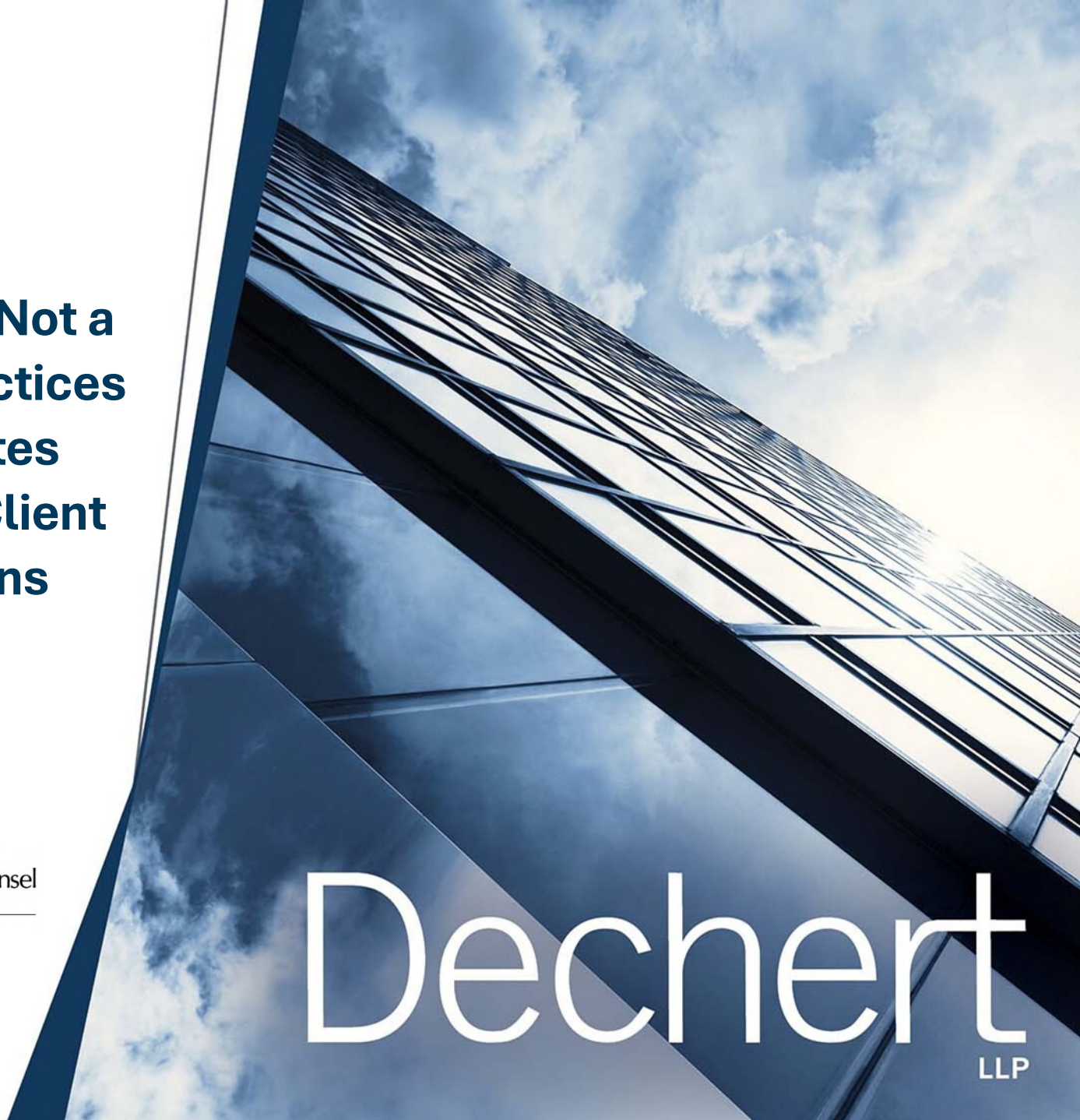

Introduction

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Background on Board Minutes and Materials

- Record of actions and deliberations by the Board of Directors
- Significant for transactions and potential litigation:
  - Reflects the facts and reports upon which the Board reasonably relied and directors' interactions with management
  - Demonstrates Board's compliance with fiduciary duties
  - Often used to draft merger disclosure documents, including SEC disclosures
  - Minutes can be used to rebut stockholder allegations
  - Directors can rely on well-drafted minutes in depositions during litigation

Key Elements of Board Minutes

- Time and place of meeting
- Attendees
- Approval of prior minutes
- Description of discussion during the meeting
  - Executive session handled separately
- Resolutions
- Exhibits

Best Practices for Drafting Minutes

- Including the right amount of detail
- How to group information
- Privilege considerations
- When to draft minutes
- When to have a litigator review draft minutes

Hypothetical

- During a board meeting discussing the potential merge with another company, significant debate ensures over the valuation methods proposed. The board also relies on legal advice to navigate potential concerns.
- **Ethical Considerations.** How do you accurately document the deliberations and legal advice in a manner that upholds attorney-client privilege and adheres to fiduciary duties?
- Consider the following:
  - **Accurate Documentation.** Ensure that the minutes accurately reflect the facts and the substance of the discussion.
  - **Identify Participants.** Document who participated in the discussions, including which board members and advisors were present. Note who made specific points.
  - **Incorporate Legal Counsel.** Document any legal advice provided by attorneys during the meeting, including an outline of legal risks and considerations discussed.
  - **Attorney Client Privilege.** Clearly indicate when discussions were held under A-C privilege. Include that legal counsel was present and providing privileged legal advice.
  - **Separate Sections**. May benefit to include separate sections to the minutes to provide clear boundaries.
  - **Detail Rationales for Fiduciary Duty compliance**. Include detailed explanations of the Board's reasoning and basis for any decisions made about the merger. Note any reports, expert evaluations that the Board relied on.
  - **Record Diverse Opinions.** Accurately document any significant debate or dissenting inions among board members regarding valuation methods or other key aspects of the merger. Then document how the board reached the final agreement or decision.

Stockholder Access to Minutes

- Section 220 of the DGCL provides stockholders "with a qualified right to inspect corporate books and records." *Simeone v. Walt Disney Co.*, 2023 WL 4208481, at *7 (Del. Ch. June 27, 2023).
  - Similar inspection rights in most jurisdictions, by statute or through a corporation's governing documents
- NOTE: Amendments to Section 220 of DGCL, signed into law on March 25, 2025
- Delaware and other jurisdictions allow minutes to be redacted to protect privilege, and sometimes for relevancy.
- But, under the *Garner* Doctrine, stockholders may be able to obtain even privileged board materials. Why?

Hypothetical

- A group of stockholders requests access to the board minutes under Section 220 of the DGCL to investigate potential mismanagement.
- **Ethical Considerations.** How do you balance the rights of the stockholders to inspect the corporate records with the need to protect privileged information?
  - **Proper Purpose.** The stockholders must demonstrate a proper purpose.
  - **Privilege Protections.** Under the Garner doctrine, stockholders might obtain privileged board materials if they demonstrate sufficient need.

Attorney-Client Privilege – Legal Standards

- Fed. R. Evid. 502(g)(1)
  - Defines "attorney-client privilege" as the protection that applicable law provides for confidential attorney-client communications
  - Mirrored in Del. R. Evid. 502(b)
- N.Y. C.P.L.R. § 4503(A)(1)
  - " . . . a confidential communication made between the attorney or his or her employee and the client in the course of professional employment . . ."
  - *Stirum v. Whalen*, 811 F. Supp. 78, 81 (N.D.N.Y. 1993): the "communication" must be related to a fact that the attorney learns (a) from her client, (b) without the presence of "strangers," (c) primarily for the purpose of securing legal services, and (d) not in furtherance of a crime or tort
- Cal. Evid. Code § 954
  - ". . . the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . ."

Attorney-Client Privilege – Legal Standards (cont.)

- Federal (and most states)
  - Four basic elements to establish attorney-client privilege:
    i. a communication;
    ii. made between counsel and client;
    iii. in confidence; and
    iv. for the purpose of seeking, obtaining or providing legal assistance to the client.

Attorney-Client Privilege – Additional Rules

- Model Rules of Professional Conduct
  - No definition of privilege, defers to state law
  - Model Rule 1.6(a) defines confidentiality obligation: “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or [exceptions, including crime-fraud].”
  - Model Rule 1.13 – Organization as Client
    - Who is the client?
    - Rule 1.13(a): “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”
    - Rule 1.13(f): “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”
    - Reminder that Rule 1.13 also includes reporting requirements

Attorney-Client Privilege – Mixed Communications

- What about communications that contain both legal and non-legal advice, "mixed-purpose communications"?
- Significant circuit split at the federal level
  - Majority view: "primary purpose test"
  - Minority view: "significant purpose test"
- Delaware: privileged "only if the legal aspects predominate." *MPEG LA, L.L.C. v. Dell Glob. B.V.*, 2013 WL 6628782, at *2 (Del. Ch. Dec. 9, 2013).

Hypothetical

- The Company's board is holding a meeting to discuss both business strategy and potential legal implications of a new product launch. The company's GC is present to provide legal advice on compliance and IP issue, while the CFO and CEO discuss market strategy and other financial considerations. An email is sent regarding the meeting.
- **Ethical Considerations.** Determine whether the email is protected under A-C privilege
  - **Separate Legal and Non-Legal Advice.** When documenting the meeting, clearly distinguish between legal and business discussions.
  - **Know your jurisdiction**. If primary purpose test, ensure that any documentation of mixed communications highlights the legal advice as the primary purpose.
  - **Document Intent Clearly**. When noting the advice in the minutes, explicitly state that the GC was consulted primarily for legal advice.
  - **Limit Disclosure.** Avoid including non-essential parties in discussions involving legal advice. The more individuals involved, the greater the risk of waiver.

Hypothetical

- **Example**.
  - Legal Advice:
    - GC discusses the regulatory compliance requirements of the new product launch
    - Key points included necessary steps to ensure IP protection and avoid infringement on existing patents
    - Legal risks associated with marketing strategies were evaluated and mitigation measures were advised.
  - Business Strategy Discussion:
    - CEO outlines market entry strategies and projected financial outcomes
    - CFO provided an analysis of the potential investment returns and funding requirements.

Attorney Work-Product Doctrine

Fed. R. Civ. P. 26(b)(3)(A)

- "Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative."

Del. R. Evid. 510 (h)(1)

- "The protection that applicable law provides for documents and tangible things (or their intangible equivalents) prepared in anticipation of litigation or for trial."

N.Y. C.P.L.R. § 3101(c),(d)

- Attorney work product, such as mental impressions and strategy, receive absolute immunity.
- Materials prepared in anticipation of litigation or trial is broader and enjoys qualified immunity.

California

- "In California, however, the protection afforded by the attorney work product doctrine is not limited to writings created by a lawyer in anticipation of a lawsuit. It applies as well to writings prepared by an attorney while acting in a nonlitigation capacity." *Laguna Beach Cnty. Water Dist. v. Superior Ct.*, 124 Cal. App. 4th 1453, 1461 (2004).

Privilege and Work Product in M&A Transactions

- Different rules depending on recipient of materials:
  - Counterparties
  - Investment bankers
  - Auditors

Hypothetical

- The in-house legal team advises the board during a heated discussion on director conflicts of interest regarding a potential acquisition.
- **Ethical Consideration**. Clarifying who the client is and ensuring that the directors understand the legal counsel's duty is to the organization if individual interests conflict.
  - **Identify the client and clarify the roles**. Rule 1.13(f) requires that the lawyer explain the identity of the client to the directors, officers, and others.
    - With special committees, considerations to be weighed regarding independence of the legal team / hiring independent financial advisors.
  - **Assess and disclose conflicts of interest.** Evaluate if the organization's interests are adverse to those of any directors involved. This includes identifying any potential personal interests a director might have regarding the acquisition.
  - **Documentation.** Ensure deliberations and decisions are documented. Minutes may potentially be used in litigation.

Questions?

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