

M&A DEAL COUNSEL'S ROLE IN CREATING A WINNING WRITTEN RECORD FOR DEFENDING BREACH OF FIDUCIARY DUTY LITIGATION

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While M&A transactions give rise to many different types of litigation, including disputes between the merger parties and statutory appraisal actions, the most common type of litigation stemming from public company mergers is a stockholder class action alleging breaches of fiduciary duty by corporate directors in connection with the sales process and approval of the transaction. The incidence of this type of litigation has increased considerably in recent years, with some studies indicating that over 90% of public company M&A transactions become the subject of stockholder class action litigation, typically with multiple suits being filed, often in more than one jurisdiction.² With the prevalence of such litigation at an all time high and showing no sign of abating, M&A practitioners must have an appreciation of how the written record of a board's or committee's deliberative process will be treated and viewed by a court in litigation. Such an understanding will better enable M&A deal lawyers to aid their clients in creating a comprehensive and consistent written record that best positions their clients to prevail in the almost-inevitable breach of fiduciary duty litigation.

It is fair to say that the role of M&A deal lawyers today includes working with the board, management, and the board's other advisors to "write the script" upon which a court will eventually rely to understand and evaluate the director's decision-making process.³ While courts frequently view meeting minutes as a critical component of this written record, and sometimes consider them to be the best and most reliable evidence of a board's (or committee's) process, other aspects of the written record can be equally important. These include more "formal" components of the written record, such as meeting agendas, financial advisor presentations, and other presentations, memoranda, and outlines prepared for the directors, as well as less "formal" components of the record, such as notes and emails. A comprehensive, consistent, and timely prepared written record that evidences a thorough and careful process, and that corroborates witness testimony, will ordinarily provide a formidable defense to directors facing stockholder litigation alleging breaches of fiduciary duty. On the other hand, the written record can engender judicial skepticism and substantially undermine the directors' defense if it is vague, incomplete, or inconsistent, or if it conflicts with witness testimony. It is the task of deal counsel to endeavor to ensure that each component of the "script" supports a cohesive story that will bolster the directors' future litigation position, rather than undermine it.

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² See Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions* (Cornerstone Research, March 2012 Update), at 2, available at <http://www.cornerstone.com> (indicating that more than 95% of public company M&A deals announced in 2010 and 2011 and valued at more than \$500 million resulted in stockholder litigation and that over 90% of all deals valued at over \$100 million were challenged during that same period; further noting the increased incidence of the number of deals challenged, the number of suits filed per deal, and the number of deals challenged in more than one jurisdiction compared to several years earlier).

³ See *In re Ancestry.com, Inc. S'holder Litig.*, C.A. No. 7988-CS, at 15 (Del. Ch. Dec. 17, 2012) (Transcript); see also *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, C.A. No. 5402-CS, at 60 (Del. Ch. May 13, 2010) (Transcript) (noting that directors engaged in a sales process with legal and financial advisors "get to write the play").

This article discusses various aspects of breach of fiduciary duty litigation of which transaction counsel should have a firm understanding in order to help clients craft a winning written record of board deliberations and to avoid common pitfalls that can undermine the reliability and credibility of that record and, ultimately, the clients' litigation defense. Part I discusses the significance of minutes and other components of the written record in stockholder breach of fiduciary duty litigation and, particularly, M&A litigation, where directors often bear the burden of proving the reasonableness of their process under the lens of enhanced judicial scrutiny. To provide a better understanding of the broad range of documents and communications that are likely to become part of the litigation record, Part II discusses the likely breadth of discovery in stockholder class action litigation, including the far reaching scope of e-discovery, as well as certain attorney-client privilege matters that are particularly pertinent to the types of documents that will ultimately be included in the litigation record. Part II also considers evolving document retention and spoliation doctrines that will necessarily affect the record making process. The article concludes with Part III, which offers some practice pointers on how deal counsel can shape a winning written record and best avoid missteps that could weaken an otherwise compelling record when litigation ensues.

IN M&A LITIGATION, THE WRITTEN RECORD CAN MAKE OR BREAK DEFENDANTS' CASE

The Written Record Reflecting Board or Committee Deliberations

When stockholders commence class action litigation against corporate directors alleging breaches of fiduciary duty in connection with the approval of an M&A transaction, the directors will typically bear the initial burden of proving that their deliberative process was reasonable under the *Revlon* doctrine or that deal protection provisions in the merger agreement are reasonable under *Unocal*.⁴ In some cases, particularly where controlling stockholders are involved, directors might carry the more stringent burden of proving the entire fairness of the transaction.⁵ Those heightened standards of judicial review differentiate stockholder breach of fiduciary duty litigation in the M&A context from other types of fiduciary duty litigation to which the business judgment rule might be applicable. In the M&A context, the director defendants must convince the reviewing court that they engaged in a careful and reasonable deliberative process and, in some cases, must satisfy the court that their process was not just reasonable, but entirely fair.

While witness testimony is often an important component of the record in M&A litigation, the quality and content of the written record evidencing the board's decision-making process is often afforded equal, if not greater, weight by a court in assessing what a board of directors did (and did not do) and why it did (or did not do) so, as well as whether the directors have carried their heightened burden of proving a reasonable or, in some cases, entirely fair, process. This is particularly true in expedited preliminary injunction proceedings, where a court ordinarily decides whether or not to enjoin a transaction based solely upon a paper record without the benefit of live witness testimony. As Vice Chancellor J. Travis Laster of the Delaware Court of Chancery recently remarked in encouraging corporate governance professionals to be especially vigilant in their efforts to create a fulsome and high quality written record, "[a]ll the judge has to rely on are things like

⁴ See *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985); see also *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 933 (Del. 2003) (holding that deal protection provisions in a merger agreement are subject to enhanced scrutiny judicial review under *Unocal*); *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010) (explaining that when enhanced scrutiny review under *Revlon* or *Unocal* applies, defendants have the burden of showing they acted reasonably).

⁵ See, e.g., *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *12-13 (Del. Ch. Oct. 2, 2009).

minutes, board materials, contemporaneous notes and emails to gain insight into what actually occurred.”⁶ The Vice Chancellor further emphasized that board minutes, in particular, “are extremely important in litigation” and “should help confirm in the judge’s mind that a good process was followed.”⁷

Well crafted board minutes supported by other contemporaneous records evidencing a diligent board process are an invaluable – and often indispensable – tool for persuading courts that a board or special committee has engaged in a well run process reasonably designed to maximize stockholder value. In *In re Dollar Thrifty Shareholder Litigation*, for example, stockholder plaintiffs moved to preliminarily enjoin a proposed merger between Hertz Global Holdings, Inc. (“Hertz”) and Dollar Thrifty Automotive Group, Inc., claiming that the Dollar Thrifty directors breached their fiduciary duties under *Revlon*. The Court of Chancery concluded that the record did not support a finding that the Dollar Thrifty directors likely had breached their obligations under *Revlon* to maximize the value stockholders would receive in the merger.⁸ In evaluating the board’s decision-making process, then-Vice Chancellor Strine referred extensively to board meeting minutes and materials presented to the board, found those materials to be strongly corroborative of the deposition testimony, and concluded that the board was “properly motivated,” “diligently attended to its duties,” and “engaged in a reasoned consideration of the relevant factors and selected a reasonable course of action.”⁹ Numerous other cases illustrate how a comprehensive and cohesive written record can inspire judicial confidence in a board’s process and positively influence a favorable defense outcome in breach of fiduciary duty litigation.¹⁰

As demonstrated by *Dollar Thrifty* and other decisions, the written record of a board’s or committee’s deliberations will be most helpful in the defense of breach of fiduciary duty litigation if it provides a fulsome account of those deliberations, including by describing and explaining the key decisions and strategic choices the directors made throughout the process, identifying the information and advice the directors considered in making their determinations, and otherwise reflecting a process of conscientious and informed decision making. The record should demonstrate, among other things, that the directors were active and engaged, understood their role and obligations to the company and its stockholders, endeavored in good faith to carry out those obligations through a reasonable process, carefully evaluated potential alternatives, and understood the principal terms of the transaction they were approving, including comprehension of the practical affects deal protection provisions would have on the company’s ability to receive, consider, and accept potentially superior transactions post-signing. Terse and vague meeting minutes coupled with a skeletal record of the information and advice considered by the board or committee are seldom conducive to convincing a court that directors acted in good faith and engaged in a thorough and rational process. While practitioners may reasonably debate the pros and cons of comprehensive versus more minimalist minute-taking practices in other contexts, when directors are contemplating a significant M&A transaction that may fundamentally alter the ownership interests of stockholders, the effectiveness of the future litigation record is best served by a more thorough approach.

The case law abounds with examples of situations in which a poorly constructed or inconsistent written record of a board’s or committee’s deliberations ill serves the interests of director defendants in ensuing breach of fiduciary duty litigation. The Delaware Court of Chancery’s recent ruling in *In re Ancestry.com Inc. Shareholder Litigation*, for example, exemplifies the skepticism a court is likely to have if the board minutes and other contemporaneous written evidence of a board’s deliberative process fail to reflect, or only vaguely touch upon,

6 See J. Travis Laster, *Cognitive Bias in Director Decision-Making*, Address Before the Society of Corporate Secretaries & Governance Professionals National Conference (July 2012), in *The Corporate Governance Advisor*, Nov.-Dec. 2012, at 8.

7 *Id.*

8 *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 576 (Del. Ch. 2010).

9 *Id.* at 581 & n.33, 582-83 & nn.40-42, 584 & nn.52-55, 585 & n.73, 586 & n.81, 587 & nn.91-92, 594 & n.156, 600, 602, 605.

10 See, e.g., *In re Orchid Cellmark, Inc. S’holders Litig.*, 2011 WL 1938253, at *5 (Del. Ch. May 12, 2011) (examining the deliberations of the special committee and entire board, “as evidenced in meeting minutes and deposition testimony”); *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 443 (Del. Ch. 2010) (denying preferred stockholder’s motion to enjoin merger and relying extensively on record of careful deliberation reflected in meeting minutes); *Rovner v. Health-Chem, Corp.*, 1996 WL 377027, *4 (Del. Ch. Jul. 3, 1996) (relying upon committee minutes).

board decisions regarding important issues. In *Ancestry.com*, the Court of Chancery enjoined a stockholder vote on a merger so that supplemental disclosures could be made to the Ancestry.com stockholders about, among other things, a downward revision in management's financial projections used by the company's financial advisor for its fairness opinion.¹¹ Although Chancellor Strine stated that defendants' argument that the original projections had been too bullish made "a lot of sense," he expressed concern that the board's deliberations pertaining to the preparation and use of what were argued to be more realistic projections were not reflected in greater detail in the contemporaneous written record of the board's deliberations.¹² The Chancellor explained that "there are lessons in this ... for everybody writing these hygienic depictions of the process where they take everything that's actually told to the directors that might be helpful out of [the minutes]" and that "when there is nothing contemporaneous when you get to write the script," whether in the minutes, PowerPoint presentations, or other written information provided to the board, "it makes you wonder."¹³

In *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, the Court of Chancery expressed similar concerns about a written record that did not reflect board consideration of a significant matter. In *Maric Capital*, the Court enjoined the stockholder vote on a merger between PLATO and Thoma Bravo, LLC pending supplemental disclosures to the PLATO stockholders, which injunction was premised, in part, on inconsistencies in the record about the discount rates used by the financial advisor.¹⁴ Although the defendants submitted deposition testimony of a representative of the financial advisor, explaining that the financial advisor had elected to use a higher discount rate based on several factors relevant to PLATO, including its status as a micro-cap company, the Court ruled that there was "no evidence, such as board minutes" in the concomitant written record suggesting that the financial advisor had discussed with the special committee the reasoning behind the "quite high" discount rate.¹⁵ During oral argument on the preliminary injunction motion, the Court repeatedly questioned defense counsel as to why the committee minutes, or some contemporaneous presentation to the committee, did not indicate that the financial advisor had explained the reasons for the discount rate to the committee.¹⁶

In *In re Prime Hospitality, Inc.*,¹⁷ Chancellor Chandler declined to approve a settlement related to the sale of Prime Hospitality, Inc. to the Blackstone Group, finding that the record was "too incomplete and [had] failed to satisfy [the Court] that the chain of events leading up to [the] sale of Prime were as pristine as the [defendants] would have [the Court] believe."¹⁸ In reaching its decision, the Court focused in part on the discrepancy between Prime's detailed proxy disclosures and the abbreviated discussion of the sales process in

11 *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (Transcript).

12 *Id.* at 15-16.

13 *Id.* at 15. In *Ancestry.com*, the Court also ordered additional disclosures about the effect of so-called "don't ask, don't waive" provisions in confidentiality agreements signed by participants in the sale process. *Id.* at 31-32. Although the company had since waived such provisions, the record showed that the Ancestry.com board "was not informed about the potency of [the] clause[s]." *Id.* at 24-25. The Court's findings are indicative of the type of nuanced understandings the Delaware courts expect directors to have about key deal terms, including the effects of deal protection measures. If a board has been advised of such matters, the courts expect that the contemporaneous written record will reflect such advice. If it does not, a court is likely to be cynical of witness testimony or arguments to the effect that the advice was rendered.

14 *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, 11 A.3d 1175 (Del. Ch. 2010).

15 *Id.* at 1176-77.

16 *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, C.A. No. 5402-VCS, at 49, 56 (Del. Ch. May 13, 2010) (Transcript) ("Where? Where? It's not in the minutes; right?"); see also *id.* at 60 ("People get to present PowerPoints. That's what they're for. You get to [write] the play. And this is not in the play; right?").

17 2005 WL 1138738 (Del. Ch. May 4, 2005).

18 *Id.* at *13.

Prime's board meeting minutes.¹⁹ *In re The Walt Disney Co. Derivative Litigation*, while not involving an M&A transaction, is yet another decision in which the meager substance of board and committee minutes proved particularly unhelpful to defendants in breach of fiduciary duty litigation.²⁰ In that case, the Court of Chancery denied defendants' motion to dismiss a stockholder derivative lawsuit alleging that the board failed to act in good faith when it approved a substantial compensation package and severance arrangement for Disney's former president, Michael Ovitz. The Court emphasized that the minutes were particularly sparse with respect to the issue of Ovitz's employment agreement and reflected limited deliberations by both the compensation committee and the board with respect to Ovitz's compensation.²¹ After a lengthy trial, the Court ultimately determined that the Disney directors were not liable,²² but the meeting minutes offered little help to the directors in defending the allegations.

When the written record of a board's or committee's deliberations is not prepared in a timely fashion, that too can lead to considerable judicial skepticism. Memories fade and details can be lost with the passage of time, making minutes prepared after a long delay less reliable in the Court's eyes. In *In re Netsmart Shareholders Litigation*, the Court of Chancery was especially critical of the fact that the special committee did not approve the minutes for ten special committee meetings until one month after the merger was announced and stockholder litigation had commenced, even though the earliest set of minutes was for a meeting that occurred over five months earlier.²³ The Court explained that the "tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence inspiring."²⁴ Thus, even comprehensive minutes that appear to explicate an ample and effective board process could be called into question if they were not prepared and approved in a timely manner, particularly if they were prepared well after litigation is underway.²⁵

As the foregoing discussion shows, Delaware case law is replete with examples of situations in which the contemporaneous written record of board or committee deliberations inspires judicial confidence in the decision-making process, but also many examples of cases in which a thin, sketchy, or inconsistent written record undermines the defendants' litigation posture. It often falls upon deal counsel to ensure that minutes are prepared in a timely manner, that they portray the board's informational and decision-making processes in a comprehensive, cohesive, and accurate way, describing critical issues the board has considered and the bases for the board's decisions. Counsel also should seek to ensure that board or committee minutes are

19 *Id.* at *11-13; *see also, e.g., Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2010 WL 3168407, at *10 (Del. Ch. Aug. 11, 2010) (denying motion for summary judgment based, in part, on doubts created by meeting minutes prepared in a "brief and conclusory" manner one year after the fact by an individual who was not even in attendance at the relevant meetings and further noting that "[n]othing in the minutes and supporting materials reflects discussion or evaluation of any particular investment"); *In re MAXXAM, Inc.*, 659 A.2d 760, 766 (Del. Ch. 1995) (identifying discrepancies in timing between matters stated in minutes of committee meetings and discussion of timing in report issued by committee advisor). *Valeant Pharms. Int'l v. Jerney*, 921 A.2d 732, 740 (Del. Ch. 2007) (finding that "[a] review of the compensation committee meeting minutes confirms the court's conclusion from the other evidence that the process the committee followed was one designed simply to justify a predetermined outcome dictated by [company management]"); *Phillips v. Hove*, 2011 WL 4404034, at *11 (Del. Ch. Sept. 22, 2011) (scrutinizing Bates stamps on alleged final meeting minutes and finding that no meeting occurred on the date claimed by defendant).

20 *In re The Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 287 (Del. Ch. 2003).

21 *Id.* at 278 (noting that the meeting minutes relating to Ovitz's employment agreement accounted for "[l]ess than one and one-half pages of the fifteen pages of [board] minutes" and that "[n]o presentations were made to the [board] regarding the terms of the draft [employment] agreement" and "[n]o questions were raised, at least so far as the minutes reflect").

22 *In re The Walt Disney Co. Derivative Litig.*, 907 A.2d 693 (Del. Ch. 2005).

23 *In re Netsmart S'holders Litig.*, 924 A.2d 171 (Del. Ch. 2007).

24 *Id.* at 191; *see also Forsythe v. ESC Fund Mgmt. Co. (U.S.), Inc.*, 2010 WL 3168407, at *7, *8 (Del. Ch. Aug. 11, 2010) (expressing considerable cynicism about the fact that the minutes of the meeting at which the transaction at issue was approved were drafted a year after the meeting by a person who did not even attend the meeting).

25 Failure to prepare minutes on a timely basis can also have adverse consequences in discovery. In *Frank v. Engle*, the Court of Chancery revisited an earlier decision in which it had declined to require defendants to produce draft minutes on the basis that the final minutes would adequately inform plaintiffs of what had occurred at pertinent meetings. *Frank v. Engle*, 1998 WL 155553, at *2-3 (Del. Ch. Mar. 30, 1998) (referencing earlier ruling, *Lee v. Engle*, 1995 WL 761222, at *5, *8 (Del. Ch. Dec. 15, 1995)). When presented with evidence that final minutes were not being produced in a "timely manner" and that they were being tailored to promote the defendants' litigation strategy, the Court ordered production of the drafts. 1998 WL 155553, at *2-3.

consistent with other aspects of the contemporaneous written record, such as financial advisor presentations, legal memoranda, deal summaries, and draft documents provided to the board. Those other aspects of the written record should complement rather than call into question matters described in the minutes. When material information or advice is provided orally at a board or committee meeting and differs from information contained in written board materials, counsel should carefully consider the appropriate manner for addressing or explaining such inconsistencies, whether through the minutes or another contemporaneous writing, so as to decrease the possibility of future misperceptions regarding such information in a litigation context.

Often, the written record of a board or committee process should reflect some of the more nuanced information and advice provided to directors, such as the effect of various assumptions and metrics used by the financial advisor in its valuation analysis or the intricate workings of deal protection provisions; and the record should further reflect that the directors understood and properly considered such matters in making their decisions. Deciding how much detail is too much for inclusion in board minutes and what information can better be conveyed through other aspects of the contemporaneous written record often involves difficult judgment calls, but those calls should be informed by an understanding of the types of information courts are looking for in a convincing written record, as well as the variety of issues that can undermine judicial confidence in the written record.

Importantly, deal counsel's role in preparing the record of board or committee deliberations in the M&A context necessarily entails more than merely acting as scrivener. As one of the primary "writers of the script," and as professionals having far more familiarity with the M&A process and judicial expectations than most corporate directors and members of management, counsel must also play a key role in orchestrating a careful and thorough deliberative board process in the first instance. The written record, after all, can only be as convincing as the underlying process itself.

Other Common Components of the Written Record: Notes and Emails

Like the more formal components of the written record discussed above, less formal writings and communications, such as notes and emails, can often be either helpful or harmful to defendants' litigation position. Such documents can be beneficial when they validate information upon which a board relied, corroborate defense witness testimony, or confirm that board members were focused on the right issues, asked the right questions, and engaged in an effective deliberative process. In some instances, the Court of Chancery has found contemporaneous notes to be reliable evidence of matters discussed during board meetings, even where the minutes themselves did not reflect such discussions.²⁶

As frequently as they are helpful to the defense of M&A litigation, however, notes, emails, and less formal communications can also be detrimental. Such documents are ordinarily prepared hastily and with little attention to detail. Notes (whether handwritten or taken on electronic media) can reflect high level summaries, potential questions, snippets of discussion, random or disorganized thoughts, or personal reminders; they are typically vague and incomplete. Emails, text messages, and communications via social networking also tend to be less formal; they are seldom proofread and often reflect rapidly assembled ideas or less-than-complete thoughts. Such attributes make these types of documents particularly favored fodder for opposing litigation counsel, who will attempt to contort their meaning, exploit ambiguities, and cherry pick words or phrases, all in an effort to discredit witness testimony, call motives into question, and otherwise paint a picture at odds with a well-run board process. In some instances, stockholder plaintiffs will seek to use notes or emails to undercut the merits of defendants' litigation position – for example, by showing that they establish improper motives

²⁶ See *Yucaipa v. American Alliance Fund II, L.P. v. Riggio*, 1 A.3d 310, 322 & n.79, 323, 346 (Del. Ch. 2010) (relying extensively on in-house counsels' handwritten notes regarding matters discussed during board meetings, even though some were not reflected in the minutes, to conclude that board was fully informed and acted appropriately and in good faith); *Aquila, Inc. v. Quanta Services, Inc.*, 805 A.2d 196, 200-02 (Del. Ch. 1995) (relying upon handwritten notes taken by attorneys to supplement meeting minutes).

or contradict witness testimony.²⁷ In other instances, the opposing party may introduce ill-conceived notes or emails into the litigation record to cause embarrassment or to cast a witness in a negative light, potentially undermining his or her credibility or rapport with the court.

The best way to avoid giving stockholder plaintiffs the opportunity to effectively use notes, emails, and other informal communications to bolster their case in M&A litigation is to educate all participants in a sales process or merger negotiations of the need to exercise restraint and special care in creating these types of documents. They should always be prepared with an eye toward how they might be used and perceived in a litigation setting. It is also critical that transaction participants be aware that all notes, documents, and communications, regardless of their nature, are potentially subject to discovery and could very well become part of the litigation record. For the reasons discussed in the following sections of this article, participants in the process should assume that the plaintiffs, their counsel, and a reviewing court will eventually see every document or communication relating in any way to the transaction.

DISCOVERY, DOCUMENT RETENTION, AND ATTORNEY-CLIENT PRIVILEGE: WHAT DOCUMENTS ARE LIKELY TO BECOME PART OF THE WRITTEN RECORD IN STOCKHOLDER BREACH OF FIDUCIARY DUTY LITIGATION?

As discussed above, minutes, board presentations, notes, emails, and other documents are often prepared and circulated in the course of M&A negotiations and board deliberations without a full appreciation by the author and recipients as to how such documents might potentially be used in future breach of fiduciary duty litigation, either to support the directors' defense or to undermine it. In some instances, the author does not even recognize or focus upon the fact that a particular document will potentially be subject to discovery in future litigation. As discussed below, given modern e-discovery practices and evolving document retention rules, it is increasingly likely that nearly every document that participants in an M&A process create, modify, send, or receive in connection with that process will be subject to discovery if litigation ensues. Even documents that might be protected by the attorney-client privilege in other contexts often become part of the record in stockholder breach of fiduciary duty litigation.

Discovery and Document Preservation: What Documents and Communications Are Subject to Production in Litigation?

The Breadth of Discovery, Including e-Discovery

When advising clients in relation to a potential transaction, M&A practitioners should convey from the outset the broad scope of discovery – including far ranging and often intrusive “e-discovery” – that will result if and when the board's approval of the transaction is challenged in a stockholder class action. Providing this information, and attendant warnings, early and often in the process not only will help manage client expectations as to the scope and burden of future discovery, but can also have a salutary effect of driving home the need to exercise

²⁷ See, e.g., *In re Mobilactive Media, LLC*, 2013 WL 297950, at *7, *31-32 (Del. Ch. Jan. 25, 2013) (explaining that internal emails among defendants' management supported an inference that defendants intended to improperly hinder plaintiff's rights under a limited liability company agreement); *NJ Carpenter's Pension Fund v. infoGROUP, Inc.*, 2011 WL 4825888, at *3-4, *11 (Del. Ch. Oct. 6, 2011) (denying motion to dismiss based upon, among other things, several email communications suggesting that Vinod Gupta, a significant stockholder and the CEO of infoGROUP, “dominated the Board Defendants through a pattern of threats aimed at intimidating them, thus rendering them non-independent for purposes of voting on the Merger”); *Venoco, Inc. v. Eson*, 2002 WL 1288703, at *6 (Del. Ch. June 7, 2002) (concluding, based in large part on email communications, that that defendants surreptitiously used their positions as directors to improperly advance their interests as significant stockholders).

greater than the ordinary level of discretion in connection with all electronic communications during the process.

The range of documents and information potentially subject to discovery under state and federal court discovery standards is extremely broad and varied.²⁸ In M&A litigation, discovery might encompass final and draft versions of transaction documents, paper and electronic communications pertaining to the transaction, board materials, banker presentations, board and committee minutes, notes (whether handwritten or electronically stored), calendars and appointment books, drafts and alternate versions of all such documents, and even recorded messages such as voice mail. Directors named as defendants in stockholder breach of duty litigation generally are not surprised to learn that their paper files and documents stored on company computer systems will be discoverable. They are often taken aback, however, to learn that their personal electronic devices, including home desktops, personal laptops, tablets, mobile devices (such as smartphones), and portable storage devices (such as USB flash drives), can also be subject to discovery.²⁹ The Court of Chancery has made clear that, in stockholder fiduciary duty litigation, it expects counsel to search these types of personal devices if directors or other custodians used them to communicate about, or to create or store documents or data in any way relating to, the subject matter of the litigation.

The need to search for responsive information on personal devices often poses a more acute issue for those outside directors who lack company email accounts and instead rely upon personal accounts to receive deal-related materials and to communicate with other directors and their legal and financial advisors. The process of searching personal devices and accounts can cause considerable inconvenience and is often viewed by outside directors and other custodians as an intrusion on their personal privacy, or even that of their families. The fact that discovery is frequently expedited in M&A litigation tends only to exacerbate these issues. Even if a custodian believes the relevant e-mails or other documents would be equally available from other sources, those in his or her account, personal or otherwise, will still need to be preserved and searched for possible production.³⁰ The practice of a director or other custodian storing relevant files in one particular folder or location on his or her personal devices ordinarily will not be an effective means to limit the scope of any future discovery search. The Court of Chancery has indicated that, in such circumstances, counsel must still conduct or personally oversee a broader search of the device for potentially responsive information.³¹

Counsel should also emphasize to directors and others involved in a sales process or merger negotiations that it is not only their emails that will be subject to discovery. Any means of electronic communication used to discuss the underlying transaction or other matters at issue in the litigation, including text messages,

28 See Del. Ch. Ct. R. 26; Fed. R. Civ. P. 26; see also *Glassman v. CrossFit, Inc.*, 2012 WL 4859125, at *3 (Del. Ch. Oct. 12, 2012) (“In Delaware, the scope of discovery is broad: ‘Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action.’” (quoting Del. Ch. Ct. R. 26(b)(1))). Effective January 1, 2013, the Court of Chancery amended its discovery rules to specifically refer to “electronically stored information (ESI),” in addition to “documents” and “tangible things” as items subject to discovery. See Press Release, Delaware Court of Chancery, Court of Chancery Announces Rule Changes and New Discovery Guidelines (Dec. 4, 2012), available at <http://courts.state.de.us/chancery/rulechanges.stm> (noting that the purpose of these amendments was “to account for modern discovery demands and ... bring the Court’s rules in line with current practice”).

29 See Guidelines to Help Lawyers Practicing in the Court of Chancery, at 14, available at <http://courts.delaware.gov/Chancery/docs/CompleteGuidelines.pdf> (last visited Feb. 18, 2013) (hereafter, the “Chancery Guidelines”); see also *Roffe v. Eagle Rock Energy GP, L.P.*, C.A. No. 5258-VCL, at 12 (Del. Ch. Apr. 8, 2010) (Transcript) (emphasizing that where a custodian stores data in multiple places, each should be searched); *ebay Domestic Holdings, Inc. v. Newmark*, C.A. No. 3706-CC, at 23 (Del. Ch. Mar. 6, 2009) (Transcript) (“eBay should ask the custodians I have named above if they used shared drives. If those custodians indicate that they did use such drives, eBay should search those drives.”)

30 See *Roffe*, C.A. No. 5258-VCL, at 10-13 (Del. Ch. Apr. 8, 2010) (Transcript) (finding it insufficient for counsel to only examine and produce two of the three relevant individuals’ emails, even though the individuals’ assured counsel that all three received copies of all responsive emails); *Grace Bros., Ltd. v. Siena Holdings, Inc.*, 2009 WL 1547821, at *1-2 (Del. Ch. June 2, 2009) (holding that it “would not be overly burdensome and would not result in great expense” to ask that additional custodians’ email accounts be searched even if the relevant e-mails may have already been produced from other sources).

31 See *Roffe*, C.A. No. 5258-VCL, at 10-13 (Del. Ch. Apr. 8, 2010) (Transcript) (finding that it was insufficient for counsel to rely upon the client’s assertion that all responsive communications had been placed in a specific folder or location and only review that folder, and that that counsel needed to personally examine and search the relevant individuals’ emails to identify those that were responsive).

electronically preserved voice mails, and social media accounts, can also be subject to discovery.³² Thus, directors and other participants in an M&A process should be advised that any document they create, any note they take, and any electronic communication they send or receive relating in any way to the transaction process will potentially be subject to discovery and production in future litigation, regardless of its source and regardless of where it is stored.

Evolving Document Preservation Rules Generally Require That Steps Be Taken To Preserve Potential Evidence Once Litigation Is Reasonably Anticipated

M&A practitioners should also have a general understanding of evolving doctrines of document preservation and spoliation that are likely to be applicable in connection with future discovery. Absent such an understanding, it is possible that documents or communications could intentionally or inadvertently be deleted or discarded at a time when applicable preservation rules require their retention, which could result in significant sanctions, adverse inferences, or even default judgments. With recent studies showing a high probability that any public company merger will draw one or more stockholder class action suits alleging breaches of fiduciary duty by directors, it is increasingly important that M&A practitioners have an appreciation for document preservation rules, both so that they may implement their own preservation procedures and so that they may properly counsel their clients at the outset of any M&A process.

The generally accepted standard for document preservation is that parties should preserve all relevant information once litigation is “reasonably anticipated.”³³ The recently published Guidelines to Help Lawyers Practicing in the Court of Chancery confirm that this standard applies in the Court of Chancery. Those Guidelines state that any party who has “reason to anticipate litigation” is obligated to take “reasonable steps” to preserve the potentially relevant information within that party’s possession, custody, or control.³⁴ The Guidelines provide that such reasonable steps include the dissemination of a litigation hold notice to any custodians of potentially relevant evidence.³⁵

Generally speaking, a party may be deemed to reasonably anticipate litigation when the facts and circumstances “lead to a conclusion that litigation is imminent or should otherwise be expected.”³⁶ There is, as yet, no specific guidance from the courts regarding when litigation will be considered reasonably anticipated in the M&A context. Notwithstanding some statistics indicating that over 90% of public company mergers become the subject of stockholder class action suits,³⁷ it might be overly conservative to assume that stringent document preservation obligations are triggered, and that a litigation hold becomes necessary, at the time a board first receives an acquisition proposal or begins to consider a sales process or merger. It seems equally safe to conclude that, at least in most instances, litigation will be “reasonably anticipated” by the time the parties enter into definitive transaction agreements in connection with a public company acquisition. It is much harder to draw any bright-line rules for ascertaining the point in time between those two extremes at which

32 *Robinson v. Jones Lang LaSalle Americas*, 2012 WL 3763545, at *1 (D. Or. Aug. 29, 2012) (finding “no principled reason to articulate different standards for the discoverability of communications through email, text message, or social media platforms”); see *Passlogix, Inc. v. 2FA Technology, LLC, et al.*, 708 F. Supp. 2d 378 (S.D.N.Y. 2010) (imposing monetary sanction of \$10,000 on a party for, among other things, failing to preserve text messages).

33 See, e.g., *Beard Research, Inc. v. Kates*, 981 A.2d 1175, 1185 (Del. Ch. 2009) (“A party who has reason to anticipate litigation has an affirmative duty to preserve evidence that might be relevant to the issues in the lawsuit.”) (citation omitted); see *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003) (“[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold.’”).

34 Chancery Guidelines, at 13.

35 *Id.* at 13-14.

36 *Beard Research*, 981 A.2d at 1185.

37 See Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers and Acquisitions* (Cornerstone Research, March 2012 Update), at 3, available at <http://www.cornerstone.com>.

a transaction and its terms become sufficiently probable and concrete such that litigation can be said to be “reasonably anticipated.” Any determination of when that point is reached is necessarily context-specific, and will no doubt be informed by future case law developments.

Until the courts offer more definitive guidance, deal counsel should confer regularly with litigators throughout the process as it evolves and give careful consideration to when it is fair to conclude that litigation may be “reasonably anticipated.” In so deliberating, counsel should weigh, among other factors, the likelihood that the parties will reach a deal and the likelihood that the final deal will be challenged in court. Counsel should also be mindful of the draconian penalties their clients may suffer if a court later finds that the parties failed to preserve relevant evidence properly. Penalties for failure to preserve evidence may range from monetary sanctions,³⁸ to an adverse judicial inference,³⁹ to entry of a default judgment.⁴⁰

If a litigation hold notice has not previously been disseminated, counsel should carefully consider the issuance of a written litigation hold at or shortly after the time the parties execute definitive transaction documents, including a merger agreement. The Delaware Court of Chancery has stated that the best practice, even if not yet the prevailing practice, is for the litigation hold to be issued in writing.⁴¹ Counsel should ensure that the litigation hold is circulated to all directors and any other custodians of potentially relevant evidence, including custodians of electronically stored information such as IT professionals.⁴²

Privileged Documents Are Often Produced and Used in Breach of Fiduciary Duty Litigation in the M&A Context

M&A practitioners and their clients often mistakenly believe that their privileged communications are unlikely to be produced and become part of the record in stockholder breach of fiduciary duty litigation. Perhaps for that reason, lawyers and clients sometimes fail to prepare their privileged documents and communications with the same restraint and special care that is warranted for other documents that are likely to become part of the record. The fact is, documents that are otherwise privileged – or believed to be privileged – often end up being produced in discovery, particularly in connection with stockholder suits alleging that directors have breached their fiduciary duties. First, privileged documents might be produced in discovery because the director defendants voluntarily waive the attorney-client privilege in furtherance of their assertion of an “advice of counsel” defense. Second, plaintiffs representing a class of stockholders might be entitled to production of otherwise privileged communications because the privilege belongs to the corporation, rather than the directors individually, and stockholders are the ultimate owners of the corporation. Third, documents believed to be privileged might not, in fact, be so. While it is beyond the scope of this article to cover the full gamut of the attorney-client privilege doctrine and the reasons particular documents and communications may or may not be privileged, one issue of particular importance to deal lawyers who are preparing the written record of board deliberations warrants discussion: whether lawyer notes taken during board and committee meetings and lawyer drafts of board and committee minutes are privileged. That issue too is discussed below.

38 *Salgado v. Mobile Servs. Int'l, LLC*, 2011 WL 6224521, at *2 (Del. Ch. Nov. 30, 2011).

39 *Triton Constr. Co. v. Eastern Shore Elec. Servs.*, 2009 WL 1387115, at *8 (Del. Ch. May 18, 2009).

40 *Minna v. Energy Coal S.p.A.*, 984 A.2d 1210 (Del. 2009).

41 Chancery Guidelines, at 13-14; see also The Sedona Conference Working Group on Best Practices for Electronic Document Retention & Production, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* 49 (2d ed. 2007) (hereafter, the “Sedona Guidelines”).

42 Chancery Guidelines, at 13-14; see Sedona Guidelines, at 48-49.

Privileged Documents Will Become Part of the Litigation Record When Defendants Assert An Advice of Counsel Defense

In stockholder class action litigation alleging breaches of fiduciary duties by directors in connection with a merger, it is sometimes advisable for the director defendants to waive the attorney-client privilege and disclose advice of counsel upon which they relied in order to demonstrate good faith compliance with their fiduciary obligations. If the directors bear the burden of proving the reasonableness or fairness of their actions under a heightened standard of judicial scrutiny, such as *Revlon*, *Unocal*, or entire fairness, a showing of good faith reliance on the advice of counsel (as well as other professional advisors) can be particularly helpful in establishing the legitimacy of the directors' decisions.⁴³ The law is well settled that when directors assert a reliance-on-the advice-of-counsel defense, they waive the attorney-client privilege as to the subject matter of the waiver, and are not permitted to use the privilege as both a "sword and shield," disclosing helpful privileged communications while guarding others from discovery.⁴⁴

Because it is quite possible the directors will elect to waive the attorney-client privilege to facilitate a reliance-on-the-advice-of-counsel defense in stockholder breach of fiduciary duty litigation, the authors of privileged communications should keep potential litigation ramifications in mind when they prepare and send such documents. Well written, thoughtful privileged communications can provide a tremendous advantage to directors asserting a reliance-on-counsel defense, while hastily crafted or inartful communications can potentially have the opposite effect.

Stockholders In Breach of Fiduciary Duty Litigation Might Be Entitled to Production of Privileged Documents Under the Garner Exception to the Attorney-Client Privilege

An important exception to the attorney-client privilege sometimes applies in stockholder suits alleging that corporate directors breached their fiduciary duties. This "good cause" exception was enunciated by the Fifth Circuit Court of Appeals in the seminal case of *Garner v. Wolfinbarger*, and has long been recognized by the courts of Delaware.⁴⁵ The *Garner* exception is premised on the "mutuality of interest" between corporate fiduciaries and those to whom fiduciary duties are owed, *i.e.*, the stockholders,⁴⁶ and arises because the corporation can assert the privilege only through its directors and officers who must "exercise the privilege in a manner consistent with their fiduciary duties to act in the best interests of the corporation and not themselves as individuals."⁴⁷

The *Garner* doctrine does not create a blanket exception to the application of the attorney-client privilege in

43 The Delaware General Corporation Law specifically provides that directors are "fully protected" in relying in good faith upon information, opinions, reports, and statements presented by persons as to matters the directors reasonably believe to be within such person's professional or expert competency if such person was selected with reasonable care. 8 Del. C. § 141(e); see also *In re Pure Resources, Inc. S'holders Litig.*, 808 A.2d 421, 431 n.8 (Del. Ch. 2002) (noting that "it seems unwise for a special committee to hide behind the privilege [to block discovery into the committee's deliberations], except when the disclosure of attorney-client discussions would reveal litigation-specific advice or compromise the special committee's bargaining power").

44 See, e.g., *Zirn v. VLI Corp.*, 621 A.2d 773, 781 (Del. 1993) ("[a] party should not be permitted to assert the privilege to prevent inquiry by an opposing party where the professional advice, itself, is tendered as a defense or explanation for disputed conduct."); *In re Unitrin, Inc. S'holders Litig.*, 1994 WL 507859 (Del. Ch. Sept. 7, 1994) (finding that defendant-directors had waived attorney-client privilege by introducing into the record the actual advice rendered to the board by counsel with respect to an antitrust issue that the board had considered in implementing the challenged defensive measures); *In re Lorai Space & Commc'ns, Inc.*, C.A. No. 20377-N, at 28 (Del. Ch. July 10, 2007) (Transcript) (holding that if defendants wished to rely on advice of counsel, they would be required to produce all privileged documents relating to the transaction, not just the communications from counsel to the directors regarding the purchase agreement); *High River L.P. v. Hallwood Realty, LLC*, C.A. No. 20276, at 64-65, 67-69, 71-72, 74 (Del. Ch. June 6, 2003) (Transcript); *Pfizer, Inc. v. Warner-Lambert Co.*, C.A. No. 17524, at 89 (Dec. 21, 1999) (Transcript).

45 *Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974 (1971); see, e.g., *Zirn v. VLI Corp.*, 621 A.2d 773 (Del. 1993).

46 See *In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2005 WL 225040, at *3-4 (Del. Ch. Jan. 26, 2005); *In re Fuqua Indus., Inc. S'holders Litig.*, 2002 WL 991666, at *3 (Del. Ch. May 2, 2002).

47 *Zirn*, 621 A.2d at 781.

breach of fiduciary duty litigation; rather, where corporate fiduciaries are involved in litigation alleging that they breached their duties to the corporation or its stockholders, the availability of the privilege is subject to the stockholders' right to show "good cause" why the privilege should not be invoked under the circumstances. The *Garner* court listed numerous factors a court may consider in assessing whether a stockholder has established "good cause,"⁴⁸ and the Delaware Court of Chancery has identified three of those factors that are of paramount importance in determining the existence or non-existence of "good cause": (i) the nature of the stockholder's claim and whether it is colorable; (ii) the apparent necessity or desirability of the stockholder having the information and the availability of it from other sources; and (iii) the extent to which the communication is identified versus the extent to which the stockholder is blindly fishing.⁴⁹

The *Garner* exception, if shown to apply in a particular case, ordinarily results in a more limited production of privileged information than that associated with the broad subject matter waiver that occurs when directors assert a reliance-on-counsel defense. Nonetheless, deal counsel and clients should remain cognizant of the fact that the potential applicability of the *Garner* doctrine is yet another reason privileged communications could potentially become part of the record in breach of fiduciary duty litigation involving an M&A transaction.

Lawyer Notes Taken During Board or Committee Meetings And Lawyer Drafts of Board Minutes: Does The Attorney-Client Privilege Apply?

A fairly common misperception among some practitioners is that a lawyer's notes taken during a board or committee meeting for the purpose of later preparing the meeting minutes are ordinarily protected from discovery under the attorney-client privilege (or perhaps the work product doctrine). The Delaware Court of Chancery, however, has ruled in at least two instances that such notes are not, in and of themselves, privileged, although they potentially can contain privileged content. In *Pfizer, Inc. v. Warner-Lambert Co.*, for example, the Court of Chancery ordered the production of "all notes taken at board meetings by directors, persons acting as secretaries, and attorneys."⁵⁰ With respect to attorney notes, the Court suggested that they could be redacted "to the extent they constitute legal conclusions, propositions, and advice developed in anticipation of litigation."⁵¹ Similarly, in *Omnicare v. NCS Healthcare, Inc.*, the Court of Chancery ordered the production of notes taken during board meetings by NCS's outside counsel (who also served as corporate secretary), explaining that "notes taken at meetings, whether taken by directors or taken by someone acting as secretary, are properly discoverable."⁵² The Court made a further observation, similar to that in the earlier *Pfizer* ruling, that to the extent meeting notes reflect "material or discussions that are privileged in some other way," they could be redacted.⁵³

Thus, to the extent attorney notes summarize, transcribe, or reflect non-privileged discussions that occurred during a board or committee meeting, such notes might not be protected as privileged. But portions of meeting notes that reflect privileged communications that occurred during the course of the meeting and portions that do not reflect or transcribe discussions, but instead reflect the author's thoughts on legal matters, likely will be protected. This means, of course, that plaintiffs' counsel in breach of fiduciary duty litigation may have access to attorney notes taken during board or committee meetings (at least in redacted form), and will have the opportunity to identify any inconsistencies between those notes and other aspects of the written record,

48 *Garner*, 430 F.2d at 1104. See generally Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 7.02[c][3] (discussing the *Garner* exception to the attorney-client privilege and the typical factors Delaware courts have considered when determining if stockholders have demonstrated "good cause" sufficient to invoke the exception).

49 *Sealy Mattress Co. of N.J. v. Sealy Inc.*, 1987 WL 12500, at *4 (Del. Ch. June 19, 1987).

50 *Pfizer, Inc. v. Warner-Lambert Co.*, 1999 WL 33236240, at *2-3 (Del. Ch. Dec. 8, 1999).

51 *Id.* at *3.

52 *Omnicare v. NCS Healthcare, Inc.*, C.A. No. 19800, at 13-14 (Del. Ch. Oct. 16, 2002) (Transcript).

53 *Id.*

such as minutes, and to otherwise use the notes to further plaintiffs' litigation strategy. Careful note taking and subsequent preparation of comprehensive minutes by experienced counsel will often be the most effect way to combat plaintiffs' ability to use meeting notes in such manner.

A related issue is whether draft minutes prepared by attorneys or sent to counsel for comment will be considered privileged. The case law has not always dealt with this issue in a consistent way. In *High River Limited Partnership v. Hallwood Realty, LLC*, for example, the Court of Chancery required defendants to produce draft meeting minutes prepared by defendant's outside counsel.⁵⁴ In contrast, the Court in *Omnicare* ruled that it is "appropriate to limit the review of ... drafts to the final minutes as they are approved by the board, except of course in circumstances where there are no final minutes and the exigencies of the litigation require that the latest draft that is available be produced[,] subject to whatever caveat may be necessary to its final authenticity."⁵⁵

Several years before *Omnicare*, the Court of Chancery reached a similar conclusion in *Lee v. Engle*, ruling that defendants were not required to produce draft minutes because the editing process presumably would involve legal advice, implicating both the attorney-client privilege and work product doctrine, and because the final minutes would adequately inform plaintiffs of what had occurred at pertinent meetings.⁵⁶ The Court later revisited that decision, however, when presented with evidence that defendants were not producing final minutes in a "timely manner" and that they were tailoring the final minutes to promote their litigation strategy. The Court ruled that, under the circumstances, defendants were required to produce the drafts.⁵⁷ In so ruling, the Court noted that the company's secretary, an attorney, appeared not to have been involved in the process of editing the minutes and that the company's controlling stockholder (who was not a lawyer) controlled the editing and was responsible for the considerable delay in producing final minutes.⁵⁸ "That process," the Court explained, "is not the type of legal review for which defendants are entitled to assert attorney-client privilege as a protection against inappropriate discovery."⁵⁹

The circumstances in which draft meeting minutes will fall within the protection of the attorney-client privilege (or possibly the work product doctrine) remain somewhat unclear. The case law suggests that there may be no categorical rule, and that application of the privilege may depend on the nature of the editing process for the meeting minutes at issue in the particular case, including the extent to which that process involves legal input from counsel and the amount of time taken to finalize minutes. Given the lack of clear guidance as to whether and in what circumstances draft meeting minutes, including those prepared by attorneys, might be subject to production in litigation, it is always prudent to ensure that even the first draft be prepared with great care. Moreover, to increase the likelihood that draft minutes will be considered privileged, counsel should have an active role in the comment and editing process, and final minutes should be prepared and approved with alacrity.

⁵⁴ *High River Limited P'ship v. Hallwood Realty, LLC*, C.A. No. 20276-VCS, at 65-66 (Del. Ch. June 6, 2003) (Transcript). Notably, defendants had asserted a reliance-on-advice-of-counsel defense, and the Court also ordered production of all privileged communications within the subject matter of the waiver between counsel and board members or management. *Id.* at 64-65. Accordingly, the Court did not address whether portions of draft minutes reflecting privileged discussions during board meetings could appropriately be redacted in the absence of a subject matter waiver. Presumably, redaction would be appropriate in the absence of a subject matter waiver, just as it is in the case of final minutes.

⁵⁵ *Omnicare v. NCS Healthcare, Inc.*, C.A. No. 19800, at 14 (Del. Ch. Oct. 16, 2002) (Transcript).

⁵⁶ *Lee v. Engle*, 1995 WL 761222, at *5, *8 (Del. Ch. Dec. 15, 1995). In a later decision, the Court elaborated on the reasoning underlying its 1995 ruling, explaining that the production of draft minutes "could compromise the board's right to edit and certify the content of its minutes privately, a process that normally relies on legal counsel." *Frank v. Engle*, 1998 WL 155553, at *2 (Del. Ch. Mar. 30, 1998).

⁵⁷ *Frank*, 1998 WL 155553, at *2-3.

⁵⁸ *Id.* at *2.

⁵⁹ *Id.* at *3.

HOW TO CREATE A WINNING WRITTEN RECORD OF DIRECTOR ACTION FOR DEFENDING BREACH OF FIDUCIARY DUTY LITIGATION IN THE M&A CONTEXT

While every deal is unique, and the written record documenting the deliberations of a board or a committee in connection with each deal with necessarily reflect a variety of circumstance-specific factors, the existing judicial guidance suggests some principles of generally applicability that can assist counsel in crafting a comprehensive written record that will well position corporate directors to defend against stockholder suits alleging breaches of fiduciary duty in connection with M&A transactions. Deal counsel may wish to consider the following practice points to assist in the preparation of minutes and the coordination of other components of an effective written record. In addition, counsel should implement, and advise clients to undertake, certain practices and procedures – including note taking and email communication practices – that will enhance rather than undermine the directors' defense of future litigation.

Managing the Expectations of Directors

Litigation is Probable, So a Strong Written Record is Critical. At the outset of any sales process or merger negotiation involving a public company, counsel should advise directors that, if they announce a deal, litigation is probable. Counsel should inform directors that a reasonably detailed, cohesive, and compelling written record of the board's decision-making process will be critical to defending the litigation.

Not "Business as Usual." The directors also should be warned at the outset that things will not be "business as usual." They will be receiving and expected to digest, often on short notice, far more than the usual amount of information, including lengthy legal and financial presentations. Meetings will be more frequent, will last longer, and might be run differently. Directors may be required to refrain from discussing certain aspects of the sales process with other directors and members of company management. There will be considerable emphasis on process, and counsel will be highly focused on constructing a compelling record of active and informed decision making. The directors might even be asked to alter some of their long-standing practices pertaining to note taking, email communications, and document retention. If litigation ensues, their notes, emails and other documents likely will be produced in discovery. And at least some of the directors will be required to sit for depositions.

The Formal Record of Board Deliberations (Minutes and Board Materials)

Tenor of Minutes. Minutes should be drafted in a manner that reflects a process of conscientious and informed decision-making; they should demonstrate that directors were active, engaged, and fully informed and that they understood their obligations and endeavored to carry them out in a good faith and reasonable manner.

Level of Detail in Minutes

- *Comprehensive v. Minimalist.* Meetings minutes documenting an M&A process should be comprehensive. Even if the company generally employs a more minimalist approach in preparing board and committee minutes, highlighting only high level topics of discussion, once a sales process or merger negotiation is underway, the board or committee, in consultation with counsel, should consider the benefits of more detailed minutes to document the meetings pertaining to such process.
- *Not Verbatim Transcript.* Although minutes should be comprehensive, they generally should not contain a verbatim transcript of conversations that occurred during board or committee meetings. They also need not identify which directors made particular statements or raised particular issues, as such a practice could have a chilling effect on the exchange of information and opinions during the meeting.

General Content of Minutes. Minutes should, among other things: (i) identify significant issues discussed and important questions raised (and answered) during meetings; (ii) describe and explain key decisions and strategic choices made by directors and the reasons for them; (iii) identify the information and advice the directors considered and relied upon in making critical decisions, including legal and financial advice; and (iv) describe the specific decisions made or authorized at the meeting (including the vote by which they were approved, whether unanimous or otherwise).

Specific Matters Addressed in Minutes

- **Consideration of Alternatives.** The full body of minutes and other components of the written record in connection with an M&A process should show that directors were fully informed about and actively considered potential alternatives, the possible advantages and disadvantages of pursuing them, and the benefits of the chosen transaction in comparison to potential alternatives.
- **Terms of the Deal.** The record, including the meeting minutes, should also confirm that directors received information about and understood the principal terms of the transaction they were approving. This includes an understanding of the deal structure and value of consideration; key representations, warranties, and covenants (including restrictive covenants relating to the company's business); regulatory considerations; any related transaction documents; and the deal protections applicable to the transaction, as well as their practical effect on the company's ability to receive, consider, and accept potentially superior transactions.
- **Deliberation Regarding Important Issues.** All important matters considered or decided by the directors should be reflected in either the meeting minutes or other components of the record of board deliberations. The courts tend to assume that silence in the written record as to significant matters means that those matters were not considered or discussed, and will be skeptical of witness testimony to the effect that matters not mentioned in the written record were, in fact, considered.
- **Debate, Dissent, and Abstentions.** Minutes should acknowledge constructive debate and convey that difficult questions were asked and answered. If a director votes against a motion or otherwise expresses dissent, that fact and the director's reasons ordinarily should be noted. When a director recuses himself or herself from a meeting or portions of the meeting, or abstains from voting, due to actual or potential conflicts of interest or other reasons, the minutes should reflect the recusal or abstention and the reasons for it.
- **Legal Advice.** The minutes should reflect any legal advice conveyed to the directors regarding important matters. The level of detail with which the minutes should describe such advice will necessarily depend on the nature of the advice, the importance of its subject matter in the context of the overall process, and whether other board materials, such as memoranda or PowerPoint presentations, contain further details. Some commentators suggest that board minutes should generically reference the fact that legal advice was given on a particular topic, but exclude specific details about the advice. Such a practice may be sound in some contexts. But deal counsel should carefully consider whether that practice is advisable in the M&A context, where it is quite possible the directors will assert a "reliance on the advice of counsel defense" in any ensuing stockholder litigation alleging breaches of fiduciary duty. In many cases, it is advisable for the minutes to describe the content or tenor of legal advice with some specificity so that a reviewing court will be better able to evaluate the directors' good faith reliance on such advice. The minutes should reference any written materials containing legal advice provided to the directors before or during a board or committee meeting.
- **Other Professional Advice.** The minutes also should convey the substance of material advice received from other professionals, such as financial advisors. This includes not only information and advice pertaining to the financial advisor's valuation analysis, but also professional advice concerning the universe of likely bidders, the pros and cons of potential alternatives, and strategies relating to a sales process or merger negotiations. As with legal advice, the level of detail with which the minutes describe information and

advice provided by financial advisors and other professionals will depend on a variety of factors, including the nature and significance of the information or advice and the extent to which it is reflected in other materials provided to the board that will become part of the written record. With respect to a financial advisor's valuation analysis, the courts often expect directors to have a relatively nuanced understanding of the valuation methodologies used. The minutes and other components of the written record should therefore convey that the directors closely scrutinized the valuation analysis, asked and received answers to questions about the analysis, and understood the reasons the financial advisor chose to use particular metrics and assumptions and the potential effects on the analysis if different inputs were used.

Length of Deliberations. Minutes should reflect the start and end time of meetings, should convey that directors took sufficient time to fully inform themselves and deliberate about important matters, and should provide a general sense of the relative amounts of time spent on each significant matter.

Meeting Attendees. Minutes should identify each meeting participant, note any directors who are not in attendance, and specify when certain participants, such as management or financial advisors, joined and exited the meeting. Particularly with respect to legal advice rendered by outside counsel to the directors, it is important to reflect accurately the parties in attendance when the directors received such advice.

Board Presentations and Other Materials. Any written materials provided to directors in connection with a meeting should be referenced in the minutes. If materials were provided in advance of the meetings, that fact should be noted in the minutes. If errors or inaccuracies appearing in board presentations are identified and discussed during a meeting, or if information different from that contained in a board presentation is conveyed orally to directors, the minutes should reflect that such matters were discussed. It is critical that board presentations and other materials provided to directors complement or supplement the discussion contained in the minutes, and that any potential errors or inconsistencies, or different information conveyed orally, be adequately explained in the written record. When feasible, deal counsel should request an opportunity to review written materials prepared by financial advisors and other professionals before they are provided to the directors. This will give counsel an opportunity to identify any matters that should be clarified, corrected, or further explained before the materials are conveyed to the board. All board presentations and other written materials provided to directors in connection with a board or committee meeting should be retained by the company as part of its formal board records.

Preparation and Finalization of Minutes

- ***Who Should Prepare the Minutes?*** Minutes of board or committee meetings in connection with a sales or merger process should be prepared by a person or persons who are experienced with corporate governance practices and legal principles applicable in the M&A context. Even if a company's secretary or in-house legal counsel ordinarily prepares the board minutes in the first instance, it is not unusual – and often may be preferable – for experienced, outside M&A counsel to undertake that role once a sales process or merger negotiations have commenced.
- ***Timely Preparation.*** Minutes should be drafted and circulated to directors for review, comment, and approval as soon as possible after the meeting itself. By doing so, practitioners can avoid the taint that meeting minutes tend to suffer in judicial eyes if they are drafted and approved long after the meetings in question have occurred. In addition, prompt finalization of minutes may enhance the prospect of draft minutes prepared by an attorney receiving protection under the attorney-client privilege or work product doctrines.

Note Taking Practices, Emails, and Electronic Communications

Note Taking

- *The Risks.* From the outset of any sales process or merger negotiation, counsel should provide clear and consistent advice to directors and other participants in the process with respect to the risks inherent in note taking in view of the likelihood that any notes will be produced in future litigation. By their nature, notes are often incomplete, incongruous, or ambiguous, and they are easily susceptible to being misconstrued in litigation.
- *Note Taking Practices.* Directors, management, and other transaction participants should exercise restraint in note taking practices and give careful consideration to whether it is necessary to take notes in the first instance. Particularly with respect to board and committee meetings, directors are often best served by leaving the note taking to experienced advisors. If a person does take notes, he or she should do so sparingly and judiciously, with an eye to how they might be perceived in future litigation.

Emails and Texting

- *The Risks.* Directors and other participants in an M&A process should also be cautioned about the dangers of ill conceived emails and texts. Emails, text messages, and other forms of electronic communications will be subject to production in any litigation challenging a merger. Because emails and text messages are usually informal in nature and hastily written, they often prove to be troubling documents in litigation, containing words or statements that are difficult to explain or that are subject to being misconstrued.
- *Email and Texting Practices.* Directors, officers, and other transaction participants should be counseled early and often to employ a heightened sense of care when engaging in email communications relating to a sales process or merger. Before sending an email, transaction participants should consider whether communication via email is necessary and appropriate. An in-person or telephonic communication might be equally or more effective, particularly for communications involving matters that could be easily misperceived in future litigation. Persons communicating by email should take time to reflect upon and edit all emails before sending them. In writing emails, authors should avoid flippant remarks, expletives, and attempts at humor. Text messaging relating to a sales process should generally be avoided.

Document Preservation Matters

- *Assessing When Litigation Is “Reasonably Anticipated.”* Given the high probability that any public company merger will trigger the filing of one or more stockholder suits, document preservation obligations could apply once negotiations have reached a stage at which litigation can be “reasonably anticipated.” Deal counsel should consult regularly with experienced litigators concerning the status and stage of negotiations for purposes of assessing the point at which document preservation obligations may be triggered.
- *Preservation of Notes.* In view of the potential applicability of document preservation rules, directors and other non-lawyer participants in an M&A process should be advised to consult with counsel before discarding notes (or deleting electronically stored notes). In addition, common practices outside of the M&A context with respect to note taking, such as directors being urged to discard their handwritten notes after a meeting has concluded or after the final minutes have been approved, may need to be reconsidered in the M&A context in view of evolving document preservation rules.
- *Preservation of Electronically Stored Information.* When (or preferably before the point at which) litigation is reasonably anticipated, M&A counsel should coordinate with the in-house and outside litigation teams concerning the issuance of a litigation hold at the appropriate time. It may also be necessary to coordinate with in-house counsel and in-house IT professionals to ensure that once document preservation obligations

are triggered, relevant documents and communications are not deleted or discarded pursuant to the company's pre-existing document retention policies or electronic data management protocols. In addition, transaction participants who receive emails and other documents relating to the deal on personal devices or through personal accounts should be advised about their potential document retention obligations.

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CONCLUSION

Recent guidance from the Delaware Court of Chancery emphasizes the importance of a cohesive written record that will inspire judicial confidence in the board's deliberative process in the event that stockholders commence litigation alleging breaches of fiduciary duties by directors. Deal lawyers are the principal architects of that record, and the courts expect them to "write a script" that evidences a careful deliberative process, reasonably designed to maximize value for stockholders, and that does not leave lingering doubts as to whether the directors were fully informed and properly motivated. To write an effective "script," counsel must act as more than a scrivener. Counsel's role will involve carefully choreographing the board's process from the outset and ensuring that all elements of the written record complement each other and tell a compelling story. Counsel should also implement, and advise their clients to implement, practices designed to avoid some of the common missteps – particularly with respect to notes and email communications – that can call into question the credibility of the written record or otherwise impair an effective litigation defense.