Special Committees in Conflict Transactions: A Practical Guide

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Special committees of the board of directors can be powerful tools for boards facing transactions involving actual or potential conflicts of interest. When properly constituted, empowered, and allowed to function independently, a special committee can reduce litigation risk, improve judicial deference, enhance credibility with stockholders and proxy advisory firms, and produce better substantive outcomes. Below, we offer practical guidance about when to form a special committee, who should (and should not) serve on the committee, hiring advisors for the committee, and documenting the committee's work.

For purposes of this guide, we focus on Delaware law, given that most U.S. corporations are incorporated in Delaware and the case law is highly developed there. As a result, companies and practitioners frequently look to Delaware standards when developing best practices. While similar principles generally apply under the laws of other states, state law is not a monolith and transaction planners should consider which state laws will govern.

What Is a Special Committee and Why Form One?

Special committees are subsets of the board of directors charged with addressing actual or potential conflicts of interest for directors, officers, or controlling stockholders. The essential purpose of the special committee is to provide a locus of independent decision-making and to replicate the dynamics that exist in an arm's-length negotiation. Directors serving on a special committee are meant to represent solely the interests of the unaffiliated stockholders, not the conflicted party. Transactions involving conflicts of interest often generate complex legal considerations and carry a heightened risk of litigation. When a special committee is properly constituted and advised, it can provide meaningful protection for directors and officers—as well as the conflicted party—if the deal is later challenged.

Special committees are frequently established in the following contexts:

- Transactions involving a controlling stockholder, such as squeeze-out mergers, recapitalizations, going private transactions, asset sales or purchases, and transactions where the controlling stockholder may receive differential consideration or other benefits not shared ratably with the other stockholders
- Management-led transactions (e.g., management buyouts or restructurings)
- Related-party transactions involving directors, officers, or affiliated entities
- Demand reviews for shareholder derivative litigation (commonly referred to as special litigation committees, or "SLCs")

The use of a special committee can provide several significant benefits to a board considering a conflict transaction.

First, the use of a special committee can bring a conflict transaction within a state's statutory safe harbors for transactions involving conflicted directors or controlling stockholders. These safe harbors have been developed to address the heightened judicial scrutiny to which conflict transactions have historically been subject.

In Delaware, Section 144 of the DGCL creates a statutory safe harbor in which the use of a special committee plays an important role.[1] Specifically, for conflicted director or controller transactions (outside of take-private transactions), the approval of the majority of the members of a special committee comprised of at least two disinterested directors will satisfy the safe harbor and prevent the challenged transaction from being the subject of equitable relief or giving rise to an award of damages for breach of a fiduciary duty against a director or officer due to the conflict. While approval of the majority of disinterested directors will also satisfy this safe harbor without a special

[1] The newly amended Section 144 is the latest step in the evolution of Delaware's approach to conflict transactions. Such transactions were historically subject to "entire fairness" review, Delaware's most rigorous standard, under which defendants had to demonstrate both a fair process and a fair price. Over time, Delaware law evolved to first allow a burden shift when an independent special committee was used to negotiate a conflict transaction and later to create a judicial safe harbor ("*MFW*") under which conflict transactions would receive deferential business judgment review if they were conditioned from the beginning of substantive negotiations on (1) the approval of a fully independent and empowered special committee; and (2) the favorable, fully informed, non-coerced vote of a majority of the votes of all outstanding shares held by disinterested stockholders. While *MFW* provided a pathway to judicial deference, it was not always clear in advance whether a court would find that the requirements to invoke *MFW* protection had been met. As a result, many transactions that had been structured to receive business judgment review were nevertheless examined under the entire fairness standard—meaning that they were subject to close judicial scrutiny that typically precluded pre-discovery dismissal.

committee, the formation of a committee will be advisable in many instances. For going-private transactions involving a controller, special committee approval is also key: the approval of the majority of the members of a special committee comprised of at least two disinterested directors, in combination with the fully informed, uncoerced vote of the majority of votes cast by disinterested stockholders, will satisfy the safe harbor, precluding claims against an officer, director, or controller.

Other states have similar statutory protections. For example, in Nevada, the approval of a controller transaction by a committee consisting only of disinterested directors (or the approval of a board in reliance upon such a committee's recommendation) creates a presumption that there is no breach of fiduciary duty by the controlling stockholder.[2]

Second, even where a safe harbor is not available, the use of a special committee can provide important evidence of good process and even shift the burden of proof. For example, in Delaware, conflict transactions that have not satisfied the safe harbor are typically subject to entire fairness review, Delaware's most rigorous standard, under which directors have the burden of demonstrating that a challenged transaction is entirely fair, both with regard to process ("fair dealing") and to price ("fair price"), to the corporation and its stockholders. But the use of a well-functioning and empowered special committee—for example, in a controller going-private transaction that did not seek a majority of the minority vote of the unaffiliated stockholders and thus is not subject to safe-harbor protection—can shift the burden of proof to plaintiffs to demonstrate that the transaction was *not* entirely fair. More generally, the use of a well-functioning special committee is an important part of a fair process because it replicates arm's-length negotiations.

Third, the formation and functioning of a special committee is evaluated by proxy advisory firms such as Institutional Shareholder Services (ISS), which assess independence, process, and transparency in determining voting recommendations for conflict transactions. A well-functioning committee—with clear authority, engaged and independent membership, and a robust process—is a critical factor in ISS's assessment of whether minority stockholders' interests were sufficiently protected. ISS has indicated that it views the absence of an independent committee, or the presence of a committee perceived as passive or constrained, as a material governance deficiency that can justify a recommendation against a transaction and, in some cases, against the re-election of incumbent directors. ISS also places considerable emphasis on whether the committee oversaw a credible market check, the transparency of the process, and whether the committee's actions reflect meaningful negotiation with the counterparty, particularly in controller or management-led buyouts. Committees that are under-resourced, lack independent advisors, or fail to document a disciplined deliberative

[2] Nev. Rev. Stat. 78.240 as amended by AB 239.

process may invite skepticism from ISS, even where the transaction satisfies a state's legal standards.

Accordingly, forming a special committee that is independent, disinterested, well-functioning, and properly advised not only strengthens the board's position but also helps reduce the risk that stockholders will fail to approve an agreed transaction.

Despite these considerable benefits, a special committee is not always the right solution. Creating one when no true conflict exists can complicate negotiations, strain relationships among board members and between the board and management, and even create the appearance of a conflict where none existed, thereby increasing, rather than reducing, litigation risk. For that reason, companies should carefully consider before forming a committee whether there is an actual or reasonably anticipated conflict as well as whether there are more limited measures, such as having conflicted directors recuse themselves, that could be at least as effective.

Who Should Serve on a Special Committee?

Number of Directors

There is no "perfect" sized special committee. Rather, the committee's size will depend on the total number of disinterested and independent directors on the board and the size and complexity of the transaction that the committee will be considering. While committee size varies, the average special committee tends to have three members.

In Delaware, to qualify for the statutory safe harbor, a special committee must be comprised of at least two individuals,[3] which accords with precedent in which courts have expressed concern that a single-member committee would lack the "oversight provided by at least one colleague" and warned that, in a single-member committee the sole member must, "like Caesar's wife, . . . be above reproach."[4] Conversely, a committee that is too large may have drawbacks, including cost, scheduling difficulties, and providing a challenging stockholder with multiple avenues to challenge independence and disinterest.

Disinterestedness

Special committee members must be disinterested in the transaction they are evaluating. That means that they can neither: (1) stand on both sides of the transaction,

[3] D.G.C.L. § 144.

[4] *Gesoff v. IIC Indus., Inc.*, 902 A.2d 1130, 1146 (Del. Ch. 2006).

nor (2) stand to personally receive a material benefit (or suffer a material detriment) as a result of the challenged transaction that is not generally shared by the stockholders of the corporation.[5]

Courts tend to find a disabling material interest to be present when, for example, a director's company stands to receive a fee if a transaction is completed,[6] a director has a unique payout structure of some kind (for example, a liquidation preference or a redemption right),[7] or a director-officer stands to receive deal-contingent employment or compensation.[8]

In contrast, a director's interest in maintaining his or her position following a merger—standing alone—will not typically constitute a disabling interest.[9] Only where it can be established that a director's board compensation is financially material to him or her, such that losing his or her seat would have a materially detrimental impact on that director, can a disabling interest be established.[10]

Delaware has a statutory definition for "material interest," the presence of which will defeat the statutory safe harbor. According to that definition, a disabling material interest would be "an actual or potential benefit, including the avoidance of a detriment, other than 1 which would devolve on the corporation or the stockholders generally, that . . . would reasonably be expected to impair the objectivity of the director's judgment when participating in the negotiation, authorization, or approval" of the challenged transaction.[11]

The Delaware statute includes a presumption that a director of a corporation listed on a national securities exchange is disinterested with respect to an act or transaction to which that director is not a party if the board has determined that the director satisfies the exchange's criteria for determining independence from the company and, if applicable, from a controller. The presumption can be rebutted only by "substantial and particularized facts" that the director either has a material interest in the transaction or has a material relationship with a person with a material interest in the transaction.

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5 *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984); *Rales v. Blasband*, 634 A.2d 927 (Del. 1993).

6 *Orman v. Cullman*, 794 A.2d 5, 30–31 (Del. Ch. 2002).

7 *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958 at *7–8 (Del. Ch. July 24, 2009); *Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at *31–33 (Del. Ch. Apr. 14, 2017).

8 *Frederick Hsu*, 2017 WL 1437308, at *30.

9 *Orman*, 794 A.2d at 28–29.

10 *See, e.g.*, *Gantler v. Stephens*, 965 A.2d 695, 707 (Del. 2009) (claims that directors had an entrenchment motive solely because they could lose their positions following an acquisition are tautological; plaintiffs must plead, in addition to a motive to retain corporate control, other facts sufficient to state a cognizable claim that directors acted disloyally); *In re Alloy*, 2011 WL 4863716, at *9 (Del. Ch. Oct. 13, 2011).

11 D.G.C.L. § 144(e)(7).

Independence

Special committee members must also be independent, meaning that they must not be beholden to a party to the transaction in a way that would compromise their ability to exercise impartial judgment. As with disinterest, the Delaware safe harbor creates a heightened presumption that directors are independent that can only be rebutted with substantial and particularized facts. Nonetheless, existing case law helps to illustrate the factors that may be deemed to undercut independence. For example, "very warm and thick personal ties of respect, loyalty, and affection,"[12] close personal relationships with a party to the transaction, or material professional or financial relationships have all been previously found adequate to impugn a director's independence.

With regard to personal relationships, it will generally be acceptable for special committee members to have casual personal relationships or to move within the same social circles as a party to the transaction,[13] as long as the relationship does not raise a reasonable doubt as to whether the special committee member can impartially or objectively make decisions.[14] Courts have found, for example, that personal friendships between a director and a party to a transaction, such as attending each other's weddings,[15] being neighbors,[16] belonging to the same local country club,[17] or serving on the same boards,[18] are not likely to impugn a director's independence. On the other hand, stronger personal relationships—which either span decades,[19] rise to the level of being "BFFs"[20] or "brother[s] from another mother,"[21] involve membership at small, exclusive clubs together,[22] or involve sharing a private plane[23]—have been more likely to raise independence questions.

With regard to material professional and financial relationships, ordinary past business relationships, board nominations, and board service have typically been insufficient to cast doubt on a director's independence. That said, when a director is considered to be a "go-to" director by a particular controller, being placed on multiple boards by the same party (and perhaps accruing significant income as a result), courts have expressed skepticism.[24] In addition, if a director can be seen as owing a "debt of gratitude" to an

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12 *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016); *Marchand v. Barnhill*, 212 A.3d 805, 819 (Del. 2019).

13 *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040 (Del. 2004).

14 *See, e.g.*, *Marchand*, 212 A.3d at 805.

15 *Beam*, 845 A.2d at 1040.

16 *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128 (Del. Ch. Dec. 29, 2020).

17 *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020).

18 *In re Viacom*, 2020 WL 7711128.

19 *Del. Cnty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022–24 (Del. 2015).

20 *In re Viacom*, 2020 WL 7711128.

21 *In re Dell*, 2020 WL 3096748.

22 *In re Dell*, 2020 WL 3096748.

23 *Sandys*, 152 A.3d at 130.

24 *In re BGC Partners, Inc.*, 2019 WL 4745121, at *12–13 (Del. Ch. Sept. 30, 2019).

interested party,[25] for example because the director owes his career to that party[26] or even amassed substantial wealth as a result of his employment for that party,[27] that director's independence could be impugned.

Vetting the Special Committee

The special committee should be selected by the company's disinterested directors, with input from the general counsel, and not hand-picked or dictated by the controller, interested directors, or a party that is interested in the transaction. When considering potential members, care should be taken to inquire as to personal and material financial relationships between the potential committee member and any interested parties. In addition to asking potential committee members questions and using their director questionnaires to assess potential red flags, companies should perform independent research to verify there are no hidden ties, including reviewing public records, news archives, social media, and web image searches for any connection. Photographs of special committee members and a controlling shareholder together have been known to raise concerns regarding the committee member's independence. It can be helpful, but not necessary, for at least some of the committee members to have experience with similar transactions or with the relevant industry.[28] Once the special committee engages outside counsel, that counsel typically would confirm the facts underlying the determination that all members are disinterested.

Should There Be a Chair?

Special committees often find it convenient to appoint a chairperson or chairpersons from among their members. Even when there is a chairperson, the special committee should function as a committee and should refrain from vesting unilateral authority in any member.

Compensating Members of the Special Committee

It is customary to compensate members of a special committee for the additional work involved in serving on the committee, which can be substantial. Special committee compensation should take into account the complexity and duration of the work the committee has been asked to do and reflect market rates. Contingent compensation arrangements are best avoided, as they may call into question the committee's independence and disinterestedness. Fees can be structured as lump sums, periodic fees (such as monthly or quarterly fees), per-meeting fees, or a combination of periodic and per-meeting fees, depending on the complexity of the transaction and duration of the

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[25] *In re Match Grp., Inc. Deriv. Litig.*, 316 A.3d 446, 471–72 (Del. 2024).

[26] *Marchand*, 212 A.3d at 805.

[27] *Match*, 316 A.3d at 471–72.

[28] *See, e.g., In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *8 (Del. Ch. Sept. 19, 2008).

committee's work. Each structure has advantages: for example, lump-sum payments incentivize committee members to work efficiently and are less likely to allow for any inference that the committee's decision-making process was motivated by the desire to earn a certain fee, while periodic payments might better ensure that committee members remain adequately compensated, even if the committee's mandate or the timeline expand beyond what was initially projected. While per-meeting payments have the advantage of matching compensation to actual workload, they also may give the appearance that a committee had an incentive to meet frequently merely to receive more fees. Ideally, companies should benchmark potential committee fees against other comparable transactions.

The Special Committee Resolutions

Courts focus not only on who serves on a special committee, but also on the scope of authority vested in the committee. A special committee's powers should thus be carefully defined in the resolutions that empower it. The most robust committee mandates give the committee the power to negotiate on behalf of the company's minority stockholders (not just give a thumbs-up or thumbs-down), as well as approve or reject a transaction, consider alternative transactions, and hire independent advisors.

Courts have found it particularly important that special committees are vested with the "power to say no."[29] The resolutions should also describe the committee's responsibilities and powers with sufficient specificity to ensure that its members have a clear understanding of the committee's mandate.[30]

Ideally, the resolutions establishing the special committee will spell out clearly and in advance the compensation its members will receive.[31] Any substantial delay in

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[29] *Gesoff*, 902 A.2d at 1146 (the special committee should be given the "'critical power' . . . to say 'no'" to the proposed transaction).

[30] *See, e.g., In re Tele-Communications, Inc. S'holders Litig.*, C.A. No. 16470, 2005 WL 3642727, at *9–12 (Del. Ch. Dec. 21, 2005) (noting that perhaps the most serious problem facing the special committee was the ambiguity of its mandate, which contributed to numerous other flaws in the work of the special committee); *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 797–798 & n.134 (Del. Ch. 2011) (criticizing the special committee for, among other things, having from the outset a narrow conception of its mandate, limited to "evaluat[ing]" a transaction proposed by the controlling stockholder and not including the power to explore alternatives, and for ineffective bargaining).

[31] *See, e.g., In re Tele-Communications*, 2005 WL 3642727, at *12(failure to specify compensation of special committee members at the outset, together with $1 million payments to those members following approval of the transaction, raised questions as to the independence of committee members and were among the factors suggesting that the special committee process was flawed).

determining committee member compensation can create the appearance that the committee is being compensated for reaching a particular outcome.

Advisors to the Special Committee

The special committee will generally need legal and financial advisors to help it negotiate and evaluate a proposed transaction. While the company may identify a selection of potential independent advisors for the committee's consideration (alongside any advisors that the committee may independently identify), the choice must be made by the committee in the exercise of its independent judgment.[32] Although it may be tempting to use advisors that have a preexisting relationship with the company because of the special committee members' familiarity with those advisors, those advisors may have their own conflicts of interest or create the appearance of improper coordination between the company and the special committee.[33]

The special committee should investigate any connections that its advisors—including individual deal team members—may have with the parties or other relevant individuals or entities to make sure they are not beholden to anybody else involved in the transaction. It is not required that advisors have no prior, current, or prospective relationships with transaction parties; instead, those relationships must be disclosed so that the special committee can form a view as to whether the relationships are sufficiently material to compromise independent judgment and advice. The recent material business relationships of any advisors with the company and the acquirer must be disclosed to the company's stockholders under SEC and FINRA regulations. Insufficient disclosure of advisor conflicts could subject the transaction to entire fairness review. In recent years, courts have focused increasingly on the importance of disclosing potential conflicts on the part of legal advisors.[34]

Ordinarily, financial advisors to acquisitions receive most of their fee only upon closing the transaction. However, such a fee structure may be seen to incentivize the financial advisor to recommend a transaction to the special committee to make it more likely to close. As a result, it is not uncommon to see a substantial portion of the advisor's fee become payable upon delivery of the advisor's opinion, regardless of the message that

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[32] *See In re Carvana Co. S'holders Litig.*, C.A. No. 2020-0415-KSJM, 2024 WL 1300199, at *8 (Del. Ch. Mar. 27, 2024) (finding no indication of lack of independence where a special litigation committee picked one of two options for counsel presented by company's general counsel, with ability to pick counsel of its choosing).

[33] *See Firefighters' Pension Syst. of the City of Kansas City, Mo. Tr. v. Foundation Building Materials, Inc.*, 318 A.3d 1105 (Del. Ch. May 31, 2024) (declining to dismiss fiduciary duty claims against directors, special committee, controlling stockholder, and financial advisers where representation was insufficiently distinct).

[34] *See, e.g., City of Dearborn Police & Fire Ret. Syst. v. Brookfield Asset Mgmt., Inc.*, 314 A.3d 1108, 1130–26 (Del. 2024).

the opinion delivers, with any contingent portion of the fee becoming payable upon the closing of the deal. That being said, contingent fees remain common and will not generally, without more, undermine the advisor's credibility and independence. As with conflicts, it is critical that advisors' compensation agreements are fully disclosed to stockholders.[35]

Conducting Business of Special Committees

Documentation of the Special Committee's Process

Accurate and contemporaneous documentation of a special committee's process is a core component of demonstrating that the committee discharged its responsibilities in an informed and deliberate manner. To establish that the special committee has done its work properly, it is important to keep a record of the meetings of the committee, including telephonic meetings, with appropriate minutes reflecting the members' knowledge of the company's business and their consideration of the issues.[36]

Delaware courts routinely rely on the committee's meeting minutes and distributed materials as the primary evidence of what the committee reviewed, considered and deliberated over and how it exercised independent judgment. The committee's minutes should therefore show that the committee understood its mandate, evaluated alternatives, and directed advisors, rather than merely endorsing management recommendations. Excessively telegraphic minutes, while avoiding the risk of providing evidence that a special committee did not consider some particular factor or failing to capture the nuance of a discussion, tend not to demonstrate persuasively that the special committee really wrestled with the factors it did in fact consider. Similarly, minutes that are heavily redacted for privilege do not enable the court to evaluate the committee's process and deliberation. Committee files should remain separate from general corporate records to reinforce independence and safeguard privilege.

Strategic Priorities

Documentation should clearly identify the strategic priorities guiding the committee's review, as establishing strategic priorities that operate as the committee's evaluative framework helps demonstrate that the committee considered the full range of issues relevant to a conflicted transaction. In practice, these priorities often include, among others, valuation, timing, process protections, alternative structures, governance implications, and financing considerations. Articulating these priorities at the outset

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35 *See Foundation Building Materials*, 318 A.3d at 1158.

36 *See, e.g.*, *Kahn v. Tremont Corp.*, 694 A.2d 422, 429–30 (Del. 1997)(noting lack of attendance and diligence by some committee members as part of the basis for its conclusion that defendants retained the burden of showing the entire fairness of the transaction, despite the use of a special committee).

provides transparency into the committee's objectives and helps establish that directors were not simply reacting to proposals as they developed, but were instead guiding the process with a clearly defined mandate.

Well-drafted minutes typically reflect priorities such as (a) determining whether the proposed price falls within a range that could be considered fair to unaffiliated stockholders; (b) assessing whether the sequencing and timing of the transaction optimize negotiating leverage; (c) evaluating whether alternative bidders or structures should be pursued; and (d) determining what conditions or protections the committee deems essential to ensure a fair process.

Consideration of Alternatives

Delaware courts often view a committee's exploration of alternatives as strong evidence of independence and diligence, even if those alternatives are ultimately rejected. The minutes should therefore reflect whether the committee considered alternative bidders, transaction structures, financing paths, valuation ranges, or the decision to continue on a stand-alone basis without a transaction. If the committee concludes that any of these paths is not viable, that too should be documented, as the absence of such consideration can be cited as evidence of a passive or controlled committee.

Evaluation of Material Terms

Material terms, such as price, deal protections, governance rights, timing, conditions, and rollover arrangements, should be addressed in the minutes with sufficient detail to show that the committee deliberated on each point and sought advice as needed. A clear record showing how the committee evaluated and negotiated terms helps establish that it possessed the "real bargaining power" required to shift the burden of proof and to be considered "well-functioning."

Effectiveness of a Special Committee

A special committee's effectiveness depends not only on its formal composition but also on whether its members demonstrate active, informed, and balanced engagement throughout the process. Delaware courts evaluate "actual functioning," not structural labels. A committee should not only receive presentations from advisors but should also ask questions, explore uncertainties, and articulate the issues that matter most to disinterested stockholders. Courts evaluating fairness look closely at whether committee members engaged substantively with valuation materials, process alternatives, and negotiation strategy. A record showing that directors reacted thoughtfully to evolving proposals and pushed back where appropriate tends to support the conclusion that the committee exercised independent business judgment rather than simply accepting recommendations that originated with management or a controller.

Balanced participation is also critical. Delaware courts have expressed concern where one director drives the discussion, receives disproportionate access to advisors, or effectively acts as the sole negotiator. When a committee preserves equal information flow and allows all members to contribute to deliberations, it demonstrates the form of independence and diligence recognized by the courts as supporting judicial deference. Encouraging all directors to ask questions, request analysis, and weigh in on negotiating priorities also helps avoid the appearance of a process dominated by a single voice.

Similarly, the committee's legal and financial advisors should present substantive analyses to the full committee, rather than to individual members or management, and the committee should be the entity directing advisor workstreams. When advisors take instruction from the committee rather than management, and when their analysis is reviewed collectively by directors, the record is more likely to reflect a process conducted under the committee's control. This structure also supports the "well-functioning" requirement articulated in Delaware case law for burden shifting or business judgment review in controller transactions.

Attorney-Client Privilege

Effective privilege management is essential to the functioning of a special committee because conflict-related transactions often result in litigation, and the committee must be able to receive candid legal advice without risking disclosure. In addition, a committee that demonstrates clear control over legal communications, advisor interactions, and the flow of confidential information is better positioned to withstand judicial scrutiny. Privilege practices that separate the committee's deliberative work from management's role help ensure that courts view the process as director-driven, well-functioning, and consistent with the expectations set out in Delaware case law.

It is critical that the special committee retains its own independent legal counsel, as overlapping representation of management or directors can create ambiguity about whether and for whom communications are protected. Independent counsel helps ensure that fiduciary advice is tailored to the committee's responsibilities, reduces the risk of inadvertent waiver, and supports the committee's ability to direct the process rather than rely on counsel aligned with other constituencies. A committee should also establish clear protocols at the outset governing how information flows, who participates in meetings with counsel, and how materials are distributed.

To best ensure that legal advice in committee meeting minutes and written materials is protected by attorney-client privilege, committee minutes should reflect that counsel provided guidance on specific legal considerations, such as fiduciary duties, standards of review, or negotiation parameters, without revealing the substance of privileged legal advice. This approach reinforces the committee's reliance on counsel while protecting

the confidentiality of legal analysis. Documents should be stored in a dedicated, access-restricted repository separate from general corporate files. Communications with counsel should be distributed only to members of the committee and, when appropriate, advisors aligned with the committee.

Committees should structure their meetings to account for situations where the committee interacts with other entities or advisors who may share aligned interests. In some transactions, common-interest or joint-defense arrangements may be appropriate to preserve privilege across closely coordinated parties. Committees may also hold executive sessions with counsel to discuss particularly sensitive matters involving conflicts, process concerns, or negotiation strategy. These mechanisms allow the committee to receive complete and candid legal advice while maintaining confidentiality.

To better protect any attorney-client privilege, committees should establish clear guidelines regarding the use of personal email accounts, non-company messaging platforms, and text messages for committee business. While the use of personal email does not, standing alone, waive the attorney-client privilege, it can complicate privilege assertions, create discovery risks, and undermine the appearance of disciplined privilege management if communications are later intermingled with non-privileged materials or lack appropriate safeguards. Text messages are particularly susceptible to discovery risk because they are often informal, difficult to preserve systematically, and more likely to be deleted or intermingled with non-committee communications.

Best practice is for committee members and counsel to conduct privileged communications through designated, secure channels (whether company-provided or committee-specific) and to avoid substantive legal discussions over personal accounts. Where personal email or other communication methods are used, committees should ensure that communications are clearly identified as privileged and confidential, segregated from general correspondence, and retained in a manner consistent with the committee's document preservation protocols. However, committee members should be aware that merely labeling a communication with "Attorney Client Privilege" or cc'ing a lawyer will not ensure a document's privilege if the communication is not otherwise covered by the privilege, for example, because it is not a request for legal advice or not confidential.

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Special committees can be important tools for boards facing actual or potential conflicts of interest. To realize their benefits, special committees should consist of only disinterested and independent directors, receive a clear and comprehensive mandate, function independently (including with regard to their choice of advisors), and ensure

that their work is well documented. The use of such a committee will ensure that a conflict transaction is best positioned to withstand judicial scrutiny and also lead to better outcomes for companies and their stockholders.

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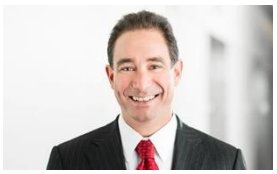

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