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Everybody Wins: The Benefits of Collaboration Between Company and Board Counsel

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Imagine you are counsel to a company conducting a serious internal investigation. You may *already* be contending with government agencies, recalcitrant employees, and private plaintiffs. And then you learn of another curveball: the company's board of directors has appointed its own counsel to do an investigation. With everything else going on, how do you handle conflicts between board and company counsel (which seem inevitable but need not be)? What are the do's and don'ts of productively navigating this obstacle and turning it into an opportunity?

Why Conflict Occurs

While the fiduciary duties of directors and officers significantly overlap (see *United Food & Com. Workers Union v. Zuckerberg*, 2021 WL 4344361 (Del. Sept. 23, 2021) ("The directors and officers of a Delaware corporation owe two overarching fiduciary duties—the duty of care and the duty of loyalty.")), each has a distinct set of responsibilities. The company's officers are responsible for day-to-day oversight of the company, providing the board with an appropriate review of the company's legal compliance programs, and informing them of risks that may require immediate attention.

Meanwhile, the board must represent shareholders and make a good faith effort at implementing an oversight system. See *Marchand v. Barnhill*, 212 A.3d 805, 821 (Del. 2019) (citing *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996); *Stone v. Ritter*, 911 A.2d 362 (Del. 2006)); see also *Asbestos Workers Philadelphia Pension Fund v. Bell*, 137 A.D.3d 680, 684 (2016).

These divergent responsibilities can lead management and the board towards conflicting priorities. At the same time as each side seeks to demonstrate that it satisfied its duties in the lead-up to the investigation, officers and directors have a natural inclination


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to protect themselves by pointing the finger elsewhere.

The board may seek to inoculate itself from claims of breach of fiduciary duty to shareholders by focusing on management's flaws; management may interpret this as scapegoating, which could further harm a company's stock price and prospects for recovery. When circumstances call into question management's integrity and objectivity, a corporation's board may retain its own counsel to investigate in parallel to the company's counsel.

While counsel for either party should conduct an impartial investigation, their client's priorities can get in the way, create tension between board and company counsel, and leave the corporation worse off.

When Dueling Counsel Collide

Conflict between company and board counsel can generate pitfalls. One common conflict is over continuity of management. When a company finds itself in a quagmire, the board may have every reason to suspect that, for example, the CEO is primarily responsible. Board counsel may start laying the groundwork for the CEO's termination.

But from company counsel's perspective, maintaining key executives in place can be critical for a company in crisis: they can be a valuable source of information, provide insight into potential mistakes, and become implementers of potential solutions. Moreover, management often serves as the face of the company—terminating a CEO could generate negative attention both in the securities markets and provide fodder for potential litigants.

Conflicts like this risk creating an additional "front" in the investigation, where company and board counsel are fighting each other. This is a distraction that threatens scarce resources when a company is already at risk. Sufficient adversity between sides may cause an officer or director to feel so targeted as to seek out their own counsel, further complicating an already complicated dynamic.

Perhaps most importantly, board and company counsel may soon be facing external litigation risk over the issues being investigated. If both sides reach separate findings of fact and make disparate recommendations at the end of the investigation, there can be significant consequences.

For one, company or board counsel could emphasize facts that serve to either insulate their client or, worse yet, shift the blame to the other side, leading to a damaging factual record for one arm of the organization.

Further, a disconnect in findings can generate competing suggestions for corrective actions, providing a basis for third parties to question why one side's advice was or was not followed. These inconsistencies are gifts to a government agency or private plaintiff because they may be discoverable and could supply ammunition to question the integrity of the investigations and remedial actions taken in its wake.

Moreover, significant factual differences can provide a basis for a third party to challenge common interest privilege. In Delaware, common interest privilege requires both parties' interests to be "parallel and non-adverse." *Buttonwood Tree Value Partners, L.P. v. R. L. Polk & Co.,* 2021 WL 3237114, at *8 (Del. Ch. July 30, 2021); see also *Loughry v. Lincoln First Bank, N.A.*, 67 N.Y.2d 369, 376 (1986).

By pointing the finger at each other in an adverse manner, company and board counsel may unnecessarily expose documents to discovery where they otherwise would be protected. See, e.g., *Ryan v. Gifford*, 2007 WL 4259557 at *3 (Del. Ch. Nov. 30, 2007) (citing to *Westinghouse Elec. v. Republic of Philippines*, 951 F.2d 1414, 1423 (3d Cir. 1991)).

Cooperative Best Practices

Internecine conflict is not inevitable. But how can you avoid it?

The first step requires a shift in perspective. Ultimately, even while their respective clients may influence them in a particular direction, company counsel and board counsel have an alignment of interests—namely, finding the truth and doing what's best for the company. Approaching each interaction with the intention of finding common ground can turn tense and suspicious discussions into productive ones and transform a picture of a fractured organization into a united front.

Cooperation starts in the discovery phase of the investigation. If company and board counsel act as facilitators of information between their respective clients, they help resolve the investigation far more efficiently.

One simple way of achieving this is by setting up standing meetings between counsel to touch base on progress, updates, and questions. Another method is by having both counsel at any investigatory interviews. Beyond conserving resources, this helps to keep both sides informed, ensure that witnesses are comfortable and candid, and reduce the risk of generating divergent narratives. As the investigation progresses, these channels of communication can be especially useful, with the board raising any concerns to company counsel, company counsel getting the chance to respond to the board (with board counsel present), and vice versa. Such openness reduces tensions and brings about further, productive dialogue.

Sharing work product goes hand-in-hand with this process. While truly deliberative materials can and (for the sake of a fair investigation) likely should remain internal to each counsel, sharing items like draft reports and interview notes helps both sides work off similar facts, keeps them informed of the other's trajectory, and reduce surprises. This can be particularly helpful where the investigation entails complicated or novel legal issues, such that either side can check their research or conclusions against the other and discuss any differences.

Doing so requires counsel to be mindful of privilege issues. Having a prospective policy in place for board-management communications can ensure the common-interest privilege is protected and prevent confusion on representational issues. Joint defense agreements can be strong evidence of such a common interest between parties. See, e.g., *Am. Legacy Found. v. Lorillard Tobacco Co.,* 2004 WL 2521289, at *3 (Del. Ch. Nov. 3, 2004).

DOJ may look unfavorably upon joint defense agreements, so parties will need to balance this risk when considering whether to enter into a formal agreement. Additionally, both sides must actively consider whether the other's interest in escaping civil and criminal liability may defeat this common interest during the investigation.

Even in the event that management truly failed to meet their duties and the board seeks to dismiss executives, company counsel can have valuable input on the timing of dismissal, related findings by the board, and the impact that these findings may have on external investigations or litigation.

If wrongdoing on management's part is not clear, counsel must balance the risk of future litigation against the value of information sharing and cooperation with management. Collaboration between company and board counsel can assist in making the optimal decision.

Finally, this spirit of cooperation is useful when extend to interactions with third parties, too. Division generates discoverable material, but a united front between counsel demonstrates the organization as a whole is committed to resolving the investigation. This comes into play when the company is seeking sign-off from an auditor on financial statements or SEC filings and when dealing with the SEC itself.

Board and company counsel providing similar information to an auditor or agency reduces the chance of doubt or delay in obtaining approvals critical to the company as a going concern.

Conclusion

Although for structural reasons they may find themselves at odds, ultimately counsel for the board and the company should both seek what is best for the company, and oftentimes, that means setting aside these differences and working together.

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