McCann FitzGerald

Briefing

Evidential and Legal Professional Privilege issues when drafting Board Minutes

INSTITUTE OF DIRECTORS IN IRELAND

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When drafting minutes of a meeting, particularly a meeting of directors or committee of directors, it is important to bear in mind that those minutes may, at some point in the future, be produced to an opponent in litigation as part of a request for discovery or may be introduced in evidence in the course of a trial. This briefing considers two important points in this regard: the first is the treatment of privileged content within minutes of meetings. The second addresses the steps that must be taken for the formal minutes of meetings to be treated as evidence in civil and criminal trials.

What is Legal Professional Privilege?

Legal professional privilege confers immunity from disclosure of documents in circumstances in which documents would otherwise have to be produced. Such circumstances include disclosure in discovery to opponents in litigation, to a prosecuting or investigating authority, to a statutory inquiry or on foot of a freedom of information request. A party whose confidential document enjoys legal professional privilege may have to disclose the existence of the document but can refuse to allow inspection of it. There are two common forms in which legal professional privilege arises: legal advice privilege and litigation privilege.

Legal advice privilege attaches to communications made in confidence between a lawyer and client during a professional legal relationship for the purposes of seeking or giving legal advice. It arises whether or not there is a prospect of litigation. It is important to note that privilege attaches only to legal advice and not to legal assistance such as administrative tasks carried out by a solicitor on behalf of a client.

Litigation privilege attaches to documents created for the dominant purpose of actual or contemplated litigation. It is not restricted to communications between a client and their solicitor but may extend to communications with agents who are assisting with preparation for the litigation.

A document may benefit from both litigation privilege and legal advice privilege, depending on the circumstances in which it was created.

The law of privilege is in effect a subset of the law of confidentiality. Unless privileged material is held and communicated in confidence the privilege attaching to it will not survive. While all privileged documents must be held confidentially, not all confidential documents attract privilege and the technical rules of privilege must be considered before the protection is invoked.

Managing Privileged Communications

The organiser of a board meeting, usually the company secretary, should take care to ensure that the meeting is structured in such a way that discussions that might attract legal professional privilege are only conducted in the presence of individuals who are bound to keep that information confidential. A good example is the discussion by a board of a commercial transaction that is either contemplated or ongoing.

The various commercial advisers and lawyers (both internal and external) assisting the company with the transaction may be asked to attend the board meeting to update the board on the status of the transaction. The discussion in relation to the transaction may also concern legal advice received from the company's internal or external lawyer. Although the company's other commercial advisers for the deal may have an active interest in receiving or knowing the content of that legal advice and would be bound to keep it confidential by virtue of their contractual arrangement with the company, other individuals who are not advising in relation to the transaction may not be so bound. Their attendance at the meeting for that particular agenda item carries the risk that any privileged communication made during the meeting may lose that vital component of confidentiality that is required to maintain privilege.

Minuting Privileged Discussions

The manner in which a privileged communication is minuted is also critically important. Privileged communications, whether they attract legal advice privilege by recording the seeking or giving of legal advice by a lawyer or are made for the dominant purpose of litigation that is contemplated or in being, should be minuted separately from other factual information relating to that agenda item. This will facilitate the redaction of that privileged communication should the balance of the document prove relevant in the context of a request for discovery or disclosure.

Privileged content ought not be mixed with other non-privileged content as this would make it difficult to successfully assert legal professional privilege over the privileged entries.

Language to Protect Privilege

The use of appropriate language is also critical when recording privileged content in minutes. As with any minute of a meeting, minutes that record privileged discussions should be concise and should not discuss the privileged discussion in greater detail than is necessary. It may be sufficient in the circumstances to note that a legal adviser attended and that there was a discussion in relation to a particular legal matter.

Where legal professional privilege may be validly invoked, the company secretary or the individual charged with preparing the draft minutes should take care to use language that makes it clear that the content in question is subject to privilege. As a result, the language used should reflect that the board was "advised" by its lawyers, that the advice "benefits from legal professional privilege" and that the advice was given in a particular legal context or in relation to a particular legal question.

Where appropriate, it may also be useful to note at the outset in the minutes that particular entries attract legal professional privilege. This will assist when the minutes are considered in the context of a reply to a request for discovery or if a judge seeks to inspect that privileged content to determine whether or not privilege has properly been invoked.

Where a discussion is minuted that relates to a dispute that is at that time contemplated but not yet in being and that discussion is privileged, the individual preparing the minutes should take care to set out, albeit in summary form, the facts to hand that form the grounds for the belief that litigation is contemplated or anticipated at that point in time.

Minutes as Evidence

Minutes constitute the formal record of proceedings at a meeting and can be submitted in court as evidence. Section 166 of the Companies Act 2014 provides that when minutes are signed by the chairperson of the board, the minutes constitute evidence of what took place at the meeting. If, however, a matter has not been recorded in the minutes, it may be proved by some other method (for example, a person present at that meeting may give evidence). The signed minutes are not conclusive evidence of proceedings and may be displaced by evidence to the contrary. Unless displaced, the meeting is deemed to have been duly held and convened and all appointments and motions passed deemed valid.

The constitution of certain companies may provide that minutes are conclusive evidence of the proceedings, in the absence of fraud or serious bad faith. In addition, a resolution recorded in minutes does not in itself create a contractual relationship between the board and a third party, although it may constitute evidence that the relevant contract was approved by the board.

Qualified Privilege: Protecting Matters Raised in Good Faith at Meetings

Qualified privilege operates as a defence to a defamation action. It generally attaches to a statement made by a party, under a duty to make it, to another party, who he or she believes has a reciprocal interest in receiving the information. It may cover a situation in which a director makes a false statement damaging to another's reputation at a board meeting and this statement is recorded in the board minutes.

This defence can be lost where the relevant statement is made with malice (eg where a director raises queries regarding the competence of an officer of the company seemingly in the interests of the company but in reality because of a wholly unconnected personal dispute). If, therefore, a director (or other company officer) raises a matter of concern, in good faith, at a board meeting, his or her statements may benefit from qualified privilege.

Qualified privilege may also be lost where the information is shared with unconnected third parties (*eg* non-directors or the press) as the law insists that publication should be restricted to those persons who have a legal interest in receiving the information.

Proving Company Records in Civil and Criminal Proceedings

The courts will require a party to prove the authenticity of a document before it is produced in evidence. This is also the case in respect of company records. The best evidence rule requires that a party seeking to rely on the contents of a document must adduce primary evidence of those contents, ie the original document in question. However, the contents of a document may be proved by secondary evidence (including a copy of an original) if the original has been destroyed or cannot be found after due search or if the production of the original is physically or legally impossible.

The party seeking to introduce the secondary evidence must demonstrate that a proper search was conducted and outline the steps taken to try to locate the document.

The court must also be satisfied on the evidence that the original document was properly executed by all the parties and that the contents were the same as those of the copy produced. Where an original document, in this instance the minutes of a board meeting, has been damaged and reconstructed, secondary evidence of the contents of the original may only be given by the individual responsible for the reconstruction or by an individual who attended at the meeting or saw the original document, as otherwise it would not be possible for the court to reach a conclusion as to the reliability of that secondary evidence.

There are various means by which the authenticity of a document can be proved. This can be done by calling the author of the document or a person who was present when the document was created and who witnessed its execution.

Generally speaking, company records such as board minutes, can be given as evidence in criminal trials via the Criminal Evidence Act 1992.

Conclusion

When drafting minutes of meetings, consider the following before putting pen to paper:

- Is there privileged content to protect?
- How should the meeting be structured to facilitate this?
- Having regard to regulatory requirements, what level of detail is absolutely necessary?
- The possibility that the minutes may at some point be made available to a wider audience, such as an opponent in litigation.
- That the minutes should record carefully who was in attendance at various points during the meeting, to record the fact that privileged communications were only made to individuals with an interest in receiving them.

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