# New guidance on handling disruptive directors

*Following a Delaware Supreme Court ruling, directors who seek to exclude their colleagues from boardroom deliberation may be risking personal liability for taking such actions.*

**By Doug Raymond**

An effective board, the commentators say, is collaborative and diverse, in which different perspectives are given thoughtful consideration in a respectful and high-functioning environment focused on creating shareholder value.

The reality is often different.

Boards, like any other social organization, can be dysfunctional, and some directors can be particularly challenging to get along with. A director may pursue a specific agenda to the exclusion of other business, such as putting the company up for sale when the other directors are not in favor of that step; but a director's personality quirks or even personal vendettas may also disrupt board deliberations. In these circumstances, the other directors may be tempted to exclude the directors they see as disruptive, so they can get on with the rest of their business without distraction. A recent case highlights that doing so prevents the excluded director from exercising his fiduciary responsibilities, and calls into question whether the other directors have violated theirs.

Under the Delaware Corporation law, a board of directors, with limited exceptions, may delegate authority to a committee of the board, including a committee comprised of all but one director. Particularly in public corporations, the demands of the board's oversight function, and the need to comply with Sarbanes-Oxley, Dodd-Frank, and the extensive array of other complex securities laws, generally necessitate extensive reliance on board committees, including the audit committee, the compensation committee, and the governance committee. Many boards have also delegated authority to an executive committee, granting it the authority to "exercise the full authority of the full board, between meetings of the board."

At first glance, relying upon an executive committee, comprised of all of the directors other than the unruly ones, may appear to present an elegant way to neutralize a disruptive or contentious board member. By confining most of the board's business to the executive committee, the regular board meetings become in-

**Doug Raymond** is a partner with Drinker Biddle & Reath LLP (www.drinkerbiddle.com). He works extensively on matters of corporate governance for both public and private companies, and advises boards of directors and special board committees across a range of challenges. Ken Ludlum, an associate with the firm, assisted in the preparation of this article.

consequential, and the unruly director is effectively isolated from the important business of the boardroom. However, this approach recently encountered sharp criticism from the Delaware Supreme Court in *OptimisCorp v. Waite*, Del. Supr., No. 523, 2015 (2016).

## A CEO taken unaware

In *OptimisCorp*, the board of OptimisCorp had called a special meeting to remove the company's CEO and a fellow director (because of alleged workplace misconduct by the CEO). The special meeting was called, but no agenda was circulated for the meeting. This was done so that the CEO would be taken unaware and so would not have the opportunity, under the company's stockholders' agreement, to replace a majority of the board before he was ousted. At the meeting, the directors created a special committee — a committee of which the CEO was not a member — which recommended that the full board terminate the CEO and amend the stockholders' agreement to eliminate his ability to replace directors.

After this occurred, the CEO sued, asserting breaches of fiduciary duties by the directors who had voted to oust him and arguing that the meeting notice was inadequate due to the absence of an agenda.

In ruling for the CEO, the Delaware Supreme Court affirmed that all directors are entitled to fair notice of the matters under consideration at a special meeting of the board, which in itself was not much of a surprise. However, the court went on to address the practice of excluding some directors from board deliberations.

In reviewing the actions of the company's directors, the Delaware Supreme Court discussed Delaware's model of corporate governance, a "board-centric model of governance" that depends on the collective involvement of all directors in the corporate decision-making process. The court rejected the proposition that boards could exclude fellow board members from important deliberations: "It has long been the policy of our law to value the collaboration that comes when the entire board deliberates on corporate action and when all directors are fairly accorded material information." The court also noted that just as a director cannot authorize anyone to act on his behalf, because his or her fellow directors are entitled to their judgment and experience, similarly, the other directors cannot deprive a director of his or her rights and powers as a director.

> **The OptimisCorp ruling is certainly a victory for directors who have been unwillingly sidelined by other directors.**

Indeed, the court concluded that by excluding some directors from the decision-making process, the other directors prevented their fellow directors from being able to fulfill their fiduciary duties. This action by the other directors, the Delaware Supreme Court suggests, may be a breach of their duty of loyalty.

## Risk to directors

While many corporations have adopted charter provisions that exonerate directors from most breaches of their fiduciary duties of care, this exoneration is not available for a breach of the duty of loyalty. Consequently, directors who affirmatively seek to exclude their colleagues from boardroom deliberation may be risking personal liability for taking such actions.

*OptimisCorp* is certainly a victory for directors who have been unwillingly sidelined by other directors. The OptimisCorp case is a reminder that all directors, even unruly dissidents, have the responsibility to participate meaningfully in board deliberations.

Moreover, the other directors may not prevent a director from exercising that responsibility, even if he is doing so in a disruptive manner. The remedy for such behavior is instead through board evaluation and counseling, and ultimately the right of the shareholders to elect a replacement director. ■

The author can be contacted at douglas.raymond@dbr.com.