Directors' Private Emails May Not Stay Private

A recent Papa John's ruling shines light on how electronic messages thought to be private could end up as evidence.

BY DOUG RAYMOND

A ruling delivered by an influential court in a case involving pizza chain Papa John's International is a cautionary tale for directors who share board matters via personal email.

Clearly, the job of director is anything but easy today. Boards are continually inundated with significant amounts of information that they are expected to process both before and between meetings, and they also are expected to be able to react to this information with thoughtful questions and insightful commentary to management and their fellow directors.

Of course, these communications are almost always electronic, typically by email. And this is where problems can arise. According to a 2017 survey of directors of publicly traded companies, the vast majority of directors preferred to use their personal email accounts for these communications. Although convenient, this can place a director in a difficult and potentially embarrassing position.

Some of the risks that directors face when using personal email to conduct board activities were highlighted in a case that was decided earlier this year in Delaware. A contentious dispute involving statements made by the controversial founder and chairman of Papa John's, John Schnatter, had spilled over into litigation between the founder and the other members of the company's board of directors.

As part of the litigation, the founder, who was also a substantial stockholder, demanded inspection of a broad range of documents from the board and a special committee that had been established to address the controversy and, ultimately, his departure. These included communications among the directors, and between directors and members of senior management.

In *Schnatter v. Papa John's Int'l, Inc.*, the Delaware Court of Chancery upheld the plaintiff director's demand for production of emails and text messages from the personal accounts and devices of his fellow board members. In this case, the Court of Chancery found that since the demand for information came from a stockholder who was also a director, they permitted broad access to the board's personal communications.

Section 220 of the Delaware General Corporation Law, like most state inspection statutes, gives stockhold-

ers a broad right to obtain corporate records so long as there is a "proper purpose" for doing so. In *Schnatter*, the founder's stated purpose for requesting emails and text messages was to investigate alleged mismanagement of the company by the other members of the board, and potential breaches of their fiduciary duty. Because the founder was not only a stockholder, but was also a director, the court held, first, that a director is "entitled to virtually unfettered access" to corporate records so long as he or she has a proper purpose.

Furthermore, the court found that the corporation has the burden of proof to show that the director's purpose is improper. (This reverses the default rule that applies to stockholders, who generally must show that their reason for the information request is appropriate.) The company failed to overcome the effect of that presumption and the founder's demand was allowed to proceed.

The court also granted the founder's request to obtain the directors' emails and text messages from their personal accounts and devices, to the extent related to the dispute. The court reasoned that means of communication, particularly those aided by technological advances, are ever growing, despite raising new challenges and expenses involved in their collection, and to rule out a requirement to produce communications in these formats could significantly restrict a plaintiff's ability to obtain important and relevant information. The court held that if "… directors, CEO, and General Counsel — used personal accounts and devices to communicate about changing the Company's relationship with Schnatter, they should expect to provide that information to the Company. That would apply not only to emails, but also to text messages, which in the court's experience often provide probative information."

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Inevitably, in the process of reviewing the directors' emails and text messages to identify those that were relevant, the directors' entire electronic communications were exposed, at least to the lawyers reviewing the files.

This case suggests three lessons for a director who uses his or her personal email and text accounts in their board work:

• First, they run a risk of potentially exposing all of their personal emails — not just those that directly reference their boardwork — to review by a third party. Typically, a director would be required to turn over a broad set of communications to the company's lawyer (or team of lawyers), who would then review and filter the potentially relevant documents.

• Second, as the public recently saw in strings of text messages involving former members of the Justice Department, text messages, in particular, are often dashed off quickly and frequently without careful thought or precise wording. They can often be interpreted in ways the author may not have intended.

• Third, beyond the risk of exposure of personal communications during litigation, the use of personal email accounts and devices by directors can pose a significant governance issue. Personal email accounts, like other unencrypted or ill-encrypted digital gateways, can be used as a point of entry into a person's computer, tablet or device, exposing sensitive communications, including board materials. Such exposure may lead to lost or stolen confidential information, including data breach. By using their personal email accounts and text messages for board businesses, directors risk neglecting their fiduciary duty of care by putting confidential information at risk and failing to maintain proper records within a secure corporate firewall.

In an age of increased communication and information exchange, over a growing number of media, directors should think twice before firing off that quick text message to a fellow director. Instead, directors would be better served by relying on a secure practice of conducting board business over company email systems and secured portals. Any inconvenience in doing so is far outweighed by the growing risks of personal exposure. ■

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