



# ATTORNEY-CLIENT PRIVILEGE: SWORD AND SHIELD ISSUES

- Advice of counsel defense requires disclosure of that advice
- Forces a choice: advice of counsel defense or protection of privilege



DAY. 14

# ATTORNEY-CLIENT PRIVILEGE: WAIVER BY EMAIL

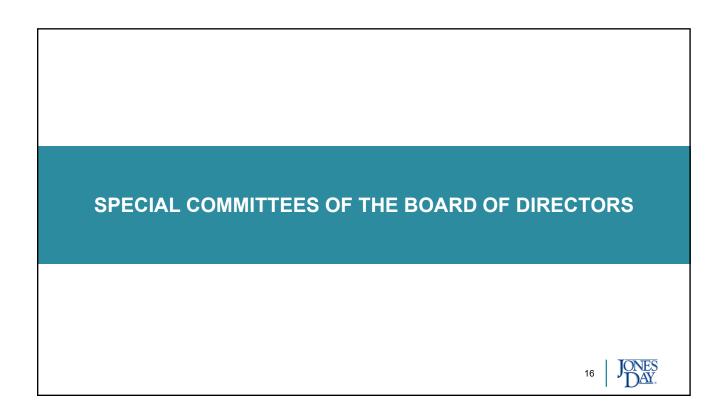


Are privileged communications protected if they exist on another company's email servers?

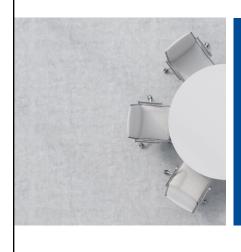
Courts consider:

- Does the corporation ban personal use?
- Does the company monitor employee's e-mail?
- Do third parties have a right of access to the e-mail?
- Did the company notify the employee of the use and monitoring policies?





## **USE OF SPECIAL COMMITTEES**



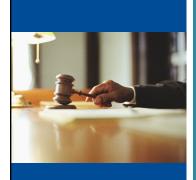
• Special committees are a tool to avoid breach of the duty of loyalty (*i.e.*, engaging in conflicted transactions).

- The burden of persuasion under the entire fairness standard shifts back to the plaintiffs.
- Special committees are considered strong evidence of fairness.
- Special committees generally retain their own outside advisors (including their own outside counsel).
  - Communications between special committees and their counsel are generally privileged.



# SPECIAL COMMITTEES: WHEN AND WHO Members of the special committee should be disinterested. Independent members are more protective. Special committees should be formed early. Corporate governance documents should be reviewed to ensure special committee creation and authority complies with any guidelines or limitations set forth therein. The authorizing resolution should clearly delineate the members, powers, and duties of the special committee.

# PRIVILEGE ISSUES AND SPECIAL COMMITTEES



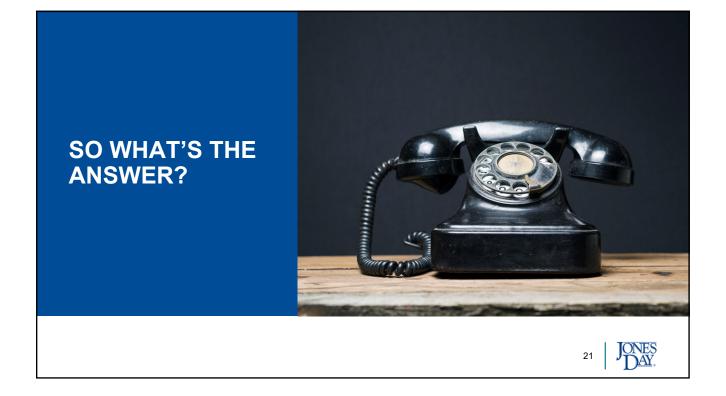
- Privilege is controlled by the special committee, not the board of directors, but is owned by the company.
- Special committee communications that would otherwise be privileged are nonetheless at risk of being discoverable in a derivative action.

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### PRIVILEGE ISSUES AND SPECIAL COMMITTEES (CONT'D)

- Special committees risk waiving privilege by:
  - disclosing reports and findings to defendant directors there in their personal capacities (evidenced by, <u>e.g.</u>, the attendance of their personal attorneys)
  - publicly disclosing the special committee's findings or reports.
- Disclosures to the board may not waive privilege.





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