Top of the Agenda - Governance

Schiff Hardin: Attorney-client privilege worth talking about

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By Hillary Jackson

Mutual fund boards would be wise to use a recent court ruling in which fund directors were told to produce information that had been withheld in discovery under a claim of attorney-client privilege as an opportunity to revisit the way they communicate with independent counsel, Schiff Hardin attorneys said in a webinar Wednesday.

In Kenny v. PIMCO, an excessive fees case alleging violations of Section 36(b) of the Investment Company Act of 1940, the plaintiffs maintained that "fiduciary exception" applied because of the structure of the trust and the role of the independent directors. In his Nov. 21 ruling, U.S. District Court Judge Ricardo Martinez, for the Western District of Washington, agreed, stating that "the communications at issue include legal advice for managing the fund, not personal advice to the trustees, and the communications were not made in anticipation of this or any other litigation."

He went on to say that the defendant failed to “satisfactorily explain why the independent trustees, acting as fiduciaries to the beneficiaries of the trust, should be able to resist disclosure to those beneficiaries of attorney communications paid for by the trust and for the benefit of the trust.”

In a similar case, the plaintiffs in an excessive fees lawsuit against Great-West Capital Management have filed a motion to compel former Great-West Funds director Donna Lynne to produce an email that had been withheld in discovery under the same claim of attorney-client
privilege. The Dec. 2 motion cites the *Kenny v. PIMCO* ruling.

Although there are important differences between the two cases, the developments in both are causing concern among independent fund directors and the lawyers who work with them about how they communicate with one another. Marguerite Bateman, a partner in Schiff Hardin’s Washington, D.C., office said during the webinar that fund boards should be revisiting the protections they’ve got in place around such communications and the deliberateness with which they formulate those communications.

"I believe [the *Kenny v. PIMCO* ruling] serves as a reminder to all boards not to make assumptions that your communications are privileged and to take care with your communications," she said. "Consider before you write an email or before you write a memo: How would this appear if it were to be produced?...Careless words or incomplete phrases can certainly be used against you if they are discussed in the wrong context."

Domenick Pugliese, a partner in Schiff Hardin’s New York office, stressed that the issue is not with directors' intent or competence but rather, in the context of litigation, with the likelihood that plaintiffs' counsel will attempt to "turn and twist" communications that are not written properly and clearly.

Pugliese pointed out, however, that simply confining all communications with counsel to telephone calls is not a practical solution. "A properly functioning board is a board that operates as a unit," he said, explaining that email communication should not be abandoned altogether as it allows for open dialogue among all of the board's directors and counsel. "One of the benefits of email is to foster that kind of communication; email is good for this. ...On the phone, you lose something unless you have conference calls among directors all the time. That's simply not going to happen," he explained. "We will continue to have a healthy degree of written and oral communication...[but] we will even more strongly remind our clients about the need to exercise care in their written communications."

Bateman said boards often have document-retention policies that cover what must be kept and for how long and said directors should look periodically at those policies to ensure they're adhering to them. She also advised taking care when addressing communications to ensure they only go to necessary parties. Communications are only considered to be privileged if they are between attorney and client and contain legal advice, she noted, warning directors and lawyers "may need to be careful about email chains."
Similarly, oral communications also only qualify when the audience is limited. "Consider who is in the room when legal advice is dispensed. If it's broader than just clients, you may not be able to evoke privilege in the first instance," Bateman said, adding that writing "privileged" across the top of a document does not make it so. Rather, it depends who sends it and who receives it, with whom it is shared, whether it contains advice, and other factors, she underscored.

The urgency with which various boards should discuss and debate privilege-related issues depends on the board and its specific circumstances, Bateman noted, though she underscored that the recent developments in 36(b) litigation provide a good reason to add to the topic to the board's agenda.