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## Corporate Minute-Taking: A General Counsel's Guide

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The post-Sarbanes-Oxley environment calls upon governing boards to place renewed emphasis on the proper role of corporate minutes as a record of organizational and board conduct. Indeed, the recently concluded *Disney* shareholder derivative litigation is the latest in a series of [Delaware] cases in which the state of corporate minutes played an important role in the court's decision.

While experts may disagree on the most appropriate style for minutes (*e.g.*, "comprehensive" v. "minimalist"), there is virtually no disagreement on the importance attributed to an effective minute-taking process. It is becoming increasingly clear that properly prepared corporate minutes can provide the organization and its board members with meaningful protection against certain liabilities, while inadequate minutes may increase legal exposure. Given the regulatory pressures of corporate responsibility, traditional approaches to minute-taking may no longer be sufficient to serve the interests of the organization and the board.

Specifically, this renewed emphasis is likely to require a substantially increased role for both the general counsel in the minute-taking process, and individual board members in the review and approval of draft minutes.

The goal of this discussion is to guide corporate general counsel as they advise executive leadership and the board on an updated, effective minute-taking process.

### THE STATUTORY BASIS

Most, if not all, corporate codes require the taking of corporate minutes, but do not address the specific issue of the scope or content of those minutes. For example, the Model Nonprofit Corporation Act provides:

**A Corporation shall keep as permanent records minutes of all meetings of its members and board of directors [emphasis added],** a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors.<sup>1</sup>

According to the Comments to this section, the minutes or record of action need not include a discussion of, or reasons for, an action.<sup>2</sup> Rather, that amount of detail is left to the discretion of each non-profit organization. Reflective of that discretion, the Model Act provides that the minutes or records may "merely recite that after consideration a certain action was taken or they may go into great detail as to the background, rationale and reasons for the particular action."<sup>3</sup>

### THE ROLE OF MINUTES

#### *How Minutes Can Help*

The fundamental role of corporate minutes is to preserve an accurate and official record of the proceedings of a board or committee meeting. Well-kept corporate minutes serve as a record of corporate decisions, reflect director dissent where appropriate, offer guidance for future board action, serve as a valuable source of contemporaneous evidence in regulatory or judicial proceedings, and reduce misunderstanding as to the intent of the board. Corporate minutes can document compliance by board and committee members with their fiduciary obligations. Furthermore, the maintenance of accurate, thorough corporate minutes is consistent with the Sarbanes-Oxley emphasis on greater accountability, transparency, and disclosure. Courts have historically given credence to accu-

rate, well-kept corporate minutes as evidence of a board's good faith and due care.<sup>4</sup>

### *How Minutes Can Hurt*

Incomplete, inaccurate, or ambiguous corporate minutes deny the board a potentially dispositive resource from which to defend their conduct or to explain the full nature of a board decision. In addition, poorly kept minutes may provide a potential "roadmap" for regulators and claimants. Such adverse parties will seek access to corporate minutes to bolster their arguments, and courts themselves will give substantial credence to the contents of minutes. Further, a failure to take and preserve minutes from key board and committee meetings can create highly unfavorable presumptions of underlying director conduct.<sup>5</sup> Recent developments offer painful examples of the cost attributed to potential consequences of incomplete or insufficiently prepared minutes.

For example, the perceived limitations of the Disney Compensation Committee minutes (e.g., brevity, inconsistency with the subsequent recollection of Disney officers) played a major role in the ability of the plaintiffs to withstand a motion to dismiss and to proceed to trial.<sup>6</sup> In the *Disney* litigation, the court reviewed the minutes of the board in detail, estimating the amount of time that the board spent on various agenda items based upon the amount and content of the minutes addressing each item.<sup>7</sup> The court was left with an imprecise method of gauging which issues were important to the board at the time, and which matters were given little consideration, i.e., there was little evidence of due inquiry or a process of careful deliberation.<sup>8</sup> Thus, the minutes provided little support to the directors' efforts to dismiss the derivative action.

Similarly, in the New York Attorney General's challenge to the compensation of the former New York Stock Exchange, Inc.'s chief executive officer (CEO), a close review of board and compensation committee minutes served as a primary basis for the breach of fiduciary duty allegations.<sup>9</sup> Similarly, much of the bankruptcy examiner's criticism of the WorldCom board of directors and its inattentiveness concerning corporate affairs was based upon its review of corporate minutes and similar records.<sup>10</sup>

Board minutes have been used extensively by the Minnesota Attorney General in his "business compliance reviews" of several leading non-profit hospitals in the state, to reflect lack of due care/proper oversight by their governing boards.<sup>11</sup> A review of the corporate minutes played a substantial role in the 2003 decision of the Maryland Insurance Administration to deny the applica-

tion of not-for-profit CareFirst, Inc. to convert to for-profit status and be acquired by WellPoint.<sup>12</sup> Most recently, the Senate Finance Committee requested copies of board and committee meetings of American University as part of a review of executive compensation/discretionary expense practices.<sup>13</sup>

In these and other high-profile cases, corporate minutes have provided damaging evidence of (or created unfavorable inferences concerning) breach of fiduciary duty and/or created confusion or misunderstanding concerning the intentions of the board.

Aside from privileged minutes, to be further discussed below, corporate minutes will virtually always be discoverable in litigation and admissible in court on the issues of what decisions were made by the board and whether the board properly discharged its fiduciary duty. Thus, minutes should be viewed as a record of the board's deliberative processes that will become publicly available should any dispute arise concerning the matters addressed at the board or committee meeting, whether or not they appear in the minutes themselves. Attempts to shield unprivileged corporate minutes from disclosure in litigation are likely to be costly and, ultimately, unsuccessful.

### **NOT AN ANTIDOTE**

As noted throughout this article, minutes cannot "cure" otherwise deficient board or corporate behavior, nor should they be "fictionalized" or otherwise drafted in a purposely incomplete manner (e.g., to "lie by omission"). A prominent example of the inappropriate use of minutes was in the WorldCom, Inc. debacle. There, the court-appointed bankruptcy examiner concluded that the board minutes had inappropriately "fictionalized" or otherwise mischaracterized a brief, informational meeting concerning a proposed transaction as a formal meeting of the Board approving the transaction.<sup>14</sup>

There is generally nothing to be gained and, on the contrary, much to be lost from omitting a material item from corporate minutes simply because it posed difficult issues for the board or may be likely to trigger a challenge from shareholders, other constituents, or a third party. Whatever the decision of the board with respect to such items, there is value in demonstrating the board's deliberative process and, in some circumstances, setting forth in general terms the potential "pros" and "cons" of a difficult decision faced by the board. The failure to address such an issue in the minutes, in fact, is more likely to raise allegations of neglect or even fraud than if the minutes memorialize the board's careful consideration of difficult corporate issues.

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To repeat, board minutes cannot reflect corporate compliance or satisfaction of fiduciary obligations when that in fact does not occur.

### SUGGESTED APPROACH

In re-evaluating the sufficiency of its minute-taking process, the corporation's board and its general counsel may wish to consider the following approach.

### REMEMBER THE PURPOSE

Well prepared corporate minutes record principal actions taken at board and committee meetings. When well prepared, minutes can achieve the collateral purposes of reducing the board's liability profile and assisting director recruitment and retention efforts.

#### *Practice Suggestion:*

- Schedule a special educational session at an upcoming meeting to brief the board on the renewed importance of the minute-taking process and specific changes in board practices that may be required in response. Consult with the corporation's outside counsel on specific regulatory, statutory, and other factors to be considered in the revision of minute-taking practices.

### LENGTH

While the fundamental purposes of minute-taking can be achieved by a "minimalist" approach, greater benefits are likely to be achieved by means of detail and elaboration. This does not mean minutes should be a "virtual transcript," but rather an elongated approach is more likely to establish the prudence and clarity of the decision-making process. After all, the very meaning of "minutes" infers a document that is a summarized record of actual events. A willingness to be expansive allows the scrivener to better reflect both the "flow" and "spirit" of the meeting, spending more time describing the discussion of more significant agenda items.

#### *Practice Suggestions:*

- Avoid artificial, officer-mandated limitations on the length of minutes, adopted primarily to facilitate "easy" director review. The length of the minutes should bear a direct relationship to the importance of the meeting agenda. If a lengthy discussion ensues on a topic, the scrivener should not be reluctant to note that in the minutes.
- Attention must be applied to accurately reflecting the tenor of particular comments, motions, or discussions

so as not to "chill" board members from making potentially provocative comments, or from asking the proverbial "dumb question" in the future.

### REFLECTING BUSINESS JUDGMENT

Demonstrate compliance with fiduciary obligations within the minutes by incorporating (1) the substance and tenor of the deliberations, (2) an identification of the general amount of time spent on a particular issue in order to reflect the related level of attention provided by the board, (3) a recitation of the material presented to the board for its review, and (4) confirmation (where accurate) the board received the material in advance of the meeting. Especially given the *Disney* court's focus on conduct of individual directors, each of these are matters in which each director will have an interest in establishing an adequate record.

#### *Practice Suggestions:*

- Record the starting and concluding time of the meeting and the approximate time spent by the board on each substantive item on the agenda to better emphasize the proportionate attention spent on material items.
- Do not attempt to reflect all of the questions raised by board members in the context of a meeting (i.e., avoid the "he said, she said" approach) but rather emphasize broadly the involvement and "constructive skepticism" of board members (e.g., "a discussion [of 10 minutes] followed the chief financial officer's presentation").
- Note for the record where material that is the subject of discussion was distributed to the board in advance of the meeting and by what amount of time (e.g., "the board referred to a strategic planning document that had been mailed to each board member with the notice of meeting, on [date]").

### BASIC FEATURES

Regardless of the subject matter discussed at a meeting, certain fundamental matters should always be reflected in the minutes: (1) the meeting date, time, duration, and location; (2) the nature (regular or special) of the meeting; (3) a list of participants, separating officers and directors from invited staff, advisors, and guests and those absent; (4) presence (or lack of presence) of a quorum; (5) the names of all individuals making specific presentations; (6) a list of all material distributed at the meeting; (7) the general items of discussion, which may be satis-

fied by attaching a copy of the agenda and noting any deviation from it; and (8) confirmation of all action taken, including adoption of resolutions.

*Practice Suggestions:*

- Be careful to explicitly reference (in the text or by footnote) the title of written materials distributed, and audio/visual (e.g., PowerPoint) presentations made during the meeting, particularly as they may relate to a decision that the board is expected to render.
- Regardless of whether they are actually in attendance at the meeting, the minutes should reflect the names of all professionals and consultants who provided advice to the corporation on a matter presented to the board for consideration, including the nature and form of that advice.
- For meetings held by teleconference, the minutes should reflect (where accurate) the ability of all participants to communicate with one another.

## **SPECIFIC DECISIONS**

Minutes should reflect the specific decisions taken at the meeting, regardless of whether they involved a decision to take action, or not to take action. The exact text of specific motions and resolutions as made, seconded, and approved should be reflected in the minutes or in an exhibit. If necessary for compliance or fiduciary duty purposes, the minutes should reflect those specific factors that were material to the board's decision (e.g., due diligence investigation, feasibility/financial analysis, accounting determination, legal opinion, officer's report). In this regard, it may often be useful to record the board's consideration of advantages and disadvantages of, and alternatives to, a specific proposal.

*Practice Suggestions:*

- In relating specific decisions, be sure to acknowledge debate, e.g., "The chief financial officer identified the various assumptions on which her projections were based, and a discussion followed."
- For non-profit, tax-exempt hospitals, the minutes should reflect any discussion of the relationship between major business decisions approved by the board and its charitable, tax-exempt mission.

## **RECORDING CONFLICTS, DISSENTS, AND ABSTENTIONS**

Minutes should identify those directors who refrain from voting or participating in the discussion due to identified conflicts of interest, as it is vitally important to establish the disinterested nature of any board action. The underlying reason for the conflict determination need not be disclosed unless required by statute. Similarly, where the board proceeds with a transaction with which a director has a conflict, the minutes should reflect the board's compliance with statutory or common law procedures for confirming the underlying fairness of the conflict of interest transaction.<sup>15</sup> In addition, the current liability environment suggests accommodating the interests of individual directors who wish their abstention to be reflected for the record. Dissents should similarly be recorded when requested by the dissenting director. In neither case, however, should the reason for the abstention or dissent be recorded unless required by statute.

*Practice Suggestion:*

- An example of identifying disinterest or dissent is "Director X was excused from participating in both the discussion of, and vote on, the matter. Directors Y and Z voted against the motion."

## **ATTORNEY-CLIENT PRIVILEGE**

The attorney-client privilege protects from disclosure communications between a client and his or her attorney so long as they are made for the purpose of seeking (or providing) legal advice, are intended to be confidential, and are thereafter actually kept confidential. Communications between corporate counsel and board members in board or committee meetings concerning corporate affairs and for the purpose of obtaining or giving legal advice are generally protected by the attorney-client privilege. That privilege is held by the corporation, however, and not individual board members. Thus, the corporation can make a decision to waive the privilege at a future date and reveal the content of otherwise privileged communications. Should the board engage counsel, communications between such counsel and the board are subject to other considerations, given that the "client" in those circumstances is not the corporation, but the board itself.

Those portions of board meetings devoted to discussion of attorney-client privileged matters should be noted as such in the minutes without further elaboration, other than confirmation that the privileged discussion was conducted in the presence of counsel. If more elaborate min-

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utes of privileged discussions are needed, they should be memorialized in separate minutes marked “Confidential-Attorney-Client Privileged,” and kept apart from other minutes in a secure location.

### *Practice Suggestions:*

- In referencing attorney-client privilege, specific language should be used, e.g., “Legal counsel for the corporation, John Doe, Esq., provided legal advice to the board concerning the proposal followed by a discussion between the board and counsel. Counsel informed the board that this portion of the meeting was subject to the attorney-client privilege” or, alternatively, “A privileged discussion between the board and legal counsel for the corporation, John Doe, Esq., then occurred and for which separate privileged minutes were taken.”
- Privileged minutes should be kept in locked files and in folders prominently marked “Confidential-Attorney-Client Privileged.”

### KEY COMMITTEES

Particular attention to accurate minute-taking should be made for proceedings of committees with board delegated powers that have jurisdiction over matters of specific regulatory importance. In healthcare, these committees include the audit, compliance, governance, executive compensation, and quality assurance committees. The importance attributed to minute-taking for these committees should be on a par with meetings of the full board. Minutes provide an opportunity to confirm, where appropriate, the consistency of committee action with “best practices” and satisfaction of regulatory “safe harbors.” This is particularly the case with respect to compensation committees of tax-exempt organizations. (A specific statutory requirement for satisfying the “rebuttable presumption of reasonableness” under the Intermediate Sanctions excise tax rules is that the committee’s discussion on reasonableness of compensation be promptly recorded.<sup>16</sup>) With the increasing focus on disclosure and transparency, there is an expectation that key committee minutes will be made available to the entire board.

### *Practice Suggestions:*

- Committee charters should specify that meeting minutes are to be taken.
- A process should be adopted for distribution of minutes outside of the committee upon request.

- Consult with counsel when responding to requests from third parties (e.g., auditors, consultants) for committee minutes.

### EXECUTIVE SESSION

The “Executive Session” (at both the board and committee level) is increasingly recognized as one of the most important of the post-Sarbanes-Oxley governance “best practices.” There are, however, differing views as to the appropriateness of establishing a formal agenda for, and taking minutes of, such sessions. An emerging perspective is that it may be unnecessary to take detailed minutes of executive sessions as long as some written record is kept confirming the session was held, its participants, and the date, time, location and duration of the meeting. The interest in having a written record of an executive session must be balanced against the policy objective of fostering candor and open dialogue in such sessions.

### *Practice Suggestion:*

- The general counsel or, if not invited, the board chair/lead independent director may choose to take notes of discussion topics, an oral summary (or portions) of which may subsequently be shared with the chief executive officer.

### SECRETARY AND DIRECTORS’ NOTES

Ideally, the minutes should be the only permanent record of the board or committee meeting. While directors may wish to take notes regarding the meeting to which they can refer when subsequently reviewing the draft minutes, there are liability risks associated with such practice. Rather, the director may prudently choose to rely on minutes taken by a neutral, trained party, which are more likely to represent an accurate and complete record of meeting activity. Once a director is satisfied that the minutes as presented are consistent with his/her recollection, meeting notes can be comfortably discarded.

### *Practice Suggestions:*

- Directors need not retain any meeting notes after reviewing and approving the formal minutes of that meeting.
- Avoid video or audio taping meetings as an aid to the scrivener, as such practice can have a distinct and counterproductive “chilling effect” on full and frank discussions. Taping can also result in individual comments being taken out of context by selective application.

## THE REVIEW PROCESS

It is crucial that minutes be prepared promptly after the subject meeting and that the review process begin immediately thereafter. The board must make a *bona fide* effort to promptly review and approve draft minutes. This is likely to require a change in practice by many directors.

Excessive editing by management should be discouraged to avoid any suggestion of a lack of integrity in the minutes.

### *Practice Suggestion:*

- The CEO should join with the general counsel in explaining to the board the benefits to the corporation and to the individual directors of ascribing greater attention to the review and approval of draft minutes.

## THE ROLE OF THE SCRIVENER

Minute-taking has evolved from a ministerial practice to more of an “art form.” Given the significance attributed to minutes by all of the participants in the governance process, it is important the process is overseen by an individual with strong familiarity with applicable governance practices and legal principles. This person must have the expertise to recognize nuances of the discussion, the credibility to suspend a particular discussion to ask for clarification, and the authority to assure the accuracy of the final minutes and their consistency with related corporate disclosures. This suggests a much more active role for the general counsel in the minute-taking process.

### *Practice Suggestions:*

- Oversight of the minute-taking process offers yet another powerful argument for always inviting the general counsel to attend board and key committee meetings.
- Consider the adoption of a protocol on parties to the review of draft minutes before distribution to the full board or committee (e.g., scrivener, general counsel, chief governance officer, board chair) to speed the review process and enhance accuracy.

In the post-Sarbanes-Oxley environment, a thorough, accurate corporate minute-taking process provides substantial benefits to the corporation and its governing board. Whether the board adopts a “comprehensive,” “minimalist,” or “in-between” approach to the form and context of corporate minutes, the emphasis must be placed on accuracy and not missing important items of the subject discussion. Most important, though, an updated, efficient corporate minute-taking process *cannot compensate* for improper, inattentive, or deficient board behavior. Therefore, a close review and refinement of existing board processes is highly recommended as part of *any* refinement of the minute-taking process.

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## END NOTES

1 American Bar Association, Revised Model Nonprofit Corporation Act, Section 16.01(a). *See also* a similar provision under Section 16.01(a) of the Revised Model Business Corporation Act.

2 Comment 1, Section 16.01(a) of the Model Nonprofit Corporation Act, *Supra*.

3 *Id.*

4 *See, e.g., In re Cavemark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. 1996), in which the Chancellor’s decision in favor of the defendant directors was based in part upon a corporate record which well-documented a diligent decision-making process and satisfaction with the duty of care.

5 *See, e.g., Smith v. Van Gorkum*, 488 A.2d 858, 874 (Del. 1985); *Abbott Laboratories Derivative Shareholders Litigation*, 325 F.3d 795 (7th Cir. 2003).

6 *In re: The Walt Disney Co. Derivative Litigation*, No. 15452 (Del. Ch. May 28, 2003).

7 *Id.*

8 *Id.*

9 *See, e.g., Dan K. Webb*, “Report to the New York Stock Exchange on Investigation Relating to the Compensation of Richard A. Grasso.”

10 *See, e.g., Second Interim Report of Dick Thornburgh*, Bankruptcy Court Examiner, *In re: WorldCom, Inc. et al.*, Debtors, United States Bankruptcy Court, Case No. 02-15533 (June 9, 2003).

11 *See, e.g., Minnesota Attorney General Business Compliance Review of HealthPartners, Inc.*, [www.ag.state.mn.us/consumer/healthlaw%5flegis.htm](http://www.ag.state.mn.us/consumer/healthlaw%5flegis.htm).

12 *See* [www.mdinsurance.state.md.us](http://www.mdinsurance.state.md.us); the CareFirst minutes were in particular scrutinized for evidence that the Board complied with its fiduciary duties in connection with its decision to convert to for-profit status and then sell the company.

13 *See* <http://finance.senate.gov/press/Gpress/2005/org102805pdf>.

14 *See supra* note 10; *see also* Pulliam, Craig, Lucchetti and Smith, “Persistent Pit Falls: How Hazards for Investors Get Tolerated Year After Year; THE WALL STREET JOURNAL, February 6, 2004.

15 *See, e.g., Section 8.31(b), (d), (c) Revised Model Nonprofit Corporation Act* (American Bar Association, 1987).

16 Treas. Reg. 53.4958-1(d)(4)(iv).