

Making Board Minutes Count

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Historically, little attention has been given by corporate directors to board and committee meeting minutes. Indeed, the process of drafting and approving minutes was once a rather perfunctory matter. Typically, company personnel would be tasked to take notes at board meetings and then to draft minutes reflecting, in an abbreviated format, what transpired. Eventually, often several months later, the board would largely “rubber-stamp” the final draft with minor revisions, if any.

Today, directors approach minutes in a markedly different way. Exercising due care in the approval of minutes is now a priority for directors. This is especially true in those situations where board action is likely to be subsequently challenged in the courtroom. Why? Because the content of minutes can make a difference in the outcome of litigation against directors. Recent cases make it clear that courts will focus heavily on minutes in judging director conduct and that flawed board minutes can be perilous to directors in litigation.

Since minutes constitute the official corporate record of what occurred at a meeting, they are arguably the “best” evidence of director conduct. Thoughtfully and accurately prepared minutes can afford great protection in the courtroom to defendant-directors. With that in

Director Summary: Board minutes constitute an official record of corporate decision-making. The outcome of directors in litigation may hinge on these points: minutes should reflect the fulfillment of applicable fiduciary standards of conduct; contain appropriate details of the meeting; establish directors’ devotion of adequate time to the decision-making process and their satisfaction of applicable governance procedures; be approved within a reasonable time period after the meeting; and be written to negate the need for director personal notes.

mind, below is a discussion of six points that directors and their legal advisors should carefully consider in making their board minutes count.

1. Minutes Should Reflect the Fulfillment of Applicable Fiduciary Standards of Conduct.

As a general guideline, especially in the case of board action that may likely be legally challenged, minutes should be prepared from the perspective of what a court and jury will be looking for in judging whether the directors fulfilled their fiduciary duties. The following areas concerning the fulfillment of director responsibilities deserve special attention when preparing board minutes.

Reasonable Decision-Making Process Followed by Directors. When a business decision of a board is challenged on the grounds that the directors breached the duty of care, the business judgment rule insulates the directors against liability, provided their decision was the result of a reasonable decision-making process. Therefore, minutes need to reflect facts that demonstrate the directors exercised due care in reaching their decision. Defendant-directors need to be in a strong position to argue from board minutes that they were fully informed about the relevant facts and issues; they carefully deliberated the issues; and they believed in good faith that their decision was in the best interests of the corporation. To achieve this objective, minutes should reflect that the directors became fully informed before making their decision, including:

- facts that demonstrate that the board was diligent in becoming fully informed;
- pre-meeting information as well as information furnished at the meeting that was relied on by the directors in making their decision, including PowerPoint presentations; external and internal memoranda; reports of experts; legal documents; and financial information;
- a list of presenters at the meeting (including



- members of management, experts, lawyers, and other advisors), and the salient points of their presentations;
- Boardroom questions and discussions that show director due diligence.

Minutes should also illustrate substantive issues discussed and debated among the directors, including the advantages and disadvantages of the action considered by the board, and key factors behind the board's conclusion that the decision would serve the best interests of the corporation. Finally, minutes should reflect that the board acted in good faith in coming to their decision.

Reasonable Reliance by Directors on Third-Party Reports. Most state corporate statutes protect directors against liability when relying on certain third-party reports in making their decisions. This protection extends to reports and opinions received from management, board committees, experts, and other third parties provided that *the directors had reasonable grounds for relying in good faith on such information*. Board minutes should cite facts that support the conclusion that the directors reasonably relied upon these reports in good faith. Information may include:

- credentials of third-party presenters;
- a description of the basis for the directors' belief that the reports or opinions of third parties (including the methods and assumptions on which they were based) were reliable; and
- an account of meeting discussions that demonstrates the directors satisfied themselves as to the reliability of the presenters.

Satisfaction by Directors of Special Judicial Standards of Review. Aside from the general duties of care and loyalty, director conduct may also be subjected to judicial scrutiny under special standards of review (e.g., the "enhanced scrutiny" standard in the case of defensive takeover actions). When that is the case, minutes need to demonstrate that the directors satisfied the requisite elements of such special standards of conduct. Facts should show that the directors fully understood their special fiduciary duties under the circumstances and how they fulfilled those duties in making their decisions. Briefings by legal counsel, investment banks, and other experts should also be documented.

Satisfaction by Directors of Standards Applicable to Special Board Committees. To comply with corporate fiduciary laws when conflicts of interest arise, special board committees—consisting solely of independent and disinterested directors of the company—are often appointed by boards: to decide whether pending stockholder derivative claims should be pursued ("Special Litigation Com-

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mittee"); to consider and negotiate the terms of a proposed transaction between an interested party, e.g., a director or controlling shareholder, and the company ("Special Transaction Committee"); or to independently investigate and address an alleged internal problem of the corporation ("Special Internal Investigation Committee").

The minutes of a board meeting at which a special committee is established should detail the scope of authority and charge given to the committee and the factual basis for the board's belief that the committee members were independent and disinterested directors. Likewise, carefully prepared minutes of committee meetings are critical in protecting the credibility of the special committee process in the event it is later challenged legally.

Consider the following kinds of information for inclusion in minutes of special committee meetings:

For Special Litigation Committees:

- Describe any briefings by legal counsel as to the legal duties of the committee in carrying out the charge of the board.
- Describe the due diligence of the committee in ascertaining material facts relating to stockholder derivative claims (e.g., documents reviewed, witnesses interviewed).
- Describe the factual basis for the committee's decision as to whether the pursuit of derivative claims would be in the best interest of the corporation.
- Describe the factual basis for the committee's belief that its advisors were independent and disinterested.

For Special Transaction Committees:

- Describe any briefings by legal counsel as to the legal duties of the committee in carrying out the charge of the board.
- Describe the factual basis for the committee's decision as to "fair price," including any investment banking reports relied on by the committee.
- Describe facts that demonstrate there was "fair dealing" in regards to the negotiations between the committee on behalf of the company and the interested party (e.g., the arm's-length basis by which the negotiations were effected; the absence of undue influence by the interested parties; and the power of the committee to



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- say no to the proposed transaction).
- Describe the factual basis for the committee's conclusion that its advisors were independent and disinterested.
- Describe the factual basis for the committee's decision to approve or not approve the proposed transaction.

For Special Internal Investigation Committees:

- Describe the investigatory steps taken by the committee (e.g., documents reviewed, witnesses interviewed).
- Describe facts that demonstrate that the committee conducted its investigation impartially and fairly.
- Describe the factual basis for the committee's conclusions drawn from the investigation.
- Describe the factual basis for the committee's conclusion that its advisors (e.g., legal counsel and forensic accountants) were independent and disinterested.

Satisfaction by Directors of the Duty to Prevent Corporate Wrongdoing. Directors are charged with the duty of overseeing the affairs of the corporation. Based on the *Caremark* decision (1996) and the *Stone* decision (2006), courts have interpreted this duty to mean that directors have a duty to implement systems and procedures that safeguard against corporate wrongdoing. In order for directors to meet the *Caremark/Stone* oversight standard, they must consciously satisfy themselves that the corporation has implemented effective internal monitoring and reporting systems specifically designed to detect and prevent illegal conduct by the corporation.

Though corporate directors are not expected to guarantee that no corporate wrongdoing will ever occur, they can be held personally accountable if they have not made a "good faith effort" to see that the corporation has in place sound programs that promote legal compliance. If the board is challenged in a lawsuit or regulatory investigation, there should be appropriate board and/or committee minutes that reflect the oversight steps taken by the board to satisfy itself that the company had in place effective compliance programs. Minutes should reflect that directors were periodically educated and updated about the corporation's compliance systems and their effectiveness, and that the board made a good faith effort to see that the company had in place effective internal reporting and compliance systems.

2. Minutes Should Contain Appropriate Details of the Meeting.

Bare bones minutes can be very problematic for defendant-directors in litigation. Illustrative of this point is the recent *Netsmart Technologies Inc. Shareholders Litigation* (2007) decision in which the court observed that "there is no credible evidence in the record" to support the board's claim that they had fulfilled their fiduciary duties in making the decision being challenged. The absence of meaningful board minutes undermined the directors' own testimony and contributed directly to the court's finding that they had breached their duties. Similarly, in *Smith v. Van Gorkom* (1985), the court rejected the defendant-directors' testimony that their conduct had been proper because "the minutes of the meeting [did] not reflect this." Contrary to the directors' assertions, the board minutes had left the court with the impression that the directors had violated their duty of care by acting hastily and without conducting adequate due diligence in approving a sale of the company.

Very simply put, the absence of meaningful content in board minutes can be the Achilles' heel of directors in the courtroom. While brevity may be appropriate in describing routine board actions, in the case of significant or otherwise controversial matters, reasonably detailed minutes can make all the difference in establishing, from an evidentiary standpoint, that the board acted properly by adhering to the applicable requirements of corporate fiduciary law.

3. Minutes Should Establish Devotion of Adequate Time to the Decision-Making Process.

A fundamental requirement under the duty of care is that directors devote reasonable time to their decision-making. Hurried decisions and decisions made with little, if any, thought are hard to square with the judicial notion of due care. Courts will look to board minutes in determining whether defendant-directors devoted adequate time to an issue. In the *Van Gorkom* case mentioned above, the defendant-directors were found to have breached the duty of care in approving the sale of their company, due in large part to the fact that they approved the transaction after only "two hours consideration without prior notice and without the exigency of a crisis or emergency." Directors that act hastily or are otherwise stampeded into making a decision put themselves at great risk. Similarly, in the case of *In re Walt Disney* (2005), the amount of time spent by the defendant-directors in considering the matter being challenged was a prime focus of the court. The court went out of the way to note deficiencies of the minutes: "It would have been extremely helpful to the Court if the minutes had indicated...that the



discussion [relating to the key issue] was longer and more substantial than the discussion relating to the myriad of other issues brought [before the meeting].”

In view of likely judicial inquiry about the appropriateness of the time spent on a board decision, indicating in board minutes the start and end times of a meeting should be considered. When a board is considering a very complex and significant matter that entails examining lengthy documents and reports, it may even be advisable to hold two or more separate meetings to show due care and good faith conduct on the part of the directors.

4. Minutes Should Establish Satisfaction of Applicable Corporate Governance Procedures.

The conduct of board meetings is governed by the procedural requirements of corporate statutory law as well as by the procedural requirements set forth in a corporation’s certificate of incorporation and bylaws. Likewise, committee charters (e.g., the audit committee charter) usually provide specific procedures and duties that committees are to follow. Thus, minutes should reflect the board’s satisfaction of all applicable meeting procedures:

- Minutes should confirm the chairperson and secretary of the meeting; the nature of the meeting (regular or special); the proper delivery of the notice of the meeting; the presence of a quorum; and the location of the meeting.
- Minutes should indicate who (e.g., directors, management, experts, other presenters) was in attendance; if attendance was in person, by telephone, or by video-conference; which directors were absent; and whether any directors left the meeting before its conclusion or joined the meeting after its commencement.
- Minutes should set out the actions taken by directors at the meeting (usually in the form of resolutions), including who voted and how on each resolution considered.
- Minutes of committee meetings should appropriately demonstrate that the members of the committee timely complied with their requisite duties under the charter of the committee.

Though minutes usually are not kept for executive sessions of non-management directors—because these are not technically board meetings board action cannot legally be taken—it is becoming a “best practice” among boards to keep a written record of who was in attendance at these meetings and what topics were discussed.

5. Minutes Should be Approved Within a Reasonable Time Period After the Meeting.

The actual timeline between the date of a meeting and the date the board approves the related board minutes

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can make a real difference to courts, regulators, and other third parties as they weigh the credibility of such minutes. By way of illustration, in the *Netsmart* decision mentioned above, the court questioned the credibility of the board committee’s minutes (which covered 16 meetings held over a four-month period) when the minutes for 10 meetings were all approved by the board at a single meeting held after the litigation was filed. The court observed: “That tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring.” The *Omni-Care* (2005) decision indicates another problem that directors can face when they unreasonably delay the finalization of minutes. In that decision, the court limited the evidentiary review of the drafts of minutes to the final draft that had been “approved by the board” with the implication being that multiple drafts might have been admitted into evidence if the final minutes had not been approved by the board.

While memories of the directors are still fresh, it is best that drafts of minutes be circulated, reviewed, and finalized.

6. Minutes Should Be Written to Negate the Need for Personal Notes.

Personal notes taken by directors during, or in preparation for, a board meeting can be troublesome in subsequent legal proceedings. Handwritten notes can be inherently ambiguous and thus can be easily miscast by a plaintiff’s lawyer to serve his or her purposes. Therefore, directors are well advised to be very judicious about when and how, if ever, to employ personal note-taking:

- If personal notes are taken by directors during a meeting, these directors should be sensitive to the importance of clarity in order to avoid the pitfalls of confusing words and phrases. Scribbled notes can be perilous. For that reason, some directors will carefully summarize/rewrite on one page the key points in their notes so they can discard their notes taken during the meeting.
- Many directors also follow the policy that once minutes of a meeting are finalized and approved by the



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board to his or her satisfaction, their handwritten meeting notes are no longer needed and thus, can be discarded. Of course, if the minutes do not properly reflect what the director believes should be contained in such minutes, the director can retain his or her notes.

- E-mails and memoranda sent by directors to other directors and management can also be subject to the same problems associated with note taking. Accordingly, directors should exercise discretion in these communications as well.

Note that board members need to be briefed periodically by legal counsel about obstruction of justice issues with respect to the disposal of personal notes, e-mails, etc. Clients need to be cautioned against inadvertently turning a civil legal problem into a criminal problem.

Conclusion

The starting point in making board minutes count is to carefully prepare in advance for each board meeting. Pre-meeting director preparation and sound planning for how the meeting will be conducted will help ensure that directors fulfill their fiduciary duties. Properly planned board meetings are the foundation for having board minutes that will make a meaningful difference in any subsequent litigation against directors. ■

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