

Corporate Minutes: When Less Is More

by John P. Beavers and Kevin M. Kinross

Your board and committee minutes may seem like necessary minutiae compared to the major governance issues facing companies today. However, minutes are in fact legally crucial. They can be the first evidence regulators and trial attorneys look at to see how well your board has done its job. Effective minutes that say as much as is needed—no more, and no less—can prove the difference between sound fiduciary oversight and legal liability.

The post-Sarbanes-Oxley era has placed heightened scrutiny on corporate governance and the actions of board members in both public and private companies. Therefore, what is captured in your board's minutes is a potential script for the plaintiffs' bar. Minutes have two purposes—to inform and protect. To accomplish this purpose consider three questions when preparing minutes:

□ *Who is the intended audience for these minutes?*

Minutes should meet the information needs of the audience without creating undue liability. With meetings of a board of directors, the intended audience is the shareholders, owners, or members. With a meeting of a committee of the board, the intended audience is the board or governing body itself (or whoever may rely upon the committee or to whom the committee is responsible).

□ *Who will rely on these minutes for protection under the business judgment rule?*

The business judgment rule protects not only the body whose proceedings are reflected in the minutes, but also any others who may rely on decisions of that body. In many jurisdictions, protection of the business judgment rule requires both a duty of care and a duty of loyalty in making decisions.

□ *Who else may review these minutes?*

For almost every public corporation, “who else”

can include government investigators, and plaintiff's lawyers who may be preparing a cross-examination. For closely held corporations, “who else” may someday include investment bankers deciding whether the company is a candidate for a public offering; venture capital companies considering an investment; or institutional lenders considering whether to make a loan.

Your board and committee minutes provide an opportunity to create a record of your compliance with legal obligations. What should that record say?

An important element of minutes is that they provide an opportunity for the organization to create a record of compliance with its legal obligations. This then begs the question—what should be reflected?

□ *Compliance with procedural matters.* For protective purposes, minutes should state, typically in an introductory paragraph, two key elements. First, the date, time and place of the meeting to show compliance with notice requirements. Second, minutes should note who was in attendance, to reflect compliance with quorum requirements.

Some meetings (for example, special meetings of a corporation's shareholders) require notice of purpose as well as time, date and place. Reflecting that purpose in the minutes is evidence of compliance with notice requirements, and the minutes can do so simply by identifying the matters considered.

For evidentiary purposes, it is helpful to tell who

John P. Beavers is a partner in the business law group and chair of the “Counsel for Boards And Executives” group of Bricker & Eckler LLP. **Kevin M. Kinross** is a member of their business law group, the Counsel for Boards and Executives group and the litigation practice group.
[www.bricker.com]

presided over the meeting and who was responsible for the minutes, either in the introductory paragraph or by signatures at the end. A person other than an officer, such as the chair or secretary who has authority under your governing documents, may preside or take minutes at a meeting in which the officer is not present.

If this is the case, the minutes should say so with a simple declaratory statement. For example, note that “X served as acting chair to preside at the meeting” or “Y served as acting secretary to take minutes of the meeting.”

Identification of the matters considered. For protective purposes, especially when a meeting is called for specified purposes or with an agenda, the minutes should identify in general terms the matters considered. For example, “The directors considered the various documents presented for consummating the merger of X into Y.” However, it is generally *not* advisable for minutes to go into detail on the considerations or the discussions involved.

Decisions made by the board are the most important context of the minutes, and vital for protection under the business judgment rule.

Decisions made. The decisions made by the board or committee are the most important content of the minutes. A record of the decisions made is not only the information needed by most audiences, but is also necessary to invoke protection of the business judgment rule. Decisions may be either: to take, or to authorize the taking of some action, or not to do so. Minutes should reflect either type of decision. A positive decision typically takes the form of a “Resolved” clause, such as:

RESOLVED, that each of the following merger documents . . . is hereby approved and adopted in the form presented together with such changes as may be approved by the officer executing the same on behalf of this Corporation, which approval shall be conclusively evidenced by the execution and delivery of the same by such officer.

A decision *not* to take or authorize some action is typically less formal than a “Resolved” clause:

The directors considered and decided to decline approval and adoption of the merger documents presented.

Recording of votes. Generally, minutes are not legally required to reflect who voted and how a director voted on any particular decision. Except for abstentions and minority votes, simple statements such as the following should suffice: “the directors adopted the following resolution” or “the directors decided to decline”

Abstentions. The laws of many jurisdictions require disclosure of any financial or personal interest of any member of a board in any matter being considered. Further, the interested members may need to abstain from voting in any decision regarding that matter.

To protect the board, the minutes should reflect an abstention when it is due to a financial or personal interest. However, the minutes should reflect only the abstention and not the underlying causes. A simple statement such as the following will suffice: “Mr. X abstained for reasons stated at the meeting.”

Directors are presumed to have voted for any board action taken unless a specific “no” vote or written dissent is filed.

What if I vote “no” on an issue? Many courts have held that board members voting on the non-prevailing side of an issue may request their vote be noted. If so, minutes should reflect that requested minority vote. Many statutes require that such negative votes be reflected in the minutes. For example, Delaware’s corporation law gives a director the right to “cause” his or her dissenting vote to be “entered” in the minutes.

Under other states’ laws, a director is presumed to have voted for any action taken, unless they vote “no” or a written dissent from the action is filed either during the meeting or within a reasonable time after the adjournment. Therefore, you will want to have a negative vote reflected in the minutes.

Courts generally have not required that the minutes reflect a director's reasons for a dissenting vote, even if requested. As with abstentions, a simple statement such as the following will suffice: "Mr. X requested that his negative vote be reflected in the minutes."

□ *Factors considered in making decisions.* Minutes should reflect factors considered in making decisions only if needed by the intended audience, for showing compliance with the duty of care. For example, minutes should reflect any factors that the intended audience wants to have considered. An example would be as follows:

"The board next considered the design department's recommendation of X over Y. Following a presentation of the issue by Mr. Smith, there followed a general discussion and the board voted unanimously to accept the proposal."

In certain situations, legal counsel for the board may advise that minutes list certain factors considered in decisions if needed to reflect the exercise of due care. The laws of most jurisdictions allow boards to consider a number of factors. These include the interests of the company's employees, suppliers, creditors and customers; the community and society; and the economy of the jurisdiction and nation.

Trial lawyers love to find details they can "blow up" in big letters and show to a jury again and again. Trying to include every detail of your discussions also raises questions of what the minutes might not say.

Any statement of such considered factors should be no more detailed than necessary to identify them. Minutes should be sparse, and should include virtually no detail of the nature of the discussion. There should never be item-by-item details of who said what.

The reason for this is simple. Trial lawyers love to find details that they can "blow up" in big letters and show to a jury again and again. Not including such detailed discussions at all avoids having a detail taken out of context and repeated it so it becomes imprinted upon the mind.

Board members may want every detail of every discussion recorded in the minutes. They naively believe it will show the thoughtful deliberations of the board, but directors simply cannot anticipate every nuance of subsequent legal battles.

Boards also ignore another problem of highly detailed minutes—what the minutes might *not* say. If minutes are so meticulous that they record every thought or statement expressed by each board member, they can then be used to demonstrate what the board was not considering at the time. It is this failure to consider something that could be your great blow-up in the courtroom.

Minutes should accurately reflect a board's reliance upon the advice, opinion or report of other advisors, including legal counsel, a committee or an officer. At times, directors face decisions that require special knowledge or expertise, which the directors themselves do not possess. Because members of a board may not have the time or resources to investigate personally every matter that comes before them, many governing statutes permit the board to "rely reasonably" upon information presented by officers, employees, board committees, and independent professional advisors in the board's decision-making process.

In such cases, the minutes should reflect such reliance with a simple statement that the board "took such action in reliance upon the advice of" However, one critical mistake that is often overlooked by a board when relying on an independent advisor is failing to "qualify" the expert.

"Qualifying" the expert is essential to complying with the director's fiduciary duties of care and loyalty, and demonstrates expertise and knowledge of the expert. Aside from qualifying the expert for the purposes of the minutes, the board must also qualify that the expert is free of any conflict that would make reliance upon the expert's advice inappropriate. This can be accomplished by requiring the expert to submit a statement of his qualifications and disclose any possible economic or personal interests. Further, note in the minutes that the board reviewed the expert's qualifications and disclosure of interests.

Minutes should also reflect and list all documents

which the board relied upon or reviewed in making a decision, referring to the title and the date, without attaching such documents to the minutes. These materials should be maintained by the company but in a separate file of supporting materials. Keeping a clear record of the documents reviewed and relied upon can be critical in proving that the directors were fully informed while making their decisions. This also includes noting documents referenced or relied upon by an expert in his or her report to the board.

□ *Privileged discussions.* At times, discussions at a meeting, especially with legal counsel regarding legal rights or obligations, are privileged. Those discussions should not be discussed in minutes. The following simple sentence will suffice: “The board participated in a privileged discussion on the subject matter with counsel.” The minutes should reflect counsel’s presence in any such session because discussions between board members and counsel are not discoverable, and saying less will protect directors against charges of misconduct.

Similarly, executive sessions among independent directors should be structured to allow open dialogue among the board members. As such, minutes of these sessions should not be kept at all. An exception—if the meeting is of a committee, the committee has independent legal counsel, and that counsel recommends minutes be kept.

However, a record should be kept that an executive session was held, who participated, and any actions that were approved during the executive session. The following simple sentence will do: “The independent directors entered an executive session for discussion on several topics.”

□ *Minutes should be the only record.* Under the laws of most jurisdictions, the board or committee minutes are the official record of that proceeding. In such cases, minutes should also be the *exclusive* record of the proceeding.

Members of a body who take notes at a meeting should, as a routine practice, destroy those notes after satisfying themselves that the minutes accurately reflect what occurred. Many organizations collect all written material, including notes, at the conclusion of the meeting. This has been accepted

as a routine or customary practice by courts in most jurisdictions.

The minutes of the corporation are considered the best evidence of what transpired at the meeting. Under the “best evidence” rule, other evidence, such as someone’s notes or memory, is generally not admissible to prove what happened at the meeting, unless it can be shown that the minutes are lost, destroyed, or are otherwise unavailable. However, personal notes or memory can be used to impeach the competence or integrity of a witness. An experienced trial attorney can effectively raise doubts on competence or integrity by asking a witness to explain differences between his or someone else’s notes and the minutes or the witness’ memory.

A dissident shareholder may consider a claim against your corporation, and the least expensive form of discovery is to demand copies of your minutes.

□ *Prior to approving the minutes read them carefully.* Minutes cannot only inform the board, but can also make the board more or less vulnerable to potential claims from shareholders and others.

A dissident shareholder may consider bringing a claim against the corporation. The least expensive form of discovery, which does not require the filing of a complaint, is to demand to see copies of the minutes. Thus, the decision as to whether to launch litigation may be based upon a quick review of your board’s minutes.

When certified as true by the secretary, minutes constitute *prima facie* evidence of the facts stated, and all actions recited as having been taken. All elections and appointments are deemed valid until proved otherwise. Further, a person who is not a shareholder, and who acts in reliance on certified minutes, is deemed to have acted in good faith, regardless of whether the minutes turn out to be accurate. Thus, ensuring the accuracy of the minutes before the secretary certifies them is critical.

When reviewing the minutes, look for the following:

□ *Factual inaccuracies.* Every director knows enough to correct material misstatements in the minutes. However, there can be pressure when the agenda is crowded to let seemingly unimportant errors remain unchanged. This is a mistake. In a litigation context, opposing counsel may prove that a meeting in fact adjourned 15 minutes before the time stated in the minutes. That fact may not be important in and of itself—but it can cast doubt on all other statements made in the minutes.

□ *Confirm dates when actions occurred.* Any attempt to make an action effective on an earlier date should precede the date with the phrase “as of” (for example, “This consent is signed as of January 1, 2008”). While this may raise grounds for challenging the action’s effective date, it will not result in the making of a false entry.

When reviewing minutes always remember that the principles of good drafting applicable to all legal documents also applies to minutes. The minutes should contain concise, unambiguous language. This

can help prevent a court looking to other sources for clarification, explanation, or allowing a plaintiff to offer its own definition as the meaning behind a particular statement.

In today’s era of heightened scrutiny, there is an anticipated rise in government investigations. Therefore, it is crucial to keep the intended audience for your minutes in mind, along with other possible readers, such as government investigators and trial attorneys.

The minutes should give enough detail to show compliance with notice provisions to allow reliance under the business judgment rule. Additionally, minutes should reflect only the decisions made, including both those to take and not to take action. Doing so will keep the courtroom from invading the boardroom.

Carefully drafted corporate minutes will inform the intended audience and protect against giving a cause of action to the other. The best approach to accomplish both—saying less is often more. ■

Reprinted by THE CORPORATE BOARD
4440 Hagadorn Road
Okemos, MI 48864-2414, (517) 336-1700
www.corporateboard.com
© 2008 by Vanguard Publications, Inc.

Copyright of Corporate Board is the property of Vanguard Publications and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.