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PERSPECTIVE

The art of the minutes

By Khoa D. Do and Scott M. Wornow

Boring. Mundane. An afterthought. A task often assigned to the uninitiated first year corporate associate. Minutes — board minutes, audit committee minutes, compensation committee minutes, special committee minutes and on and on. Minutes tend to be glossed over by practitioners. Unimportant, until they happen to become important.

Even Delaware law offers little guidance on the matter, with but a sparse dictate that "one of the officers shall have the duty to record the proceedings of the meetings of the stockholders and directors in a book to be kept for that purpose." Delaware General Corporate Law Section 142(a)). No more, no less.

Little thought is given to the "art" of the corporate minutes. How should they be crafted? How should they be framed? Should they provide an extensive description or a short review of matters discussed? Should they include intricate details of complex issues or offer just a high level overview? And, once prepared, what is the process for review and approval of those minutes? Can the contents be shared with auditors or other "outsiders" without any filter?

Where should minutes drafting begin? With the purpose, presumably.

Focus on the purpose. Minutes serve a purpose. They reflect the business decisions of a company's board of directors and its committees as well as their processes in reaching those decisions. Practitioners should not lose sight of that simple precept. Minutes tell the story of corporate decision-making; if done effectively, they present evidence, in written, tangible form, that the board properly exercised its fiduciary duties. That it did so in an informed and reasonable manner.

Minutes should fundamentally document the board's "business judgment" for both internal and external consumption. And if so documented, those minutes should increase the probability that the board's decision-making will be respected. In Delaware and other jurisdictions, courts will generally defer to the board's business judgment, loathe to substitute their own judgment absent real and apparent conflicts of interest or other semblances of self-dealing. Minutes that describe the full, informed and reasoned proceedings of the board and reflect its considered business judgment help pave the way for those board proceedings to receive that deference.

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Form. A longstanding debate persists between those who favor more and those who favor fewer words. There is no correct answer to this difference in approach. The drafter should consider a simple question: If an outsider were to review the minutes, would that individual conclude that the board made a clear, informed decision based on relevant information? It's not more complicated than that basic concept. The form taken will largely depend on the circumstances, the issues requiring explanation and the likelihood of second guessing by a court or other persons.

A decade ago, Michael Ovitz, president of The Walt Disney Company, was fired without cause. To the shock of many, the former entertainment industry agent received severance of nearly $130 million for only 14 months of work. Questions understandably arose regarding whether such a significant payment for that short-lived tenure reflected a breach of fiduciary duty by the board — in other words, how could the board justify an outsized severance for minimal service to Disney? Among issues reviewed in the course of extensive litigation, the Delaware Supreme Court commented on documentation proffered in support of the board's decision to make the payment, specifically noting a lack of exhibits within the minutes that might have better evidenced the compensation committee's discussion, evaluation and analysis of the severance.

While not dispositive in that litigation, the court's analysis underscored the practical benefits of ensuring that minutes accurately reflect discussion, interaction, debate and understanding by board participants of the matters under consideration. The none-too-uncommon statement within many standard sets of minutes that "discussion occurred" is acceptable in most circumstances, so long as the predicate to that statement is a description of the underlying matters discussed.

Taking it a step further, how should particular interactions be noted? Is there a preferred protocol for referencing director questions, by identifying, for example, the name of the specific director raising a question ("Jane asked") or leaving references more generic ("a director asked")? Preferences diverge, with one school of thought suggesting that use of specific director names within the text more effectively indicates active participation, while others believe that the generic formulation portrays the same level of involvement without placing undue attention on the acts of particular directors. On the whole, we suggest that the generic formulation may provide a better path, eliminating the possibility of misidentifying directors while appropriately placing focus on the board as a single decision-making body, rather than on any individual director.

Drafts. Drafts should be drafts. They should be easily identifiable as drafts and clearly marked as "Draft-Subject to Final Approval" (or words to that effect). Drafts should ideally note that edits can be made until the time at which the final form of the minutes has been approved by the board. In the midst of discovery, a reviewer should be able to quickly determine that minutes are in draft form and that the board's business decisions are reflected only in the final minutes.

Draft minutes should promptly be circulated among the board — the sooner following the meeting, the better. Preliminary comments and approvals can be obtained through informal channels like email, assuming proper tracking of comments. Final approval, however, should be formally confirmed, preferably at a standing meeting, after receipt of the preliminary approvals, which itself indicates that board members have read and reviewed the contents, and that their feedback has been considered.

Confidentiality/privilege. Counsel must carefully consider whether issues of confidentiality or privilege are raised by matters addressed within board minutes. Compensation decisions, employee evaluations, acquisition analyses and litigation assessments, among other matters, may be described. These sensitive issues should be evaluated for necessary redaction prior to circulation of draft or final minutes to non-board members or others to whom legal advice or analysis contained in those minutes may not be directed. Maintenance of minute books must be carefully controlled, especially when outside consultants, including auditors, request access. Uncontrolled access may risk not only the loss of privilege, but also the unintended leak of highly sensitive, confidential information within or outside an organization.

Board minutes are frequently characterized as dull. Drafting those minutes can be an uninspiring task for most. This mindset is unfortunate. Whether crafting minutes for a start-up, a Fortune 500 company or in the midst of an acquisition, care should be afforded to the contents, form, and approval processes applicable to those minutes. A second chance may not be available to correct ambiguities, errors or unintended perceptions. Unfortunately, many often seek those "do-overs" under the most critical, existential organizational circumstances when they are unlikely to be granted.

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