



Corporate minute-taking: a general counsel's guide

By **Russell Hayman, Mark J. Mihanovic, Michael W. Peregrine,**
McDermott Will & Emery

- *Traditional approaches to minute-taking may no longer be sufficient to serve the organisation and its board*
- *How to re-evaluate your minute-taking process*
- *Practical suggestions for effective minute-taking*

The post-Sarbanes-Oxley environment calls upon governing boards to place renewed emphasis on the proper role of corporate minutes as a record of organisational and board conduct. Indeed, the Disney shareholder derivative litigation is one of a series of United States 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 (for example, 'comprehensive' versus '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 organisation and its board members with meaningful protection against certain liabilities, while inadequate minutes 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 organisation 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 secretaries and general counsel as they

advise executive leadership and the board on an updated, effective minute-taking process.

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 and disclosure.

How minutes can hurt

Poorly kept 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, regulators and other plaintiffs will seek access to corporate minutes to bolster their arguments, and courts themselves will give substantial credence to the contents of minutes. 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 (for example, 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. In addition, 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. 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. In these and other high-profile cases, corporate minutes have provided damaging evidence of (or created unfavourable inferences concerning) breach of fiduciary duty and/or created confusion or misunderstanding concerning the intentions of the board.

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.

Practical 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.

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

Practical suggestion

Avoid artificial, 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.

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.

Reflecting business judgment

Demonstrate compliance with fiduciary obligations within the minutes by incorporating:

- the substance and tenor of the deliberations
- 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
- a recitation of the material presented to the board for its review, and
- 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.

Practical suggestion

- Record the starting and concluding time of the meeting and the time spent by the board on each substantive item on the agenda to better emphasize the proportionate attention spent on material items.
- Don't attempt to reflect all of the questions raised by board members in the context of a meeting but rather emphasize broadly the involvement and 'constructive scepticism' of board members (for example, '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 time.

Basic features

Regardless of the subject matter discussed at a meeting, certain fundamental matters should always be reflected in the minutes:

- the meeting date, time, duration and location
- the nature (regular or special) of the meeting
- a list of participants, separating officers and directors from invited staff, advisers and guests and those absent
- presence (or lack of presence) of a quorum

- the names of all individuals making specific presentations
- a list of all material distributed at the meeting
- the general items of discussion, which may be satisfied by attaching a copy of the agenda and noting any deviation from it, and
- confirmation of all action taken, including adoption of resolutions.

Practical suggestion

- Be careful to explicitly reference (in the text or by footnote) the title of written and audio/visual (such as PowerPoint) presentations made during the meeting, particularly as they may relate to a decision upon which 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.

Specific decisions

Minutes should reflect the specific decisions taken at the meeting, whether they involved a decision to take action or not to take action. If necessary for compliance or fiduciary duty purposes, the minutes should reflect those specific factors that were material to the board's decision. 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.

Practical suggestion

In relating specific decisions, be sure to acknowledge debate, for example, 'The chief financial officer identified the various assumptions on which her projections were based, and a discussion followed'.

Recording conflicts, dissents and abstentions

Minutes should reflect 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. In addition, the current liability environment suggests accommodating the interests of individual directors who wish their dissenting vote or abstention be reflected for the record.

Practical 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'.

Lawyer–client privilege

Those portions of board meetings devoted to discussion of lawyer–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 minutes of privileged discussions are needed, they should be memorialised in separate minutes marked 'Confidential — Lawyer–client privileged,' and kept apart from other minutes in a secure and confidential location.

Practical suggestion

In referencing lawyer–client privilege, specific language should be used; for instance '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 lawyer–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'.

Key committees

Particular attention to accurate minute-taking should be made for proceedings of committees with specific regulatory importance, such as audit, compliance and executive compensation. Minutes provide an opportunity to confirm, where appropriate, the consistency of committee action with 'best practices' and satisfaction of regulatory 'safe harbours' (such as the compensation committee and the 'rebuttable presumption of reasonableness').

Practical suggestion

- 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.

Executive session

Increasingly popular as a 'best practice', 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.

Practical 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 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.

Practical suggestion

- Directors need not retain any meeting notes after reviewing and approving the formal minutes of that meeting.
- Avoid tape recording meetings as a means of facilitating the drafting of minutes.

The review process

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.

Practical 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 recognise 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 corporate secretary in the minute-taking process.

In the post-Sarbanes environment, a thorough, accurate corporate minute-taking process provides substantial benefits to the corporation and its governing board. Corporate minutes cannot compensate for improper, inattentive or deficient board behaviour; therefore, a close review and refinement of existing board processes is highly recommended.

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