



Governance Notes

A Quarterly Summary of News, Resources, and Events for Governance Support Professionals



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This newsletter provides governance support professionals with information and expert opinions in the area of hospital and health system governance and gives updates on services and events at The Governance Institute.

News, Articles, and Updates

The “Art” of Minute Taking

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Yes, it's an “art” and not a “science” because there is no one-size-fits-all method for the preparation of board and committee meetings. That's not to say that the practice of minute taking shouldn't receive close board attention. Indeed, it is one of the most critical planks of the board support platform. Properly prepared minutes can serve not only as a useful guide for future board action, but also to memorialize the exercise of due care by board and committee members. The latter is becoming increasingly important, as the quality of board conduct is more frequently coming under regulatory and judicial scrutiny. For these and other reasons, the practice of minute taking and the process by which minutes are reviewed and finalized should reflect a thoughtful, coordinated effort by the general counsel and governance support personnel.

Practical Concepts

The fundamental role of corporate minutes is to preserve an accurate and official record of board and committee proceedings. Effective minute taking is not a substitute for the good faith exercise by board and committee members of their duties of care and loyalty. Minutes cannot be used to alter the historical record (and indeed, those who seek to do so expose themselves—and their organization—to substantial liability). Keep in mind a simple rule: if it didn't happen in a meeting and if someone didn't say or do it, it can't be documented and it can't be reflected in the minutes. Along the same lines, if it can't be documented in the minutes or otherwise, then from the law's perspective, it's almost as if it didn't happen. That's why a review of the minute-taking process should be accompanied by a “refresher

course” on the standard of board member care (with special focus on attentiveness, diligence, and constructive skepticism). The two go hand in hand as measures intended to support the board in its exercise of fiduciary duty.

The Fundamentals

The practice of summarizing through minutes the deliberations of board and committee meetings is grounded in established principles of corporate law. Indeed, many state non-profit and business corporation codes contain an explicit requirement that the organization keep permanent records of the minutes of all meetings of its directors, all actions taken by directors in the absence of a meeting, and all actions taken by committees upon delegation from the board. The public policy goal is to preserve a permanent record of the actions taken by the board, and by committees acting with board-delegated authority. These codes typically defer to the judgment of the organization the extent of detail contained in the minutes (e.g., whether the minutes summarize the discussion leading to board action, or the rationale for such action). Counsel and governance support personnel should be attentive, however, to the potential that other relevant statutes may have more explicit minute-taking requirements. For example, Internal Revenue Service regulations set forth specific requirements for the content of minutes recording the approval of transactions with corporate “insiders,” as part of the criteria for qualifying the transaction for the rebuttable presumption of reasonableness safe harbor. In addition, many non-profit governance guides published by individual state attorneys general speak to the importance of minute taking. Also,

IRS auditors are directed to review board minutes as part of any examination of a tax-exempt organization.

No “Best Practice”

The general concept of flexibility allowed by the law in the minute-taking process is underscored by the lack of any relevant governance best practice. The highly respected Panel on the Nonprofit Sector does not explicitly address the form or manner of minute taking. Both the law and best practice allow the board substantial leeway in the level of detail incorporated within minutes-taking practice. Given that, the general counsel and governance support personnel should be guided by the principle that minutes can play a positive role in reducing the board’s liability profile. Within that, the following elements of the minute-taking process deserve particular attention:

- **Length:** The never-ending question: short or long? Brief or detailed? While there is no legal problem presented by the short, concise, “one-page” format, the view here is that it is a missed opportunity to demonstrate the full extent of board diligence. With the increase in scrutiny of director conduct, more detailed minutes provide a greater opportunity to reflect favorable elements of director performance in the meetings (e.g., good faith attentiveness, constructive skepticism, diligence, full engagement with the relevant issues, and appreciation of the financial and mission implications of particular decisions). Minutes can be an enormously valuable record of responsible board behavior, and more lengthy minutes provide more narrative “running room” with which to make such demonstration. More detailed minutes also serve as a useful reference that directors may point to when preparing for subsequent meetings or action. That doesn’t mean that the minutes must be “transcript” in nature; it serves little purpose to drown the reviewer in minutiae. Rather, it means that far more benefits are achieved in terms of establishing a record of conduct and providing guidance and direction for future meetings and board action. The general counsel and governance support personnel should seek to balance (e.g., four to five page limit?) the interests of detail with the concern that excessive detail would be a disincentive for review.

- **Dissent and other details:** A frequent question is whether there is a need to reference the name of individuals who dissent from particular votes or otherwise register their objection to specific board actions or positions. Unless a board member makes a particular request to be mentioned in the minutes, there is no value to be served (and some harm that can arise) from allowing the minutes to take on a personal flavor. Much the same result can be achieved by referencing that “spirited discussion” took place, that “several members expressed their concern,” or similar phrases to reflect the fact that opposition, concern, or skepticism was expressed.
- **Time reference:** Some boards will actually reference in the document the amount of time spent by the board discussing a particular issue. Not a bad idea, as there is value in having the minutes reflect the allocation of a greater amount of time to the more important issues on the agenda. Yet, holding a stopwatch to the process might be unwieldy, and add a “machine-like” element to the process. Much of the same results can be achieved by placing an emphasis on substantive discussions in the narrative of the minutes, or using phrases that reflect that certain agenda items took more of the board’s time than others.
- **Recording:** Many boards ask their governance support personnel to record the meetings, both to provide a transcript for future reference, and also to serve as a basis for the preparation of written minutes. Experience suggests, however, that board members may “pull their punches” or “play to the microphone” knowing that their comments are being recorded. Some folks just take on a different persona when they are being recorded, and that is not helpful to the governance process. The “white-collar” lawyers will tell us that keeping a transcript of the meeting may create certain evidentiary risks to the board should it be preserved and subsequently requested/subpoenaed in a document request.
- **Committees:** The same laws that require recordation of full board meetings also require the recordation of meetings of committees with board-delegated powers. So, it is important to maintain an effective minute-taking process at the committee

level. This is particularly the case with respect to committees with vitally important responsibilities (e.g., compliance, audit, executive compensation, and finance). In addition, effective committee minutes provide particular value with larger boards, where substantial responsibilities are delegated to committees. Detailed committee minutes provide board members with a more complete understanding of committee action and organizational developments, and are more capable of exercising oversight and judgment as a result. More limited minutes can be taken in executive sessions of independent directors, given the unique and often highly confidential nature of those sessions.

- **Review process:** An effective minute-taking mechanism will also place renewed emphasis on the role of the board in reviewing and approving draft minutes presented to them for approval. Normally this is a pro forma aspect of every board meeting, to which little attention is made by board members. How many board members actually take time to review the draft? Board diligence and awareness, and the quality and value of minutes will be significantly improved should more board members take interest in reviewing draft minutes.
- **Attorney–client privilege:** Increasingly, major portions of board and committee meetings are devoted to subjects for which the board will wish to assert the attorney–client privilege. In order to reflect that the board was briefed on the important matters for which the privilege is to be asserted, the minutes can make a simple reference to the effect that the agenda then reflected a discussion with legal counsel over which the attorney–client (and possibly other) privileges apply—and leave it at that.

Do's and Don'ts

Do:

- Reflect the presence of advisors at the meeting, the presentations they make, the questions that are asked of them, and the reliance placed on their advice.

- Remember to ask questions in order to clarify a statement, motion, resolution, etc. to make sure that the minutes are as accurate a representation of the intended discussion as possible.
- Make sure the minutes make note of scope, flow, and purpose of particular discussions by tracking to the extent possible the written agenda.
- Memorialize any discussion of or deviation from the consent agenda.
- Specifically identify documents reviewed by the meeting participants, whether oral, visual, or in writing.

Don't:

- Rush the members through a quick vote on adoption of the previous meeting's minutes.
- Forget to reference the fundamentals, for example, time of call to order, the presiding officer, attendance, presence of quorum, type of meeting (e.g., regular or special), whether some members are participating electronically, specific resolutions adopted, etc.
- Apply a "he said/she said" blow-by-blow transcript of the proceedings.
- Allow multiple pairs of hands to have access to the minutes drafting process.
- Allow board members to keep their notes following the meeting.

Properly prepared board and committee meeting minutes can provide an excellent guide for future board action and oversight, as well as establish a written record of the level of care exercised by meeting participants. Poorly prepared minutes can create confusion as to the intent and expected action of board and committee members, as well as uncertainty of the diligence they exercised in those meetings. While ministerial in nature, minutes can play an outsized role in the function and liability profile of the board and the organization. For those and other reasons, it is a highly worthwhile exercise for the board to periodically consult with the general counsel and governance support personnel on the effectiveness of its minute-taking process

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