

SOLID PLANKS OF EFFECTIVE BOARD SUPPORT

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GOALS OF THE PRESENTATION

To provide Governance Support Professionals with:

- “Need to know” legal trends that underscore the importance of proper documentation and support of governance practices.
- A review of the “Planks” for an enhanced platform for effective board conduct that is appropriately documented.
- New developments on the “Advice of Counsel” defense and related board review/documentation practices.
- Comments on the possible limitations of digital information/technology in support of effective board practices.

WHERE WE'RE COMING FROM

1. A “Climate of Accountability” has emerged in the current environment, in which “finger-pointing” and attempts to assess blame are increasingly the order of the day.
2. In corporate (civil and criminal) investigations, regulators are more willing than before to consider the role of the Board and executive officers when the corporation suffers “preventable harm” or material noncompliance.
3. Creditors and other litigious constituents can be rapacious in their scrutiny of boardroom actions.

WHERE WE'RE COMING FROM (CONT'D)

4. Board documents - chair/officer communications; minutes; agenda; resolutions; supporting documentation and similar material are frequently subpoenaed by regulators and civil plaintiffs in the context of investigations and litigation.
5. The cost of regulatory inquiry/derivative litigation/creditors' rights actions and related media coverage (in terms of both dollars and reputation) can be enormous - both to the corporation and to its officers and directors.
6. Appropriate fiduciary conduct, supported by effective board support practices, will position the organization to respond promptly and thoroughly to any challenge to fiduciary conduct.

“IN A NUTSHELL”

- GSP, acting in coordination with the General Counsel can proactively “team” to help increase information flow efficiency and reduce board liability exposure; together, you can make a significant difference!
- The effort-to-reward ratio can be impressive.
- There are a series of low-cost, non-disruptive action items which the GSP (in coordination with the General Counsel) can implement in the near term to improve the board communication process.
- “Reduce the Litigation Target Zone”

KEY PRINCIPLES

- How the General Counsel, the Compliance Officer and Governance Support Professionals can “Team” to make a positive difference
- How to support the board in its exercised of **informed** oversight and decision-making
- How effective documentation and prudent use of digital technology practices play a valuable role in this respect
- How such coordination can reduce the pressures that sometimes (otherwise) confront the GSP

WHY WE CARE

1. Continuing focus on board accountability
2. Emerging case law focusing on “bad faith” conduct
3. State law enforcement initiatives
4. “Where Was the Board?” Controversies
5. Parent/Affiliate Disputes
6. Focus on Conflict of Interests Evaluation
7. IRS/Tax Exempt Status (Governance) Considerations
8. Emphasis on Board Room Oversight and Best Practice
9. Coverage from the “New Media”
10. Rise in “Books and Records” Requests

WHY WE CARE (CONT'D)

11. State AG enforcement initiatives focused on officer, director conduct in connection with:

- Change of Control transactions
- Executive compensation
- Conflict of Interest transactions

12. IRS governance examination guidelines

13. Creditors' rights actions

Key Concept: Thorough, readily accessible documentation of prudent governance and executive practices is vital.

COMPETING CONSTITUENTS

- The Board
- Board Leadership
- The Chief Executive Officer
- The General Counsel
- The Compliance Officer
- Other key officers (e.g., CFO, CIO, CPO)
- SVP/HR
- Corporate mission officers

COMPETING INTERESTS

- Accuracy
- Competency
- Brevity
- Speed
- Confidentiality
- Compliance with Laws
- “Sending a Message”

CORE CONCEPT: “PLANKS” OF THE BOARD SUPPORT/DOCUMENTATION PLATFORM

- i. Board *education* on proper fiduciary conduct
- ii. Proper *information flow* on board matters
- iii. Instructive board *agenda* reflecting matters considered
- iv. Meeting *minutes* that reflect good faith, diligence
- v. Preservation of appropriate legal *privileges*
- vi. Efficient and accessible *retention* of board records
- vii. Effecting recognized board “*shortcuts*”
- viii. Management of the “*minutia*”

CONDUCT TO EMPHASIZE IN DOCUMENTATION (EXAMPLES)

- Loyalty to Mission/Purpose/Constituents
- Constructive Skepticism
- Attentive Oversight
- Informed Business Judgment
- Good Faith
- Disinterest
- Legal Compliance
- Adherence to Corporate, Board Policy
- Advice of Counsel, Advisors

PRACTICAL CONCEPTS

1. If it didn't happen, or someone didn't say or do it, it can't be documented and it can't be included in the minutes.
2. If it's not reflected in documentation, then from the law's perspective, it's as if it didn't happen or someone didn't say or do it.
3. Minutes are not an antidote to deficient fiduciary conduct. Don't embellish the facts; minutes are not intended to be an advocacy platform.

PLANK ONE: EFFECTIVE BOARD EDUCATION

- Targeted, frequent board education presentations contribute significantly to the exercise of the requisite good faith, oversight and business judgment and is therefore recognized as a governance “best practice”.
- The GSP can team with the General Counsel to help satisfy this “best practice” by developing a comprehensive board education program of in-person presentations and supportive reading material.
- Note, e.g., recent developments in health care and how they may affect the board’s standard of care.

PLANK TWO: PROPER INFORMATION FLOW

- A key method for empowering the board to satisfy its fiduciary obligations: assure (**and document**) proper information flow.
- Specific type, quantity, format, timing and source of information will depend upon the composition and sophistication of the particular board.
- The GSP (and the General Counsel) should actively engage the board to develop the proper knowledge base that will enable the board to exercise active oversight and make informed decisions: *tell us what you want; what works best for you!*

PLANK THREE: INSTRUCTIVE BOARD AGENDA

- The agenda can serve several critical **documentation related** purposes:
 - **First**, to prepare the board for the issues to be addressed at the meeting;
 - **Second**, to facilitate advance requests for information from attentive board members;
 - **Third**, to assist board members in identifying and disclosing potential conflicts of interest;
 - **Fourth**, to serve as a base of future reference (in addition to the minutes) as to the matters discussed at board meetings **and** materials provided in advance to board members; and
 - **Fifth**, to reduce the potential for subsequent dispute.

PLANK FOUR: EFFECTIVE MINUTE-TAKING PRACTICE

- With respect to board and committee minute-taking, there truly is no “one size fits all” approach to style or content. There is no related “best practice”. The fundamental role of corporate minutes is to preserve an accurate and official record of governance proceedings.
- Note: Chief Justice Strine’s comments.
 - “Long form” v. “short form”
 - Be clear as to what method is being used, and why
 - Avoid having form of minute-taking be a subject of after-the-fact skepticism

“ADVICE OF COUNSEL” CONCERNS

Important to avoid the perception of “opinion shopping” when several opinions are sought to help address a complex technical legal issue confronting the organization. **Minutes can help create a record that supports an “advice of counsel defense”** in that situation by documenting the organization’s good faith in how it approaches the matter of “second” and “multiple” opinions, e.g.:

- Why they are being sought
- That all counsel are being fully informed of all relevant facts (including prior received opinions)

“ADVICE OF COUNSEL” CONCERNS (CONT’D)

- How best to protect the attorney-client privilege
- That the board was advised of the resulting conclusions
- How to resolve conflicts or differences between opinions as part of reaching an informed and prudent position
- Special needs for executive session” practice.

PLANK FIVE: PRESERVATION OF LEGAL PRIVILEGES

- The GSP and the General Counsel play a crucial role in assuring that board processes are properly structured and managed to preserve the attorney-client and related legal privileges when intended to apply to board presentations and distributions of supporting documents.
- **Key concerns:** extends to all types of communications; value exists in demonstrating attorney-client relationship and intent to treat communication as privileged; corporations can receive the protection of privilege; the privilege can be inadvertently waived.

PLANK SIX: EFFICIENT BOARD RECORDS RETENTION PRACTICE

- The GSP (and the General Counsel) should help assure that board/governance records are retained in a safe, secure paper and electronic files that allow ready access to interested officers and directors, and to facilitate prompt response to regulatory/judicial requests for corporate/board records.
- The limitations of Directors' individual note-taking.

PLANK SEVEN: RECOGNIZED BOARD “SHORTCUTS”

- The GSP and the General Counsel play a vitally important role in assisting the board’s effective application of the various corporate governance “shortcuts” available under corporation law and established corporate practices, *e.g.*:
 - Consent agendas
 - Action by “Informed Action”
 - Meeting by conference/video call
 - Proxies and voting agreements (where applicable)
 - Special Pandemic-Related Statutory Shortcuts

PLANK EIGHT: “MANAGING THE MINUTIAE”

- The GSP and the GC can team to help manage the documentation and meeting minutiae; *i.e.*, the collection of ministerial and non-ministerial issues and developments critical to supporting evidence of prudent and legally compliant board action.
- Statutes that allow board action by electronic means.
- Planning for board action by other interactive technology.
- iPhone, , Tablet use by directors in meetings.

CONCERNS REGARDING THE BOARD PORTAL

- That the electronic option (without an accompanying paper copy) will **impair the ability of some directors to fully absorb information** (e.g., electronic documents limit the director's ability to notate and edit those documents for decision-making purposes, especially if the director lacks the technical skills to manage the portal process).
- That **plaintiff's lawyers** are showing an increasing interest in discovery of electronic information that may evidence the **attentiveness of individual directors** to materials posted on the board portal.

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