ARE MINUTEMEN GUARDING YOUR CORPORATION?

by

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Introduction

Corporate minute-taking is often regarded as a formalistic, mundane task performed as "ritualistically as a minuet."[1] Preparing minutes has even been compared to watching paint dry.[2] However, with board activities being subjected to legal challenge and regulatory scrutiny in the post-Sarbanes-Oxley environment, "the existence of a clear record of the board's activities has become an increasingly critical element in establishing a corporation's decision-making process."[3] Minutes that detail a board's efforts to be fully informed, and evidencing robust deliberative processes serve to bolster the defense against a claimed breach of the director's duty of care. The minutes "are likely the most—and sometimes the only—reliable record of what actually transpired."[4] If the board knows or suspects that its decisions will be scrutinized by the courts, then it should highlight the positives of its meetings in carefully drafted minutes. If the board has a good story to tell, then the minutes should tell it.[5] Dierdre Burgman refers to the careful and detailed preparation of corporate minutes as the "best insurance against liability."[6] In a newsletter to its clients, a prominent law firm states it this way: "Poorly kept minutes deny the board a potentially dispositive resource from which to defend their conduct or to explain the full nature of a board decision."[7]

In contrast, Norman Veasey warns against "legal issues lurking in the process of preparing the minutes."[8] Others describe corporate minutes as "ticking time bombs" that remain benign until "exhumed."[9] Litigation risks associated with creating a self-critical report must be factored into the equation. Therefore, according to this line of reasoning, despite the potential benefits of more descriptive minutes, skeletal minutes, which exclude the self-critical component, reduce the risk of inadvertently providing fodder for a derivative lawsuit. Which position is more persuasive? Do minutes represent an opportunity or a snare?

This article will explore the dilemma of how to achieve the optimal strategic balance in the preparation of corporate minutes by examining cases in which minutes have been a focal point of the decision. Minute-taking is no longer a perfunctory, ministerial practice. In the current legal environment minute-taking is now regarded as an art rather than a science.[10] One commentator quoted Goldilocks when he declared that the minutes must be "just right."[11] In an effort to find the right balance, Section I offers a legislative background. Section II puts the analysis in the context of the current business climate. In Section III, judicial interpretations of minutes are examined, and a similar review of regulatory interpretation is contained in Section IV. Finally, Section V offers recommendations to those charged with the challenging and sometimes perilous task of preparing corporate minutes.

I. Legislative Background

The role of corporate minutes is to memorialize and to preserve an accurate and official record of material actions taken at meetings of the board or its committees.[12] In most cases, the minutes are the primary record of action taken at board meetings. More importantly, the minutes are presumed to represent accurately all subject matter covered in a board meeting. This presumption gives minutes the status of prima facie evidence.[13] Although commentators disagree on whether the "comprehensive" or "minimalist" viewpoint of minute-taking is more justifiable, there is no debate about the materiality of effective minute-taking.[14]

All states require the preparation of board minutes, and most conform to the Model Business Corporation Act which states: "A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation."[15]

Unfortunately, this standard language does not offer guidance or illumination about the form or content of the minutes. At a minimum, the minutes must provide a record of corporate decisions. But, the amount of detail used to describe the deliberative process is left to the discretion of individual corporations. In the post-Sarbanes-Oxley era, board minutes must receive strategic focus and attention.

II. Board Minutes in the Era of Greater Transparency—The Stakes are Higher—Bet with Caution

Robert Mueller declares that the time has arrived for minutes to be more accessible to interested parties.[16] Although it is doubtful that boards will voluntarily publish their minutes in the near term, access to the minutes has successfully been

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obtained by shareholders pursuant to a demand under either Section 220 of the Delaware Code[17] or pursuant to discovery. Section 220 provides, in pertinent part, that any stockholder shall have the right upon written demand, and under oath stating the purpose thereof, to inspect books and records (including minutes) for a proper purpose. Such demands are frequently a prelude to a derivative or class action lawsuit.[18] "Proper purpose" includes any purpose reasonably related to such person's interest as a stockholder, such as using 220 as an "information gather tool" prior to instituting derivative litigation, or preparing a shareholder resolution.[19] It is important to note that the Section 220 request need not prove wrongdoing as a condition to access. Instead, if such party has a "credible" basis for believing that there has been a breach of the board's fiduciary duties or other wrongdoing, the court will uphold the request.[20] The Delaware Chancery Court has gone as far as to encourage shareholders to use Section 220 before filing derivative actions.[21] Although an expectation of confidentiality is attached to minutes produced pursuant to a Section 220 demand, it does not apply if the information is to be used to state a cause of action in a derivative lawsuit.[22]

If the board loses its challenge to a Section 220 demand, it may, nevertheless, attempt to shield the minutes by asserting attorney-client privilege. It is common for the corporate general counsel to serve as corporate secretary, and it is also customary to have other attorneys on or advising the board. However, the presence of an attorney in the room does not *ipso facto* make the minutes privileged. In the seminal case of *Garner v. Wolfinbarger*, the Fifth Circuit Court of Appeals distinguished between when the attorney in the room was wearing a legal hat, and when the attorney was acting more as a businessperson. In the discussion of the exception to the rule, the court stated: "In many situations in which the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other."[23] The court acknowledged that a corporation was not barred from asserting the privilege, "but where the corporation is in a suit for acting inimically to shareholders," the privilege was subject to the shareholder's right to argue why the privilege should not be honored in a particular situation.[24] In a close case, it is reasonable to assume that the courts will side with the shareholder's right to examine the records.[25] However, Hayman, Peregrine and Mihanovic contend that the likelihood of successfully asserting attorney-client privilege will be enhanced if the minutes specifically note that a particular board discussion was devoted to attorney-client privilege matters along with a confirmation that the discussion took place in the presence of counsel.[26]

It is indisputable that corporate minutes have figured prominently in many high profile lawsuits against boards of directors.[27] Given that shareholders will gain access to corporate minutes in most cases where director misconduct is alleged, it is prudent to consider proactive minute-taking strategies to blunt adverse inferences and to confirm sound decision-making processes were used.

III. Judicial Interpretation of Minutes

A. Inconsistencies/Conflicts

Inconsistencies between corporate minutes and verbal explanations of what *really* happened in the board meeting cause unpredictable results and sometimes draw flashes of judicial sarcasm. In *Smith v. Van Gorkum*, after noting a number of inconsistencies between the record and what allegedly took place in the boardroom, a frustrated Justice Horsey remarked that "Johnson's testimony and the Board Minutes of January 26 were *remarkably* consistent." [*emphasis added*].[28] Likewise, in *Mills Acquisition Co. v. MacMillan, Inc.*, Justice Moore commented dryly in a footnote: "It also appears that the handwritten 'official' minutes of the board meeting were taken by a partner of Charles J. Queenan, Jr., the Pittsburgh lawyer who was present when Evans tipped Maxwell's bid to KKR."[29] And, in *Weinberger v. UOP*, Justice Moore observed that while Mr. Walkup, the Chairman of Signal, claimed to have discussed the infamous Arledge-Chitiea report with the UOP directors, the record did not support his assertion. With tongue firmly planted in cheek, he suggested that "Perhaps it is the result of some confusion on Mr. Walkup's part."[30]

Although courts do not always resolve inconsistencies in favor of the record created in the minutes,[31] the attempt to overcome a damaging recitation in the minutes is an uphill slog that can be averted with prudent minute-keeping. Because of the difficulty of overcoming the presumed accuracy of the minutes, it is imperative that draft minutes be reviewed by all directors to ensure they reflect the substance of the meeting and are sufficiently inclusive. In addition to the presumed accuracy of the minutes as a record of board proceeds, the courts will also presume that all material issues addressed during the meeting are described in the minutes.[32]

In *Disney*, the court took judicial notice of the lack of meeting minutes for the executive session which considered Ovitz's compensation package. It also noted the conflicts in testimony of the attendees about what transpired during the meeting.[33] Part of the confusion was because much of the discussion took place in informal sidebars. Although Chancellor Chandler was willing to consider testimony about the informal meetings, reliance on such oral testimony is fraught with uncertainties.[34]

Another matter concerns minutes that are found to be demonstrably sloppy under the intense magnification of the judicial microscope. Gilchrist Sparks warns that courts may well be uncomfortable relying on sloppy minutes as a presumptively accurate record of what occurred.[35] *Disney*, *Weinberger* and *Van Gorkum* offer painful examples of incomplete or insufficiently prepared minutes that feed adverse assumptions and significantly raise the liability profile of directors.

B. Silence

Related interpretive problems arise when minutes are silent on an issue. As discussed earlier, many experts believe that the minutes should be minimal—the "short form" approach-- in order to avoid statements that can be taken out of context and twisted to fit the liability theories of plaintiffs' attorneys. While the fears of minute minimalists are understandable, bare-bones minutes leave a void where judges can speculate, infer and interpret. For example, in *Mills Acquisition Co. v. MacMillan, Inc.*, the court concluded, "There is nothing in the record to suggest that this was done pursuant to board action. If anything, it was Evans acting alone in his own personal interest."[36] Not only did the court conclude that the action was not taken by the board because there was no reference to it in the minutes, but it proceeded to speculate that Evans must have done it for his own interest. Likewise, in *Cheff v. Mathes*, the absence of any reference in the minutes to the stock option plan as a motivating factor for the purchases left the court free to hypothesize about the underlying motivations.[37]

Ward describes the problem as follows: "What actually happened in a meeting of your board ultimately consists of whatever the minutes say happened- and if the minutes are silent on a subject, then legally it never arose."[38] Burgman refers to this as a "two-edged sword."[39] Since the minutes are a primary source of what transpired at a meeting, the failure to disclose the consideration of a material item can be used as a "weapon" in a shareholder suit.[40] Although the absence of an item in the minutes will not prevent directors from later claiming that it took place, they will have a formidable task when weighed against presumptively valid and complete minutes.[41] Numerous courts have found board inaction to constitute a breach of the duty of care or good faith.

If inaction might equate to a breach of the duty of care, then the lack of detail in the minutes can have disastrous consequences.[42] Minutes typically are used to describe actions taken by the board, but in light of the foregoing, it is equally as important for the minutes to describe what was discussed—even if no formal action was taken. A primary function of the board is to monitor corporate activity. Its failure to monitor can result in director liability. Accordingly, the minutes should describe monitoring activity even if the activity does not result in formal action, because the omission might lead a judge to conclude that the monitoring did not take place.

C. Timing

The courts have frequently used corporate minutes to establish critical timing parameters. In *In re Prime Hospitality*, the Chancery court noted that the first time Mr. Petrocelli communicated with the board was at a regularly scheduled board meeting on July 27, 2004, which was the day after the negotiations had occurred and after the final price had been agreed upon.[43] The court further noted that the majority of that meeting was devoted to a presentation of Prime's financial outlook, not to the possibility of selling the company.[44] The case shows that the Chancery Court used the minutes to establish whether negotiations took place before or after the board was notified of the possibility of a sale of the company, and secondly, the court gauged the relative priority of the acquisition by noting the amount of time devoted to the issue compared with the time devoted to the routine matter of financial performance.[45]

Similarly, in *Arnlund v. Smith*, the court used the corporate minutes to establish when the defendants were first made aware of certain material information. The court held that the length of time from learning of the material information—as disclosed in the minutes—to the public disclosure of the information gave rise to an inference of fraud.[46]

The *Disney* court also used the minutes to calculate the relative importance of the Ovitz Employment Agreement. The court commented that "[I]t would have been extremely helpful to the court if the minutes had indicated in any fashion that the discussion related to the OEA [Ovitz Employment Agreement] was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning."[47]

D. Length of Minutes

In addition to taking judicial notice of the proportion of time a board spends on particular issues to determine the relative importance of those issues, courts also study the minutes to evaluate how much relative space in the minutes was devoted to particular issues. For example, the *Disney* court commented: "[T]he minutes of the meeting were fifteen pages long, but only a page and a half covered Ovitz's possible employment."[48] The board minutes were so sparse on the subject of Ovitz's employment that they called into question whether the directors had exercised any judgment whatsoever. The relatively short period of time devoted to a discussion of the Ovitz contract, coupled with the meager allotment of space, had the adverse effect of coloring the court's opinion concerning the broader issue of whether fiduciary duties were breached.[49]

E. Board Deliberations

Board minutes matter because courts will make inferences about the conduct and deliberations of the board based on the minutes. A court may dismiss a suit based on an alleged failure to fulfill fiduciary duties because of the court's inference drawn from the minutes that the board acted in good faith and on a fully informed basis, or the minutes may lead the court to deduce an absence of good faith or due care.[50]

Commentators disagree widely on the extent to which minutes should disclose aspects of the deliberative process. In *Disney v. The Walt Disney Company*, [51] Chancellor Lamb warned of the potential harm to the deliberative process if shareholders have access to discussions, opinions, and assessments of individual board members. He predicted that such access would have a "chilling effect" on board deliberations.

Ambivalently, Chancellor Lamb acknowledged that shareholders have a legitimate interest in monitoring how boards perform their managerial duties.[52] Shareholders are keenly interested in the quality of the deliberative process used to reach a decision. Specifically, shareholders seek to know if alternatives were evaluated and if the board fully informed itself about the issues.

Since courts use the minutes to determine whether the board exercised due care, it is then necessary to negate the inference that short-form, skeletal minutes are indicative of a lack of deliberation. In its Handbook for Corporate Officers and Directors, O'Melveny & Myers states that complete and accurate information about the board's decision-making process in the minutes may help directors to demonstrate due care and good faith, while incomplete and ambiguous minutes will handicap directors who try to demonstrate satisfaction of those duties.[53]

However, as a cautionary note, if the minutes do detail the deliberative process the court may assume that *all* matters discussed at the meeting are included in the minutes.[54] In other words, once the board starts with the "more-is-better" approach, all matters *must* be discussed, or at least mentioned, in the minutes.

Proponents of the "less is better" viewpoint argue that detailed minutes are even more potentially destructive than "short-form" minutes. They rationalize that directors' testimony can provide flesh to skeletal minutes at trial, but that fully-inclusive minutes provide less leeway to clarify or alter the record after the fact.[55]

The "more is better" advocates counter that the minutes can be used either as a "sword or a shield."[56] If the minutes are drafted purposefully to serve as a sword, shield, or both, the corporate secretary who drafts them must artfully capture the deliberative highlights without devolving into "he said, she said."

Although Veasey warns of the legal pitfalls associated with minute-taking, he believes that "showing what directors discussed and considered and whether questions were asked—cannot be overstated."[57] Stated differently, Faith Grossnickle advises that minutes should confirm that directors collectively exercised their business judgment to advance the company's business.[58] Burgman states definitively: "After Trans Union the record must show whether deliberations occurred at board meetings."[59]

For example, in *Disney*, Chancellor Chandler searched the minutes for any evidence of deliberations related to the Ovitz employment agreement,[60] or, in the words of several commentators, "active board involvement and questioning."[61] Doubtless, the Disney minute-taker lost an opportunity to influence the judge with details of the deliberative process that might have counteracted his inference that the decision to hire Ovitz was steamrolled by CEO Eisner.

However, even among the "more is better" advocates, there is disagreement about the extent of the disclosure of the details of the deliberative process. Minutes should not be filled with unnecessary points that could be taken out of context and used by plaintiff's counsel.[62] Instead, the minutes should chronicle both the decisions that were made and the basis for those decisions.[63] Also, in light of the judicial inclination to draw conclusions based on what was omitted from the minutes, it is advisable that they provide a sense of the time and effort devoted to the decision-making process even when no action is taken.[64] Atkins said it best: "Minutes should convey a meaningful sense of the subjects discussed…participation and interaction of directors…and other indicia of the deliberative process in which the board engaged."[65] The minutes should highlight points made in debates and discussions. This will help to convince a court that the process was sound and exhaustive and that, therefore, the results are defensible.[66]

A more controversial issue concerns the extent to which the minutes should identify the specific directors who argued certain points in the meeting or disagreed with the ultimate decision. Until recently, because the board was a decision-making monolith, even though the minutes might incorporate a discussion of the deliberative process, the identities of participants were shielded from disclosure. However, times have changed. While formerly the courts examined the conduct of the board of directors collectively in assessing liability, without focusing on individual directors, the decision in *Emerging Communications*[67] makes clear now that directors will be evaluated on an individual basis. In *Disney*, Chancellor Chandler concurred with the holding in *Emerging Communications* when he stated, "[L]iability of the directors must be determined on an individual basis because the nature of the breach (if any), and whether they are exculpated from liability for the breach can vary for each director."[68]

In response to this new focus on individual directors, Baxley, Stein and Tebbe at King & Spalding advise that individual directors must now avoid "herd mentality," and consider how their individual conduct will be evaluated if the board decision turns out badly.[69]

Directors are not Musketeers. It is no longer "all for one and one for all" when it comes to potential liability. Accordingly, individual board members must insist that the minutes reflect their individual contributions, including arguments made in opposition to the board decision. As boards continue to select new directors based on their individual expertise, liability may well hinge on whether the board decision was within a director's field of expertise. And, the liability of the other directors may be based on the reasonableness of their reliance on the expertise of their fellow directors.

However, if the minutes incorporate deliberative detail, including identifying the comments of individual directors, it could provide plaintiffs' attorneys with a veritable cornucopia of usable evidence. How then, should an individual director

defend his or her actions if targeted in a duty of care case? One suggestion might be for the director to maintain personal notes from the meeting so that the director would then have a record of his or her actions to rebut adverse assumptions concerning apparent participation in a decision. Yet, if each director maintained individual notes, it would be virtually impossible for the corporate secretary to manage the recordkeeping process by eroding the presumption that the minutes constitute the primary, and only, record of the board meeting. Commentators on this subject are unanimous in advising that notes taken by directors during board meetings should be destroyed no later than the date the minutes are approved.[70] However, this would eliminate the documentary proof that the director may need to defend against individual liability.

To solve this problem, commentators have suggested that directors concerned about individual liability may want to send their notes to outside counsel. In this way, plaintiffs' attorneys would have to overcome the protection of the attorney-client privilege in order to obtain access. As stated earlier, *Garner* has lessened the protection of the privilege in the context of shareholder derivative litigation, but there is reason to believe that individual notes taken by a director to preserve his or her individual defense in a due care case would stand a better chance being deemed privileged than notes which were not sent to outside counsel. The individual director could then waive the privilege if targeted in a subsequent lawsuit.

IV. Regulatory Interpretation of Minutes

Marc Morgenstern has warned that the "Board Package," which includes draft minutes transmitted to the board, has "significant disclosure ramifications."[71] Furthermore, in the integrated SEC disclosure system, prior disclosure will form the baseline for future disclosure obligations. In the event that the current "Board Package" indicates a trend or departure from prior ones, it may signal the need to amend or modify prior disclosures.[72] Therefore, the board would be ill-advised to file away and forget about minutes from prior meetings. The minutes from prior meetings must be compared with current minutes to determine if, due to changed circumstances, the board is now obligated to make a public disclosure.

Likewise, board member knowledge of material facts, as expressed in the board minutes, may necessitate disclosure of material, non-public information.[73] To illustrate, in the *Caterpillar* case, the SEC used the minutes to prove that the board was aware of a trend in Brazilian currency that would negatively and materially impact the next quarter's earnings. The SEC alleged that the failure to disclose the trend in the company's 10-Q was a violation of the requirements of Item 303 of Regulation S-K.[74]

In light of *Caterpillar*, Morgenstern suggests that a "Disclosure Team" knowledgeable in SEC rules and case law related to disclosure be created.[75] The team must then have access to prior board and committee minutes in order to access whether there was a trend noted in the minutes that required disclosure. To avoid a *Caterpillar*-type problem, directors need information about what has been disclosed, *and what has not been disclosed,* previously. Morgenstern notes that trends occur in context and that certain information that may not have been material in the past, and therefore not disclosed, may now have to be disclosed. Morgenstern warns: "In short, evolving facts and circumstances continuously require disclosure analysis. Prior analysis cannot remain static."[76]

Obviously, the *Caterpillar* problem can be ameliorated by adopting lean minutes. However, as discussed above, this would prevent the board from including highly beneficial discussions of decision-making and the deliberative processes. Regulatory reforms, including the Sarbanes-Oxley Act of 2002, have also caused an increased focus on carefully drafted minutes which document board and committee action. These developments have muffled somewhat the arguments in favor of short-form minutes for major board actions.

Audit committees in particular must understand the importance of proper minutes. Audit committee minutes should memorialize its consideration of each matter for which it now has responsibility whether by statute, rule, policy or otherwise. Section 404 in particular "has lead to a plethora of recommendations that various process be 'documented,' and these recommendations are frequently expressed as a requirement that minutes be kept…"[77] Also important is the documentation of the range of alternatives discussed especially with respect to matters covered in the financial statements and in Management's Discussion and Analysis.[78]

Zinski advises that seemingly innocent statements in the board minutes can create unintended tax and accounting consequences.[79] He offers the example of a company's senior investment officer's intent to sell bonds in the following year may require an immediate accounting adjustment. In like manner, a company's declared position on federal income tax issues may be used subsequently by the IRS in an audit.[80]

A final example of the importance of corporate minutes in the context of regulatory enforcement is the internal investigation of the New York Stock Exchange of the compensation of former CEO Richard Grasso. The investigative reporters extensively reviewed certain key compensation and board meetings based on a review of the minutes. The report concluded that the deliberative process was flawed in a number of respects, including a failure to consider Grasso's accumulated benefits when making compensation decisions.[81]

Statutory changes, such as Sarbanes-Oxley, and recent cases that invade the sanctity of board meetings, have focused attention on the formerly routine, ministerial act of preparing corporate minutes. Although changes to the minute-taking process continue to evolve and no "one size fits all" formula for minutes is realistic, it seems appropriate at this juncture to pool the collective wisdom on the subject for the purpose of making recommendations for corporate minute-takers and everyone involved in the process.

V. Recommendations

A. Metrics

Although in the context of corporate minutes, "metrics" is perhaps too academic a term, there are certain measurables pertaining to the process which deserve to be tabulated and highlighted.

1. The minutes should identify the attendees, including whether they were present in person or participated electronically. If a director is not in attendance because of a conflict, the minutes should identify that fact along with a description of the conflict.

2. Since director liability is now meted out on an individual basis, the record should reveal if a particular director left the meeting early or arrived late.[82] The importance of attendance records was apparent in Jeff Skillings' defense that he attended a specific meeting, but asserted that he left before the transaction in question was discussed. These kinds of attendance records may seem trivial, or even juvenile[83], but it is important to capture whether a particular director was present in the meeting when a significant disclosure was made or a discussion took place.

3. Since the courts have noted the relative amount of board meeting time spent on a particular issue,[84] Sparks suggests that the amount of time spent on each issue should be reflected in the minutes. He explains that some matters are routine and others require greater discussion.[85] A disproportionate amount of time being spent on a routine issue at the expense of a more substantive issue could influence the court's opinion regarding whether due care was exercised in deliberations.

B. Advance Materials

4. Whenever possible, it is preferable that written materials be circulated to board members in advance, and this fact should be noted in the minutes. This adds a level of integrity and credibility to the coverage of the related issues.[86]

C. Decision-Making

5. The prevailing view of the experts is that the minutes should contain some insight into the deliberative process, particularly with respect to the key issues.[87] Since drafting minutes is a matter of balance, some detail of the deliberative process. The appropriate level of detail is a matter of opinion on which the experts disagree. Deciding the appropriate level of detail is where minute-takers must practice their "art."

6. Hayman, Peregrine and Milhanovic suggest that the minutes should show that alternatives were discussed and that their advantages and disadvantages were weighed in the decision-making.[88] Otherwise, due care could be challenged on the grounds that the board was single-minded, or that the decision was cast in stone before the meeting began.

7. Along the same lines, Grossnickle advises that the "basis on which the board exercised its business judgment and satisfied its fiduciary duties" should be described.[89] Atkins describes it as "conveying a meaningful sense of the subjects discussed."[90]

8. Pasturzenski, Santucci and Chung advise that the minutes should reflect active board involvement and questioning. [91] Zinski describes this as drafting the minutes "defensively" in order to store up ammunition in the event of a legal challenge.[92] Although each of the commentators has described the appropriate level of description of the deliberative process somewhat differently, there is a consensus that the minutes must provide a glimpse or roadmap of the deliberative process.[93]

D. Review of Minutes

9. Minutes should be distributed promptly after the meeting because people – including the corporate secretary- forget details and nuances of discussion.[94]Each director should review the minutes before approving them to ensure they depict accurately the substance of the meeting.[95] Directors can keep hand-written notes to verify the accuracy of the minutes, but after that, all notes should be destroyed. Such notes are likely discoverable, and inconsistencies between notes and the official minutes could create opportunities for plaintiffs' counsel. Early circulation of the minutes for review refreshes the board's recollection and offers one final opportunity for self-scrutiny—both of which have salutary effect.[96]

E. Preserving Attorney-Client Privilege

10. Although *Garner* has severely limited the available of the attorney-client privilege in the context of shareholder derivative suits, the privilege is more likely to be upheld if the privileged matters are noted in the minutes including a confirmation that the discussion took place in the presence of counsel.[97]

F. Preserving Confidentiality

11. It is common for confidential information to be distributed before or during the board meeting – such as compensation information on officers that will not be disclosed in the proxy statement. Rather than include the confidential information in the minutes, there should be a reference in the minutes to such information.[98]

G. Consistency and Disclosure

12. Minutes should be consistent with public filings. New minutes should be reviewed in the context of prior minutes to determine if a change or trend has been noted that needs to be reported publicly.

H. Minute-Taker

13. In light of the new focus on corporate minutes in litigation and statutory compliance, the individual charged with taking minutes must have a working knowledge of the case law and a firm grounding in statutory requirements such as Sarbanes-Oxley. As mentioned earlier, the minute-taker should be a member of the Disclosure Team.

VI. Conclusion

The foregoing suggestions are not a definitive "how to" for drafting corporate minutes but are guidelines to facilitate the drafter's task. Minute-taking requires the subjective judgment of the drafter. The level of detail and boundaries of disclosure require discretion and foresight. Whether the minutes are impressionistic, abstract or photographic will depend on the circumstances of the company. Regardless of the precise form, the key point is that minutes are now more important than ever. Minute-taking is substantive and consequential. Failure to include detail in the minutes may cause judges to fill in the blanks with unfavorable inferences and assumptions. It is time for corporate secretaries to rethink this key component of corporate governance.

Footnotes

[1] Robert Mueller, BOARD LIFE: REALITIES OF BEING A CORPORATE DIRECTOR, AMACOM 1974, at 109.
[2] Robert Lamm, *Corporate Minutes: The Not-So-New-Frontier*, CORPORATE COUNSELLOR, November 2005, at 1.
[3] Timothy E. Hoeffner and Shiloh D. Napolitan, *The Increasing Importance of Corporate Minutes*, CORPORATE COUNSELLOR, September, 2005, at 1. *See also*, Russell Hayman, Michael W. Peregrine and Mark J. Mihanovic, *Corporate Minute-Taking: A General Counsel's Guide*, MONDAQ BUSINESS BRIEFING, 2005 WLNR 16596604, at 1 (further discussion of the fundamental role of minutes). Although the strategic importance of minute-taking is a relatively recent phenomenon, Martin Lipton was ahead of his time in noting the importance of minutes in the context of defending against a hostile takeover. After counseling directors regarding possible reasons for turning down an uninvited offer along with defensive strategies, Lipton would then provide the board with a sample set of minutes for a "fictional" meeting of a target board. R. Franklin Balotti, Gregory V. Varailo, and Brock E. Czeschin, *Unocal Revisited: Lipton's Influence on Bedrock Takeover Jurisprudence*, 60 BUS. LAW. 1399, 1406 (2005).
[4] Lamm, *supra* note 2, at 1.
[5] *Id.* In the same theme, McCarthy states that "[I]t is axiomatic that any judicial review of the board's actions reflects the lucidity of the board's process through its board's minutes. Good minutes ensure that a corporate 'light' is not 'kept under a bushel basket.'" Charles R. McCarthy, *The Chronicling of Corporate Minutes, Continued: A Retrospective Look at Van Gorkum*, DIRECTOR'S MONTHLY (Sep. 1999), at 1.
[6] Dierdre A. Burgman, *Corporate Directors, Corporate Realities and Deliberative Process: An Analysis of the Trans Union Case*, 11 J. Corp. L. 311, 339 (1986).
[7] McDermott Will & Emery, Newletter, *Corporate Minute-Taking: A General Counsel's Guide*, Nov. 17, 2005. http://www.mwe.com/index.cfm/fuseaction/publications.nldetail_print/object_id/f2896ec
[8] E. Norman Veasey ("Veasey I"), *The Tensions, Stresses and Professional Responsibility of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 18 (2006).
[9] Mueller, *supra* note 1, at 91 and 109. Presumably analogizing between corporate minutes and dead bodies reflects the sentiment that minute-taking is comparable to undertaking – leave buried what's been buried. "The evil that men do lives after them, the good [minutes] are oft interred with their bones." WILLIAM SHAKESPEARE, JULIUS CAESAR, Act. III, Scene II.
[10] *See e.g.*, Hayman, Peregrine and Mihanovic, *supra* note 3, at 1-2 (minutes reflecting the "flow" and "spirit" of the meeting); McDermott Will & Emery, *supra* note 7, at 3.
[11] Lamm *supra* note 2, at 2.

[12] This article will focus on minutes prepared for corporate board meetings, but the principles apply equally to minutes take by board committees such as the audit and compensation committees. There is little established law on the subject of executive session of the board, but minutes of executive sessions should be taken for the same reasons as board and committee meetings, especially now that meetings in executive session are mandated by the rules of the NYSE. For a discussion of minutes for executive sessions, *see*, Michael R. Littenberg, *Should You Keep Minutes of Executive Sessions?* BOARD PRACTICES, (2nd Qtr. 2006), at 45.

[13] John C. Carter, *Corporate Minutes: Their Form, Content, Inspection, and Evidentiary Value*, THE PRACTICAL LAWYER, Sept. 1983, at 45. *See also*, O'Melveny & Myers LLP, *The Scope and Content of Corporate Minutes*, 2004 HANDBOOK FOR CORPORATE OFFICERS AND DIRECTORS, (RR Donnelly, 2004), at 2 (further discussion of minutes as prima facie evidence). *See e.g., Sykes v. Caldwell*, 282 S.W. 282 (Tex. App. 1926). Although the minutes create prima facie evidence of what occurred in board meetings, the minutes are not conclusive evidence. Directors obviously can challenge the credibility of the minutes in legal proceedings, but overcoming the presumption of accuracy is unlikely particularly in light of the fact that as a matter of course, minutes of prior meetings are approved at the commencement of board meetings.

[14] McDermott Will & Emery, *supra* note 7, at 1.

[15] MODEL BUS. CORP. ACT § 16.01(a) (2003). *See e.g., DFI Communication, Inc. v. Greenberg*, 41 N.Y.2d 602, 607 (1977). (interpreting § 624 of the Business Corporation Law of the State of New York).

[16] Mueller, *supra* note 1, at 115.

[17] DEL. CODE ANN. Tit. 8 § 220 (2007).

[18] S. Mark Hurd and Lisa Whittaker, *Records, Demands and Litigation: Recent Trends and their Implications for Corporate Governance*, 9 DEL. L. REV. 1 (2006), at 1.

[19] *Id*. at 5. In *Brehm v. Eisner*, for example, the original complaint was stricken for failing to state a cause of action. However, the court allowed the plaintiff to replead. After making a §220 demand, the plaintiff was then able to amend the complaint so as to withstand a motion to dismiss. 746 A.2d 244, 249 (Del. 2000).

[20] *Haywood v. Ambase*, 2005 WL 2130614 (Del. Ch.) at 4-5. *See also, Skoglund V. Ormand Industries*, Inc., 372 A.2d 204, 210 (Del Ch. 1976). Norman Veasey discussed the importance of a Section 220 request for minutes as follows: "The importance of minutes or other documentation demonstrating informed and good faith board consideration of actions of material importance to the corporate is particularly significant given the frequency with which shareholders now use Section 220 demands to obtain board and committee minutes without first commencing litigation, and then use the minutes to allege insufficient deliberation by directors in a manner that may be—and in the case of Disney was—sufficient to survive a motion to dismiss and require a trial." E. Norman Veasey ("Veasey II"), *Weil Briefing: Corporate Governance*, 1543 PLI/CORP. 531, 537 (2006).

[21] *Fruend v. Lucent Techs, Inc*., 2003 WL 139766 at 4 (2003). *See also, Amalgamated Bank v. UICI*, 2005 WL 1377432. Delaware courts have also allowed §220 demands with respect to the minutes of board committees. *Grimes v. DSC Communications Corp*., 742 A.2d 561 (Del. Ch. 1998). *See also*, Beam v. Stewart, 845 A.2d 1040, 1056 (Del. Supr. 2004), wherein the court suggested that Beam might also have reviewed the minutes of the board's meeting to determine how the directors handled Stewart's proposals or conduct in various contexts. Whether or not the result of this exploration might create a reasonable doubt would be sheer speculation at this stage."

[22] *Stone v. Ritter*, 2005 WL 2410365 (Del. Ch.) at 2.

[23] 430 F.2d 1093, 1103. (5th Cir. 1970). In light of the difficulty at times in determining when the attorney-client privilege is available to protect against disclosure, it has been suggested that those portions of a board meeting devoted to a discussion of privileged matters should be noted as such in the minutes of the meeting along with a confirmation that the discussion took place in the presence of counsel. McDermott Will & Emery, *supra* note 6, at 2. *See also, In re Asbestos Litigation*, 1992 WL 302025 (Del. Super.) at 1. ("The Master issued a Final Report in which he found certain portions of the minutes to be privileged because the Secretary in question was acting in the capacity of a legal rather than business advisor."), and Raymond L. Sweigart, *Attorney-Client Privilege: Pitfalls and Pointers for Transactional Attorneys*, BUSINESS LAW TODAY, March/April 2008.

[24] *Id.*

[25] Victoria Kummer, *The Garner Exception to Attorney-Client Privilege: A New Approach to "Good Cause,"* 13 CARDOZO L. REV. 2141 (1992). "In the face of suggestions that management might be concealing questionable conduct behind a veil of privilege, management must be held accountable to shareholders whose interest they are employed to serve." *Id*. at 2142.

[26] Hayman, Peregrine and Mahonovic, *supra* note 3, at 4.

[27] *See e.g., Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985); *In re The Walt Disney Company Derivative Litigation ("Disney I")*, 907 A.2d 693 (Del. Ch. 2005); *Omnicare v. NCS Healthcare, Inc*., 818 A.2d 914 (Del. 2003).

[28] *Van Gorkum*, *supra* note 27, at 887.

[29] 559 A.2d 1261, 1277 (Del. 1989).

[30] 457 A.2d 701, 708-9 (Del. 1983).

[31] *Unitrin v. American General Corp*., 651 A.2d 1361 (Del. 1995). "The minutes of the full Board meeting do not reflect a discussion of Tuerff's proposition. Nevertheless, the parties agree that the Board's position in February was that Unitrin was not for sale." *Id*.at 1368.
[32]Gilchrist A. Sparks, *Good Faith and the Walt Disney Company Derivative Litigation – Guidance for Directors of Delaware Corporations*, SL046 ALI-ABA 501, 525 (2005).
[33] Robert V. Hale II, 61 BUS. LAW. 1413, 1425 (2006). Similarly, the bankruptcy examiner's criticism of the WorldCom board of directors and its inattentiveness concerning corporate affairs was based in large part on a review of the corporate minutes. McDermott Will & Emery, *supra* note 7, at 1. Indeed, if directors approve the minutes, they may well be estopped to later deny that the minutes accurately reflect the substance of the meeting.
[34] Victor Lewkow and Lillian Rice, *Reflections on the Disney Decision*, 1584 PLI/CORP 413, 419 (2007).
[35] *Id*.
[36] *Mills Acquisition*, *supra* note 28, at 1271.
[37] 199 A.2d 548, 555 (Del. Ch. 1964). *See also*, *Cheaspeake v. Shore*, 771 A.2d 293, 307 (Del. Ch. 2000).
[38] Ralph Ward, IMPROVING CORPORATE BOARDS 89 (John Wiley & Sons, Inc.. 2000).
[39] Burgman, *supra* note 6, at 339.
[40] *Id*.
[41] Peter Atkins, *Symposium on Takeover Bids in the Boardroom: 25 Years Later*, 60 BUS. LAW. 1455, 1462 (2005).
[42] Lewkow, *supra* note 34, at 415. *See also*, *In re Caremark International, Inc*., 698 A.2d 959, 968 (Del. Ch. 1996). (In *Caremark*, Chancellor Allen stated that: "The second class of cases in which director liability for inattention is theoretically possible entail circumstances in which a loss eventuates not from a decision, but, from unconsidered inaction.").
[43] 2005 WL 1138738 (Del. Ch.), at 5.
[44] *Id*.
[45] Katz advises that with regard to "red flag" and "yellow flag" issues which require enhanced monitoring activities by the board, that the minutes should accurately convey the time and effort devoted to decision making even in those cases where no formal action is taken. David A. Katz, *Key Issues for Directors*, 1520 PLI/CORP. 575, 583 (2007).
[46] *Arnlund v. Smith*, 210 F. Supp. 2d 755, 765 (E.D. Va. 2002).
[47] *Disney*, *supra* note 26, at 769. *See also*, Veasey I, *supra* note 20, at 537.
[48] *In re Disney Derivative Litigation ("Disney II"),* 825 A.2d 275, 281 (Del.Ch. 2003). *See also*, Hoeffner *supra* note 3, at 2. *But see*, Samuel N. Fradin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 24-25 (2004) (using the space in the minute is a poor measure).
[49] Although some courts have made inferences based on the amount of time devoted to a particular issue or the amount of space given to the issue in the minutes, it seems that this kind rationale fails to account for the quality of the deliberations. Furthermore, the board members may have encounter this kind of a issue previously and therefore were able to make a quick assessment that should not be interpreted as a dereliction of duty.
[50] Christopher Zinski, *Choose your Words Carefully: Board Minutes Matter*, ABA Banking Journal, October, 2006, at 22.
[51] 2005 WL 1538336 (Del. Ch.), at 4-5.
[52] *Id*.
[53] O'Melveny & Myers, *supra* note 13, at 3.
[54] Lewkow, *supra* note 34, at 419. Needless to say, the courts may greet such after-the-fact explanations of what took place in a board meeting with skepticism. *See*. John P. Beavers and Kevin M. Kinross, *Corporate Minutes: When Less is More*, THE CORPORATE BOARD, March/April 2008.
[55] Zinski, *supra* note 50, at 2.
[56] *Id*.
[57] E. Norman Veasey ("Veasey III"), *Weil Briefing: Corporate Governance—Delaware Supreme Court Affirms Chancellor's Judgment of No Liability for Directors in Ovitz Case*, 1581 PLI/CORP. 155, 158 (2007).
[58] Faith Grossnickle, *A Disney Tale*, CORPORATE COUNSEL (January 2006) at 2.
[59] Burgman, *supra* note 6, at 339. In the context deliberations in regard to repelling a hostile takeover, *see*, Ronald D. Ellin, *The Poison Pill Warrant—Apothecary and Antidote: Moran v. Household Int'l. Inc*., 36 DePaul L. Rev. 413, 432-433 (1987). (Ellin points out that at times the minutes should specifically reflect that a particular mattered received the vote of the outside directors, such as the implementation of a poison pill as a defensive strategy.).
[60] *Disney II*, *supra* note 48, at 280. *See also*, Pastuszenski, Santucci and Chung, Practical *Steps for Directors to Consider after Disney*, SL085 ALI-ABA 1183, 1188 (2006).
[61] Zinski, *supra* note 46, at 2.
[62] Ward, *supra* note 37, at 91; Zinski *supra* note 33, at 3.
[63] Hoeffner *supra* note 3, at 3.
[64] Katz, *supra* note 45, at 583.
[65] Atkins *supra* note 38, at 1462.
[66] McCarthy, *supra* note 5, at 6.

[67] *In re Emerging Communications, Inc*., 2004 WL 1305745 (Del. Ch. 2004), at 38.
[68] *Disney I, supra* note 27, at 748. *See also*, Pastuszenski, Santucci and Chung, *supra* note 60 , at 1179 ("*Each* director must take care to ensure that his or her conduct reflects that level of care and diligence required of a director, and otherwise complies with his or her fiduciary duty [*emphasis added*].
[69] Bill Baxley, Jeff Stein and Andy Tebbe, CORPORATE BOARD MEMBER MAGAZINE, September 8, 2005, at 1. http://www.boardmember.com/network/index.pl?section=1022&article_id=12342&show=article
[70] McDermott, Will & Emery, *supra* note 7, at 3. Another good reason for destroying notes is that most note-takers are not doing so to communicate with anyone other than themselves. Notes are, by their very nature, incomplete, vague and terse. Fradin, *supra* note, 48 , at 29-30. One downside to the destruction of board notes is that some courts will make the assumption that the destroyed notes contained damaging information, or that someone in a position to deliver the notes should not gain from their absence. *See generally*, Robert C. Friese, *Document Creation, Retention and Destruction and the 'Negative Inference'*, 7 Insights 22 (Jan. 1993).
[71] Marc Morgenstern, *Public Companies: Sarbanes-Oxley's Subtle Disclosure Costs*, 1555 PLI/CORP 595, 602 (2006).
[72] *Id*.
[73] *Id*. Obviously, material, non-public information in the possession of directors may necessitate that the directors refrain from trading in the company securities until the information becomes public.
[74] *In the Matter of Caterpillar, Inc*., 1992 W.L. 71907, SEC Release No. 34-30532 (1992). The SEC quoted from the company's minutes: "[Management] commented on the results of operations in Brazil because of the significant [negative] impact they will have on overall results for 1990.
[75] Morgenstern, *supra* note 64, at 605. (Morgenstern suggests that the Disclosure Team should have access to: 1. the company's most recent SEC filings; 2. the company's recent press releases—particularly releases containing forward-looking statements; 3. minutes for recent board and committee meetings, and 4. recent and updated internal company projections. Furthermore, the team must be comprised of individuals with knowledge of SEC rules and case law relating to disclosure (including 8-K Rules and Reg. FD), rules of SRO rules applicable to the issuer, Sarbanes-Oxley and corporate law (such as the Business Judgment Rule)).
[76] *Id*. at 606.
[77] Lamm *supra* note 2, at 2.
[78] O'Melveny & Myers, *supra* note 12, at 6-7.
[79] Zinski, *supra* note 50, at 3.
[80] *Id*.
[81] Hoeffner and Napolitan, *supra* note 3, at 2.
[82] Veasey III, *supra* note 52, at 160.
[83] Although issuing a "hall pass" to directors that step out of the meeting to take a call or transact other business, the burden should be on the departing director to make sure that the record of attendance is accurate.
[84] *Disney II*, *supra* note 45, at 281.
[85] Sparks, supra note 31, at 525; Veasey, *supra* note 52, at 160; Lewkow, *supra* note 33, at 419. A related issue is confirming that sufficient time is allotted to discuss issues before the board in a meaningful way. It is reasonable to assume that courts will also consult plans and agendas for meetings to see how much time was planned for a discussion item. This would be a backhand way of determining whether the deliberative process was given time to develop or whether the allocated time was pure window dressing. See also, Hayman, Peregrine and Mihanovic, *supra* note 10, at 2 ("The length of the minutes should bear a direct relationship to the importance of the meeting agenda.").
[86] McCarthy, *supra* note 5, at 1.
[87] *See e.g*., Lewkow, *supra* note 34, at 419; Grossnickle supra note 58, at 2;
[88] Hayman, Peregrine and Mihanovic, *supra* note 3, at 2; Lamm, *supra* note 2, at 2. ("The minutes should reflect that both sides of each matter (pros and cons, benefits and risks) as well as alternatives to the action proposed, have been considered.").
[89] Grossnickle, *supra* note 58, at 2.
[90] Atkins, *supra* note 38, at 1462.
[91] Pasturzenski, Santucci and Chung, *supra* note 60, at 1179.
[92] Zinski, *supra* note 50, at 2.
[93] In the event that the board relies on experts in its decision-making, the minutes should describe the interrogation and dialogue that took place between the expert and the board – especially if the report is disputed or rejected by the board. McCarthy, *supra* note 5, at 6.
[94] Lamm, *supra* note 2, at 3.
[95] Sparks, *supra* note 32, at 526.
[96] McCarthy, *supra* note 5, at 7.
[97] Hayman, Russell and Mihanovic, *supra* note 3, at 4. (Specifically, the commentators have suggested using the following language: "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." Or, "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 attorney-client privilege.").

[98] Lamm, *supra* note 2, at 3.