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Are Current Minutes More Important than Past Minutes?

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How Recent Litigation Developments Are Significantly Increasing the Importance of Well-Crafted Corporate Minutes

For decades, practitioners have stressed that well-drafted corporate meeting minutes reduce the likelihood of bad corporate outcomes. As explained further below, the recent proliferation of "books and records" requests and other changes in Delaware litigation practice have upped the ante. Now more than ever well-drafted minutes can benefit companies by reducing the expense and risk of litigation, limiting the likelihood of negative judicial inferences, and potentially forestalling the filing of suits altogether.

1. What has *not* changed?

It has long been known that well-prepared corporate minutes can protect companies in a variety of ways. Most fundamentally, well-crafted minutes will document that directors engaged in deliberate decision-making and fulfilled their fiduciary duties. Courts look for objective evidence that directors have discharged their oversight duties and have carefully considered relevant information before acting or refraining from acting. Minutes can provide objective evidence of these activities by summarizing:

- Matters and information presented to the board
- Which internal or external advisors advised the board
- Advantages and disadvantages of potential actions, including risks and potential alternatives
- Board deliberations commensurate with the matter presented, including the directors' input and questions.

Courts will generally defer to thorough and timely prepared minutes as the best evidence of corporate decision-making.[1] Properly prepared minutes, together with associated agendas and presentation materials, will create a *single* coherent record of what transpired at meetings and permit directors to

recollect complex deliberations if subsequently asked to testify. This will help create a single corporate narrative and reduce the risk that plaintiffs will be able to shop for alternative narratives.

On a more prosaic level, minutes can document (i) requisite corporate approvals, (ii) delegations of authority, (iii) adherence to corporate formalities or applicable law, (iv) rationales for board action or inaction, (v) dissenting views or votes, (vi) discussions of conflicts of interest, including how such conflicts were addressed, and (vii) which directors attended which portions of meetings, which could be important if testimony is later necessary.[2]

Finally, it has long been known that well-prepared minutes can act as shields to deflect shareholder challenges, whereas inadequate minutes can act as weapons in the hands of skilled litigants.[3]

For all these reasons and more, practitioners have long stressed the importance of minutes in protecting corporations from harm.

2. What has changed?

Three changes in litigation practice over the past decade or so have substantially increased the importance of well-prepared minutes. Each is discussed below. Although this article focuses on changes in Delaware litigation practice, these changes will likely have similar impacts in other jurisdictions given the key role Delaware plays in shaping corporate law.[4]

A. Proliferation of "Books and Records" Demands. Delaware courts have in recent years broadened the rights of stockholders to demand and receive "books and records" of corporations under Section 220 of the Delaware General Corporation Law.[5] Section 220 permits stockholders to inspect a corporation's books and records for any "proper purpose." When corporations resist these Section 220 requests, the demanding stockholders frequently file suit requesting the court to order the corporation to produce a specified set of corporate documents. Delaware courts handling these books and records demands have typically reviewed (i) whether the stockholder has asserted a *proper purpose* and (ii) the reasonableness of the *scope* of documents requested.[6]

Investigating potential corporate wrongdoing or mismanagement is a proper purpose under Delaware law, as long as a stockholder can show a "credible" basis for his or her allegations of wrongdoing (which Delaware courts refer to as the "lowest burden of proof" under Delaware law).[7] Upon this showing, Delaware courts traditionally in the past ordered corporations to produce minutes and other basic formal corporate documentation.[8] Even if those minutes were sparse, Delaware courts in the past were often reluctant to order the production of additional materials, which partially mitigated the negative consequences of producing substandard minutes.

Recently, however, Delaware courts have expanded their view of what constitutes a proper purpose and substantially broadened their view of what constitutes a permissible scope. Commentators have not always agreed on what caused this change.[9] But all seem to agree that the number of Section 220 demands has continued to proliferate in recent years and that stockholders are increasingly deferring filing suit until they can first complete a review of available books and records.[10]

Since 2017, Delaware courts have expanded their view on what constitutes a "credible" basis for demanding records to include the investigation of possible wrongdoing under circumstances where the chances of a successful claim are very low due to director exculpation or other factors.[11] This has led these courts to increasingly approve stockholder requests to review minutes. More importantly, in the past few years Delaware courts have substantially broadened the scope of

documents they believe are necessary for stockholders to conduct their investigations. In several instances, Delaware courts have permitted stockholders to inspect emails, text messages and other forms of digital communications.[12] Critically, though, Delaware courts have typically permitted stockholder access to electronic communications only when the corporation's formal documents provided insufficient information for purposes of the stockholder's investigation. In the 2019 case *KT4 Partners*,[13] the Delaware Supreme Court determined that the lack of proper board minutes left it no choice but to authorize the production of electronic communications. More recently, Chancellor Kathaleen McCormick permitted stockholders to review informal communications between directors and senior management to help reconcile inconsistencies between formal board minutes and proxy materials.[14] Conversely, in the 2023 case of *Simeone v. The Walt Disney Company*,[15] the Delaware Chancery Court determined that Disney's well-prepared board minutes were sufficiently comprehensive to enable the stockholders to investigate their claims, and accordingly ruled that Disney would not be required to produce emails and questionnaires of its directors.

These cases have quite clearly *increased* both the risks of weak minutes and the rewards for strong minutes. Delaware courts are increasingly staging their approvals of Section 220 demands to first assess the adequacy of corporate minutes and other formal documents. Delaware courts seem inclined to order the production of informal electronic communications principally in instances when the formal documentation is lacking. As the *Simeone* case illustrates, Delaware courts continue to view well-prepared minutes as the best evidence of corporate decision-making.[16] As such, corporations that prepare effective minutes can substantially reduce their litigation risks by presenting a single coherent narrative of their corporate decision-making. In contrast, corporations that produce poorly prepared minutes could be compelled to furnish directors' electronic communications. In most cases, this will significantly enhance the stockholders' ability to shop for competing narratives harmful to the corporation, and increase the cost and complexity of the proceeding.[17]

Moreover, the current environment of frequent pre-filing document requests rewards companies that produce clear and cogent minutes more than in the past. Before the advent of pervasive pre-filing document requests, it was difficult for plaintiffs to differentiate in advance between companies with strong and weak corporate documentation. In that prior environment (which was accompanied by looser pleading standards), plaintiffs typically filed suit before commencing discovery.[18] As such, in that environment companies with strong documentation benefited therefrom only after being sued and forced to endure the time and expense of securing a dismissal. Now, however, plaintiffs making pre-filing document requests can receive an early glimpse of their prospects of success by reviewing the completeness and cogency of the alleged wrongdoers' minutes. Plaintiffs with multiple litigation options are likely to pursue strong cases against defendants with poor narratives, and forgo pursuing weaker cases against companies with strong narratives. In short, well-prepared minutes may now shield corporations from the need to defend against claims that they would have been forced in the past to defend at significant cost.

B. Judicial Inferences of Inaction. Since at least the *Smith v. Van Gorkom* decision in 1985, practitioners have been wary of the problems associated with sparse minutes.[19] In *Van Gorkom*, an inadequate record of the corporate decision-making contributed to a finding that TransUnion's directors violated their fiduciary duties, notwithstanding approving a cash sale of TransUnion at a premium of 39% to 62% (depending on the method of calculation).[20] In 2003, extremely lean minutes were a major factor that precluded Disney from dismissing a challenge to its board's grant of sizable separation compensation to Michael Ovitz.[21] Although Disney ultimately prevailed, it was forced to defend the board's action through several years of very expensive litigation.

Since 2010, Delaware courts have increasingly voiced growing skepticism of variances between thinly drafted minutes and subsequent corporate narratives. In certain instances, these recent decisions have inferred that events not summarized in minutes did not occur. During oral arguments in the 2010 *Plato case*, Vice Chancellor Strine, on no fewer than four occasions, asked why the defendant's explanation of events was not recorded in applicable minutes.[22] In 2012, then Chancellor Strine once again drew negative inferences from a corporate defense not recorded in minutes.[23] In the 2014 *C&J Energy Services* case, the failure of minutes to document a purported review of transaction alternatives contributed to a Delaware Chancery Court holding that such review was not conducted.[24] Similarly, in the 2019 *Marchand* case, the failure of minutes to mention the board's review of health risks posed by Blue Bell's ice cream products contributed to adverse inferences about the comprehensiveness of the board's oversight.[25]

These cases should serve as a warning to practitioners who believe thinly drafted minutes can later be salvaged by directors' testimony. This approach has always entailed risks, but those risks have increased in recent years as minutes bereft of sufficient detail have been met with increased judicial skepticism.

C. Conditional Grants of Books and Records Orders. Several recent Delaware Chancery Court decisions have permitted corporations to condition their production of books and records upon the stockholder's agreement to incorporate by reference all of its document production into any future breach of fiduciary duty complaints.[26] These cases have weakened the ability of plaintiffs to unfairly "cherry-pick" information from corporate records, and have strengthened the ability of corporations to introduce evidence that could defeat allegations of bad faith behavior.[27] These recent cases provide yet another illustration of how well-drafted minutes can provide procedural and substantive advantages to help shield corporate defendants from potentially harmful allegations.

3. Conclusion

In 2012, Vice Chancellor Travis Laster said "Writing good minutes is like flossing: nobody likes to do it, but it is essential for good hygiene."[28] That was good advice in 2012. In light of the developments summarized above, it is even better advice today.

Footnotes

[1] *In re Netsmart Technologies, Inc. Shareholders Litigation*, 924 A.2d 171, 192 (Del. Ch. 2007); see also *Oberly v. Howard Hughes Medical Institute,* 472 A.2d 366, 384 (Del. Ch. 1984) and Greg Samuel, *Should I Take Personal Notes in Board Meetings?,* Boardmember.com (August 5, 2010).

[2] For general information on minute preparation, see Kenneth J. Najder, *Every Minute Matters: How Good Meeting Minutes Protect Companies and Their Directors from Bad Outcomes*, 69 La. Bar J. 16 (2021).

[3] *Id.*, at 17.

[4] For a description of Delaware law's pervasive influence, see note 1, Stephen A. Radin, *The New Stage of Corporate Governance Litigation: Section 220 Demands*, 26 Cardozo L. Rev. 1595 (2005).

[5] This broadening of stockholders' rights has resulted from legislative changes and judicial changes over the past few decades, including (i) a wave of judicial decisions around the turn of the last century in which Delaware courts increasingly encouraged stockholders to use Section 220 as an "information-gathering tool" prior to the initiation of litigation (see *Security First Corp. v. U.S. Die Casting & Development Co.*, 687 A.2d 563 (Del. 1997)) and (ii) amendments to Section 220 in 2003. See Radin, *The New Stage, supra,* at 1597, 1599.

[6] See Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 Cardozo L. Rev., 1949, 1965 (2021).

[7] *Seinfeld v. Verizon Communications, Inc.*, 909 A.2d 117, 121 (Del. 2006); see also *Security First Corp., supra,* at 568.

[8] Lenin Lopez, *Section 220 Books and Records Requests: Keeping Up With Case Law Trends and Optimizing Response Strategies,* Woodruff-Sawyer & Co. Insights (August 2, 2023); and Edward B. Micheletti and Jenness E. Parker, *This Isn't Your Grandparents' Books and Records Demand,* Skadden Insights (October 7, 2021).

[9] Explanations vary, but include (i) a conscious effort of Delaware courts to enhance Section 220 rights following other decisions restricting litigants' rights, such as *Corwin v. KKR Fin. Holdings LLC,* 125 A.3d 304 (Del. 2015), (ii) stockholders' increased recognition of the benefits of making pre-filing Section 220 requests, and (iii) the courts' recognition that the greater use of electronic communications has fundamentally changed corporate decision-making processes. See Shapira, *Corporate Law, Retooled, supra,* at 1960, 1968–1969; Micheletti and Parker, *This Isn't Your Grandparents' Demand*, *supra*; and Sonia K. Nijjar, Jenness E. Parker, and Lauren N. Rosenello, *The Angel's in the Details: The Importance of Carefully Drafted Board Minutes,* Skadden/The Informed Board (Fall 2022).

[10] Jenness E. Parker and Elisa M. Klein, *In the Name of the Company: When Stockholders Interfere in the Boardroom,* Skadden Insights (June 1, 2022); Micheletti and Parker, *This Isn't Your Grandparents' Demand*, *supra*; Shapira, *Corporate Law, Retooled, supra,* at 1954; and Nilofer I. Umar and Elizabeth Y. Austin, *Drafting Board of Directors Meeting Minutes: A Litigator's Perspective,* Sidley Perspectives (October 2017).

[11] Shapira, *Corporate Law, Retooled, supra,* at 1964–1967, citing *Lavin v. West Corp.*, No. 2017-0547-JRS, 2017 WL 6728702 (Del. Ch. 2017) and *In re Facebook, Inc. Section 220 Litigation*, No. 2018-0661-JRS, 2019 WL 2320842 (Del. Ch. 2019).

[12] Shapira, *Corporate Law, Retooled, supra*, at 1967–1968; Nijjar, Parker, and Rosenello, *The Angel's In the Details, supra*; Lopez, *Section 220 Books and Records Requests, supra;* andMicheletti and Parker, *This Isn't Your Grandparents' Demand*, *supra*.

[13] *KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738 (Del. 2019).

[14] *Hightower v. SharpSpring, Inc.*, C.A. No. 2021-0720-KSJM (Del. Ch. 2022); see also *Schnatter v. Papa John's International, Inc.,* No. 2018-0542-AGB, 2019 WL 194634 (Del. Ch. 2019), at 16, in which Chancellor Bouchard permitted Section 220 litigants to receive electronic communications.

[15] *Simeone v. The Walt Disney Company,* C.A. No. 2022-1120-LWW (Del. Ch. 2023).

[16] See note 2, *supra;* see also *In re ProAssurance Corp. Stockholder Derivative Litigation*, C.A. No. 2022-0034-LWW (Del. Ch. 2023) (Memorandum Opinion) (in which the court cited defendant's minutes 24 times in connection with dismissing the plaintiffs' oversight lawsuit).

[17] For a discussion of issues raised by directors' notes, see David Katz and Laura McIntosh, *Directors' Notes: A Trap for the Unwary?,* Corporate Governance Update (May 2018); Samuel, *Should I Take Personal Notes?*, *supra;* and Najder, *Every Minute Matters*, *supra*, at 18.

[18] See Shapira, *Corporate Law, Retooled, supra,* at 1960.

[19] For an earlier expression of judicial skepticism of sparse minutes, see *Loft, Inc. v. Guth*, 2 A.2d 225, 242, 247 (Del. Ch. 1938).

[20] *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985); see also Stephen A. Radin, *The Director's Duty of Care Three Years After Smith v. Van Gorkom*, 39 Hastings L. J. 707 (1988).

[21] *In re Walt Disney Co. Derivative Litigation,* 825 A.2d 275 (Del. Ch. 2003).

[22] *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.*, C.A. No. 5402-CS, at 46, 49, 56 and 60 (Del. Ch. 2010) (Transcript).

[23] *In re Ancestry.com, Inc. Shareholder Litigation*, C.A. No. 7988-CS, at 15 (Del. Ch. 2012) (Transcript).

[24] *City of Miami Gen. Employees & Sanitation Employees' Ret. Tr. v. C&J Energy Servs., Inc.*, C.A. No. 9980-VCN (November 24, 2014) (Transcript), reversed by *C&J Energy Servs., Inc. v. City of Miami Gen. Employees & Sanitation Employees'* Ret. Tr., 107 A.3d 1049, 1073 (Del. 2014).

[25] *Marchand v. Barnhill,* 212 A.3d 805 (Del. 2019).

[26] See Umar and Austin, *Minutes: A Litigator's Perspective*, *supra*, citing *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752, 796 (Del. Ch. 2016); see also *Elow v. Express Scripts Holding Co.*, 2017 WL 2352151, at *8 (Del. Ch. 2017); and *In re Plains All Am. Pipeline, L.P. Unitholders Books & Records Litig.*, 2017 WL 3424573, at *5 (Del. Ch. 2017) (Order).

[27] *Id.;* see also Nijjar, Parker, and Rosenello, *The Angel's in the Details, supra*.

[28] Dane E. Allen, Jennifer E. Bennett, and Shelly J. Dropkin, *More Minutes: Special Situations*, at 24, Society for Corporate Governance Essential Seminar (January 2019).

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