Managing Litigation Risks: Board Minutes and Electronic Communications

In her regular column on corporate governance issues, Holly Gregory discusses litigation risks for directors stemming from poor minute practices and electronic communications, as well as steps companies can take to mitigate these risks.

HOLLY J. GREGORY
PARTNER
SIDLEY AUSTIN LLP

Holly counsels clients on a full range of governance issues, including fiduciary duties, risk oversight, conflicts of interest, board and committee structure, board leadership structures, special committee investigations, board audits and self-evaluations, shareholder initiatives, proxy contests, relationships with shareholders and proxy advisors, compliance with legislative, regulatory, and listing rule requirements, and governance best practice.

Recent Delaware court decisions underscore the risks that the minutes of board meetings (board minutes) and other corporate books and records can present in litigation involving claims against directors for board oversight failures. Plaintiffs often seek to use these books and records to craft allegations that withstand scrutiny in the earliest stage of litigation on a motion to dismiss.

Careful preparation and maintenance of board minutes and related materials can yield significant dividends in managing and mitigating litigation risks, including the risk of personal liability for directors. Similarly, companies should monitor director access to and use of email and other electronic communication channels to avoid inadvertent waiver of privilege with respect to these communications.

This article discusses:

- Shareholders' increased use of books and records demands to obtain board minutes.
- Effective minute practices.
- Guidance regarding director use of electronic communications.
- Practice pointers for companies to mitigate litigation risks related to board minutes and electronic communications.

THE RISE IN BOOKS AND RECORDS DEMANDS

Companies seek to accurately record the actions they take, both for internal company purposes and to serve as evidence of these actions for third parties. Board minutes support these functions by providing an official record of the discussions held, approvals made, and actions taken at board meetings. Board minutes also can be used to demonstrate compliance with legal requirements.

For example, under Delaware law, companies must maintain accurate books and records, including board minutes, and designate an officer to maintain records of board and shareholders meetings (DGCL §§ 224, 142(a)). The Foreign Corrupt Practices Act of 1997 also requires companies to maintain accurate books and records (for more information, search The Foreign Corrupt Practices Act: Overview on Practical Law). Additionally, the Securities Exchange Act of 1934 requires reporting companies to make and keep books, records, and accounts that accurately and fairly reflect their transactions and dispositions of their assets. The books and records must be in reasonable detail, meaning the level of detail and degree of assurance that would satisfy prudent officials in the conduct of their own affairs. (15 U.S.C. § 78m(b)(2)(A), (7).) Board minutes are also an essential part of documenting compliance with the internal controls requirements under the Sarbanes-Oxley Act of 2002.

Search Corporate Governance Standards: Overview for more on board-related corporate governance requirements under state and federal law.

Recent trends in corporate litigation and shareholder activism underscore the importance of attending to these records. Given increasing demands by would-be shareholder plaintiffs for corporate books and records to assist them in assessing potential claims and constructing their allegations, it is important for the board to devote sufficient attention to board (and board committee) minutes. Under Delaware law, shareholders have the right to seek corporate books and records by making a written demand to the company that states their purpose for doing so. However, shareholders' right to inspect corporate books and records is limited. A shareholder must first show a proper purpose, which is defined as a purpose reasonably related to their interest as a shareholder (DGCL § 220(b)). This has been found to include the investigation of allegations of wrongdoing or mismanagement (*AmerisourceBergen Corp. v. Lebanon Cty. Emps. Ret. Fund*, 243 A.3d 417, 427-30 (Del. 2020)).

Once a shareholder establishes a credible basis that wrongdoing may have occurred, the shareholder will be allowed to inspect corporate books and records that are sufficiently relevant to the stated purpose. Establishing a proper purpose to seek corporate books and records is a relatively low bar compared to the standards that apply in other types of litigation. The Delaware courts have expressly encouraged shareholders to seek these records before filing shareholder derivative claims (for more information, search Shareholder Derivative Litigation on Practical Law). With board minutes and other corporate records in hand, shareholders are better equipped to state claims that may withstand a motion to dismiss, overcoming the business judgment rule presumption that directors acted with care, good faith, and in the company's best interests.

> With the aid of information obtained through the books and records demand process, more *Caremark* claims are surviving a motion to dismiss in situations where the plaintiff can use board minutes to show the absence of board attention to a mission-critical risk.

Vague or incomplete board minutes are of little use to directors who are accused of breaching their fiduciary duties, such as failing to properly oversee the company by either:

- Failing to implement corporate reporting or information systems or controls.
- Creating systems or controls but consciously failing to monitor or act on them, which prevents directors from being informed of risks or problems requiring their attention (see *Stone v. Ritter*, 911 A.2d 362 (Del. 2006)).

In these claims, known as *Caremark* claims, a plaintiff asserts that the board consciously disregarded a matter, or "red flag," that should have put directors on notice of problems. An absence of references to that topic in board minutes and related board agendas and materials can be used, on a motion to dismiss, to infer that the board failed to attend to the matter. Well-crafted board (and board committee) minutes can provide evidence that the board was informed and discussed the challenged topic.

Failure of oversight claims are among the most difficult on which to establish director liability, particularly because they

involve proving bad faith. The plaintiff must argue that the board did so little to oversee the company's operations and risk exposure that its failures amount to a conscious disregard of its duty to stay informed and provide this oversight. Conscious disregard of a known duty to act is a recognized element for establishing bad faith. However, with the aid of information obtained through the books and records demand process, more of these *Caremark* claims are surviving a motion to dismiss in situations where the plaintiff can use board minutes to show the absence of board attention to a mission-critical risk.

For example, in *Marchand v. Barnhill*, the Delaware Supreme Court allowed the plaintiff's *Caremark* claim to proceed following a listeria outbreak in an ice cream manufacturing plant that caused three deaths. In considering the board's oversight of food safety, the court noted that board minutes from a three-month period reflected no board-level discussion of listeria, even though management allegedly was aware of and working to mitigate the problem at the time. From this and other evidence that the board failed to oversee food safety, including the lack of a board committee charged with oversight of food safety, the court inferred a lack of good faith effort on the part of the board regarding consideration of a key area of risk to the business that was sufficient to allow the claim to proceed. (212 A.3d 805, 811-14, 820-24 (Del. 2019).)

Similarly, a lack of minutes produced in response to a books and records demand led to an inference of bad faith and failure of board oversight in *Hughes v. Hu*, a case in which the plaintiff alleged that the board failed to oversee and remediate material weaknesses in the company's financial reporting system. The Delaware Court of Chancery concluded that, for periods for which the plaintiff requested relevant minutes but no minutes were produced, the plaintiff was entitled to the reasonable inference that no meetings occurred at which those topics were addressed. (2020 WL 1987029, at *2 (Del. Ch. Apr. 27, 2020).)

Most recently, in *In re The Boeing Co. Derivative Litigation*, a case alleging board failure to oversee airplane safety, the Delaware Chancery Court denied Boeing's motion to dismiss based on, among other things, the absence of evidence of any discussion of or reporting on airplane safety in board and audit committee minutes and other materials before the court. Specifically, the court found that the information in books and records obtained by the plaintiffs supported an inference that the board's annual updates on compliance did not address airplane safety, the company's enterprise risk visibility process did not specifically emphasize airplane safety, and airplane safety was not a regular agenda item at board meetings. Noting that the plaintiffs had obtained over half a million pages of documents in response to their books and records demand before filing the lawsuit, the court determined that it was reasonable to infer that exculpatory information not reflected in the document production did not exist. (2021 WL 4059934, at *1 n.1, *5-7 (Del. Ch. Sept. 7, 2021).)

Complete and accurate board minutes can be valuable to a board facing after-the-fact scrutiny in litigation because they:

- Memorialize the board's deliberations on key matters at issue (assuming they were in fact discussed at the board or committee level).
- Provide an accurate record of board decisions.
- Evidence directors' good faith and diligence and the absence, or appropriate handling, of conflict.
- Can support early termination of shareholder suits for breach of fiduciary duty.

These benefits also underscore the importance of ensuring that the board and its committees are focused on the most important issues and risks facing the company.

Search Fiduciary Duties of the Board of Directors for more on failure of oversight and other breaches of directors' fiduciary duties.

Search Board Oversight: Key Focus Areas for 2022 and Board Oversight of Compliance for more on Delaware court decisions involving *Caremark* claims.

EFFECTIVE MINUTE PRACTICES

The process of memorializing and maintaining board minutes, and the level of detail that the board minutes include, should be tailored to the needs and circumstances of the company and the context. While companies' processes for creating board minutes vary, effective practices address:

- The content of meeting materials.
- Note-taking by directors.
- Preparation of board minutes.
- Review and approval of board minutes.
- Records maintenance.

CONTENT OF MEETING MATERIALS

The materials and presentations that are provided to the board and its committees should be thorough, timely, and relevant. The corporate secretary, or other appropriate company personnel, should maintain a record of these materials and refer to them in the minutes to make an official record of the informed nature of board and committee deliberations and decisions. Consideration should be given to whether meeting agendas and board materials demonstrate that the board is engaged and informed on important topics, and whether upcoming topics are likely to involve privileged materials or discussions. The board minutes should clearly note when the directors hold a privileged discussion.

Generally, the majority of board materials should be circulated or posted to the board portal at least one week before a meeting to allow directors adequate time to review the information. Board materials are often voluminous and include a meeting agenda, presentation decks, reports, agreements, or other documents to be considered or discussed at the meeting, finalized minutes of prior meetings to be approved at the meeting, and other supporting materials.

Search Preparing for a Meeting of the Board of Directors for more on preparing for board meetings.

NOTE-TAKING BY DIRECTORS

Directors should understand the risks of note-taking during board meetings. Notes that are incomplete or informal, or interweave a director's impressions with points discussed at the meeting, are subject to misinterpretation out of context, particularly in litigation. Directors should discard their notes after the formal minutes of a meeting are approved unless a litigation hold applies. (If a litigation hold is in place, directors should avoid taking notes. The corporate secretary will memorialize the meeting, and directors need not retain notes for that purpose.) Any note-taking should be necessary to facilitate a director's review of the board deck or to prepare questions for discussion during the meeting.

PREPARATION OF BOARD MINUTES

The corporate secretary (or an assistant corporate secretary) usually takes notes at board and committee meetings. Before the meeting, the corporate secretary or assistant corporate secretary often prepares an outline of the items for discussion and deliberation, and potential resolutions, to assist in that process.

Board minutes should reflect the board actions taken at the meeting, and should include information sufficient to evidence that directors were informed and deliberative, and acted as prudent fiduciaries. If no decisions were made at the meeting, the drafter of minutes should consider how best to indicate that the board or committee faithfully exercised its oversight responsibilities. This is especially important in the areas of legal and regulatory compliance and risk management.

While board minutes should provide an accurate and complete description of the board's activity, the minutes should be a summary and not a transcript. It is not necessary to identify each director who asks a question or makes a discussion point, although it is common to identify the directors or other meeting attendees who lead discussions or make presentations. It is also not necessary to indicate specific questions asked or points made. Overall, minutes should be objective, use plain language, and omit the drafter's personal perspective.

REVIEW AND APPROVAL OF BOARD MINUTES

Draft minutes should be prepared and circulated for review promptly (ideally, within one week after a meeting), so that directors can review and provide feedback on them while the meeting is recent in their memories. Typically, revised draft minutes are then submitted for approval to the board or committee members at the next meeting. While it can be difficult to circulate and review minutes during circumstances that require frequent meetings, such as a crisis, having an established process and a tight time frame in place will assist in maintaining timeliness in hectic times.

Each director should carefully review the draft minutes, and identify and resolve any issues before the board approves the minutes. Once approved, the minutes, together with any board materials they reference, serve as the official record of the meeting, and all notes, draft minutes, and other unfinished materials should be promptly destroyed, consistent with the company's document retention and destruction policy, and subject to any litigation hold that may apply. If a company uses a board portal to disseminate information or facilitate director communications, the company should ensure that the disseminated information, electronic communications, and any notes that directors make on the portal can be retained or deleted, consistent with the company's document retention and destruction policy.

Search Preparing Minutes: Checklist for more on board minutes.

Search Minutes of the Board of Directors for a model form of board minutes, with explanatory notes and drafting tips.

Directors should understand the risks of note-taking during board meetings. Notes that are incomplete or informal, or interweave a director's impressions with points discussed at the meeting, are subject to misinterpretation out of context, particularly in litigation.

RECORDS MAINTENANCE

The corporate secretary generally is responsible for maintaining the company's key books and records, including board minutes and related materials. A complete set of any board materials sent to the board or referenced in board minutes should be retained in an official record (whether in electronic or physical form). These supporting materials reflect the information the board considered, and provide important context for understanding the minutes and resulting board action. Each company should ensure that it maintains its books and records in accordance with its recordkeeping policies and information technology protocols for safekeeping and continuity.

DIRECTOR USE OF ELECTRONIC COMMUNICATIONS

The scope of what a company must produce in response to a shareholder's books and records demand may vary with the quality of the company's formal records. Appropriately memorializing board activities in minutes, with resolutions as necessary, may assist the company in avoiding the production of electronic communications in response to a books and records request.

A court may extend the reach of a books and records demand to email if directors use email for making key decisions that are not formally documented in minutes or other board materials. For example, the Delaware Supreme Court found that in the absence of formal records, the production of informal communications (in this case, email) to reflect board action may be appropriate. The court noted that if a company has traditional, non-electronic documents sufficient to satisfy a requesting shareholder's needs, it should not have to produce electronic documents. However, if the shareholder reasonably identifies the documents it needs and provides a basis for the court to infer that they likely exist in the form of email, the company "cannot insist on a production order that excludes emails ... if they are in fact the only responsive corporate documents that exist and are therefore by definition necessary." (*KT4 Partners LLC v. Palantir Techs. Inc.*, 203 A.3d 738, 749-58 (Del. 2019).)

While electronic communication channels, such as email and text messaging, are highly convenient, companies should be wary of using them for director communications. In addition to concerns about confidentiality, these channels raise concerns about the protection of privileged communications, if applicable. More fundamentally, email and text messaging cannot substitute for board-level deliberation, and the quick informality they encourage allows messages to easily be taken out of context, with significant risks if they become subject to discovery in litigation.

The use of web-based portals presents other related risks. These portals can facilitate (rather than discourage) director note-taking. They can also document user access information and have retention policies that are independent from other company systems. These issues warrant additional consideration and revision in line with the company's retention policies.

The Delaware Chancery Court decision in *In re WeWork Litigation* underscores the risk that use of a non-company email address (for example, by an outside director) to communicate with the company may undermine the protection of privileged communications. Although the privilege waiver in *WeWork* involved emails of employees who were seconded across companies with overlapping ownership, the decision highlights that there may not be a reasonable expectation of privacy regarding communications through non-company email accounts. (2020 WL 7624636 (Del. Ch. Dec. 20, 2020).) Many companies have policies on the use of email and other communications transmitted across their networks and may monitor, or reserve the right to monitor, these communications, which can limit any expectation of privacy.

Board business should, to the extent possible, occur in formal meetings called with appropriate notice and be memorialized in board minutes that accurately reflect what was discussed. The use of email, text messaging, or other electronic communication channels by board members, whether to obtain legal advice or communicate among themselves, presents risks, including the risk of discovery in litigation and waiver of privilege. If electronic communications are necessary, the consistent use of board portals (rather than standard email platforms) can mitigate waiver of privilege concerns, subject to the considerations about portals discussed above. Alternatively, boards may require outside directors to either:

- Use a company-assigned or dedicated personal email account for board communications.
- Obtain written confirmation that any non-company email account they use for board communications (such as their work email account) is not subject to monitoring and therefore establish a reasonable expectation of privacy.

The use of email, text messaging, or other electronic communication channels by board members, whether to obtain legal advice or communicate among themselves, presents risks, including the risk of discovery in litigation and waiver of privilege.

PRACTICE POINTERS

Given their critical role in memorializing a board's deliberations, decision-making process, and actions, among other things, board minutes should:

- **Reflect basic "who-what-when-where" information about the meeting.** The minutes should include the meeting date, the meeting start and end times, and all attendees' names, times of attendance, and methods of attendance (for example, in person or by other means). They should also specify who served as chair and secretary of the meeting and whether notice of the meeting was either duly given or waived, a quorum was present, and the minutes of the

previous meeting were approved (which typically is the first order of business). Additionally, the minutes should track the order in which other business items were discussed (which typically follows the meeting agenda) and reflect any process used to address conflicts relevant to a subject under discussion (for example, disclosure of any conflict or recusal of a director).

- **Create a comprehensive record of the rationale for critical decisions and, where appropriate, the key factors the board considered.** The minutes should reference any board materials, presentations, and expert advice the board relied on, and should convey that the board reviewed and considered the information provided. Important matters should receive more time on the board agenda, as well as more board attention, and the minutes should reflect that.
- **State the board's decisions clearly.** Formal resolutions are not always required to reflect that the board took action or made a decision. Often, potential resolutions are drafted in advance for the board to consider for major actions, with the final resolutions amended as required in the boardroom to track the final outcome. If resolutions are used, they should describe any specific parameters of the board's decision and related instructions to management or others on implementation, and the introductory Whereas clauses may be used to describe the rationale and context for decisions. The minutes should record approvals by a majority of directors, but recording the specific board vote is unnecessary. Dissenting votes are typically only recorded if a dissenting director requests that their dissent be recorded.
- **Segregate any privileged information from the remainder of the minutes to protect the attorney-client privilege.** Any discussions with or information provided by legal counsel should be covered in a discrete section of the minutes and marked "attorney-client privileged and confidential," with references to the involvement of counsel. During the meeting, the corporate secretary and the board should ensure that only those who need to be present attend discussions with counsel, or have access to privileged information, to avoid any waiver of privilege. Access by anyone outside the company to draft and final minutes that contain privileged information should also be carefully limited.
- **Note if a portion of the meeting is held in executive session, meaning without board members who are part of company management.** The minutes should indicate who attended the executive session and what general topics were discussed. Often the director who leads this session takes brief notes and provides them to the corporate secretary. These sessions typically are not for the purpose of taking action. Instead, they allow the non-management and independent directors to share perspectives on management's performance and identify areas for further inquiry and feedback to management.

With respect to electronic communications about board matters, it is important for companies to:

- **Assume any written communication will be disclosed and ensure the communication's tone and content reflect that assumption.** Directors should avoid reacting to matters with quickly drafted and informal email or text messages.
- **Ensure directors use email and text messaging for logistic purposes only (for example, scheduling).** Directors should not share their viewpoints or engage in substantive discussions through email and text messaging. Holding substantive discussions or delivering a critical message likely is best accomplished in a board call or meeting.
- **Consider whether an expectation of privacy attaches to the email account or other electronic communication channel that a director uses.** The company should consider assigning each director a company email address or requiring written confirmation that any non-company email addresses preferred by outside directors are not subject to surveillance by a third party.
- **Review the cybersecurity and data security risks associated with a web-based board portal and educate directors about the security features of the portal.** As with all corporate records, materials hosted in a portal must be kept secure and confidential. The corporate secretary should ensure that:
  - access to the portal is appropriately limited, including with respect to attorney-client privileged materials; and
  - the settings for maintaining records are consistent with the company's record-keeping policies.
- **Consider whether to permit electronic note-taking.** To ensure compliance, board portal settings for electronic note-taking should be limited or disabled. If directors may take electronic notes, they should discard them as soon as minutes are approved, in accordance with the company's document retention and destruction policy, unless advised otherwise through a document hold notice or other advice of counsel.
- **Assess from a risk perspective, and potentially disable, board portal functions that allow tracking of whether directors access or download materials.** Directors should understand how the portal stores, preserves, or destroys information, and whether these settings can be modified.
- **Train directors periodically on safe practices for using web-based portals, email, and other electronic communication channels, and ensure that directors use only devices with compatible security settings.** Boards should consider developing guidelines covering access to and use of electronic board materials. PL

The views stated above are solely attributable to Ms. Gregory and do not necessarily reflect the views of Sidley Austin LLP or its clients. Portions of this column are based on the work of Ms. Gregory's colleague Charlotte K. Newell of Sidley Austin LLP.