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The Devil Is in the Details: A Litigator's 5 Tips for Drafting Board Minutes

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Recent Delaware cases continue to emphasize that well-drafted board minutes are crucial to surviving and defeating challenges from shareholders in derivative and securities class actions. Although corporate counsel or the corporate secretary may be responsible for drafting board minutes as a matter of good corporate governance, the board minutes may well become the center of litigation. Litigation involving these board minutes may not only be around the corner, but may also proceed years later after memories have faded or directors or management have left the company. Against the backdrop of reviewing millions of documents in litigation involving the company or its board of directors, litigators often face the herculean task of defending inaccurate or inconsistent board minutes, which highlights the importance of well-drafted minutes in increasing the likelihood of success in the courtroom. As litigators who practice in securities and derivative litigation, we have a unique perspective regarding the benefits of a well-drafted record, the hurdles raised in litigation by poorly drafted minutes, and certain nuances of which corporate counsel and directors should be aware. The following are five tips for drafting effective board minutes from a litigator's perspective:

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Tip 1: Make Board Minutes Easy to Interpret and Defend

The drafter of board or committee minutes should make minutes easy to interpret and defend for the litigator who may have no personal knowledge of the meeting. Unlike corporate counsel, oftentimes litigators do not know the identity of every individual in the boardroom, particularly if board minutes are produced in litigation years later. Thus, minutes should include the names and positions of all attendees at the meeting, the length of the board meeting, as well as titles of any documents or materials used or referenced during the meetings, and all documents provided to board members in advance of a meeting. For example, courts have noted where complex documents were not provided in advance of the meeting, the board members had no time to fully analyze and digest. See, e.g., Amalgamated Bank v. Yahoo , 132 A.3d 752, 782 (Del. Ch. 2016) (noting failure to provide material information to committee). In addition, frequently board members will serve in other capacities, like on a

special independent committee for a transaction or investigation. In circumstances in which the capacity a board member is serving may not be clear, a delineation of roles reflected in the board minutes will only help the litigator, particularly in circumstances when certain roles are to remain independent of the board.

The time deliberated about an issue should also be well-documented. In *Yahoo*, for example, the committee only considered the term sheet for 30 minutes, which Vice Chancellor J. Travis Laster implied was not long enough given the complexity of the issues. 132 A.3d at 766. Moreover, document changes to the board books and reasons behind the changes should be clearly labeled and similarly memorialized so that company counsel or the court are not left trying to piece together the puzzle of the board minute drafting process during the pendency of litigation.

In addition, attorney-client privilege is always a concern in any litigation, so where possible, the drafter should clearly indicate when the board or committee has received privileged advice from in-house or outside counsel, as opposed to the receipt of nonprivileged information. Because not all communications from counsel are privileged, such as when outside counsel's recitation of information learned from third parties or opposing counsel in an arm's length transaction, thinking through these issues when drafting the minutes will make it easier for the court and litigation counsel to protect such privileged communications at a later date. For example, the minutes could reflect that "Attorney X, outside counsel, next provided the following privileged legal advice." Care should be taken, however, to ensure that any nondirector/management attendees of the meeting would not arguably destroy any privilege. Indeed, boards and drafters of minutes should consider whether a third party, such as a financial adviser, destroys privilege, a complicated matter involving various legal frameworks.

Similarly, the independence of any special committee or special litigation committee should be considered when drafting committee minutes. For example, management and in-house counsel may participate in meetings in order to provide information necessary for the committee to perform its duties. However, the minutes should reflect that substantive deliberations and decisions were reached without the participation or influence of any other individual who could be considered interested. By carefully considering how the minutes may be viewed in subsequent litigation, the drafter can help clarify and resolve any ambiguity regarding privilege and independence issues and the attendees' respective roles.

Tip 2: Establish a Process for Consistent Drafting of Board Minutes

Corporate boards should have set guidelines regarding the format for board and committee minutes, which will only help to document a diligent and robust process. For example, the drafting process should include established guidelines regarding how much detail to include for various topics. This is of particular significance because plaintiffs counsel and courts will analyze the minutes months or years later and attempt to discern how much deliberation and background information has been dedicated to any given topic. For example, in *In re Walt Disney Co. Derivative Litigation*, "[i]t would have been extremely helpful to the Court if the minutes had indicated in any fashion that the discussion relating to [president's employment agreement] was longer and more substantial than the discussion relating to the myriad of other issues brought before the compensation committee that morning." 907 A.2d 693, 769 (Del. Ch. 2005), n.539, aff'd, 906 A.2d 27 (Del. 2006). Establishing such guidelines in advance will create consistency, particularly if the drafter changes as time passes. Without a consistent approach to particular topics, courts could be left wondering why the level of detail in board minutes changes dramatically from meeting to meeting.

Tip 3: Approve Board Minutes in a Timely Manner

Establishing a process for the timely approval of board minutes ensures that nothing gets missed. Timely approval can enhance the board's substantive deliberations to ensure an issue which is raised in one meeting is not dropped without careful consideration and reasoning. Draft minutes should be distributed in advance of the next board or committee meeting so directors have an opportunity to review, and, if necessary, add any outstanding issues to the agenda. This process will help avoid the situation where one set of minutes reflects an issue being raised, but subsequent minutes contain no mention of the subject. It may be that changed circumstances made the issue obsolete, but without memorialization, the company must rely on the directors' memories, which may have faded at the time of litigation. Thus, review of the previous meeting's board minutes should not be pro forma; instead, any review should be deliberate and careful, noting any points of confusion or

outstanding issues. As shown in the Court of Chancery of Delaware decision in *In re Netsmart Technologies Shareholders Litigation*, 924 A.2d 171 (Del. Ch. 2007), then-Vice Chancellor Leo Strine granted a preliminary injunction in part because a special committee met and approved formal minutes for 10 meetings ranging over three months. Strine then stated that "tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring." Id. at 191. Thus, establishing a process to timely approve board minutes will only make the process more robust and defensible down the road.

Tip 4: Don't Sanitize Dissenters' Viewpoints or Alternative Strategies

The minutes should reflect the deliberation process, not "justification for a decision already made." *In re Netsmart*, 924 A.2d at 199. In fact, courts turn to board minutes to determine whether directors properly vetted their options before reaching a decision. For this reason, alternative strategies and opposing points of view among board members should be encouraged and memorialized. In *In re Netsmart*, the Court of Chancery of Delaware was particularly critical about the board's practices regarding its minutes as it focused on private equity buyers instead of strategic buyers. The court pointed out that one supposed meeting had no minutes in the record at all, and important decisions were "not reflected in any minutes or resolution." Id. at 184, 187. Similarly, the court in Maric Capital Master Fund v. Plato Learning , 11 A.3d 1175 (Del. Ch. 2010), enjoined a merger even though defendants argued several reasons why another range was chosen for the discounted cash flow valuation. The court reasoned that "there is no evidence, such as board minutes, indicating that [the adviser] ever told the Special Committee these reasons." Id. at 1177. Indeed, decisions to change course, abandon previous plans, or not do something should be memorialized with reference to adequate process or a discussion regarding such decision.

Tip 5: Keep Fiduciary Duties in Mind

Finally, care should be given to memorialize the thoughtful and deliberative process employed by the board to meet their fiduciary duties. For example, in *In re Dollar Thrifty Shareholder Litigation*, 14 A.3d 573 (Del. Ch. 2010), the court denied a motion for preliminary injunction, in part, given the sufficiency of the record which showcased the board's thoughtful and deliberate approach as well as the CEO's forthright disclosure of possible conflicts. Id. at 582-83, 605. In contrast, in *Yahoo*, 132 A.3d 752, stockholders filed an action relating to the hiring and subsequent firing of a senior executive. The *Yahoo* court noted that the compensation committee did not receive any materials that quantified the effect of changes in compensation or payouts under different scenarios, and ultimately ordered Yahoo to provide additional books and records. Id. at 768, 799. Accordingly, memorializing the board's deliberative and thorough process only aids the board, and later the court, in determining that directors have met their fiduciary duties of care. Such care transforms drafting board minutes from a science to an art, ultimately helping the company prevail in any potential litigation.

Conclusion

Delaware and other courts have confirmed the increasing importance of the written record. As Laster has explained, "[a]ll the judge has to rely on are things like minutes, board materials, contemporaneous notes and emails to gain insight into what actually occurred." Board minutes "are extremely important in litigation" and "should help confirm in the judge's mind that a good process was followed." While this level of detail may not be necessary in all circumstances, the above-mentioned five tips regarding drafting effective board minutes will help memorialize directors' strong commitment to their fiduciary duties, and write the script that could defend the company and its directors and officers in subsequent litigation.

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