# *À la recherche du temps perdu*:
The Art and Science of Corporate Minutes

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Notice: This paper presents more opinion, personal preference and outright idiosyncrasy than law. But there is some law.

## Preface

Three reasons why lawyers ought to want to know about preparing corporate minutes:

1. *Compliance and control.* Increasingly, courts and regulatory agencies expect corporate minutes to evidence the "governing board's[1]" compliance with relevant standards of performance (*e.g.*, the Business Judgment Rule) and other statutory or regulatory requirements (*e.g.*, Sarbanes-Oxley, Dodd-Frank, intermediate sanctions). Internally, minutes can serve as checks and controls on how boards operate, and promote boards' awareness of their own processes. Lawyers are best suited to assist boards with this.

2. *Leadership and strategy.* Minutes provide an opportunity for an organization to view its operations in the context of its mission and business plan; they can be an instrument of leadership, strategy and accountability. Often, lawyers (either as advisors or as board members) are best able to provide this perspective.

3. *Credibility and marketing.* People commonly turn to lawyers, if not actually to draft the minutes, then to speak authoritatively about their form and content. So, lawyers who work with organizations (either as advisors or as board members) will want to have a vision of how minutes should be prepared in order to project professional competence and authority.

Among corporate lawyers the traditional point of view was that minutes should record final board actions and otherwise say as little as possible. This was based on the theory that the less you say, the less chance you have of creating problems. That approach is changing now, prompted by the *Disney* litigation and also fueled by changing social expectations and increasing federal regulation of boards and governance.

There's not much law to know. Most of it is below. That is followed by admittedly idiosyncratic comments about how minutes might be understood, designed and written.

[1] These materials are intended to be generally relevant to all kinds of governing boards of private rather than governmental entities. The phrase "board of directors" used below is most often not intended to exclude boards of trustees or others.

## The corporate law of corporate minutes

*Form and content of minutes.* The North Carolina Business Corporation Act and the Nonprofit Corporation Act require only that boards of directors keep minutes of their meetings as permanent records of the corporation. They don't address form or content. A scattered and growing number of statutes and regulations are beginning to require that specific data of different kinds must be recorded in or kept with the minutes of some types of organizations, such as banks and publicly-held companies, but those statutes and regulations do not address minutes in general.

Generically, minutes are "minute" accounts of organizational proceedings. North Carolina's Supreme Court has said,

> 'the purpose of minutes is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. …' Their purpose is to reflect matters such as motions made, the movant, points of order, and appeals – *not to show discussion or absence of action*.
>
> This accords with the common understanding of the purpose of minutes. Generally, "they should contain mainly a record of what was done at the meeting, not what was said by the members." Henry M. Robert, Robert's Rules of Order Newly Revised § 47, at 458 (9th ed. 1990).

*Maready v. Winston-Salem*, 342 N.C. 708, 733, 467 S.E.2d 615, 630-31 (1996); *see Multimedia Publishing of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 550 S.E.2d 846 (2001) (emphasis added).

In short, the general rule is that minutes need not say anything at all beyond recording board actions. Russell Robinson sensibly (as always) observes however that:

> a corporation needs to strike a proper balance between recording enough for internal management and external certification purposes, but not so much as to inhibit frank and open discussion due to fear of later disclosure. *Robinson on North Carolina Corporation Law, § 12.05,*

*Minutes as evidence.* Minutes are accorded a special status as evidence:

> [a]s a general rule the minutes of a corporation are the best evidence of its acts, resolutions, and proceedings; and when they are complete, when no fraud or mistake is shown, and it does not appear that there is any error or omission, parol evidence is not admissible to contradict, modify, or vary the record. *Respess v. Rex Spinning Co.,* 191 N.C. 809, 133 S.E. 391 (1926).

> [T]he recorded minutes of a corporation are presumed to cover the entire subject-matter or transaction …. But, if the entire transaction is not recorded, or the record is incomplete and fragmentary, the presumption is not conclusive and parol evidence may be introduced to show what in fact was done. The incomplete records of private corporations are generally open to explanation by parol evidence. *Scotton Motor Co. v. Scotton*, 190 N.C. 194, 195, 129 S.E. 199 (1925).

So, minutes provide a unique opportunity to demonstrate compliance with relevant standards and ward off later attacks, subject to the nagging requirement that they must be "complete."

*Contemporary trend to more detailed minutes*. In the still relatively recent *Disney* case, Chancellor Chandler denied motions to dismiss that litigation (about Michael Ovitz's lavish compensation), but suggested that he might have dismissed it had the minutes been more detailed. Famously, he concluded that the board's bare-bones minutes, while legally sufficient as minutes, did not comport with "best practices" and in any event were not sufficient, where more detailed ones might have been, to support a motion based on the Business Judgment Rule. *In re: The Walt Disney Company Derivative Litigation*, 906 A.2d 27 (Del. 2006). (For a good, concise discussion of *Disney* in light of North Carolina law see Stephen Later's article "A Stroll Through Chancellor Chandler's Magic Kingdom," in *Notes Bearing Interest*, vol. 30, no. 3 (Business Law Section, NC Bar Association, April 2009).)

*Forms and checklists.* The Internet and other sources are replete with forms and checklists and guidelines for drafting minutes.[2]

*Legal and non-legal functions of minutes.* The primary legal uses of minutes are

- To record final actions taken by the board,

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[2] These materials appear to reflect consensus that the following data should be in the minutes every time:

- Date, time, location
- Whether the meeting is held over the telephone or in person
- Nature of the meeting (regular or special)
- Names of those present (including officers, directors, invited staff, advisers or guests)
- Names of those absent
- Presence (or lack) of a quorum
- Names of all individuals making a presentation
- The titles of any written or audio/visual presentations
- Names and qualifications of professionals or consultants who provide advice and the nature of their advice
- All actions taken
- Specific factors that were material to the board's decision (see somewhat different idea in text of this paper)
- Dissents or abstentions from actions taken (see somewhat different idea in text of this paper)

- To capture aspects of the board's proceedings that may serve useful legal purposes in retrospect as evidence to demonstrate compliance with the Business Judgment Rule and other standards of board performance,
- To meet specific legal and regulatory requirements such as those imposed in specific federal statutes and regulations: Sarbanes-Oxley, Dodd-Frank, Regulation O, Intermediate Sanctions, etc; and
- For internal management and external certification purposes.

Beyond using minutes for these purposes, many organizations commonly employ their boards' minutes for what might be characterized as cultural and historical purposes. That is, minutes may be vehicles for communicating the mission, values and vision of their organizations; and they may be used to build community with recognitions and appreciations and by recording discussions and occurrences that have no particular legal significance.

The advisability of using minutes in this way is heavily dependent on the nature and circumstances of the organizations involved. In many cases (most?), it's hard to believe that these purposes aren't better served by other means of communications or chronicling, such as newsletters, annals and reports. But it's also hard to say that the practice of using minutes for non-legal purposes, which is virtually ubiquitous, does much harm beyond sometimes creating possibilities for confusion.

*Summary*. The law makes few requirements about the form or content of corporate minutes. Social concern about corporate governance is feeding general expectations that fiduciaries will make records of their work that demonstrate a level of care commensurate with the importance of the work.

## Comments about minutes prepared to be records of final actions

> *Winslow's First Law of Board Dynamics*
>
> Board minutes are about the group, not its members.

Drafting minutes to record final actions is straightforward. (See Note 2 above.) Where and when did the meeting occur? Was proper notice of the meeting given? Who was present? Exactly what action was taken?

What matters are the group's actions. Normally, other details are not needed. Indeed, extra detail may be problematic later. This accounts for the traditional lawyers' approach to drafting minutes: take no unnecessary chances; record only the bare bones of final actions. Don't risk unanticipated mischief.

This suggests to me that, except in disputes, minutes should not normally record the names of persons who advanced and seconded motions, or identify who spoke for or against resolutions, what was said by whom, or even what the final vote was. The traditional expectation of North Carolina courts may have been somewhat different. One court opinion comments that the purpose of minutes (at least in contested matters) "is to reflect matters such as motions made, the *movant*, points of order, and appeals …." *Maready v. Winston-Salem*, 342 N.C. 708, 733, 467 S.E.2d 615, 630-31 (1996)(emphasis added); *see Multimedia Publishing of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 550 S.E.2d 846 (2001). It's hard for me to see why the identity of the movant matters.

From time to time, directors may wish to record dissents or dissociate themselves from the group's action for legal or organizational reasons. In some cases, a director who has dissented may avoid liability for a board's improvident action, if he or she has recorded a dissent. *Cf.*, *Frances T. v. Village Green Owners Assn*, 42 Cal. 3d 490, 511 (1986). Directors should certainly be aware that, if they are present at a meeting and their dissenting votes are not recorded, then they are deemed to have approved actions taken by the board.

By adoption of minutes policies or otherwise, boards should be clear with their members about whether the identities of movants and dissenters will normally be recorded in their minutes without a special request.

## Comments about minutes crafted to be evidence

> *Winslow's Second Law of Board Dynamics*
>
> Listening is more important than speaking.

The core contribution that lawyers can make to preparing corporate minutes is to craft what will become the official evidentiary record of the board's proceedings. Minutes conceived as evidence go beyond bare legal expectations for recording final actions and seek to demonstrate that the board's processes leading to its final actions met applicable standards of board performance.

From this perspective, minutes are the final artifact of the larger process of how the board fulfills its fiduciary duties. This process begins with understanding, designing and guiding the decision-making process. The whole process would entail:

- Identifying governing legal standards, such as the Business Judgment Rule,
- Advising and coaching board leadership to design a process that will comply with applicable standards,
- Executing the process,

- Preparing draft minutes for review and (ultimate) approval by the board,
- Recording and preserving final minutes.

Here are suggestions for minutes that undertake to go further than recording final actions:

*The whole truth but not all of the truth.* What is recorded must be true, but minutes are not required to record everything that happened or, necessarily, anything that was said. Much will be omitted. That is expected and proper. *See Maready v. Winston-Salem*, 342 N.C. 708, 733, 467 S.E.2d 615, 630-31 (1996); *Multimedia Publishing of North Carolina, Inc. v. Henderson County*, 145 N.C. App. 365, 550 S.E.2d 846 (2001).

*Lawyers are subject to clients' directions.* When acting in their capacities as lawyers, lawyers are agents of their clients. This is to say that final decisions about what is recorded in the minutes and what is omitted, are the client's decision, not the lawyer's. Where the client is an entity, the board speaks for the client. Rule 1.13 of the Rules of Professional Conduct governs circumstances where a lawyer questions the propriety of a client's actions or instructions.

*Crafted record.* Minutes prepared for legal evidentiary purposes are not a historical narrative. They are not a condensed recounting of what occurred, or what was said. They are a record of the board's decision-making process. They should normally be "crafted" to demonstrate that the board complied with relevant standards of conduct. That is, out of everything that happens, the minutes will seek to capture the facts relevant to that purpose.

*Nothing without a purpose.* Every statement recorded in minutes should serve an identifiable purpose. "It happened" and "he said it," are *not* reasons in themselves to record anything.

*Identify the applicable standard.* Minutes should implicitly place the board's proceedings into the larger context of applicable law (normally the Business Judgment Rule, but also other requirements). Where substantive requirements of securities, regulatory, tax or other laws, apply (e.g., addressing how executive compensation is determined), there may be specific requirements about findings the board must make, or what the minutes must record.

*Record the process, not the blow-by-blow.* For Business Judgment Rule purposes, minutes would normally record (by topic or in summary) information considered by the board and the final action, but not the substance of debates or arguments, or necessarily even the narrow reasons "why" it appears that a particular decision was reached. (This is discussed below.)

*Anticipate how memories will operate.* If minutes are consulted at all, they will be consulted later. In contested matters, they will be consulted months or years after the

events they record. They will be *prima facie* evidence of what happened at the meeting; and, in most instances they will be the only "hard" evidence of what happened. But they will be scrutinized and questioned, ultimately by means of cross-examining persons who were present at the meeting. Therefore, minutes are best drafted with the expectation that they will be used to "refresh the recollection" of the witnesses. This makes some understanding of how memory works desirable (see below, *La recherche du temps perdu*), and also some anticipation of the dynamics of group memory of a collective decision – especially the memory of a group under fire (see below, *Board ownership of minutes*).

*Make the truth your friend.* Unlike many other legal processes, board deliberations are contemporary and dynamic. Mistakes and misstatements are natural and even desirable in the interests of robust discussion. Mistakes may not be recognized until minutes are prepared. Keep in mind that draft minutes are not final. Almost always, a board's mistakes can be corrected (by convening another meeting, if necessary). This is a salutary effect of the practice of keeping minutes. Covering up or papering over a mistake is rarely a good response. Addressing and changing bad facts is almost always possible, preferable and proper. Where problems are fixed, the final minutes often need not record the solecism, or they can record it as part of a process by which the mistake is recognized and fixed. That is a healthy thing.

*Emphasize board review and approval of minutes.* Misunderstandings and disagreements are best resolved sooner rather than later. Almost always, a common, united memory among the group serves the organization's best interests. Therefore, importance should be ascribed to board approval of minutes. (See below, *Board ownership of minutes*.)

*Internal controls.* The single best outcome of an emphasis on good minutes would be to bring the board to a new level of awareness of itself and its processes. This can come from inviting the board to read draft minutes for the story they tell of the group's processes, then asking whether the board likes the story.

## *La recherche du temps perdu*

> And so it is with our own past. It is a labor in vain to attempt to recapture it: all the efforts of our intellect must prove futile. The past is hidden somewhere outside the realm, beyond the reach of the intellect …. – Proust, *Swann's Way*

The nature of minutes is that they are prepared to be consulted later, potentially months and years later. Where a board's action is disputed, minutes are unique evidence. They may constitute the totality of the evidence, or they may be used to refresh witnesses' recollections.

The prospect of eliciting recollections of a collective decision-making process begs attention to memory and how it works. Modern brain science, confirming and confirmed

by the century-old literary insights of Marcel Proust, has opened up new understandings of this.

In short, memories are not recordings. Human brains do not store a transcript or a video of past times, which can be accessed and replayed from time to time upon demand. Instead, what happens is that a few vivid aspects of an experience are stored in the brain, and memories are "created" later when those impressions are recalled. The mind fills in the blanks between impressions. The memories so created are profoundly shaped by the circumstances in which they are recalled. And, every time a memory is recalled, the experience of remembering "overwrites" the original memory so that future recollections in fact call up, not the original experience, but the last recollection of it.

This has important implications for preparing minutes.

First, keep in mind that months or years may pass before persons who witnessed a meeting are asked to recall it. Anticipating what members of a group may recall, especially about a group process that is mostly intellectual rather than sensory is impossible. Everyone will forget more than anyone can imagine is possible. Proust says,

> And in myself … many things have perished which I imagined would last for ever, and new ones have arisen, giving birth to new sorrows and new joys which in those days I could not have foreseen, just as now the old are hard to understand.

Only a few impressions, primarily sensory ones, will be recalled. The rest will be gone. Proust says,

> I saw no more of it than this sort of luminous panel, sharply defined against a vague and shadowy background, like the panels which … a searchlight beam will cut out and illuminate in a building the other parts of which remain plunged in darkness: … in a word … isolated from all its possible surroundings, detached and solitary against the dark background ….

Voluntary memory of non-sensory experiences is very limited. And Proust says that when memory is "prompted only by voluntary memory, the memory of the intellect …, the pictures which that kind of memory shows us preserve nothing of the past itself."

So, the intellect only recaptures isolated bits and pieces; and without being aware of doing so, the mind fills in details and makes connections based on other data available to it (including later-acquired information). In this sense the mind "creates" a memory which is not the past recaptured but instead is something new. Proust says,

> I … examine my own mind. It alone can discover the truth. But how? What an abyss of uncertainty, whenever the mind feels overtaken by itself; when it, the seeker, is at the same time the dark region through which it must go seeking and

> where all its equipment will avail it nothing. Seek? More than that: create. It is face to face with something which does not yet exist, to which it alone can give reality and substance, which it alone can bring into the light of day.

In the law of evidence, this is called "refreshing" the witness's recollection.

In the context of board meetings, persons present at long-ago meetings will have little direct recollection of what happened at the meeting and less ability to recapture the event itself. And lawyers who question those witnesses have little to go on except the minutes.

The minutes serve as the common fund, the basis for everyone's memories. They are themselves primary evidence and they also frame, shape and condition what the witnesses remember. Little will be recalled that is not within the four corners of the minutes. Most of what is omitted will be gone forever.

Said more provocatively (suivant Proust), minutes provide the framework for the creation of memories. Those memories are not created until after a dispute has arisen and at a time when the parties have firmly in mind why the bare record is being questioned. Although perfectly honest, all recollections are shaped by the purposes for which they are recalled; and they shift over time in response to questions. "Every memory is inseparable from the moment of its recollection." [3]

Clearly, it is a wasted opportunity not to prepare minutes that provide a crafted outline (an account of the group's process) that will be an effective frame for preserving common memories that serve the client's best interests. Too much detail – especially detail that departs from the level of shared experience (the process) – may in retrospect be confusing and diverting, risking traditional concerns that unneeded information may take on different colors when viewed later, for reasons that cannot be anticipated until the gravamen of a later dispute is known.

## Crafting a record of a business judgment

> [B]ut they knew, either instinctively or from experience, that our impulsive emotions have but little influence over the course of our actions and the conduct of our lives; and that regard for moral obligations, loyalty to friends, patience in finishing our work, obedience to a rule of life, have surer a foundation in habits solidly formed and blindly followed than in these momentary transports, ardent but sterile. – Proust, *Swann's Way*

[3] "As long as we have memories to recall, the margins of those memories are being modified to fit what we know *now*. Synapses are crossed out, dendrites are tweaked, and the memorized moment that feels so honest is thoroughly revised. … [E]very memory is inseparable from the moment of its recollection." Jonah Lehrer, *Proust Was a Neuroscientist.*

Minutes of board decisions documenting business judgments might include the following elements (to different degrees of detail depending on the magnitude and circumstances of the issues).

*Identify the issue.* Identify the question before the board.

*Place the issue in the context of the mission.* Framing the board's inquiry and action in terms of the organization's mission and guiding principles or strategies grounds the process and defines the relevance of occurrences or data. Strategic plans, codes of conduct and other foundational documents may be relevant. The "framing" may be explicit or implicit.

*Address the independence and good faith of directors.* Directors' independence and how any conflict of interest is handled, are fundamental to the application of the Business Judgment Rule and other standards of corporate decision-making. See N.C. Gen. Stat. §§ 55-8-30; 55-8-31; 55A-8-30; 55A-8-31.

For important board decisions, the first step toward good corporate hygiene is to determine the directors' independence. Despite the general advice in these materials that minutes should record only process and final actions, determining and recording in the minutes virtually all facts relevant to conflicts of interest may be advisable. Those facts are normally objective. That is, they exist independently of the organization's processes. Conflicts of interest can be proved and will support attacks on corporate decisions independently of the minutes. Recognizing, disclosing and addressing conflicts at the outset demonstrates the board's good faith, heightens the board's awareness of the issue, enables directors to protect themselves, and will normally prompt an appropriate resolution of any conflicts.

*Record steps taken and information considered in exercise of directors' diligence.* Seeking to record evidence of a board's diligence, normally entails identifying steps taken by the board to inform itself and may include identifying possible alternatives considered. This does not require recording any individual director's opinion, or reasoning (that is, why an individual speaker preferred one alternative over another). Most often, the board is best served to record by topic or in summary, the information or issues it has considered, pro and con, and its final action. Where a board's reasoning is important, that is best captured by preparing a resolution with explicit premises (i.e., reasons), then asking the board to adopt the resolution. This makes clear that all the board, as opposed to individual speakers, did in fact subscribe to particular reasons. A blow-by-blow account of a discussion won't do that.

*Opinions, reports, statements or data.* Where the board receives written or other recorded opinions, reports, statements or data, minutes should identify them and who presented them and state the board's basis for believing that the presenters are qualified and merit confidence. See N.C. Gen. Stat. §55-8-30(b)(2) and §55A-8-30 (b)(2). Part of preparing

minutes is to review such reports to ensure that they do not include materials or references (red herrings) that might be problematic. Materials delivered to board members for review in advance of a meeting should be identified together with the facts that the directors received them in advance (and so, had time to review them). Normally, such materials would be filed with the minutes.

*Deliberate process.* Minutes should demonstrate that the board's proceedings were deliberate (not rushed) appropriately to the nature of the action taken. The minutes should disclose that the board took enough time to read and consider information and advice before it. This may require multiple meetings or other extended periods for deliberation, which may require multiple sets of minutes. It may be advisable to record the time when a meeting begins and when it ends (assuming that those facts indeed do demonstrate due deliberation and not undue haste). On the other hand, merely to record that a board debated "at length," or that "there was a detailed discussion," seems self serving and feebly persuasive if at all, of deliberate decision-making.

*Experts, consultants, officers, board committees.* Where the board relies on retained experts and other advisors (these may include board committees), who deliver oral advice, minutes may be the only means of capturing the substance of their opinions and reports. As opposed to discussions among board members, oral comments of expert advisors, corporate officers, board committees and other consultants (if they go beyond the contents of written reports and exhibits) may need to be recorded in detail, else they will be lost and not available later to defend the board's decision. Such minutes may also serve a salutary purpose in focusing consultants on exactly what advice they are willing to stand behind.

Board decisions to retain experts and consultants normally will record those persons' qualifications and the purpose and scope of their engagements.

*Legal advice.* Lawyers may advise boards both about relevant standards of performance and processes best designed to conform to those standards; and also about legal aspects of substantive issues before the board. Boards will want to create a record that they have sought and relied on such advice. Often, the lawyers also want a record of exactly what advice they have given. This must be done in a way that does not waive the attorney-client privilege, if the client wishes to preserve that confidentiality. In many instances, boards of directors may intend to waive the privilege from the outset, so they can cite the advice they received in support of their actions. This choice should be weighed and where waiver is intended, careful lawyers will want to be extra clear about the implications of waiving confidentiality, and exactly what advice they have given. This may be achieved either by providing advice in writing, or by extra care in drafting and reviewing minutes.

*Third parties other than consultants.* Third parties such as potential contracting parties or an organization's adversaries may appear at board meetings from time to time in order to

urge a board to enter into specific transactions, or to threaten. Minutes of these events may need to be recorded in detail in order to capture oral statements on which the board has relied, or the board's response.

## Omissions

> I heard the crash on the highway, but I didn't hear nobody pray. – Roy Aycuff, *Wreck on the Highway*

By design, minutes do not record everything that happens. This does not mean that they should be crafted to record only the "good" facts and that "bad" ones should be omitted. An account of a meeting rendered in minutes should be complete and truthful consistently with the level of detail at which it is presented.

Where minutes fail to record that a board took a step or considered important information, that omission may be interpreted as evidence the step was not taken or the information not received. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 (Del. 1983) ("If Mr. Walkup had in fact provided such important information to UOP's outside directors, it is logical to assume that these carefully drafted minutes would disclose it.")

The more detailed minutes are, the greater is the likelihood that omissions may be read to support negative inferences. This militates in favor of minutes that record the board's processes, but do not seek to capture every statement or occurrence. Describing the features of a process and not every occurrence, normally will fairly demonstrate compliance with the Business Judgment Rule without raising the inference that every datum or statement considered by the board has been captured in the minutes.

## The stupid, the candid and the impolitic

> *Winslow's Third Law of Board Dynamics*
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> In any group of eleven or more directors, as to any important decision, at least two directors will be complete idiots.[4]

Boards of directors at their best are diverse groups of people who bring different backgrounds and perspectives to the oversight and direction of their organizations. Unfettered deliberations are what the board is for. This virtually guarantees that from time to time (on a *good* board) directors are going to say and propose stupid, or merely candid or impolitic, things. Minute-keeping practices should not inhibit this. Normally,

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[4] AUTHOR'S NOTE: This statement is intended to make its point by means of the device of exaggeration. The author wishes to state that he has never represented nor indeed ever been a member of any board of directors of whatever size which included among its members any *complete* idiot.

stupid, candid and impolitic comments can fairly be omitted from minutes pitched at the level of process – and they should be. Where this goes beyond talk to action, mistakes can normally be corrected – if they are recognized, understood and confronted. On balance, a process that acknowledges mistakes and corrects them is healthier than one that seeks to present a picture of pristine, uninterrupted correctness.

Minutes that record only good facts and omit bad facts, at worst, may be construed as seeking to cover up problems. Minutes (and, more importantly, boards) that face bad facts head-on and deal with them demonstrate good faith and more often come out at the right place. In some cases, minutes may help to identify problems in hindsight and contribute to solutions.

## Board ownership of minutes

> *Winslow's Fourth Law of Board Dynamics*
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> In any group of eleven or more directors who come under fire, at least one director will break from the group and contend that he or she remembers things entirely differently and never agreed with the rest of the group in the first place.

There is no legal requirement that boards must review or approve minutes. Surely though, the best practice is to emphasize that minutes belong to the board; and to insist that minutes do not become final until they have been reviewed and approved by the board.

Done right, this practice is an important internal control. Clear minutes, thoughtfully reviewed by the board, promote

1) board self-awareness and attention to its processes and performance;
2) clearly defining issues before the board in the context of the organization's mission;
3) recognizing and fixing mistakes or problems;
4) providing a basis for future oversight and accountability; and
5) unity later.

"Best" or ideal practices, although few organizations appear to observe them, might be (i) that organizations adopt a policy that governs how their minutes will be kept, reviewed and preserved; and (ii) that directors are trained as to their organizations' minutes-keeping policies and practices.

In high-stakes matters, meaningful board review of minutes (with advice from legal counsel about how to evaluate them) has heightened importance. In later testimony, nobody wants an individual director to contradict the organization's minutes or to testify that he or she does not understand them. Those are issues that can normally be managed easily at the time when the minutes are prepared and when memories are fresh.

Achieving unity later, when the board is under fire, may be problematic. Disagreements can be resolved, or they can be acknowledged and made a part of the minutes. Where the board "owns" the minutes, the likelihood that the lawyer-drafter may be deposed is diminished.

## Recordings, transcripts

> *Winslow's Fifth Law of Board Dynamics*
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> A transcript or a recording will necessarily be incomplete and may actually be misleading as a record of a collective decision-making process.

New technologies make audio (even video) recordings of meetings increasingly easy and inexpensive. The practice of making audio recordings of board and committee meetings is ubiquitous, if only as an aid to preparing the minutes. Many board rooms are designed to facilitate recordings.

Legal commentators are virtually unanimous in advising against creating minutes which are transcripts of meetings, and they uniformly advise against keeping audio or video recordings after minutes have been approved by the board. Reasons for this are that making recordings is assumed to inhibit or chill frank deliberations, and that verbatim transcripts inevitably contain materials that later may appear to be embarrassing, inflammatory or diverting. Also, transcripts and recordings will almost certainly be accorded greater credibility than the memory of persons present. This may not be appropriate because those present will have a sense of the context of any statements that no transcript can impart.

To these concerns might be added the observation that neither a verbatim transcript nor even a video recording can ever be said to be "complete," or to capture the *process* that results in a collective decision. The final action of a board of directors is not simply the sum and result of all statements made and information received during a meeting. Separate statements do not have equal weight. Listening is often more important than speaking.

Transcripts may war with memories. If they do, peace should be made once and for all when the minutes are approved.

> *Winslow's Sixth Law of Board Dynamics*
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> The purpose of minutes is to record the proceedings, not the words.

## Keeping recordings, drafts and notes

> I almost believed that each of the spectators [at the theatre] looked, as through a stereoscope, at a scene that existed for himself alone, though similar to the thousand other scenes presented to the rest of the audience individually. – Proust, *Swann's Way*

Most commentators advise that recordings (if they are made) or notes or early drafts of minutes should be destroyed when final minutes are adopted. If the minutes are prepared well, then the only purpose that recordings, drafts or notes might serve after final minutes are adopted is to add to or vary what the final minutes say, thus rebutting the evidentiary presumption that the minutes are complete and correct.

Notes kept by individual directors present different concerns. Whether directors' notes will be kept or destroyed after final minutes are adopted might be addressed in the organization's policy regarding minutes, if there is one. In any event, separate notes kept by individuals create the same risks as recordings and early drafts, with the added concern that those keeping the notes may have separate, personal agendas.

## Drafting style, preferences, idiosyncrasies, questions and random observations

> *Winslow's Seventh Law of Board Dynamics*
>
> Everything looks different later and every memory dates from the moment of its recollection.

*Due deliberation*. The perception that a board of directors deliberated and acted within a very short time might be cited as some evidence that the board failed to exercise due care. Isn't there some better way though to evidence due deliberation than merely to say that the board discussed an issue "extensively" or "in detail" or "at length," or even that the board discussed the issue in "great (or "very great") detail"?

*Adverbs.* Is there ever a context in which adverbs add anything to corporate minutes?

*Time*. Is it desirable to record the time of day when a meeting started and when it ended? Is it desirable to record the actual length of time during which a particular issue was discussed? What is the effect of recording such data on some occasions but not on others?

*Naming directors.* When and why is it desirable to record the names of individual directors or to identify them with specific statements or opinions or suggestions or positions, if the board ultimately acts as a group and there is no dissent? Is there a danger that identifying who said what may chill frank debate, or otherwise cause individuals to be more focused on their individual contributions rather on the group's decision? Aren't directors who listen well as important as those who speak well?

*Process vs. occurrence*. To record that a board "considered" or "discussed" an issue or question describes the process. To record that a board "believed" or "relied on" or "agreed" describes an occurrence.

*Reasons supporting a final action.* Where a board is required to reach specific conclusions before taking action, or where the board wishes to record specific reasons why it has taken a final action, isn't the most precise way to accomplish that to draft a resolution whose premises set out those reasons, then ask the board to adopt the resolution and premises? Or, to set out those reasons explicitly in draft minutes and ask the board to approve the minutes? Minutes of deliberations preceding the adoption of a resolution might record that the board "considered" or "discussed" alternative reasons, which may or may not be adopted.

*Sharp practices.* Are the following misleading, or merely artful?

- Recording the time at which a meeting begins and the time when it ends, but not recording the fact or duration of breaks in the meeting?
- Omitting occurrences that are deemed irrelevant, but that may have had some effect on decision-making? For example: A director fainted? Two directors got into a fist fight? A director walked out of the meeting?
- Recording that a director "departed" a meeting, when in fact, she "walked out"?
- Omitting the fact that an attorney interrupted the meeting to advise the board to say, or not to say or do specific things?
- Not recording attendance at the meeting of persons whose presence may have the effect of waiving the attorney-client privilege?

*Ideal practices*. In an ideal world, every organization would adopt a policy for the preparation and keeping of its minutes and related practices. That policy would address issues, practices and suggestions identified in these pages and others. *See* Bradley R. Brewer & Norman R. Solberg, *Corporate Minutes: What Should They Include?*, 20 Bus. Law 745, 751-752 (1964-1965). Directors would be trained in their orientations about their organizations' minutes policies and practices.

I'm thinking this is not an ideal world.