
A SPECIAL REPORT FROM THE NON-PROFIT LEGAL & TAX LETTER®

NON-PROFIT LEGAL GUIDE TO MEETING MINUTES

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Summary: Minutes of Board meetings and other key committee meetings should be drafted with care and deliberation. Poorly or hastily written minutes can be harmful to an organization in the event of litigation or government investigation, but well crafted minutes not only avoid harming the organization, but can actually be highly beneficial.

INTRODUCTION

When the Internal Revenue Service began its just recently concluded investigation of the National Association for the Advancement of Colored People (NAACP) in October 2004 based on charges of improper political activity, one of the very first document requests by the IRS was for minutes of NAACP Board of Directors and Executive Committee meetings. This, in fact, was to be expected. Whenever a non-profit organization is named in a lawsuit or is the subject of an investigation – whether the opposing party is a private litigant, the federal government, or a State attorney general – the minutes of Board and other meetings are sought and closely scrutinized.

Indeed, the Internal Revenue Service Manual¹ itself provides the following instruction to examining agents:

- The minute book [of an exempt organization] usually provides a summary of the activities conducted during the year. A review of the minute book may also give an

indication of the thinking and intent of those controlling the organization.

- [When reviewing minutes], do not confine your review solely to the taxable year under examination. Cover at least some of the tax years immediately before and after. Expand your review as circumstances warrant.
- Review the minutes of any committees that maintain separate minutes.

STRATEGIC DRAFTING OF MINUTES

Probably the best example of how the drafting of minutes can harm, or help, an organization embroiled in a legal dispute involved a lawsuit against the members of a Board of Directors in which the Board members were accused of negligence in approving a top executive's employment agreement and compensation package.

The plaintiffs alleged that the Board members approved the contract without having sufficient knowledge of its terms and used as evidence Board minutes which seemed to indicate that the Board spent very little time considering the arrangement. As stated by the Court:

The minutes of the meeting were 15 pages long, but only a page and a half covered [the executive's possible employment]. A portion of that page

¹ Exempt Organization Examination Guidelines, Part VII, Section 7.8.1, Chapter 1

and a half was spent discussing [a different topic]. According to the minutes, the Board did not ask any questions about the details of [the executive's] salary, stock options, or possible termination. The Board also did not consider the consequences of a termination, or the various payout scenarios that existed. Nevertheless, at that same meeting, the Board decided to [hire the executive].²

This case, and others like it, demonstrate the importance of crafting minutes that can be used as evidence that a Board at all times acted appropriately and in particular gave important issues due consideration. While it is not necessary, and is in fact ill advised, to have minutes that resemble a transcript, key phrases such as, "after a lengthy discussion" or "following much deliberation" can be quite useful.

Other steps include:

- Summarize or cite reports and other information provided to the Board, and attach copies to the minutes.
- Describe alternatives considered by the Board in reaching major decisions, as this demonstrates diligence.
- Be careful about word choice; e.g., "discussion" is preferable to "argument," and saying the Board reached a "compromise" might suggest they made a poor decision for the sake of placating a particular faction. Of course, inflammatory adjectives should be avoided altogether.
- Try to follow the same format or style of minutes for each meeting. A sudden change or aberration could

raise unnecessary suspicions as to why the routine was not followed with respect to a particular meeting.

Finally, a person serving as counsel to, or an executive of, a non-profit organization in attendance at a Board meeting, who notices that the Board is not giving sufficient attention to a matter, may wish to raise even obvious issues or ask basic questions simply to have them, and any ensuing discussion, reflected in the minutes.

BASIC CORPORATE LAW RULES

Most state statutes require non-profit organizations to maintain minutes of Board of Directors (as well as membership) meetings. A typical statute will require that each non-profit corporation "shall keep minutes of the proceedings of its members, Board of Directors and committees having authority of the Board of Directors."

Of course, there are also very practical reasons to maintain minutes of Board meetings, the most basic of which is to have a written record of actions of the Board. In fact, the purpose of minutes of a corporation is to transcribe into permanent and official form the actions at a Board of Directors meeting.³

Minutes are also used to prove what action was, in fact, taken by a Board of Directors. Corporate minutes are prima facie evidence of the proceedings that transpired at a meeting and are admissible in a court proceeding as such evidence.⁴

Other evidence also can be introduced to rebut what is contained in the minutes in order to prove that the minutes do not reflect what in fact occurred, but the burden is on the person attacking the minutes to prove that they are incorrect.

³ Chapin v. Cullis, 299 N.W. 824 (Mich. 1941)

⁴ Phoenix Finance Corp. v. Iowa-Wisconsin Bridge Co., 16 A.2d 789 (Del. 1940); Santa Fe Hills Golf & Country Club, 349 S.W.2d 27 (Mo. 1961)

² In re Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003)

Minutes are also important to prove that a meeting was valid. For example, if someone challenges the validity of an entire meeting on the basis of a lack of a quorum, such a challenge may succeed if the minutes do not explicitly state that a quorum was in fact present.⁵ Also, if an action by the Board is not recorded in the minutes, that action may be voidable.⁶

While minutes can be signed, such as by a secretary, they need not be.⁷ In addition, a Board has the discretion to amend or correct minutes in order to ensure that they accurately reflect the facts.⁸ Standard practice among non-profits is for minutes to be prepared sometime after the meeting and then have the minutes approved by the Board at a subsequent meeting. This is a well-accepted method of operation.⁹

It should be noted in this regard that voting to approve minutes is not tantamount to approving or ratifying the actions taken at the meeting in question.¹⁰ The approval of minutes simply acknowledges that the minutes accurately reflect what transpired.

It should also be noted that while minutes are prima facie evidence of what occurred, failure to include a certain matter or to reflect action taken

in written minutes does not invalidate that action, as it can be proven in other ways, such as testimony of individuals who attended the meeting, informal notes, etc.¹¹

One issue that organizations continually struggle with is the amount of detail that the minutes of a Board meeting should contain. Some minutes are very short, essentially reflecting only motions that were passed. This is sufficient legally, and has the advantage of brevity. At the other extreme, some minutes can look like an almost verbatim transcript of what transpired. Having some detail can be very useful under certain circumstances, for example, as stated above, if a Board wishes to demonstrate that it did deliberate at length with respect to a particular issue, or if a Board wishes to memorialize the fact that it granted due process to an individual subject at a disciplinary proceeding, or that the Board legally and adequately dealt with a conflict of interest situation; then minutes should be written to reflect that. But, as stated by one Court:

In recording the minutes of a director's meeting, the secretary, though under an obligation to keep the minutes faithfully, is not obligated to include everything that is said in the minutes as long as he accurately transcribes what has taken place.¹²

Another Court¹³ opined on the legal requirements with respect to what must be included in minutes as follows: "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. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary."

⁵ Lake Arrowhead Property Assoc., 100 S.W.3d 840 (Mo. App. 2003) (While "it is presumed that a quorum was present" nevertheless the "presence of a quorum must appear by satisfactory proof.... It is the duty of a corporation to keep a record of the minutes of [its] meetings.... Such minutes should show *the date when the meetings* were held and also who was present.")

⁶ Swain v. Wiley College, 74 SW2d 143 (Tex. App. 2002)

⁷ Cosfol v. Varvoutis, 213 A.2d 331 (Pa. 1965); Bank v. Brooklyn Hills Import Co., 74 N.Y.S. 1023 (A.D. 1902)

⁸ Brown v. Ramsdell, 249 N.Y.S. 387 (1931)

⁹ Whitley v. Pacific Industries, Inc., 283 N.Y.S.2d 525 (1967)

¹⁰ Colorado Mgt. Corp. v. American Founders Life Ins. Co., 359 P.2d 665 (Colo. 1961)

¹¹ Cameron & Willacy Counties Community Projects v. Gonzales, 614 S.W.2d 585 (Tex. App. 1981)

¹² Field v. Oberivortmann. 148 N.E.2d 600 (Ill. App. 1958)

¹³ Multimedia Publishing of North Carolina v. Henderson County, 550 S.E.2d 846 (NC. App. 2001)

Citing Robert's Rules of Order, the Court further stated: "Generally, the minutes should contain mainly a record of what was done at the meeting, not what was said by the members. 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."

From a practical standpoint, meeting minutes should include the following:¹⁴

- a. the date, time, and place of the meeting;
- b. the fact that proper notice was given for the meeting, or that notice was waived by the participants;
- c. whether the meeting is a special meeting or a regular meeting;
- d. the names of all attendees;
- e. whether or not a quorum is present;
- f. departures and re-entries of attendees;
- g. actions taken; and,
- h. upon request, Directors who vote in a negative or abstain on motions, a brief summary of reports given or reference to an attached written report.

ACCESS TO MEETING MINUTES

In addition to discovery in litigation and governmental investigations, it is important to bear in mind as well that most every state non-profit statute has a provision allowing for access of members to certain records of the organization. The kinds of records available vary under these laws, but generally include minutes of Board and membership meetings.

¹⁴ See *Corporate Minutes: What Should They Include?* Brewer and Solberg, 20 Bus. Law. 745 (1965). See also, *Lake Arrowhead Property Assoc.*, 100 S.W.3d 840 (Mo. App. 2003) (While "it is presumed that a quorum was present" nevertheless the "presence of a quorum must appear by satisfactory proof.... It is the duty of a corporation to keep a record of the minutes of [its] meetings.... Such minutes should show *the date when the meetings* were held and also who was present.")

In addition, under many statutes, the member seeking the records must have a "proper purpose" for doing so. Courts have defined this term rather broadly, evoking it to block a request for access to records only when it appears that the member wishes to use the information to the detriment of the organization (such as to form a competing organization); to gain a commercial advantage (e.g., by using the membership list to market a product or service); or simply to engage in a harassment campaign of the organization.

One of the basic purposes for wanting to inspect the records of an organization is to ensure that the organization is acting in a manner consistent with its non-profit and, if applicable, its tax-exempt purposes. Other general purposes found to be proper include concerns about mismanagement and specific improper transactions.

In one case,¹⁵ certain former members of a non-profit organization who had been deprived of their membership rights when the organization's bylaws were amended, were permitted to inspect minutes of certain committee meetings relevant to the adoption of those amendments, and were entitled to a current membership list so that they could communicate their concerns to other members. The overall purpose of the request for the documents was to assist in an effort to repeal the bylaw amendments, and, the Court held, that is a proper purpose.

CONCLUSION

Meeting minutes, especially those of Board meetings, can be a useful weapon in connection with any legal proceeding against, or investigation of, a non-profit organization. Since the organization itself prepares those minutes, the organization can ensure that the minutes are a useful, rather than a harmful, weapon.

¹⁵ *Carapico v. Philadelphia Stock Exchange*, 2000 Del. Ch. LEXIS 137