

# Best practice in drafting board minutes: In brief

February 25, 2020

## Introduction

This Insight provides a high-level discussion with respect to the basic content required in all minutes, including a discussion on the level of detail that should inform the content of minutes, and the five best practices that drafters of minutes should keep in mind each time they document a board of directors meeting.

Every corporation, regardless of jurisdiction, is required to keep a record of their directors' meetings. However, there is minimal guidance in the applicable legislation as to how minutes should be kept, including what information should be recorded and at what level of detail.

## Include basic/required information

At a minimum, certain basic information should be included in every set of minutes. As a best practice, it is recommended that the corporation/corporate secretary create a meeting minute template that sets out this basic information at the top of each set of minutes. The substantive content of the meeting can then be recorded underneath the introductory template.

This template may look like the following:

<b>Corporation:</b>	
<b>Type of Meeting:</b>	[Is this a regular meeting of the board, special meeting, etc.?)
<b>Meeting Date/Location:</b>	
<b>Start Time:</b>	
<b>End Time:</b>	
<b>Meeting Chair:</b>	
<b>Meeting Secretary:</b>	
<b>Meeting Materials:</b>	[Generally describe the meeting materials / board packages prepared prior to meeting and when distributed.]
<b>Directors (Present):</b>	
<b>Directors (Regrets):</b>	
<b>Quorum:</b>	[Describe how the quorum requirements are met, with specific reference to the quorum requirements in the constating documents.]
<b>Attendees:</b>	[Describe any non-director attendees, with title.]

Minutes should also accurately reflect when any director joins or leaves the meeting currently in progress. Not only does this information impact quorum, having an accurate picture of attendance is critical if there are decisions/resolutions being passed at the meeting. Minutes typically state whether a motion/resolution was unanimously approved (or denied), and there should be written evidence of when an individual did (or did not) participate in a decision/resolution, because they were (or were not) present at the meeting.

## Level of detail

In general, there are two approaches to taking minutes: the detailed approach and the minimalist approach.

On one hand, the detailed approach endorses an almost transcript-like record be taken of the meeting. The theory behind the detailed approach is that the meeting record may support a due diligence or “Business Judgement Rule”<sup>1</sup> defence. Detailed minutes can evidence the fact that directors considered all issues and courses of action in their decision making process. On the other hand, a minimalist approach to taking minutes may be adopted in the rare case minutes need to be produced in the context of litigation. As a rule, minutes are not protected from the production and discovery in the litigation process. If minutes need to be produced, there is a risk that the minutes may be misconstrued if reviewed out of context during the litigation process.

Both the detailed approach and the minimalist approach to taking minutes have their advantages and disadvantages. It is unlikely that a corporation can foresee which method will ultimately lead to a better result over the course of time. Instead of debating whether a detailed or minimalist approach should be taken in drafting minutes, minutes should instead be of a length and detail that reflects an accurate summary of what occurred at the meeting. Minutes should reflect the directors’ deliberations and act as an accurate record of discussions and decisions on material issues.

With the uncertainty that surrounds the content of minutes, there are a handful of best practices that ensure minutes comply with good corporate governance.

## Best practice in drafting minutes

### 1. Objective

Minutes should: (i) be a record of discussions and decisions made by the directors on material issues; and (ii) provide directors with protection against certain liabilities by providing a written evidentiary record.

### 2. Deliberative process

Directors who fail to meet their fiduciary duties or general duty of care to the corporation, may be found liable for such failure.

Minutes are one of the most reliable sources for determining whether directors have met this duty of care or fiduciary obligation. Minutes should not only document decisions made, they should also document what considerations went into the making of those decisions. By demonstrating that directors considered all relevant issues prior to making a decision, they are evidencing the Business Judgment Rule<sup>1</sup>.

While minutes must be sufficiently detailed to evidence the deliberative process, caution must also be taken to not record a complete minute-by-minute “transcript” of the meeting. If minutes are so detailed that every consideration and discussion point was recorded, then those detailed minutes may be used as evidence of what considerations were NOT taken into account by the board; creating a liability instead of an asset.

Quality minutes, which properly document the deliberative process, can help directors prove they have met their

fiduciary obligations to the corporation, and have met the test of the Business Judgment Rule. On the other hand, inadequate or deficient minutes deny the directors the ability to defend their conduct and decision making process. All the same, one should remember that minutes do not need to be overly detailed to evidence that the directors considered all of the relevant issues before making a decision.

Consider this sample resolution as a best practice:

#### Award of Services Contract

The Board reviewed the materials provided to it, including the recommendation of the Vice-President of Operations and the Health, Safety and Environment Committee. Specific reference is made to Board Report X, set out in the Meeting Materials. Following a thirty-five minute discussion, which included the Board's consideration of various alternatives, as well as management's confirmation that the alternatives were explored, and the associated costs and savings set out in the Board Report X were verified, UPON MOTION duly proposed, seconded and carried, it was resolved that:

- a. The President of the Corporation be and hereby is authorized to select, through a competitive process, a supplier of services for the Corporation, and to enter into a contract with that supplier for the provision of such services in a value not to exceed \$10 million, on terms and conditions that she deems advisable.
- b. Any director or officer of the Corporation be and hereby is authorized to execute and deliver on behalf of the Corporation such agreements, documents, and other writings to take such actions as he/she considers necessary or desirable to give effect to the foregoing resolutions.

### 3. Maintaining privilege

Any legal advice provided in a directors' meeting, whether from general counsel, in-house counsel or external counsel, should be treated with great care. Discussions that are subject to legal privilege should not be documented in the minutes. Instead, the minutes should reflect that the directors participated in a privileged discussion with legal counsel and only the general subject matter of the discussion should be reflected.

The meeting secretary should be familiar with the different types of privilege to ensure that minutes are properly redacted or appropriately general:

- Solicitor-client privilege: Protects communications between a lawyer and a client, made for the purpose of seeking or giving legal advice, that are intended to be confidential.
- Common interest privilege: Allows separately represented parties with common legal interests to share information with each other and their respective lawyers without destroying the solicitor-client privilege.
- Litigation privilege: Protects any documents or communications between a lawyer, his or her client, or a third party, which were originated for the dominant purpose of preparing for existing or anticipated litigation.

### 4. Documenting dissent

Well-drafted minutes will specify the decisions of the directors, which would include directors who abstained or recused themselves from voting due to a conflict of interest. With respect to director dissent, some commentary warns against documenting dissenting director's votes when there is no regulatory requirement to do so.

A director that is present at a board meeting is deemed to have consented to any decision/resolution passed at such meeting. Generally, it is unnecessary for the minutes to specify which director asked a particular question or had a particular concern. Specifically highlighting a director's dissent may erode the integrity of the board, or make that director a potential target for a plaintiff's litigation. Once the directors pass a decision/resolution, the directors may

strategically want to present a united front in respect of that decision/resolution, regardless of the dissent.

However, a director who wishes for their dissent to be documented in the minutes must be accommodated. A director has the right to shield themselves from liability associated with the decision/resolution by relying on the minutes evidencing their dissent.

## 5. Review / approval process and document retention

The meeting secretary should draft and circulate the minutes to the directors as soon as possible after the board meeting. Timely drafting and circulation will help minimize any confusion or uncertainty over what transpired at the meeting. Each director should ensure he or she make a genuine effort to promptly review and comment on the minutes; critical and careful review is necessary prior to approval of the minutes.

Minutes, once approved, should be the only written documentation evidencing the meeting. Source notes of the meeting secretary, directors or attendees, should be destroyed following the meeting. Retaining these notes may create an alternative record of the meeting, and such evidence may challenge the accuracy of the formally documented minutes.

For more information, please contact Courtney Burton or another member of Dentons' Corporate group.

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1. The presumption that in making a business decision, the individuals acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the corporation.↩

## Your Key Contacts



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