FPLG: BLOG

Nonprofit Corporate Minutes: What Not to Do

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Let's say there's a contest to find great examples of nonprofit corporate-meeting minutes.

Well …. There are some sure-fire ways to make sure you *don't* make the cut. The experts we cited in *Breach of Duty by Ogling the Doughnuts* and *Fun Facts About Corporate Minutes* offer useful tips for avoiding common mistakes and trouble spots.

Failing to Document Quorum

Simply put, if there is no quorum at a meeting, it cannot lawfully proceed. Any purported votes or action taken will be null and void.

On the other hand, if a quorum *is* present, but the corporate minutes don't make that fact clear, that's a problem, too. More often than not, the corporate secretary will write nothing more in the corporate minutes that "[t]he meeting was called to order." There is no additional detail: no information specifically identifying it as a meeting of the board of directors, no mention of how many directors constitute a quorum, no list of those present for the meeting.

How that becomes a problem is if – at some later date – there is a challenge to an action taken at that meeting. The objection may come from a dissident board member, or a dissatisfied or injured employee, or a third party. The lack of a clear and definitive statement establishing the presence of a quorum at the beginning of the meeting that continued through to adjournment can work to the advantage of the person challenging the legitimacy of the entire proceeding.

Failing to Timely Draft, Circulate Proposed Minutes

More often than not, when a board meeting is adjourned, the notes for the meeting minutes are put in a file folder and set aside. Then, just before the next meeting, those notes are grabbed and written up quickly as "formal" minutes. The directors take their places at the conference table and,

while selecting from an assortment of delectable pastries, hastily skim the document. The perfunctory motion to accept the minutes is made, seconded, and unanimously approved.

This is bad practice for several practical as well as legal reasons.

First, memories quickly fade about exactly what was said and done at a particular meeting. Busy professionals juggle multiple commitments. Any significant delay between a board meeting and the first review of a draft set of minutes can result in spotty – and faulty – recollections. This creates doubt about whether the later-approved minutes represent the true and correct intent and actions of the board.

Second, government regulators including the Internal Revenue Service consider any significant delay in drafting and approving meeting minutes a failure of proper governance and an indication of possible bigger problems with how the organization is run. The revised Form 990 asks in Part VI, Section A, Question 8, whether there is contemporaneous documentation of the full board and committee minutes or written unanimous consent for the actions taken. Contemporaneous means the "later of (1) the next meeting of the governing body or committee (such as approving the minutes of the prior meeting) or (2) 60 days after the date of the meeting or written action." While there's no penalty for failing to meet this requirement, this deficiency, especially if chronic, can be a red flag for these government officials. And because the Form 990 is a public document, this omission may be an issue of concern for others as well: grant-makers, major donors, and the general public.

Failing to Use Uniform Format

Having a book of minutes that is substantially inconsistent in level of detail from one meeting to the next can create suspicions, even when there are no real grounds for these doubts or concerns. Consider this example: an organization's February board-meeting minutes are full of detail even though the directors discussed only relatively minor, routine matters; the May minutes are sketchy although the board voted to approve a substantial raise in the executive director's salary after careful discussion and deliberation. The sloppily drafted May minutes could create the false impression that the board members did not perform due diligence or exercise their fiduciary duties adequately.

The better practice is to adopt a uniform "template" and guidelines for the organization's minute-taking practices and procedures. That doesn't mean the format can't be improved over time, but sudden changes or erratic an uneven practices may signal problems. Any deviation from an established and consistent format should be justifiable, rather than haphazard or inadvertent.

Failing to Include Details

While some commentators suggest that a "minimalist" approach is an acceptable method of writing corporate minutes, that practice is likely insufficient in today's climate of regulatory scrutiny and reasonable expectations by an organization's funders or supporters for transparency. Minutes that are too brief, and lack sufficient detail to support the reasons for significant corporate actions, may do a serious disservice to the organization … and give fodder for disgruntled insiders or others.

The Walt Disney case that we described in *Breach of Fiduciary Duty by Ogling the Doughnut*s is a good example. Members of this for-profit corporate board were sued for breach of duty for negligently approving a key executive's employment contract and compensation package. What was the smoking-gun evidence in this lawsuit?: Insufficient board-meeting minutes. The judge ruled for the plaintiff and against the Walt Disney Co. because the minutes demonstrated too little discussion and consideration of a corporate decision of such importance and involving a great deal of money.

This case, and others like it, demonstrate the importance of crafting minutes that can be used as evidence that a board of directors acted appropriately at all times and gave due consideration to its decisions and actions.

Failing to Omit Sensitive Material

Since there's often a valid exception to every rule, keep in mind that there are certain categories of information – confidential, harmful, or sensitive – that should *not* be disclosed in full in the corporate minutes.

For instance, discussions protected by the attorney-client privilege are not disclosed in the minutes in the same way as ordinary business in a corporate meeting. There are any number of good reasons why legal counsel may be present at a board meeting; indeed, many in-house counsel regularly attend these events. The corporate secretary should make note in the minutes that counsel was present and a privileged discussion took place. One suggested format is: "A privileged discussion between the board and legal counsel for the corporation, Jane Doe, Esq., then occurred and for which separate privileged minutes were taken."

Failing to Have Document-Retention System

Section 501(c)(3) organizations should have a formal document-retention system as well as a policy under which it keeps certain official documents permanently. These include: the IRS application for exemption (Form 1023); the IRS determination letter (notice of tax-exemption granted); the Articles of Incorporation; the Bylaws; and corporate-meeting minutes.

That fancy, gold-embossed, loose-leaf binder your organization has had since its start-up days is a lovely memento for a bookshelf but doesn't cut it as an adequate document-retention system in the electronic age. There should be multiple certified copies (when available) as well as additional copies for reference, digitized or cloud-based for quick and easy retrieval – tomorrow or ten years from now.

Conclusion

These "what-not-to-do" rules are helpful to reinforce the common theme throughout our series of posts on corporate minutes: They are not just quaint formalities or meaningless customs. As the "official record" of the organization, they serve multiple, significant purposes for a variety of audiences.

An often overlooked function of the minutes is as a coherent and consistent "history" of the organization for reference use by its future boards of directors.