

10 Secrets Directors Must Know About Minutes

What puts you at risk and
how to protect yourself from
unexpected liability



Governance Studio

Table of Contents

Secret	Page
Chapter 1 – Defense and Duties	
Your first and best defense	1
Proof of due diligence	2
Proof of fiduciary duty	3
Chapter 2 – The Devil is in the Details	
Short is not so sweet	4
Long is as bad as short	5
Goldilocks had it right	6
Chapter 3 – YOUR Minutes Must be RIGHT	
The minutes are yours	7
Accuracy is everything	8
Chapter 4 – The Kickers	
Directorship is a team sport	9
Hoisted by your own petard	10

Already knowing most of these secrets is an excellent start – do not let the one you haven't heard trip you up.

Chapter 1 – Defense and Duties

#1 – Your first and best defense

Under law, minutes are considered *prima facie* – on the face of it – evidence. Minutes prove that a meeting took place, who attended, what was discussed and what was decided.

That means, if it ever comes down to a courtroom, the other side has to prove the minutes are not correct. If they cannot prove the minutes are incorrect or likely to be inaccurate (check out page 8), the judge will take those minutes as proof of exactly what they state.

It's like using a simple piece of paper as a suit of armor. To make sure your first line of defense is your best defense, read on.

Chapter 1 – Defense and Duties

#2 – Proof of due diligence

Well-crafted minutes ensure you are protected by demonstrating that you were duly diligent when making Board decisions. As a director you have a duty to act as a reasonable person would in similar circumstances (the duty of care).

To be duly diligent means that you were provided with sufficient information from a reasonable source to make a decision and then it was discussed and considered before a decision was made.

Great minutes demonstrate that those reasonable discussions occurred and that a reasoned decision was made by the Board.

Great minutes are also backed up with a full record of information provided to the Board for the meeting. Everything that got sent with the notice and anything provided before or during the meeting.

Chapter 1 – Defense and Duties

#3 – Proof of fiduciary duty

Your second key duty as a director is to act in the best interests of the organization (the fiduciary duty).

The same well-crafted minutes that prove your duty of care, also show that you are carried out your fiduciary duty to the organization.

The minutes need to document not just the decisions, but the process in getting to Board decisions.

The minutes should also include the results of the vote (were they unanimous), any dissenting votes and indicate the processes followed if there was a conflict of interest.

Chapter 2 – The Devil is in the Details

#4 – Short is not so sweet

Many organizations, through their corporate counsel, take the view that the less you include in the minutes, the better. Or, simply, unless it is required by law, don't put it in the minutes.

The reasoning is that you give a litigator less ammunition. However, what results is a style of minutes that shows the decisions, but not the process of getting to the decisions.

You, as a director, can be liable for not appropriately carrying out your duty of care because the minutes make zero reference to process and discussions.

If the pendulum at your organization has swung too far to the “less is better” side, ask that future minutes be adjusted to better protect all of the directors.

Chapter 2 – The Devil is in the Details

#5 – Long is as bad as short

The other side of the coin – minutes that are nearly verbatim – are just as bad and minimalist minutes.

When each question asked and answered is set out in detail and who was speaking is identified, it provides a litigator with an enormous amount of freedom to cross-examine every director and ask why none of you asked the “right” question – the question that would have changed the outcome of the decision.

Unless your organization is required by law to keep full transcripts (perhaps a government or municipal organization), ask that the minutes be “right-sized” (check out page 5 for more on this) to protect the Board.

Chapter 2 – The Devil is in the Details

#6 – Goldilocks had it right

Sometimes answers are found in the simplest principles – not too hot, not too cold or, in the case of minutes, not too long, not too short.

Getting the right balance is as much an art as it is a science. Ensuring your corporate secretary has the resources and training to strike the right balance is definitely in your best interest.

Great minutes provide brief context for decisions – what is being decided and the information the Board was given about the decision. They highlight the key areas discussed by the Board and reviewed with management before the decision was made.

Additionally, great minutes will include major commitments management makes to the Board (like agreeing to holding meetings more frequently, for example).

Chapter 3 – YOUR Minutes Must be RIGHT

#7 – The minutes are yours

Board minutes are exactly that – a record of what occurred at the Board meeting.

Board minutes are not a record of what the management team thought you should hear or what they wish they had said. Rather, the minutes should reflect the directors' view and discussions on the decisions being made.

One way to help ensure the minutes are a proper record for the Board is to read them. If you find discrepancies or errors, make sure they are corrected before the minutes are approved.

The minutes are your armor and they cannot protect you if you don't know what is in them. If they are so long that you do not want to read them, I can be almost certain that they are too detailed.

Chapter 3 – YOUR Minutes Must be RIGHT

#8 – Accuracy is everything

There is no slippery slope with minutes – there’s just a big cliff and either you fall off or you don’t. If one set of minutes is not accurate, every set of minutes is suspect. So accuracy isn’t the only thing – its everything!

Perhaps management has included something that you know was not discussed, because they meant to bring it up. Or a resolution is shown as being passed, when it was missed. It seems innocuous at the time, but it can come back to haunt you.

A case is brought against the directors for breaching their duties, maybe alleging a project was approved without appropriate due diligence. The minutes indicate a robust discussion, so the evidence is there to protect you.

The litigator asks the Corporate Secretary, under oath, if the minutes are always 100% accurate. If just once, there was something, however tiny, amiss – the Corporate Secretary must tell the truth.

Instantly, every set of minutes becomes suspect and your suit of armor is more than just dented. If some tiny item was “cleaned up”, how can anyone believe the minutes weren’t “fixed” to reflect better on the directors on a big item?

Chapter 4 – The Kickers

#9 – Directorship is a team sport

Decisions are made by the Board as a whole (except where there are delegations made to a committee or an individual).

It does not add to your defense to single yourself out in the minutes, by having your name noted every time you speak. More likely, it shines a spotlight on you and leaves you vulnerable. Getting your name in the minutes is not just unimportant, it can be downright risky.

It is better to adopt the approach that people providing reports (such as Committee Chairs) are identified, but that other topics are shown as overall board discussions, staying away from any “he said, she said”.

Chapter 4 – The Kickers

#10 – Hoisted by your own petard

This is the one that you may not know and it will probably annoy you. Ready?

Get rid of your notes! ALL of them! Not right after the meeting, but right after the minutes have been approved (usually at the next meeting). Bring up any concerns you have about the draft minutes and have them addressed through amendments or corrections so, at the end of the day, there is only one true and final set of minutes.

Here is the problem: all your notes are discoverable evidence that a litigator can use to “prove” the minutes are incomplete or inaccurate. They might contain unrelated margin notes, like “Cr*p!” – which you scribbled when you remembered it was your job to arrange an after school ride for the kids. That comment will seem much more incriminating if it happens to be on the page asking for approval of the project that sank the company.

The litigator will have a field day asking about how that comment was related to the project and you may not remember ten years later what it was really about.

Keep your armor in tip-top shape: make sure you read all the minutes, make sure they are accurate, then shred your notes as soon as the minutes are approved.



Sylvia Groves, FCIS, Acc.Dir.

President, Governance Studio

Adding Value to Every Seat at the Boardroom Table™

Ms. Groves, a self-proclaimed “governance nerd”, believes in the power of transparency, diversity, and continuous improvement to add value. She created Governance Studio from her award-winning work with one of Canada’s foremost governance leaders. Directors and Corporate Secretaries from all sectors appreciate working with Sylvia to enhance organizational governance. Listening to each client’s unique needs, she applies her decades of expertise to build the right program for each organization. “To be effective, governance has to fit the company and its culture,” notes Sylvia.

She is the author of the highly acclaimed book: *AAA+ Minutes™ – The Three Must-Do Fundamentals And 100s Of Practice Tips For Writing Minutes That Protect Your Organization And Its Directors*. She is a fellow of the Chartered Governance Institute of Canada and received the 2014 Excellence in Governance Distinguished Contribution Award from the Governance Professionals of Canada.



AAA+ Minutes™ is the ultimate guide to writing thoroughly modern minutes that save your time and your sanity!

Learn how to...

- *Protect your organization and directors*
- *Apply the three must-do fundamentals*
- *Avoid the biggest minute-writing mistakes*
- *Use IOOs of practical tips and ideas*

“AAA+ Minutes™ is a must-read for any director, corporate secretary, officer, or advisor – of any board in any jurisdiction – concerned with preserving reputation, establishing diligence, and documenting and defending actions and decisions taken.”

Dr. Richard Leblanc, Professor of Governance, Law and Ethics, York University, Toronto

“Sylvia Groves has demonstrated her divine status once again by writing a book that is as clear and straightforward as her advice – and as the minutes she would have us write.”

Robert B. Lamm, former Assistant General Counsel and Assistant Secretary, Pfizer Inc., New York

Visit www.GovernanceStudio.ca/shop to get your copy.