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Board Practices in the Digital Era: Using Corporate Governance to Maximize the Benefit-to-Cost Ratio of Information Technology

By Leo E. Strine Jr. and Laura A. McIntosh

Virtual capabilities and electronic documents are double-edged swords.

I. A Practical Approach to the Role of Digital Technology in Governance

Modern information technology can markedly improve the efficiency and quality of the deliberative processes of corporate boards of directors. Yet, if used imprudently, the same technological capabilities can reduce the quality and integrity of corporate decision-making, potentially exposing a company and its directors not only to greater litigation costs and risks, but also to serious reputational harm.

Regrettably, rather than evolving to keep pace with technological developments, corporate governance practices often involve an admixture of obsolete past approaches and ad hoc new ones, a combination that underutilizes the potential benefits of technology and increases its potential risks. In this article, we look in particular at two types of board-level practices that should evolve to take into account technological developments:

i) Board information policies involving (a) the transmission to and use of information by the board of directors and (b) the documentation of action taken by the board and board committees; and

ii) Board meeting practices in the wake of the COVID-19 pandemic and the ubiquitous use of virtual web-conferencing platforms to conduct director meetings remotely, rather than in person.

These two topics are related. A regular diet of virtual meetings puts pressure on board information policies and requires directors and managers to be selfdisciplined in their focus and engagement. The efficiency advantage can be undermined by director and manager inattention and unproductive online interaction. An overreliance on virtual meetings can also lead to insufficient in-person time for the board and key managers to meet and develop the chemistry and expectations for information flow that are vital to a successful company's governance.

This article is not intended to be theoretical, but intensely practical. In Section II, we briefly highlight the typical board practices that prevailed in the latter half of the 20th century and detail some key changes in board practices during the 21st century that resulted from the confluence of improved information technology and substantive corporate governance developments. Using that context, we pivot in Section III to specific recommendations for affirmative steps — "do's" — that companies could take to improve their board information policies, positive steps that imply certain actions to avoid — "don'ts" — that we set forth in correlative footnotes. From there, we turn to recommending evolved "do's" for board organizational, calendaring and meeting practices and highlight certain "don'ts" in this important and understudied area. We conclude by explaining how these "do's" fit together to facilitate informed and efficient board decision-making and the creation of an appropriate record that credibly documents the basis for corporate action by the board of directors.

II. The Impact of a Generational Shift in Boardroom Practices

Most of the architecture used for board documentation practices was developed long before the internet era and well established by the latter half of the 20th century. Before word processing, email and other technology made the transmission and production of written information so easy, preparing and reproducing documents was time-consuming work, and materials were transmitted and read in hard copy. In sensitive areas like the delivery of legal advice, privileged attorney-client communications were put in a memorandum or, most commonly, formal opinion form. Management, along with financial advisors and other experts, also provided decision-useful information to the board in a formal, written fashion. Directors received couriered packages of this information and reviewed it in preparation for upcoming board meetings. Directors would then travel to the board meeting with all this printed information. Because creating and distributing written information was expensive and labor-intensive, board communications were not treated lightly, and the materials sent to directors tended to be pointed in style and substance. And because of delivery logistics, board packages had to be sent well in advance to reach the directors, or information had to await the board's arrival on site.

Consistent with these analog realities, when boards of directors took action, corporate formalities were observed in traditional fashion. Proposed resolutions were circulated in paper form. Conversations among directors took place primarily in person at board and committee meetings, or on special conference calls, and that was also true of most management-board communications. Email did not exist, and even when it first came into use, many companies rightly discouraged digital board-level communications via this more spontaneous and therefore often less carefully drafted medium. In particular, it was unusual for individual directors to exchange written communications with each other without involving the full board and senior management. To the extent individual directors did communicate on these matters between board meetings, they did so by telephone. Similarly, when there were important updates between board meetings, to the extent that a special telephonic board meeting was not needed, board members would generally receive either written communications provided to the full board or a telephone call from the CEO or the general counsel with an oral update.

Accordingly, in the pre-digital era, when companies faced discovery requests in litigation or a statutory books-and-records request, the documents they had to produce were confined to a limited universe. In responding to a books-and-records request, the company typically had to go no further than board minutes, resolutions, financial statements and communications with shareholders: the iconic "books and records" to which statutes like 8 Del. C. § 220[1] speak. Even in litigation, where a broader scope applied, the documents that company custodians controlled were limited and tended to be organized and stored in formal filing systems. In certain high-stakes matters, documents with notations made by management or directors would emerge, but these were usually not large in volume. And because of the formal approach taken, it was easy to identify which documents were legitimately the subject of attorney-client or other privilege and to withhold or redact them, as appropriate.

The old-school formality of board documentation practices also manifested itself in board meeting practices. Boards met in person, and agendas and written materials were set in advance. Committee meetings were typically scheduled the day before the full board met, and the board would often dine with top management that evening. Telephonic meetings were not even statutorily authorized in Delaware until 1969[2] and remained rare until this century, except in M&A or crisis situations when more frequent meetings were required.

Before the 21st century, it was often the case that many directors tended to live in the same community as company headquarters, and it was easier to meet in person if needed. Boards had fewer independent directors and often included several members of senior management or their family members. These boards were sometimes referred to as “country club” boards because many of the directors belonged to an elite, interconnected group. For example, it was not unusual for a board to include a representative of the company’s lending bank or a partner from the company’s traditional outside law firm, both of whom might be pillars of the local community. This approach had some downsides, but it also meant that there were outside directors with regular access to important information, such as company leverage ratios and legal risks.

Fast forward to today. What’s happened?

Well, boards still have minuted meetings, and formal resolutions still typically record key board decisions. But much else has changed.

Most public company boards have at most one management director, generally the CEO, and the rest of the members are typically independent directors. Statutes like Sarbanes-Oxley and Dodd-Frank, Delaware law doctrines encouraging independent directors, and stock exchange rules have driven this market standard. Boards no longer include a representative of the company’s lender, who can be expected to have a weather eye on balance sheet risk, and most companies do not even have a regular lender.[3] Similarly, it is now rare to find a company’s outside counsel on a public company board, and outside counsel may not even be involved in most regular board meetings. Nor do boards have quasi-outside directors from firms with symbiotic interests (i.e., suppliers or customers). Instead, boards are populated almost entirely with independent directors who are selected mostly because they have no prior affiliation with the public company in any capacity, who hail from diverse parts of the country or the globe, and who have no special affiliation with the local community in which the company is headquartered. Generationally, directors tend to be near traditional retirement age or in the decade after it, and, because of the stock exchange rules' independence requirements, they are less likely to be active in the company's industry space. Many independent directors serve on several other boards (especially if they are retired) and spend the later period of their careers as professional independent directors. When CEOs or other active members of senior management are permitted to serve on other companies' boards, they are generally limited to sitting on a single public company board.

These 21st-century boards often do not receive paper copies of materials they are expected to read. Instead, these materials are put into an online board "portal," which can be updated continually until the board or committee meets. And because the portal can be easily populated with new documents right up until the meeting starts, it often is, unless the directors affirmatively demand otherwise. The board portal is sometimes the only means by which directors can receive and read written information. Many companies do not permit directors to print the materials or to mark them up and do not send directors written information in hard copy. By this means, these companies seek to tightly control how the board uses information. Indeed, at some companies, any written materials provided to directors at committee or board meetings are expected (or required) to be returned at the end of the meeting, and directors are often instructed to avoid taking notes or annotating (or even highlighting) documents.

At the same time, emails and text messages have become common means for directors and management to communicate with each other, and for members of the board to communicate, often in messages not seen by all directors or management. Emails are used to transmit information to boards in some situations, as well as to gather assent for action. Informal digital transmissions are also used by advisors and management to share substantive information. This information can include privileged information, such as legal advice, or sensitive financial information about, say, an active bidding situation. Because many directors use a single email address for personal and business correspondence, a director might receive communications from multiple boards at that address. And, in some cases, a director's email may be monitored by assistants or secretaries who have unfettered access to these communications.[4]

Board meeting practices have evolved, but to a lesser degree. Before the pandemic, most board and committee meetings were held in person, and directors were strongly encouraged to attend all of them, rather than participating by telephone. Typically, as in prior eras, the board would gather for a day of committee meetings and a dinner with some cross-section of the management team, followed the next day by the full board meeting. Per Sarbanes-Oxley requirements and stock exchange rules, the independent directors often meet separately from management in executive session. In some companies, the lead independent directors will often request that the executive session be the first to occur either before committee meetings or at the outset of the board meeting. But, traditionally, at companies where management sets the agenda, that executive session is often the last, after the full board meeting, at an hour when directors may be looking at their watches and focusing more on the logistical imperative of making their flights home.

Because of the increased expectations imposed by Sarbanes-Oxley, Dodd-Frank, and updated stock exchange rules, public company boards now tend to be more compliance-oriented, with mandated committees grinding through checklists on a regular basis.[5] These compliance items put stress on boards and management and sometimes bump up to the top of the board's queue issues that are less worthy of director attention. Checking governance boxes may not be as important as considering, for example, whether the company's core business strategy is sound, whether the company's key products or services are safe and valuable to consumers, and whether the company has a safe, fair and inclusive workplace and treats its employees and communities with respect. But legally mandatory issues must by definition be addressed. And these mandatory requirements also pressure management to provide the board with more information, and, with information technology reducing the cost and burden of more voluminous board distributions (if not their quality), incentives have grown to just "hit send" and for the amount of material sent to the board to substantially increase. Although analog technology imposed practical limits on the size of board and committee books, digital capacity is essentially unlimited. Unfortunately, too much information can be as problematic as too little. Even the most diligent and competent directors can be overwhelmed by vast quantities of digital information and have a hard time finding and focusing on the most important parts.

The vulnerabilities these less-than-ideal practices create have been exploited by activist investors and plaintiffs' lawyers. In situations where boards have lapsed into careless practices, and have conducted business by text and email, companies have been unable to produce a set of traditional board materials, such as minutes, management reports, and resolutions, to respond to books-and-records requests. Because the company in fact conducted its business by informal means, stockholders seeking books and records have convinced courts to grant access to electronic information such as emails and texts, and to enable activist investors — and potential future plaintiffs — running proxy contests to review a much greater volume of information with which to advance their arguments at the ballot box, to state a claim in court or to embarrass directors and management.

Moreover, because this information set is much broader and more informal in nature than the formal corporate documents of prior eras, it often contains stray comments, less than artfully crafted thoughts and, unfortunately, snark or sarcasm. These unprofessional asides may expose divisions within the board or management or, worse, suggest that decisions may have been made without adequate consideration of certain factors or may have been influenced by inappropriate considerations.

Later, in court, these realities can result in a perverse situation that might be seen as the worst of all worlds. On the stand, directors may have to testify that they never received hard copies of any key information, were not allowed to print documents, and were instructed not to take notes. In some cases, the company has failed to keep advisor presentations for all meetings (since, as a matter of course, they were shredded after board meetings) or to adequately keep minutes, and thus memory aids for the directors, managers, and advisors are lacking, leading to inconsistent recollections of key events. Companies that take this undisciplined approach also tend to lack rigorous practices for highlighting changes in key documents — such as financial advisor updates in M&A situations — leading directors to miss important developments and fail to adequately factor them in.[6] When confronted in court with a comparison by a competent plaintiffs' lawyer, this can lead directors to be flummoxed or to feel hoodwinked by their own management and advisors. At the same time, these directors may also face cross-examination about text messages, emails and other electronic discovery that they or their colleagues created, often many months in the past. Compounding the confusion, many directors who are near retirement age do not have a natural facility with information technology and digital communications.[7] They thus could appear before the court as fiduciaries whom management did not trust with information (and were thus managed by management rather than the other way around) and who formally preside over a C-suite that engages in serious business over text messages and emails (communications that, in addition to other shortcomings, are vulnerable to being hacked).

Discovery of digital records enables skillful plaintiffs' lawyers to ferret out directors who do not pay adequate attention, or who like to send funny texts or emails during meetings to colleagues. By focusing on what directors were and were not doing electronically, it is increasingly possible to show that a director does not spend much time in the board portal, but spends a lot of time during board meetings sending messages and browsing the internet for reasons that have nothing to do with company business.[8] It is also increasingly easy and common for discovery to expose divisions within the board and management through the revelation of snide emails that allies send to each other about those with whom they differ, either persistently or just on that particular day.

The presence in each director’s and manager’s hand of a potentially distracting device that can create a full record of its use is made all the more dangerous by telephonic and web-conference meetings over virtual meeting platforms. If two directors are sitting next to each other in a boardroom, one might lean over to the other and whisper a comment in his or her ear; in a virtual meeting, this oral communication is often replaced by an email, text, or virtual chat, which is captured as a discoverable part of the deliberative record.

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Although the human temptation to multitask at any long meeting is enormous to begin with, it becomes nearly irresistible when it is possible to do so without being seen by the other meeting participants thanks to the virtual nature of the meeting (especially when board meetings are held by conference call). This is particularly the case if management and other presenters regularly use PowerPoint presentations and other approaches that limit real deliberation by turning the directors into passive observers, a technique known in the military as “hypnotizing the chickens.” With online meetings, there is also the risk that the meetings are being captured in full in a discoverable way[9] and, moreover, that the precise timing of the meeting can be matched to what directors were doing with their smartphone or tablet when they were supposed to be focused on the board meeting.

Poor board meeting and organizational practices can compound these risks. In recent cases, companies that had rote risk management structures have been embarrassed by their failure to manage mission-critical business issues that caused harm to customers, undermined the company’s reputation, exposed it to legal sanctions, and resulted in adverse effects for the company’s main customers as well as the company’s stockholders.[10] Rather than using technology’s potential to make the most of scarce director time, board calendaring and committee structures have tended to just add more tasks and committees on top of pre-existing practices. Directors would benefit from taking a fresh look at how to most effectively organize the board’s use of time, giving priority to the most critical issues confronting the company’s sustainable profitability, its impact on key stakeholders, and its reputation.

The recent spate of *Caremark* complaints that have survived motions to dismiss shows companies in diverse industries sharing a common theme: the misallocation of responsibilities and time. The targeted companies tended to put the most important tasks of compliance and risk management into the audit committee and failed to set up structures that ensured adequate time for board members with relevant industry expertise to focus regularly with key company officers on the companies' most important industry-specific issues.[11] And even when boards were able to win dismissal of a *Caremark* claim for lack of adequate oversight, the companies and their directors had usually already suffered regulatory fines, financial losses and reputational injury.[12] It's also important to note that although board oversight liability has drawn substantial attention in recent years, it is not a recent phenomenon; courts long have allowed legitimate *Caremark* claims to survive motions to dismiss.[13]

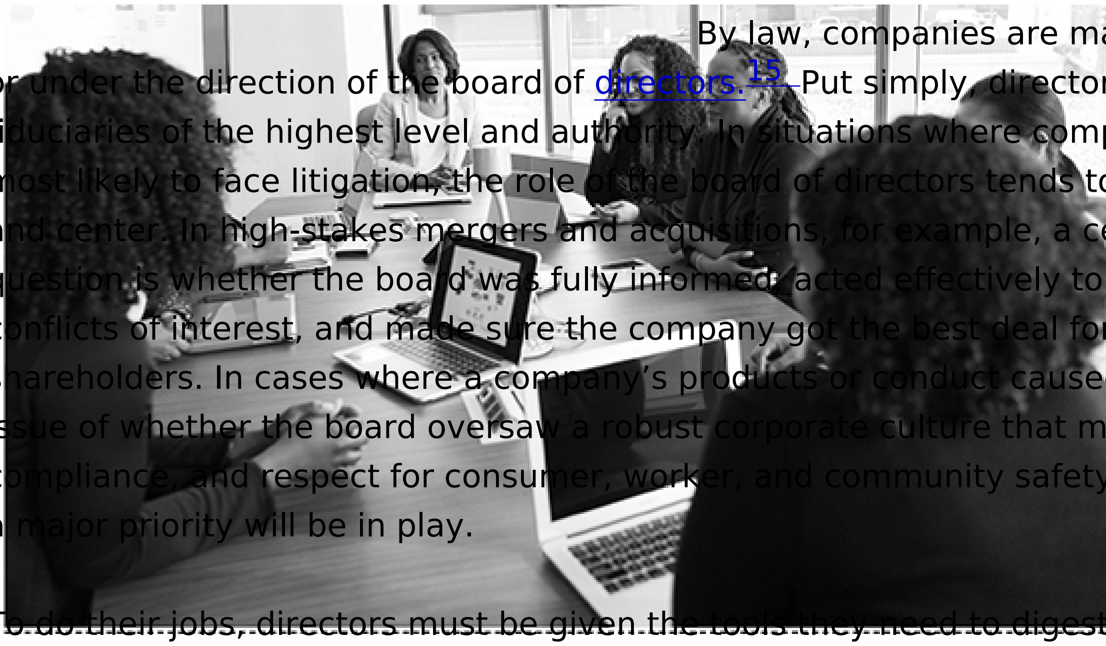
Although this picture is not a pretty one, it should not obscure this promising reality: Virtual meeting technology and other online tools have improved the information flow between management and the board. They facilitate more efficient and effective deliberations and, when used judiciously, can relieve stress, generate better decision-useful information on a more timely basis, and produce a more robust and reliable record of informed board decision-making. The challenge is for companies to capitalize on the advantages this technology provides while minimizing its risks. This requires bringing some old-school discipline and common sense to the new digital world.

How? By implementing protocols that promote the timely production of quality information for the board, that enhance the ability of board members to use this information more easily and to receive it in the form most helpful to them, and that reduce the temptations to multitask and indulge in sidebar texts and emails. Effective protocols will also produce a formal record of committee and board action, thereby minimizing the risks that the company will have to engage in sprawling electronic discovery in response to books-and-records requests or that it will lack a solid record for directors, managers and advisors to use as a memory aid if they are called upon to testify about important decisions.

Companies must also reevaluate how the board is organized, both structurally (e.g., the allocation of responsibilities among committees) and logistically (e.g., the setting of schedules and venues for board and committee meetings). Smart use of technology can enable directors to complete less important tasks more efficiently and increase the amount of time spent on the issues that are most critical to the company's sustainable profitability and responsible governance.

To help maximize the benefit-to-cost ratio of new technology, we next identify a series of “do’s” addressing common problems in these areas, starting with board information practices. With appropriate attention to these matters, boards and management can increase the integrity of corporate decision-making processes and reduce stress. The burden of implementing better practices is far smaller than that created by slipshod practices, which open the door to wide-ranging information requests that can be extremely costly to address, not just in dollars, but more importantly in terms of the distraction from business they impose on key managers and employees and the reputational risks they create.

III. Positive Practices to Improve the Board’s Effective Use of Information



By law, companies are managed by or under the direction of the board of directors.[15] Put simply, directors are fiduciaries of the highest level and authority. In situations where companies are most likely to face litigation, the role of the board of directors tends to be front and center. In high-stakes mergers and acquisitions, for example, a central question is whether the board was fully informed, acted effectively to check conflicts of interest, and made sure the company got the best deal for its shareholders. In cases where a company’s products or conduct caused harm, the issue of whether the board oversaw a robust corporate culture that made law, compliance, and respect for consumer, worker, and community safety and health a major priority will be in play.

To do their jobs, directors must be given the tools they need to digest important information, refer to it when needed, develop questions and issues to raise and generally act like competent adults trying to do an important job well. These tools include the ability to retain files of important documents, to have hard copies of documents when they may be helpful and, fundamentally, to access and use relevant information in the course of performing their duties.

For this reason, board information protocols should guarantee directors access to the information they desire in order to do their jobs effectively. If certain information is genuinely sensitive and should not leave company property — e.g., the Colonel’s secret recipe — then that should not be in a board portal, but neither should managers be walking around with it in their backpacks. Put another way: If you cannot trust a director to be responsible with company information, can you trust that person to be a director at all? And if the board is the ultimate authority, why should directors be subject to informational restrictions that do not apply to company managers and employees? Recognize that this is the appearance you may be giving to a fact finder in hindsight, especially when the dots are connected by a skilled plaintiff’s lawyer.

This does not mean that the corporation should not have policies for the handling of sensitive information. They not only should, they must. But these policies must not infantilize the board or make it a dependency of the very management team the board is supposed to oversee. Directors should be entitled to print documents from the board portal and to retain them for appropriate use. Directors should be entitled to keep paper files of key information they receive in advance of and at meetings.

That said, the company should ask and expect directors to use due care in their filing practices; to retain their board materials in an identified, secure location; and to recognize that in the event of litigation, a regulatory inquiry, or books-and-records demand, their files may be subject to company search and may need to be produced. Directors should understand that the amount of material that the company must produce from a particular director’s personal files, the more likely that director will be deposed, and for a lengthier period of time. With this reality in mind, most directors will be mindful of the advantages of a “less is more” approach and retain only those documents necessary for ongoing tasks or a specific mission, such as a transactional committee overseeing an M&A process.

Of course, there are risks in any situation when more records exist, but there are corresponding advantages. Directors who are diligent, do their homework and follow the evolution of documents and board discussions more closely are likely to help the board make more credible, high-integrity, sensible business decisions. If called to testify or to talk to institutional investors, directors of this kind are much more likely to be effective in discussing the reasons why the board acted as it did and why the action taken was in the best interests of the company. They will not have to feign authentic involvement because their authentic involvement and work ethic will come through when they are asked to testify.

Directors who allow themselves to be managed and to have fleeting access to online documents can be viewed as (or may indeed lapse into) box-checking yes-sayers, with no genuine depth of knowledge about key considerations and information.

By contrast, directors who allow themselves to be managed and to have fleeting access to online documents can be viewed as (or may indeed lapse into) box-checking yes-sayers, with no genuine depth of knowledge about key considerations and information. Their ability to study up at a later moment is unlikely to compensate for their lack of real-world engagement and study when it counted. And of course, when boards are not deeply engaged, the resulting decisions often fail to take into account important considerations — such as controlling for all conflicts of interest — and thus create unnecessary risk for the company.

Heightening the stakes is the fact that directors are commonly asked on the witness stand as to how much access to information they had. If the lead independent director testifies that she was not allowed to print documents and had to turn in all hard copies at the end of every meeting, that tells the fact finder that the board is not running the company. Instead, the board is being managed by management. The overall credibility of the directors will be called into question, and the company will be viewed as having something to hide or, at the very least, as having a board of directors whom the company's managers did not think could be responsibly trusted with company information.

In fostering a culture of genuine deliberation within the boardroom and in facilitating the communication of decision-critical information from management to directors, the role of the company's general counsel is, in our experience, critical.[16] The general counsel can and should play a strong role in facilitating a relationship between top management and the board that recognizes the primacy of the board on policy while acknowledging the need for management to have the latitude it needs to run the company. The general counsel is a key participant in creating good information practices that provide time for the board and management to reflect together on key decisions. And the general counsel must play an overarching role in ensuring that the company commits to prospering in the right way — by seeking profit within the bounds of the law — and, to that end, developing and implementing policies that foster a culture of integrity. These steps are vital to preserving the company's value and reputation.

Have a general protocol for minuting meetings and be specific and careful when deviating from that protocol.[17] One of the least gratifying, but most important, corporate governance tasks is documenting board and committee meetings. No one is rewarded for well-drafted minutes. But, if the minutes fail to record an important board decision or to take note of a critical issue the board considered in making a decision, serious questions will be asked and blame may be cast. In litigation, minutes can provide protection for the company and its directors and officers because if done well, the record of good-faith deliberations will satisfy the business judgment rule and provide regulators and judges with assurances that the board took its duties seriously. If done poorly, minutes provide potential ammunition for regulators and plaintiffs' lawyers, who use them to identify gaps in the deliberative record and to cross-examine directors and officers about testimony that is not supported by the minutes.[18]

The expansion of mandated board committees and of required board actions stresses the minute-taking capacity of even large-cap companies and puts severe pressure on smaller companies. The more that a company needs to spread the minuting load across company personnel, with the occasional aid of an array of outside advisors, the greater the risk of inconsistencies in style. Some companies put together minutes by combining after-the-fact descriptions and pre-drafted sections (e.g., adding meeting notes to a lengthy tax-related section that was, for convenience, prepared before the meeting even took place). This practice can generate an odd record in which an item that might have been discussed only briefly by the board occupies more space in the written minutes than an item discussed for ninety minutes that is only briefly described. Faced with such minutes in court, directors can appear deceptive in testifying that in fact the shorter paragraph on an M&A process reflected an hour-long, in-depth discussion while the two-and-a-half-page tax section described an issue the board voted on after five minutes.

Adding to the morass, companies often use a lumpy mixture of long- and short-form minutes without a consistent approach. Fulsome (a word we use advisedly) renditions of some deliberations are interspersed with terse summaries of others. Regrettably, sloppy long-form minutes often involve the worst combination of the specific and general. They have some of the qualities of a court transcript but often omit key points, leaving directors who remember issues discussed but not mentioned looking less credible. And long-form minutes too often fail to accurately state the precise action the board took and whether the decision was unanimous.

There is no perfect approach to the difficult task of minuting, but what must be done is for the board and management to settle on an approach thoughtfully and to implement it with fidelity, professionalism, and consistency. For many smaller companies, this might involve a general commitment to high-quality short-form minutes that scrupulously record key information (such as the length of the board meeting, who was present and the action taken) and that summarize succinctly the considerations the board took into account but do not attempt to be exhaustive or to characterize the views or statements of any particular director. For companies taking this general approach, the policy should indicate that in certain situations, such as an internal investigation or a special transactional committee, the company may deviate and take a long-form approach with the help of outside advisors. And when deviation is warranted, that should be reflected by a board decision explaining the limited purpose for which long-form minutes will be used. With a policy of this kind, the company makes clear what it is and is not attempting to do with minutes, and also uses its constrained resources effectively. To create a more complete record, the policy should require that all management and advisor presentations for particular meetings be stored with the minutes in the company's files, so that the full record is available for document production and as a memory aid for witnesses.

Companies that prefer to create long-form minutes for all meetings should set forth rigorous criteria to which minute-takers are required to adhere. In general, we think it unwise for even long-form minutes to put words in the mouths of specific directors, rather than to identify a subject that was discussed and the material considerations that arose. Minutes that refer to some but not all directors imply that those not mentioned did not speak or participate actively, and that is not always the case. The more that minutes look like an attempt at a transcript, the less room there is for participants to credibly testify later on other questions or issues that were raised in the meeting but not reflected in the minutes. Ironically, fulsome minutes of that kind often fail to record important information of a more objective kind, such as the individuals presenting information or leading a discussion and the names of all the advisors present during the meeting.

The process for approving minutes is also important because the reality is that there are few individuals involved in corporate governance who have not occasionally given approval to circulated minutes without adequate reflection or study. Part of the problem with the approval of minutes is that it is difficult to focus on the past when pressing business is on the table. Minute-approval processes could benefit from the general counsel or corporate secretary directing the participants to the most crucial parts of the minutes, describing the most important decisions to ensure the participants focus on whether the minutes accurately capture the decision taken, and, as important, fairly summarize the major factors the board considered. Again, if the company ensures that management and advisor presentations are referenced in the minutes as material factors the board considered, and those presentations are stored with the minutes, that practice will buttress the minutes' articulation of the deliberative process. Similarly, it is best practice to prepare minutes soon after the meeting concludes and present them for approval at the next meeting. When individuals are asked to review a large number of minutes covering a number of meetings, recollections may have faded and it may be more difficult to carefully review each meeting's minutes.

Educate directors and managers on the benefits and hazards of note-taking.[19] Because stray notes can be misconstrued in litigation and are often intentionally given an inflammatory portrayal by plaintiffs' lawyers, it is understandable that corporate counsel may wish to minimize the risks to the company and the other directors of unwise note-taking. That is particularly true given the temptations we have identified for notes to be incomplete, to appear jejune after the fact and to reflect poorly on the board's deliberative process. This is compounded when one recognizes that an individual is unlikely to have full recall regarding the meaning of a particular notation or comment when asked about it many months after the fact.

On balance, however, an approach other than prohibition is the best one. One of the reasons notes are taken is that it is impossible to review in full lengthy documents in repetitive versions. Notes can act as key reminders of important sections of documents or of subjects discussed at meetings, and as an aid in remembering to ask questions or raise an issue for further consideration. But, precisely because notes are summary, they are an imperfect record of what happened.

And of course, sometimes the human mind yields to the temptation to doodle, to make a written note about a colleague's statement or to create a misleading impression about what in fact occurred at a meeting. Importantly, people rarely write notes indicating when they themselves were multitasking, nodding off or spending more time getting another cookie than listening, but instead tend to write about others' lapses or missteps. For these reasons, some companies instruct directors not to take notes. To our mind, that is not a best practice and is another way that directors can be managed and infantilized and that the proper functioning of a board can be undermined. Instead of that approach, what should happen is instruction as to the proper use of notes, which is to flag key issues for consideration, highlight critical portions of documents and generally help directors in diligently fulfilling their duties.

Directors should be discouraged from using notes as a personal paraphrase of meetings and from characterizing the remarks of other directors or management. If directors want a reliable guide to past meetings, that energy should be directed toward a careful and timely review of the draft minutes and advisor presentations. They should comment on drafts to make sure the minutes reflect what they believe was critical to their deliberative process and that advisor presentations are updated accordingly and to reflect other material developments.

As with emails and texts, directors should know that any notes about board business, or any mark-ups of board documents, may be discoverable and are subject, if they address covered topics, to the company's document retention policies as well as to subject matter litigation and regulatory holds. Directors should also understand that if they take notes on a regular basis, they are more likely to be selected as witnesses by plaintiffs or regulators and will be expected to explain what they meant by snippets that might cast the company (or particular individuals) in an unflattering light. They also should be aware that the contents of their notes in the course of litigation may need to be discussed with other directors and managers, especially if those notes are critical of them and put them at risk or in need of defending themselves.[20]

Prohibit multitasking during meetings, especially virtual meetings.[21] Many businesspeople are under the impression that an electronic communication, such as an email or a text, is somehow less susceptible to discovery by a plaintiff, regulator or stockholder than a written document. That is not true as a matter of law — the law does not distinguish between the forms in which information is captured — and is actually closer to the opposite in terms of today's reality. A printed-out document that a director possesses is difficult to send unless the director scans it in and attaches it to an email. An email or text, once sent, is beyond the director's control and typically is backed up and stored on multiple information systems.[22]

A related reality is that documents intended for distribution typically are prepared with more care than emails and texts. Emails and texts, though written, have many of the qualities and dangers of immediate oral responses. Boredom, anger, frustration, enthusiasm, and thoughtlessness can result in instant communications that are ambiguous, snarky, or hurtful to others or the company. These create misimpressions that are difficult to dispel and that can't be rescinded or adequately explained. Everyone has had that "Oh no!" moment after sending an email inspired by a group communication but intended only for selected recipients: "Uh oh, did I hit 'Reply All' by mistake?" Communications of this kind happen every day, in boardrooms and beyond.

One way to better control this risk is to have a policy that requires all participants in board and committee meetings to restrict their use of email and text while meetings are in session. This does not mean that directors and managers should be beyond the reach of their family in an emergency; it means that they should be focused on the meeting. Key contacts, such as close family and personal assistants, should be told to call if there is an emergency, as directors will not be watching their emails or texts. If a director receives an emergency phone call, the director should step out of the meeting and see to it. Periodic breaks can be scheduled to allow directors and managers to review incoming communications and to respond to them. These activities should be strongly discouraged during the board or committee meeting itself.[23]

As important, any communications about and during the meeting should be made orally, so that those thoughts can be heard by all participants. Side emails and texts involving a subset of attendees can be a minefield for divisions within the board and management. All too often, they indulge in unprofessional sarcasm and create a hazard not just for those who make and receive them, but also for the others in the room who are focused on the meeting. There is no privilege for side conversations, and these communications are as discoverable as a formal memo despite lacking dignity or care in preparation.

This protocol should be reinforced especially as to virtual meetings held via web conference or meetings held by conference call. As difficult as it is sometimes to be fully "present" at an in-person meeting, it is even more so when attendance is virtual or by teleconference and when, to be candid, no one can see whether you are sending an email on your mobile phone or browsing the internet. Being in the same room tends to create a group discipline that virtual meetings do not.

The same policies against multitasking and sidebar communications via email and text must be enforced with special rigor as to virtual meetings. One way to do this is to remind directors and managers of these realities:

· Communications of any kind made during a board meeting may be discoverable.

· If the communications are relevant to the board's deliberations, you should expect that they will be subject to discovery by plaintiffs and regulators.

· If the communications are not relevant to the subject of the meeting, you should still know that they may be discoverable precisely because they are relevant to whether you as a director are exercising your duty of care with diligence or using your time at meetings to conduct personal business and otherwise not attending to your fiduciary duties and responsibilities as a corporate director.

Deliberately manage the volume, flow and security of electronically provided board materials.[24] With online portals, there is a temptation for management to provide an ever-greater quantity of materials to directors. Where there formerly was a practical limit on board and committee books (the size of a FedEx box, for example), there now is none. Printing out the materials before making them available online would be one way for the corporate secretary to assess whether they are too voluminous for directors to digest and usefully absorb.

That said, not all information need be provided in a single giant serving in the run-up to a board meeting. Certain types of information may be updated on a board dashboard on a monthly basis, so that information provided specifically for board meetings can be more streamlined and directors are able to focus on key elements within the bigger picture.

As electronic information delivery and online access expand, so does the need for up-to-date information security. Portals and mailboxes can be hacked, and having password policies that address these realities (while not burdening management and directors with unreasonable numbers of passwords) is a difficult but necessary task. Companies also must be able to remotely erase a lost device so that sensitive information does not fall into the wrong hands. In the "old days," a director might accidentally compromise confidentiality by, say, leaving a board book in a seatback pocket on an airplane. Now technology can mitigate the damage done by loss, theft or hacking. Companies should use their IT departments or consultants to ensure that their information security for board materials remains state-of-the-art and should consider providing an official device and email address for each director. Although it may be annoying for an individual director to have three company-issued tablet computers and separate email addresses for each of her three boards, it may be courting disaster to have different companies' sensitive information on a shared device or accessed through a single, relatively insecure personal email address. Efficient solutions can be forged to solve this problem, but they require careful execution and implementation, and often cooperation with the other companies with whom your directors are affiliates, who face the same reciprocal concerns with their own directors.

Update information-retention policies to take into account new realities.[25] Given the realities of regulation and litigation, companies often face the obligation to retain certain information. Once certain documents and other records have been created, their existence and retention have consequential legal implications.

Thus, information-retention policies now must cover the emails, texts, and other information contained in the devices used for company business by directors and officers. In litigation or a regulatory proceeding, it is problematic if key documents in a board portal have been deleted or if directors and officers were not properly instructed regarding a hold on the destruction of records.

The proliferation of virtual meetings itself creates new issues. There is no requirement to record a board meeting, but, if a recording is made, it cannot lightly be destroyed. In fact, it may have to be preserved if the meeting touched on matters relevant to an ongoing or expected proceeding. Companies must inquire whether a meeting conducted on Zoom or other platforms will be recorded, understand the consequences if so and subject those recordings to the company's retention policies. Likewise, just as with the temptation to make tape recordings, minute-takers may wish to make video recordings to help ensure the accuracy of the minutes.[26] But it is quite possible that a recording of a meeting, once created, cannot legally be destroyed.

An emphasis on the need for high integrity and due care in all corporate communications, whether orally in meetings or in written or electronic communications, is the best safeguard. Policies that rely on destroying corporate records invite natural skepticism and may subject the company, directors and officers to an adverse inference that the destroyed records would have revealed wrongdoing and resulted in sanctions for evidence destruction.

IV. Suggested Practices to Capitalize on the Potential of Modern Technology to Make the Most of the Board's Limited Time

Use the pandemic experience to rethink your board committee structure.[27] Although a deeper subject beyond the scope of this article, the capabilities of modern web conferencing and communication technology present opportunities to address a topic long overdue for discussion at most companies: the need to update board committee structures. Board structure should put the most important issues at the forefront of board time and make sure that the key matters — business risk; employee, environmental, social, and governance (EESG); and legal issues — are addressed by directors with adequate expertise. Spreading these essential responsibilities rationally across well-designed committees will also help ensure that all key senior managers have regular access to a segment of the board to surface and discuss critical issues.[28]

Recent cases illustrate the hazards of rote governance, in which all compliance oversight resides in the audit committee, even in cases where the most important compliance/business/EESG issues a company faces are not primarily financial in nature nor accounting-related.[29] It is difficult and challenging enough for an audit committee to cover all the required financial business and directly related matters, and its required duties often crowd out the ability of non-financial officers to have regular time with the audit committee.

As important, for too long many companies have ignored an obvious reality: the fact that someone is a financial expert does not mean that they understand pharmaceutical, product safety, manufacturing, engineering or supply chain issues, much less labor issues. Many companies do not have risk or safety committees and, with just the usual audit, compensation and nomination/governance committees, they tend to put compliance and risk into the remit of the audit committee. Too many companies fail to build their committee structure on the foundation of what is most central to the company and its industry, instead dividing responsibility for integrally related issues among separate committees (e.g., one committee addresses environmental or employee issues for legal compliance purposes, and another committee addresses the same issues for EESG purposes).

This issue merits longer discussion,[30] but we underscore it briefly here. Most companies could have the audit committee focus only on financial risk issues and perhaps cybersecurity, both challenging tasks in themselves. The compensation committee could be expanded into a full-blown workforce committee with the responsibilities of situating top executive pay within a pay plan that is fair to the overall workforce. This committee should address all key HR policies — such as those on living wages, contractor pay and unions, as well as on diversity and harassment — and other issues that are essential to fostering a healthy and productive workplace. Then, for most companies, there should be a third industry-specific committee charged with overseeing the company's central business/compliance/EESG risks, which will tend to be integrally related. For most companies, the biggest areas of risk are those where their conduct could harm their consumers, endanger their reputation and future cash flows, and run afoul of societal expectations regarding proper company behavior with regard to both legality and ethics. The industry-specific committee should be populated by directors with relevant expertise and should not simply be put into the nominating and governance committee because it is (often) the least overburdened committee.

> **By thinking in a fresh and businesslike way about the board's role, companies will more effectively and efficiently meet the demand that they seek profits through sustainable strategies that do not externalize costs to other stakeholders or society.**

By thinking in a fresh and businesslike way about the board's role, companies will more effectively and efficiently meet the demand that they seek profits through sustainable strategies that do not externalize costs to other stakeholders or society. Not only that, but a more rational committee structure also will ensure that all key risks receive more regular attention and that directors serving on committees have the benefit of regular exposure to the diverse talents of the management team employed to address those risks. By this means, functionally related tasks — e.g., addressing legally required environmental actions and also any more robust goals the company has set for itself in terms of its environmental impact — are performed efficiently, coherently and thus more effectively.

Through this approach, boards can also diversify themselves more rationally both in terms of race and gender and across skill sets. Outside the finance space, minorities and women have advanced more rapidly, and experts in supply chain, human resources, consumer safety and other relevant topics can be found in the public sector, the nonprofit and higher education sector, and institutions like the military, where high-level commanders must master many subjects that companies address.

Increase committee and board efficiency using virtual meeting technology.[31] The virtual meeting world allows for priority-setting in a new way. Although in-person committee meetings remain essential, virtual committee meetings present an opportunity for some routine functions to be done before or after in-person meetings. When checklist items can be responsibly addressed by concise virtual committee meetings, that leaves more time at in-person meetings to address core areas of business, legal and stakeholder risk. Mandated committees that might not need as much meeting time, such as nominating and corporate governance, can conduct their business in a compact and non-burdensome way, allowing the three core committees described in the prior section more time to perform their duties. Committees can meet, together or with the full board, to consider overlapping issues and to use the full capacity of the board's diverse strength to make sure that the best thinking is brought to bear on all major issues.

Even more important, in virtual meetings committees can distill key information about important issues and create materials for the full board to use in considering an issue that the committee has vetted with management and that is ripe for input from the whole board. Pressing committee agendas can cause full board meetings to be rushed, limiting the ability of the full board to engage on issues that have had substantial consideration at the committee level. One of the advantages of the virtual meeting world is time management: Committee meetings can be scheduled at convenient times, and in-person board meetings can become an opportunity to deliberate deeply on a better information base and on the most important issues that deserve more time for discussion.

By this means, a board could have the benefit of committees that cover key issues regularly with input from important managers and advisors as well as greater cross-fertilization and information sharing across committees by the board as a whole. If this approach to calendaring is combined with a thoughtful approach to allocating key risks and issues across a sound committee structure — one that does not center all key compliance and EESG issues in the audit committee — the full board's and management's diverse talents can be better utilized to make sure all key business issues receive adequate consideration by the entire board. Ideally, the thoughtful use of virtual committee meetings would expand the time available for the full board to meet and focus on the company's strategy and the major risks to the success of that strategy.

Technology also should be leveraged to make sure that meetings of the independent directors alone are not rushed. The independent directors might consider holding an executive session virtually in advance of on-site board meetings, which would enable them to transmit to management any additional information they may want to consider at the full board meeting or surface any issues that they may wish to discuss in addition to the circulated agenda. In addition, some companies may commit to having an executive session both at the start of the board's in-person meetings and at the end. That is an excellent practice, and we would simply note that if a choice has to be made, technology enables the summative meeting to occur remotely, after the directors have traveled home and had a chance to reflect on the committee and full board meetings. We are not advocating a specific approach, but we are advocating consideration of the utility of this technology in ensuring that sessions of the independent directors without management are not time-pressured, and that lead directors, committee chairs and management also use available technology to draft well-considered agendas for these meetings. We believe that independent board chairpersons or lead independent directors should take charge of determining the appropriate practice for their companies. Too often, boards adopt a one-size-fits-all model for governance rather than a bespoke approach that maximizes efficiency and effectiveness for that particular board and company.

Technology can thus enable a board to concentrate limited resources on what is most important to the company, and to structure the board's use of time around that business judgment. The flexibility that technology provides can be used to handle all required business more efficiently and effectively, while centering the schedule on what the board determines are the most mission-critical ways in which the company affects its stakeholders and the biggest challenges the company faces in creating sustainable value for its investors.

But also: Do insist that directors commit to being present at scheduled in-person meetings.[32] There is no substitute for human chemistry and contact, and that is especially so in corporate governance. Directors are not on-site most of the time. To do their jobs effectively, they must cultivate relationships and foster information-sharing practices that enable them to understand what is going on at the company, but that do not overwhelm management with unreasonable demands. Thus, the connections that deepen over dinners, the ability to read the room, the space for appropriate side conversations and the chance for key managers to provide discreet input to board members about sensitive subjects all depend on a reliable and consistent level of actual personal interaction.

For those reasons, as companies take advantage of the very real upsides of the virtual meeting world, they must also address the potential downsides. Board effectiveness and regular interaction with management cannot be achieved unless the board commits to meeting in person six to eight times per year and sets the firm expectation that all board members attend those meetings. Meetings at company facilities cannot be accomplished virtually. A hybrid approach of rotating the blend of directors in the room and others appearing virtually diminishes the collective capacity of a board to do its job effectively, makes meetings awkward, likely requires repetitive briefings at later meetings, and provides no consistent basis for management-director communications in key areas.

Better practice is to build the board's year around a reasonable set of in-person meetings, with several of these also involving in-depth committee meetings. There should also be a meeting each year at which the board visits a site of company operations outside headquarters. With the ability to have more frequent committee meetings thanks to growing comfort with the virtual meeting approach, in-person meetings can focus on the subjects that require the most deliberation. In-person meetings are the best time for directors to address issues that have been vetted and teed up for discussion for the entire board by specific committees and the key managers who regularly interact with them. Vital to good governance, the opportunity to interact with fellow board members and senior management in a more casual setting is impossible to replicate in the virtual meeting world, and its importance cannot be overlooked. Board members must respect and trust each other; that type of rapport is difficult to build without getting to know each other by being together in the same room, lifting a glass and fork together, and sharing the occasional laugh or personal struggle.

Likewise, certain types of committees must commit to a responsible number of in-person meetings. These include special investigation and transactional committees. A number of these committee meetings should be conducted in person at key inflection points. Virtual meeting platforms can facilitate the progress of decision-making, but at important moments where committee judgment is critical, policy should favor having all the directors present with the key members of management and the outside advisors who are relevant to helping the committee fulfill its mandate. Although it might appear to be more efficient (and thrifty) to ask board advisors to appear virtually instead of in-person at board meetings, it will be substantially more difficult to develop the confidence and trust between the board and its advisors that are so important to making the board process effective.

Respect the boundaries between the roles of board and management.[33]
The increased ease and frequency of virtual meetings can give rise to an awkward, but real, corporate governance problem. When a board of directors oversteps its bounds and moves from approving the company's policies, ensuring their faithful implementation by management and holding managers accountable for their effective and ethical performance, to instead enmeshing itself in day-to-day management, overburdening management with constant information requests or conversations and expecting excessive committee meetings, the company is likely to suffer. Forcing management to attend to director "squeaky wheels" risks creates a situation where the board's own priorities are not effectively pursued — not because management does not wish to accomplish them, but because management's ability to do so has been undermined by the board's own overreaching and interference.

Thus, board calendaring and meeting practices must recognize the burden on management imposed by board meetings and information requests and the distraction from other important functions that excessive demands create. Put simply, the board calendar must be shaped to facilitate the board doing its proper policy-level role effectively, not to allow the board to act as a shadow management team. Any committee meeting or board meeting is likely to require considerable management time, and though scheduling a virtual meeting may be easier, the fact that a meeting is virtual does nothing to reduce the time required by management to develop materials for consideration and to properly document the record of the meeting.

V. Making the Most Out of New Technology Requires Equally New Thinking

We end on an optimistic note. None of us would prefer to go back to mimeographs, carbon paper, whiteout and typewriters. None of us wants to spend more time in an airport than in the meeting to which we are traveling. But a digital world where everything can be and often is recorded has risks and inconveniences of its own. So does a world where the creation of information is often too easy, and where technology can enable wasteful uses of scarce director and management time and resources.

In our view, what is required is nothing new and is what business leaders are best at: using business judgment to reflect on how the most positive impact can be obtained through the effective use of available resources.

In our view, what is required is nothing new and is what business leaders are best at: using business judgment to reflect on how the most positive impact can be obtained through the effective use of available resources. That requires bringing professional analysis to 21st-century board practices and not assuming that the inertial use of late-20th-century policies with ad hoc additions is optimal or even adequate. With fresh thinking that builds the board's information policies, committee structure, and use of time around what is most important, new technology can markedly improve the quality and efficiency of company decision-making.

Looking ahead, companies should apply today's technology to their corporate governance practices in order to create more efficient, less stressful and thus more robust and effective means by which to transmit information and deliberate on critical issues. With discipline in execution and a focus on doing what is right for the company, board practices that encourage deep consideration of the most important issues and document the basis for decisions will not just result in lower legal, regulatory and reputational risk; they also will lead to better business decisions and a stronger company that is well-positioned to create sustainable value for its investors and to treat all its key stakeholders with respect. We recognize, of course, that each company and each industry space is different. The general suggestions in this article are simply suggestions for consideration and adaptation to the specific circumstances companies face. But the deeper principles we articulate about integrity and care in board information and deliberative practices are ones we hope can be usefully brought to bear at all companies. Fundamentally, we urge companies to think deeply about these issues in a businesslike way.

We hope to have provided some useful ideas toward that important goal.

Leo E. Strine Jr. *is the Michael L. Wachter Distinguished Fellow in Law and Policy at the University of Pennsylvania Carey Law School, a senior fellow of the Harvard Program on Corporate Governance, and of counsel at Wachtell, Lipton, Rosen & Katz. He was the chief justice of the Delaware Supreme Court from 2014 through 2019. Before becoming the chief justice, he served on the Delaware Court of Chancery as chancellor and as a vice chancellor.*

Laura A. McIntosh *is a consulting attorney for Wachtell, Lipton, Rosen & Katz. Since 2004, she has coauthored a corporate governance column for the* New York Law Journal*.*

The authors are grateful to Janet Carrig and Kim Rucker for their thoughtful comments, Amy Zeng and Peggy Pfeiffer for their assistance and David A. Katz for his insights and support.

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[1] *8 Del. C. § 220, "Inspection of books and records," addresses the rights of stockholders and directors to examine the books and records of a Delaware corporation.*

[2] *57 Del. Laws ch. 148, § 6 (1969) (codified at 8 Del. C. § 141(i)). Meetings of stockholders could not be held by means of remote communication until 2000. 72 Del. Laws ch. 343, § 7 (2000) (codified at 8 Del. C. § 211(a)).*

[3] *Today, the information provided to a company's lenders is prescribed by the relevant loan documents and is generally historical in nature. Therefore, lenders generally learn of a problem after it has been manifested. When a board of directors includes a representative of a lender, that lender has a much better sense of the company's business plan and liquidity and can push a company to address issues that might lead to insolvency and harm to all stakeholders at a much earlier stage than a lender who has access to a company's information only after the fact.*

[4] *It is not unusual for an assistant to print out email communications so that the principal can more easily read and digest the information conveyed.*

[5]*Unfortunately, many board committee charters contain long lists of mandated items that need to be considered at specific (or, in some cases, all) committee meetings. Although these long lists of mandated items are well-intentioned, they often have the effect of crowding out other important discussion items and may not even be relevant for a particular company.*
[6]*For a deeper examination of the specific importance of documenting the process used to consider important mergers and acquisitions situations, including those involving conflicts of interest and unsolicited takeover bids, see Leo E. Strine, Jr., Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone, 70 BUS. LAW. 679 (2015).*
[7]*It is not unusual for a director to mistakenly believe that text messages disappear or that a deleted email cannot be retrieved. Similarly, some directors have used alternative applications such as WhatsApp or Snapchat on the incorrect assumption that once read, messages were automatically deleted, never to be seen again.*
[8]*One hypothetical often used by one of us in discussing these matters is a corporate director who sends 200 emails and makes social media postings during a 90-minute board meeting. Even if the substance of those messages or postings is not discoverable in litigation, the sheer number of emails or postings could lead the fact-finder to conclude that the director was not focused on the matters at hand in the boardroom.*
[9]*This is not simply a hazard of the digital age; years ago, a colleague of ours observed a person in the corner at an important board meeting who appeared to be writing feverishly. Upon inquiry, the associate learned that the individual was the CEO's secretary, who was an expert in dictation and previously had been a court reporter. Not only did her presence compromise potentially privileged discussions, it appeared that she had been unwittingly preparing a verbatim transcript of prior board meetings.*
[10] *In re Boeing Company Derivative Litigation, 2021 WL 4059934 (Del. Ch. Sept. 7, 2021) (finding a potential Caremark claim for alleged lack of board-level oversight of airplane safety and noting tens of billions of dollars of costs incurred by the company and substantial damages to its credibility, reputation and business prospects); In re Clovis Oncology Inc. Derivative Litigation, 2019 WL 4850188 (Del. Ch. Oct. 1, 2019) (finding a potential Caremark claim where the board allegedly consciously ignored red flags revealing a mission-critical compliance failure and noting substantial monetary and reputational harm to the company);* Marchand v. Barnhill, *212 A.3d 805 (Del. 2019) (finding a potential Caremark claim for alleged lack of board-level compliance monitoring and reporting of food safety issues and noting substantial harm to consumers, employees and stockholders);* Hughes v. Xiaoming Hu, *2020 WL 1987029 (Del.*

Ch. Apr. 27, 2020) (finding a potential Caremark claim for alleged lack of board-level system for monitoring financial reporting and noting significant reputational harm to the company and costs incurred with restatements); Inter-Marketing Grp. USA, Inc. ex rel. Plains All Am. Pipeline, L.P. v. Armstrong*, 2020 WL 756965 (Del. Ch. Jan. 31, 2020) (finding a potential Caremark claim for alleged lack of board-level compliance monitoring and reporting of pipeline integrity issues and noting $257 million in cleanup costs and substantial fines, reputational harm and decline in stock price).*

[11] *In separate work, one of us has discussed the advantages for companies of thinking harder about their committee structures, making sure they build them around the most central issues important to the company's success, and not being driven to add government-imposed functions on top of an internal committee structure. E.g., Leo E. Strine, Jr., Reilly S. Steel, & Kirby M. Smith, Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy, 106 IOWA L. REV. 1885 (2021); Leo E. Strine, Jr. & Kirby M. Smith, Toward Fair Gainsharing and a Quality Workplace for Employees: How a Reconceived Compensation Committee Might Help Make Corporations More Responsible Employers and Restore Faith in American Capitalism, 76 BUS. LAW. 31 (2020-2021); EESG That Is Effective and Efficient . . . And Just Makes Good Business Sense, David A. Katz, Leo E. Strine, Jr. & Sarah K. Eddy, American College of Governance Counsel Roundtable Discussion, Oct. 14, 2021.*

[12] *In re MetLife Derivative Litigation, 2020 WL 4746635 (Del. Ch. Aug. 17, 2020) (dismissing Caremark claim alleging failure to establish and/or monitor a system for identifying beneficiaries but noting that many millions of dollars of fines and restitution payments had already been imposed on the company, including $189 million in restitution to affected retirees and almost $20 million in fines to New York state);* Richardson as Trustee of Richardson Living Trust v. Clark*, 2020 WL 7861335 (Del. Ch. Dec. 31, 2020) (dismissing Caremark claim but noting nearly $250 million forfeited by the company in connection with a criminal investigation related to its anti-money laundering procedures);* Firemen's Retirement System of St. Louis on behalf of Marriott International, Inc. v. Sorenson*, 2021 WL 4593777 (Del. Ch. Oct. 5, 2021) (dismissing Caremark claim but noting the company had been fined $24 million in connection with the cyberattack in question); Pettry on behalf of* FedEx Corporation v. Smith*, 2021 WL 2644475 (Del. Ch. June 28, 2021) (dismissing Caremark claim but noting the company had paid more than $35 million to settle enforcement actions related to its alleged shipping of illegal cigarettes).*

[13] McCall v. Scott*, 239 F.3d 808 (6th Cir. 2001) (finding a potential Caremark claim for directors' alleged intentional or reckless disregard of red flags indicating systematic healthcare fraud); In re Abbott Laboratories Derivative Shareholders*

Litigation, 325 F.3d 795 (7th Cir. 2003) (finding a potential Caremark claim because the board allegedly failed to act for six years with knowledge of FDA violations that eventually led to the then-largest civil fine imposed by the FDA and substantial corporate losses); In re Veeco Instruments, Inc. Securities Litigation, 434 F. Supp. 2d 267 (S.D.N.Y. 2006) (finding a potential Caremark claim for directors' alleged failure to oversee the company's internal accounting controls and compliance with federal export control laws).

[14] *Don't patronize directors by treating them as though they cannot be trusted as mature adults. More specifically, don't tell them they cannot print a document or keep a copy of a document, as that will appear in hindsight to a fact finder as a lack of trust (or worse).*

[15] *E.g., 8 Del. C. § 141.*

[16] *In some companies, this essential role may be filled by the corporate secretary; in others, the general counsel is also the corporate secretary.*

[17] *Don't have an ad hoc, ever-changing and thus necessarily inconsistent and erratic approach to documenting corporate action and board deliberation.*

[18] *While cursory minutes can be problematic, it can be just as bad for minutes to read like a transcript. In either case, the minutes fail to emphasize the key matters at hand and may give the impression that there were not robust discussions and deliberations about the most important issues.*

[19] *Don't tell directors they cannot take notes that they consider important to aid them in doing their duty. One of us remembers reviewing a director's notes from an important board meeting where the director wrote in all capital letters at the top of the first page of several pages of notes, "[Name of partner at outside law firm] SAID NOT TO TAKE ANY NOTES."*

[20] *Emails and texts sent during a board meeting addressing substantive issues being discussed can create similar issues for the director sending the email as well as for the director receiving the email.*

[21] *Don't be afraid to discuss and address with the board the obvious dangers of distraction and improvident statements that devices like smartphones and tablets can create. It's for the good of the company and the directors themselves.*

[22]*Harkening back to the last two decades of the 20th century, the same can be said for documents that were faxed to different people and inevitably saved in some type of filing system (by the sender, the recipient or both).*

[23] *Consider, for example, a corporate director who frequently steps out of board and committee meetings to take phone calls and is then absent from the board meeting for extended periods. Just as that is unlikely to be well tolerated by that director's fellow board members, it should not be tolerated of those who physically sit in a board meeting but are focusing their mental efforts elsewhere using virtual means.*

[24] *Don't let board and committee materials expand to fill the near-infinite online space. Don't overload directors with one massive push of information immediately before a board meeting. And don't neglect updating information security protocols around information made available to directors online.*

[25] *Don't assume you can delete emails or texts or destroy Zoom, WebEx, Teams or other virtual-meeting recordings or the hard or solid-state drives of devices. They should be treated no differently than paper documents.*

[26] *Companies should also have policies prohibiting individual directors from recording board or committee meetings. In some jurisdictions, such recordings may be illegal, but even if not, in almost all circumstances these recordings are likely to be detrimental to the board as a whole.*

[27] *Don't heap new committee requirements and tasks on top of the existing committee structure without thoughtful consideration.*

[28] *See, e.g., David A. Katz & Laura A. McIntosh, "Board Structure Is Key to Oversight,"* NYLJ*, Sept. 22, 2021, available at* *https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.27859.21.pdf. &n…;*

[29] *See Boeing, 2021 WL 4059934 (noting that while the audit committee was Boeing's primary arbiter for risk and compliance, it was primarily focused on financial risks and did not monitor airplane safety specifically); Inter-Marketing, 2020 WL 756965 (noting that though the audit committee was charged with overseeing the pipeline transportation company's regulatory compliance, defendants failed to show that the audit committee actually conducted pipeline integrity review).*

[30] *For a more thorough consideration of this important issue, see Leo E. Strine, Jr., Kirby M. Smith & Reilly S. Steel, Caremark and ESG: Perfect Together: A Practical Approach to Implementing an Integrated, Efficient and Effective Caremark and EESG Strategy, 106* Iowa L. Rev. *1885, 1915–21.*

[31] *Don't waste the opportunity to leverage directors' newfound, pandemic-generated familiarity with virtual meeting technology into greater efficiency and flexibility.*

[32] *Don't allow the board to degenerate into an ad hoc combination of members present in person and on virtual meeting platforms. Research has shown that the hybrid approach is generally less effective than either the all-in-person or all-virtual approach.*

[33] *For directors, this means: Don't forget your proper role. Remember what it was like to have important daily managerial responsibilities and the legitimate space you needed from board micromanagement to perform your management duties with the effectiveness the board itself demands. Board oversight does not mean substituting the board's judgment for management's. In Europe, the equivalent to our board of directors is often called the "supervisory" board; it is important that each director understands the responsibilities and limits of their oversight role.*