

# How Documenting Corporate Decision-Making Helps Defend Against Breach of Fiduciary Duty Claims

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**D**irectors and officers face increasing scrutiny of corporate governance and exposure to breach of fiduciary duty claims. This is especially true following moments of financial distress, strategic uncertainty or leadership conflict.

Liability in these situations hinges less on the substance of a specific decision than on whether decision-makers followed a reasonable and informed process. That means robust documentation for how decisions are made creates the very evidence that will best defend against challenges.

This article provides practical guidance to create a bulwark against breach of fiduciary duty claims by documenting level-headed, process-driven decision-making even in times of crisis. It also touches on how to document that directors and officers sought legal advice while preserving attorney-client privilege.

## 1. Why Documentation Matters— Even If You Think You'll Never Be Sued

When assessing claims of breach of fiduciary duty, courts focus less on a decision's outcome and more on whether the decision-making process was reasonable and deliberative. In light of this, contemporaneous documenta-



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tion of that process is the best evidence for a robust defense.

Time and again, officers and directors kick themselves because they didn't better document what they were doing and why at the time. While the importance of solid, credible witnesses at trial cannot be overstated, even the best witness will lack credibility with scarce supporting records. Skilled defense lawyers can offer explanations for the lack of records due to, for example, decision-makers being consumed by fast-moving events—but it's far better to be proactive even in the midst of chaos.

Documentation is even more crucial when one or more decision-makers are conflicted out and isolated from a process. These decisions are even

more likely to be challenged regardless of how deftly the conflict is managed. In these circumstances, it also won't do much good to establish an independent special committee to conduct an internal review unless you also clearly document its scope of authority and the process undertaken. Otherwise, it could be painted as a sham, rather than being truly independent.

If a dispute goes to litigation, a detailed record can support early dismissal, shape discovery limits, and show decisions were made in good faith. All is not lost if records are less than ideal, but the path to dismissal or judgment becomes much harder, and courts may permit claims to proceed into costly discovery or all the way to trial.

## **2. Dos and Don'ts of**

### **Smart Internal Recordkeeping**

Directors and officers frequently make the mistake of keeping records that are overly sanitized and generic. Instead, include color about the actual drivers for tough decisions. Don't just note that the board "considered pros and cons of the offers made." Instead, be specific about the actual concerns, such as whether to take a lower offer that could close sooner and provide needed liquidity, or to wait longer for a higher offer.

Without good records created close to when a decision was made, explanations of the process can seem like after-the-fact justifications. But for this documentation to be helpful, it cannot be a box-checking exercise. Perfunctory notes that merely record a meeting, state "relevant costs and benefits" were considered, and then indicate a decision was made, aren't going to move the needle for a judge or jury.

Document important decision details: materials reviewed, specific alternatives considered, actual risks weighed, questions asked, experts consulted, and reasons for choosing one alternative. Without records, a court may assume issues weren't considered.

Don't be afraid to spell out what was going on: Were concerns expressed about asset valuation or business projection development? Were those issues addressed through discussion or expert counsel before the decision? Such details demonstrate that decision-makers were engaged.

### **Key practical tips:**

- Document key considerations and rejected alternatives. Yes, this is more art than science, but don't be too generic.
- Be prepared to tell the story of what you did and why, so add some color. Records should describe what was actually considered.
- Attach board presentation decks, financial models, and expert opinions to minutes or email notes. When litigation comes much later, it may be harder to find and demonstrate which materials were reviewed at the time.
- Avoid one-liner minutes suggesting a passive role, such as "the board approved the recommendation." Instead, note active participation, especially when questions or concerns are raised and addressed.
- Ensure dissents or abstentions are explicitly recorded when they occur.

## **3. Documenting Under Pressure**

In high-stakes or time-sensitive situations, formal documentation can fall by the wayside. Yet, these are precisely the moments when it is most critical.

The tough decisions made at these junctures are the ones most likely to be challenged with 20/20 hindsight. Knowing scrutiny will come, reduce risk by building records creation into your standard operations to show an impeccable process entitled to deference under the business judgment rule.

Don't let the perfect be the enemy of the good, though. Documenting deliberations doesn't have to take tons of time; focus on building and maintaining the habit.

Also, don't leave the court with nothing more than the decision-makers' say-so. Even when time is short, do small things to show what was going on, such as adding a sentence to a cover email about reasons for a resolution change or writing abbreviated minutes for a short emergency meeting. Document that you still followed your standard process even under tight time constraints.

### Takeaways:

- Make sure someone is always responsible for taking notes about deliberations, with this article's concepts in mind.
- It's better to have tentative but contemporary notes demonstrating considerations—even if not polished—than to waste the opportunity to create key evidence.
- If action needs to be taken without a meeting, document its purpose and compile the materials considered.
- When there's no time for a meeting, document the need for urgency so later explanations don't seem like after-the-fact justifications.
- Seek expert input when feasible and document that it was discussed, even if time is limited.
- Designate a folder or specific location for saving minutes, notes, and materials, even in draft form.

## 4. Demonstrating Consideration of Legal Advice Without Waiving Privilege

Accounting for all relevant considerations during decision-making often requires reliance on legal advice. But showing legal advice was taken into account requires walking a careful line to not risk waiving privilege.

When discussing legal advice, create a record that demonstrates deliberation, rather than

passive receipt. Don't record the actual advice. Instead, keep its substance separate.

### Best practices:

- Include enough information to make clear that a discussion or documents relied on were privileged: identify attorneys and state they gave legal advice, or note the discussion was in anticipation of potential or actual litigation.
- Identify the issue discussed without sharing the advice's substance. However, don't be so general as to raise eyebrows about whether privileged material was actually discussed.
- For example, say "The board received advice from counsel regarding compliance with fiduciary duties" rather than summarizing the specific advice.
- Avoid quoting legal conclusions or strategic guidance in minutes.
- Store detailed legal memos separately, but refer not just to their existence but to their consideration.
- Have outside counsel confirm their review of key issues on the record, but off-the-minute.

### Conclusion

It's crucial to build thoughtful record-keeping into your process—even for high-stakes, tough decisions under a time crunch. This can prove hugely important for avoiding and defending against breach of fiduciary duty claims. Always assign record-keeping responsibility and ensure everyone involved understands the importance of establishing your own evidence.

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