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OKLAHOMA SHAREHOLDER AND DIRECTOR INSPECTION RIGHTS: USEFUL DISCOVERY TOOLS?

JOHNATHAN D. HORTON*

I. Introduction

When seeking to obtain information helpful to their clients, attorneys have a variety of devices available. Some are formal discovery devices like interrogatories, depositions, subpoenas, and document requests. Other devices, such as freedom of information requests, exist independent of litigation but still provide valuable methods of obtaining information to assist the client. One such information-discovering device is the request of a shareholder to inspect corporate records.

Courts have long recognized that certain individuals have the right to inspect corporate books and records. Indeed, common law courts recognized that three different classes of persons had the right to inspect corporate books and records: shareholders, directors, and members of nonstock corporations. Like other states, Oklahoma has codified these rights, which provide convenient methods to obtain information from a corporation. For litigators, these rights offer a method to supplement discovery motions to gain additional information for derivative suits. For transactional attorneys,


2. Id.


4. See 18 OKLA. STAT. § 1065 (2001). In enacting section 1065 of title 18, the Oklahoma legislature adopted the Delaware codification of these rights. See id.; see also DEL. CODE ANN. tit. 8, § 220 (2001). Because members of nonstock corporations have rights that are similar to shareholders in this context, the author makes no effort to distinguish between the two.

5. See Rales v. Blansbad, 634 A.2d 927, 934-35 n.10 (Del. 1993); see also 2 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 7:35, at 227 (2d ed. 1991); Randall S. Thomas, Improving shareholder Monitoring and Corporate Management By Expanding Statutory Access to Information, 38 ARIZ. L. REV. 331, 359 (1996). Assuming that the corporation cooperates, these requests could supplement discovery and save
these rights offer access to information necessary to correspond with the shareholders of a target company, often a prerequisite for obtaining control in the context of mergers and acquisitions. Similarly, these inspection rights are critical for securities attorneys conducting due diligence in hostile situations.

This article will examine the inspection rights of both shareholders and directors under Oklahoma law in an effort to inform Oklahoma attorneys of another weapon they may use in their quest to obtain corporate information. Because the genesis of Oklahoma law lies in Delaware law, this article explores Delaware law to ascertain both the approach Oklahoma courts will likely take and the authority that Oklahoma courts will likely find persuasive.

Part II concentrates on the shareholder’s right to inspect corporate documents, including the rationale for providing this right, its statutory development, its origin in current Oklahoma law, and common limitations on this right. Part III examines statutory limitations on the right to inspect corporate documents. Part IV concentrates on the director’s right to inspect corporate documents, including its rationale and its application under both Oklahoma and Delaware law. Part V examines the issue of whether a corporation must create documents in response to a request by a shareholder

an attorney’s time and his client’s money. If the corporation insists on litigating a request by a shareholder or director, these cost benefits may evaporate. See Thomas, supra, at 360 (noting that Delaware attorneys estimate fees for simple stocklist cases to run around $10,000, fees for straightforward books and records cases to run around $20,000-50,000, and fees for more complex, contested cases to be significantly greater).

If the corporation litigates the matter in bad faith, however, the inspecting party may recover attorneys’ fees either by statute or via the bad faith exception to the American rule. See id. at 366; see also McGowan v. Empress Entm’t Inc., 791 A.2d 1, 4 (Del. Ch. 2000). In McGowan, a director made a lawful demand, and although the company had promised orally and in writing to provide the documents, it did not. This action enabled the director to recover his attorneys’ fees for the action to compel inspection under the bad faith exception to the American rule that each party bears his own fees. McGowan, 791 A.2d at 5.

For a thorough discussion of the distinction between the right of inspection and the right of discovery during litigation, see 5A FLETCHER, supra note 3, § 2213, at 335.

6. Proper Purpose, supra note 3, at 393 (noting that such correspondence is necessary for the three primary means of corporate acquisition: proxy contests, public exchange offers, and cash tender offers). Because the incumbent officers who have an interest in the corporation’s continued existence have physical custody of the documents, companies rarely turn over these documents after a single request, and parties often must seek judicial enforcement. See id. at 393-94; Frank G. Newman, Inspection of Stock Ledgers and Voting Lists, 16 Sw. L.J. 439, 440, 458 (1962).
or director. Finally, Part VI lists factors for practitioners to evaluate in determining whether to use this newly acquired weapon.

II. Shareholder's Right of Inspection

A. Rationale

All states recognize the shareholder's right of inspection.\(^7\) Two general theories support this right,\(^8\) both arising from the fundamental notion that shareholders own the corporation. First, the "agency" theory explains that shareholders own the corporation and that rights of inspection protect the shareholders' investments in the company.\(^9\) As the United States Supreme Court noted, "The right of inspection rests upon the proposition that those in charge of the corporation are merely the agents of the stockholders, who are the real owners of the property."\(^10\) Oklahoma courts hold that the statutory right to inspect corporate documents is an incident of stock ownership.\(^11\)

A second, related theory also supports the shareholder's right of inspection. The "watchdog" theory explains that inspection rights exist to protect shareholders who, after entrusting their property interests in a company to its agents, must "keep a watchful eye on the management and the condition of the business."\(^12\) Indeed, one Oklahoma Supreme Court Justice has referred to the shareholder's right of inspection as "the assertion of a right to know the full scope of corporate activity."\(^13\) To enable shareholders to monitor corporate activities more efficiently, one scholar has advocated broadening and streamlining shareholder inspection statutes.\(^14\) Moreover, some scholars advocate shareholder monitoring, at least by institutional shareholders, under the theory that such monitoring will

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7. See supra note 3 and accompanying text.
8. See generally Thomas, supra note 5, at 337; Griffin, supra note 3, at 616.
9. See generally Thomas, supra note 5, at 336; Griffin, supra note 3, at 616.
11. Hoover v. Fox Rig & Lumber Co., 1948 OK 1, ¶ 14, 189 P.2d 929, 932; see also 5A Fletcher, supra note 3, § 2230, at 438; cf. Ramco Operating Co. v. Gassett, 1995 OK 8, ¶ 8, 890 P.2d 941, 943 (holding that pledgee lacked such common law rights).
12. 5A Fletcher, supra note 3, § 2213, at 336; see also Guthrie, 199 U.S. at 155 (noting that "oftentimes frauds are discoverable only by examination of the books").
14. Thomas, supra note 5, at 369 (concluding that the SEC should amend SEC Rule 14a-7 if no state law reform takes place).
improve corporate performance. Others are more skeptical about its effects on corporate performance.

B. Historical Development

Before the seventeenth century, courts regarded corporations as trustees holding corporate property for the benefit of the shareholders. During the industrial revolution, the development of the modern corporation led English common law courts to recognize the shareholder’s right to inspect corporate books to protect property interests.

At common law, shareholders had the right to inspect corporate books and records for a proper purpose at a reasonable place and time. Today, this common law rule exists in the absence of legislative abrogation or an enactment by the corporation in its bylaws or charter. Indeed, courts hold that modern statutes codifying common law inspection rights supplement rather than abrogate these rights. The common law rule established shareholders’ inspection rights as qualified rights that shareholders may assert in good faith, after establishing the inspection’s proper purpose.

Procedurally, common law courts required that a dispute or controversy exist before granting the right of inspection and, even then, circumscribed the inspections granted depending on the purposes of the particular dispute.


17. Thomas, supra note 5, at 336-37.

18. Id. at 337.

19. Ramco Operating Co. v. Gassett, 1995 OK 8, ¶ 8, 890 P.2d 941, 943 (noting that the common law right was personal to the stockholder; thus, the court denied a pledgie the right of inspection); see also 5A FLETCHER, supra note 3, ¶ 2214, at 342; 2 O’NEAL & THOMPSON, supra note 5, ¶ 7:35, at 228; Proper Purpose, supra note 3, at 394.

20. 5A FLETCHER, supra note 3, ¶ 2214, at 342.

21. See, e.g., State ex rel. Cochran v. Penn-Beaver Oil Co., 143 A. 257 (Del. 1926); see also Griffin, supra note 3, at 617 (noting that shareholders still have the common law right to inspect documents lying beyond the scope of state inspection statutes). But see Gassett, ¶ 8, 890 P.2d at 943 (“Statutes were later adopted to include and enlarge upon the common law inspection rights.”). As its statement in Gassett reveals, the Oklahoma Supreme Court views statutes as including and enlarging on common law inspection rights; thus, it may hold that the Oklahoma inspection statute either included or abrogated common law rights.

22. 5A FLETCHER, supra note 3, ¶ 2214, at 342; see also Proper Purpose, supra note 3, at 394.

Shareholders asking courts to enforce their inspection rights also had to allege and prove a proper purpose for their inspection.24

In the 1800s, the increasing size and complexity of corporations resulted in problems of corporate finance and production, and led to an increase not only in the number of shareholders, but also in the shareholders’ need for reliable information about corporate affairs.25 As shareholders were progressively less involved in corporate management and less likely to have convenient access to corporate business information, shareholders turned to corporate law to gain this information.26 Corporate statutes in the early 1800s dealt with this problem in two ways: (1) by granting shareholders inspection rights, and (2) by requiring the corporation to report to its shareholders periodically.27

Often, corporate officers resisted inspection by minority shareholders, and this resistance led to growing dissatisfaction with the common law rule.28 In the latter part of the nineteenth century, this dissatisfaction caused many states to enact statutes to provide a right of inspection in “unqualified terms.”29 These statutes neither made a proper purpose a condition of inspection nor allowed companies to deny shareholder access, even on grounds of an improper or illegal purpose.30 By the early 1900s, many state statutes also provided for sanctions against a company and its officials for refusing shareholder requests for information, even when the shareholder made unreasonable demands.31

A variety of common law forms allowed shareholders to exercise their rights to inspect, including: mandamus at law, mandatory injunction in equity, animation-before-trial, and discovery-and-inspection.32 For a time, courts limited inspection rights by procedural means. For example, in some courts, the remedy for refusal of inspection was to seek a writ of
mandamus. As courts considered writs of mandamus discretionary, extraordinary remedies, they refused to issue the extraordinary writs when the shareholder’s motive or purpose was improper. Delaware courts, among others, followed this approach.

Delaware’s procedural formalities for obtaining writs of mandamus required courts to consider as true undenied allegations in the writ, but if the response denied the allegations, then Delaware courts considered the denial to be true and refused to issue a writ. Practically, Delaware courts held that they lacked authority to reach the merits of the writ, so merely by alleging an improper purpose, corporations could defeat a shareholder’s “absolute” right of inspection. The Delaware legislature responded by amending the mandamus procedure to allow Delaware courts to examine the facts of each request to ascertain the propriety of an inspection demand.

The unlimited right of inspection led to abuses, such as companies purchasing stock of their competitors to access corporate information or to blackmail the competitor. These abuses produced legislative backlash and, in the 1930s, resulted in “a statutory movement back toward the common law’s limitations on shareholders’ inspection rights.”

Modern corporate inspection statutes abandon the absolute language of their predecessors and expressly require a minimal showing of a proper purpose. Although state statutes differ in the terms and inspection rights

33. See Proper Purpose, supra note 3, at 395; see also Thomas, supra note 5, at 342 (noting Delaware followed this approach).

34. See Proper Purpose, supra note 3, at 395 (citing Guthrie v. Harkness, 199 U.S. 148, 155 (1905); State ex rel. Costelo v. Middlesex Banking Co., 88 A. 861 (Conn. 1913); Shea v. Sweetser, 111 A. 579 (Me. 1920); Bruning v. Hoboken Printing and Publ’g Co., 50 A. 907 (N.J. 1902)). Other courts held that because inspection was an absolute right, no discretion existed to deny the writ of mandamus. Id. (citing Venner v. Chi. City Ry., 92 N.E. 643 (Ill. 1910); State ex rel. Dempsey v. Werra Aluminum Foundry Co., 182 N.W. 354 (Wis. 1921)); see also Thomas, supra note 5, at 338; C. Thomas Attix, Jr., Note, Rights of Equitable Owners of Corporate Shares, 99 U. PA. L. REV. 999, 1000 (1951); William T. Blackburn, Comment, Shareholder Inspection Rights, 12 SW. L.J. 61, 61 (1958).


36. Proper Purpose, supra note 3, at 396.

37. Id.

38. Id. at 396-97 (citing State ex rel. Miller v. Loft, Inc., 156 A. 170 (Del. Super. Ct. 1931), as an example of a court applying the amended statute).


40. Thomas, supra note 5, at 339; Blackburn, supra note 34, at 61.

41. Proper Purpose, supra note 3, at 397.
conferred, the majority of modern corporate statutes grant the right of inspection only to qualified shareholders making written demand for inspection at a reasonable time for a proper purpose.42 Some state statutes limit the statutory inspection rights to those shareholders who either were shareholders of record for six months prior to the demand or hold a minimum of 5% of the outstanding stock.43

Furthermore, some modern statutes differentiate between requests based on the information sought. The Revised Model Business Corporation Act, for example, divides the shareholder right of inspection into two categories depending on the information sought. If a shareholder seeks the articles of incorporation, bylaws, lists of officers and directors, or the most recent annual report, the shareholder can access these materials without any showing of purpose.44 If a shareholder seeks the shareholders list, accounting records, or excerpts from directors' meetings, a shareholder must show that his demand is made in good faith, for a proper purpose, and that the records sought are directly connected to his purpose.45

Practitioners should note that although modern inspection statutes are the most common vehicle for exercising inspection rights, common law inspection rights may remain viable.46 Whether the Oklahoma Supreme Court would determine that shareholders retain common law inspection rights not codified in the Oklahoma General Corporation Act47 is uncertain. In the case of Ramco Operating Co. v. Gassett,48 the Oklahoma Supreme Court examined the history of common law inspection rights and their subsequent codification, before determining that a pledgee of stock lacked such rights that were personal to shareholders.49 In reaching this conclusion, the court stated that "[s]tatutes were later adopted to include and enlarge upon the common law inspection rights."50 The Oklahoma Supreme Court, therefore, views inspection statutes as including and enlarging common law inspection rights and, thus, could hold that the Oklahoma inspection statute either included or abrogated common law rights.

42. 5A FLETHER, supra note 3, § 2215, at 348.
44. See REV. MODEL BUS. CORP. ACT § 16.02 (1984); see also 2 O'NEAL & THOMPSON, supra note 5, § 7:35, at 229.
45. See supra note 44.
46. See supra note 21 and accompanying text.
47. 18 OKLA. STAT. § 1065 (2001).
49. Id. ¶ 8, 890 P.2d at 943.
50. Id.
C. Oklahoma Shareholder Inspection Rights

The Oklahoma General Corporation Act (OGCA) establishes Oklahoma shareholders’ inspection rights.51 The OGCA answers the initial questions of who, what, where, when, and how. In defining who possesses these rights, the OGCA defines "shareholder" as a record shareholder in a stock corporation, or a member shown on the records of a nonstock corporation.52 The OGCA then provides that by making a written demand under oath setting out the purpose for the inspection, any shareholder, personally or through his agent, has the right to inspect the stock ledger, shareholders list, or other books and records of a corporation and to copy or make extracts from these documents.53 It also provides that if an agent is to make the inspection, a power of attorney or other writing authorizing the agent to act on the shareholder's behalf must accompany his demand.54 It further states that the demand "shall be directed to the corporation at its registered office in this state or at its principal place of business."55

If the corporation itself, or one of its agents or officers, refuses to allow the inspection after a shareholder has made a request, or does not reply to the demand within five business days, the shareholder may apply to a district court for an order compelling an inspection.56 The OGCA provides that the court may summarily order the corporation to permit the shareholder to inspect the documents or to furnish him a list of its shareholders as of a specific date.57 The court may condition the furnishing of such a list on the shareholder’s paying the corporation its reasonable cost for obtaining and furnishing the list or other appropriate conditions.58

51. For a thorough discussion of the Oklahoma statute, see 3B M. THOMAS ARNOLD & H. WAYNE COOPER, VERNON'S OKLAHOMA FORMS 2D, BUSINESS ORGANIZATIONS, § 12.01, at 549 (West 2001). For generic corporate forms relating to demands for inspection, see id. § 12.07-.09, at 572-76.
52. 18 OKLA. STAT. § 1065(A)(1)(a-b) (2001). Courts have sometimes allowed inspection under the statute of the state in which the shareholder resides instead of the state of the company's incorporation. See 2 O'NEAL & THOMPSON, supra note 5, § 7:35, at 229.
53. 18 OKLA. STAT. § 1065(B) (2001). If a corporation has equity securities registered under the Securities Exchange Act of 1934, federal proxy rules may provide shareholders another avenue to access the shareholder list. See 2 O'NEAL & THOMPSON, supra note 5, § 7:35, at 234 (citing 17 C.F.R. 240.14a-1).
54. 18 OKLA. STAT. § 1065(B) (2001).
55. Id.
56. Id. § 1065(C).
57. Id.
58. Id.
Oklahoma law does not define what constitutes "other books and records" under the OGCA. Some authors have suggested that the Internal Revenue Code and publications of the Internal Revenue Service offer guidance in construing this term. When dealing with books and records, however, attorneys should maintain a skeptical mind, as the possibility exists for management to override internal controls and engage in creative accounting. The broad statutory language invites Oklahoma courts to construe the term "books and records" to encompass any of the corporate books, ledgers, or financial records.

The Oklahoma legislature based the OGCA on the Delaware General Corporations Act. Under their principles of statutory construction, Oklahoma courts should interpret the OGCA in accordance with Delaware decisions. Delaware authorities, therefore, will likely be very persuasive to Oklahoma courts. This article, consequently, will address inspection rights in Delaware.

D. Delaware Inspection Rights

Shareholder inspection demands in Delaware operate in a manner nearly identical to Oklahoma shareholder demands. Delaware shareholders have the right to inspect the stock ledger, a list of its stockholders, and other

59. See Michael J. Faul, Jr. & Robert Dipasquale, A Minority Shareholder's Inspection Rights Under N.J.S.A. 14A:5-28, N.J. LAW., Aug. 2000, at 8, 9-13. The authors suggest that the IRS offers guidance for construing this term in I.R.C. § 6001, which requires "taxpayers other than wage earners and farmers to keep 'permanent books of accounts or records including inventories sufficient to establish gross income, deductions, credits and other amounts required to be shown on any tax return or information return.'" IRS Publication 583 may provide similar guidance for items companies may keep as records. Id. at 11. Nothing suggests that Oklahoma courts would either accept or reject the IRS definition of "books and records" as coextensive with the term as used in the OGCA. Compare Estate of Sieber v. Okla. Tax Comm'n, 2002 OK CIV APP 25, 41 P.3d 1038 (finding IRS and I.R.C. definitions persuasive in tax arena) with Heskett v. Heskett, 1995 OK CIV APP 52, 896 P.2d 1200 (rejecting application of I.R.C. definition of "unrealized receivables" where term used in partnership agreement). See also In re Sales Tax Protest of West, 1994 OK CIV APP 24, 979 P.2d 263 (rejecting application of definition of "tangible personal property" as used in sales tax code to use in tax case).

60. See Faul & Dipasquale, supra note 59, at 12-13 (discussing approaches used by creative corporate accountants).


62. See id.; see also Bank of Lakes v. First State Bank, 1985 OK 81, ¶ 9, 708 P.2d 1089, 1091 ("It is a settled rule that where one state adopts a statute from another, it is presumed to adopt the construction placed upon that statute by the highest court of the other state.").

63. This is not surprising because the Oklahoma legislature borrowed the Delaware provisions when it enacted title 18, section 1065 of the Oklahoma Statutes.
corporate books and records if they make written demand, under oath, on the corporation stating the purpose of the inspection. Delaware law places the burden of proof on shareholders, requiring that they demonstrate a proper purpose to inspect corporate books and records. If a shareholder seeks to inspect the stockholder list, however, Delaware law places the burden of showing an improper purpose on the corporation. Delaware courts note that shareholders "must justify each category of the requested production" and that shareholders seeking inspection bear the burden of proving "that each category of books and records is essential to the accomplishment of the stockholder's articulated purpose for the inspection." Delaware courts have also noted that while the legislature may statutorily abridge a shareholders' right of inspection, this right cannot be "abridged or abrogated by an act of the corporation." For example, Delaware courts have refused to allow provisions of a merger agreement to abridge a shareholder's right of inspection.

III. Statutory Limits on Shareholders' Inspections

A. "Proper Purpose" Limitation

If a shareholder seeks to inspect corporate books and records other than the stock ledger or list of shareholders, the OGCA provides that the shareholder must establish that he has complied with the provisions respecting the manner and form of demand and that the inspection is for a proper purpose. If the shareholder wants to inspect the stock ledger or a list of shareholders, and has complied with Oklahoma law regarding the form and manner of demand, the OGCA places the burden of proof on the corporation and requires that it establish that the inspection sought by the

66. Id. at 1031 n.2.
68. Id. at 569.
70. Id. Companies may still create and implement internal policies or procedures to handle shareholder inspection requests. Indeed, in litigating equitable shareholder inspection demands, companies may find such policies helpful, especially if a shareholder who is receiving the desired materials files a shareholder inspection action to "speed up the process."
shareholder is for an improper purpose. The OGCA gives Oklahoma courts discretionary authority to limit or condition the inspection or to award any other relief they deem just and proper, and Oklahoma courts may order books or records or copies thereof under prescribed terms and conditions.

1. Defining "Proper Purpose" Under Oklahoma Law

As one scholar has noted, the phrase "proper purpose" is a "nebulous term that has spawned much litigation." The OGCA defines "proper purpose" as "a purpose reasonably related to such person's interest as a shareholder." The Oklahoma Supreme Court has interpreted this term broadly. In a series of cases under the 1947 Oklahoma Business Corporation Act, the Oklahoma Supreme Court defined "proper purpose" under Oklahoma law. In one case, the Oklahoma Supreme Court held that a bona fide stockholder has a legal right of inspection in good faith where he does not seek to gratify curiosity or is not proceeding for speculative or vexatious purposes. It is also necessary that the purpose be lawful in character and not contrary to the interest of the corporation. . . . The proper purpose required by the statute, then, is one wherein a stockholder seeks information bearing upon the protection of his interest and that of other stockholders in the corporation. He must be seeking something more than the satisfaction of his curiosity and not conducting a general fishing expedition. A mere statement in a petition alleging a proper purpose is not sufficient. The facts in each case may be examined.

72. Id. § 1065(C)(3).
73. Id.
75. 18 OKLA. STAT. § 1065(C)(3) (2001).
76. The 1947 Oklahoma Business Corporation Act was formerly found at title 18, section 1.71 of the Oklahoma Statutes. See 18 OKLA. STAT. § 1.71 (1961) (repealed 1986).
78. Fears, ¶ 9, 483 P.2d at 727 (quoting Sawers v. Am. Phenolic Corp., 89 N.E.2d 374, 379 (Ill. 1950)); see also Tolkan Royalty Corp., ¶¶ 11-12, 141 P.2d at 574 (noting that none of these concerns were present).
In another case, the Oklahoma Supreme Court noted that the phrase “for any proper purpose” limited and revoked the unlimited and understood right of inspection existing under a prior statute.79 In Fears v. Cattleman’s Investment Co., the Oklahoma Supreme Court held that a stockholder’s demand for a list of stockholders and addresses was for a proper purpose, even if the stockholder wanted to solicit proxies from other corporate shareholders, and even if he made the demand with the intent to gain control of corporate management.80 Similarly, in Hoover v. Fox Rig & Lumber Co., the Oklahoma Supreme Court held that examining corporate books to ascertain stock value was a proper purpose.81 In Wolozyn v. Begarek, however, the Oklahoma Supreme Court held that the plaintiffs did not show a proper purpose where the only grounds for their claim of right of inspection related to acts of the corporation in influencing the basic dogma, doctrine, and religious beliefs of a corporate church.82

The Oklahoma Supreme Court has not overruled its earlier cases, and no recent decisions interpret the statutory definition of “proper purpose.” This raises the question of how Oklahoma courts will harmonize these pre-1986 Oklahoma decisions with Delaware decisions on the same point. One Oklahoma appellate court has stated that Oklahoma courts should interpret the OGCA in accordance with Delaware decisions.83 The Oklahoma Supreme Court has stated that “[g]enerally, where one state has adopted the uniform laws or statutes from another state, at the time of such adoption, decisions from the latter state are persuasive in the former state’s construction of such laws; however, subsequent interpretations placed upon such laws are not controlling or conclusive.”84 This statement suggests that Delaware decisions will be persuasive, not controlling, authority. At best, the amount of weight that Oklahoma courts will give to these decisions is uncertain.

2. Defining “Proper Purpose” in Other Jurisdictions

Decisions from other jurisdictions establish that a number of purposes are “proper purposes” for exercising shareholder inspection rights, including communicating with other shareholders about matters of common concern,

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79. Wolozyn, ¶ 11, 378 P.2d at 1010.
80. Fears, ¶ 16, 483 P.2d at 728.
81. Hoover, ¶ 22, 189 P.2d at 933.
82. Wolozyn, ¶ 13, 378 P.2d at 1011.
83. See supra note 62 and accompanying text.
investigating corporate mismanagement, and valuing corporate stock.\textsuperscript{85} As with Oklahoma courts,\textsuperscript{86} courts in other jurisdictions are reluctant to permit "fishing expeditions."\textsuperscript{87} Courts have, therefore, required potential inspectors to show "a credible basis to find probable wrongdoing."\textsuperscript{88} Courts have also noted that several purposes are not "proper purposes," including satisfying one's idle curiosity, harassing the corporation or its managers, pursuing purely social or political aims, and misusing information obtained.\textsuperscript{89}

\section*{B. Miscellaneous Statutory Limits on Shareholders' Right to Inspect}

Three additional statutory requirements limit the right of shareholders to inspect documents: (1) that the request be in proper form; (2) that the potential inspector transmit the request through the proper demand process; and (3) that the request set out a "proper purpose."\textsuperscript{90} Courts have required that requests strictly adhere to the statutory guidelines as to the demand's form for two reasons: (1) it furthers "the interest of insuring prompt and limited litigation"; and (2) the request requires that corporations receive and consider demands before litigation.\textsuperscript{92} As a result, Delaware courts have dismissed actions in which the shareholders did not make the complaint under oath or filed it less than five days after delivery of demand.\textsuperscript{93} Shareholders examining documents other than the corporate stock ledger or

\begin{footnotes}
\footnotetext{85}{See 3B ARNOLD & COOPER, supra note 51, § 12.06, at 561-64 (detailing jurisprudence from several states); I R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 7.44 (3d ed. 1998) (discussing Delaware law); 2 ERNEST L. FOLK, III ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 220.7.3 (3d ed. 1998) (discussing Delaware law).}
\footnotetext{86}{See Fears v. Cattleman's Inv. Co., 1971 OK 22, ¶ 9, 483 P.2d 724, 727 (quoted supra text accompanying note 78).}
\footnotetext{87}{See supra note 85.}
\footnotetext{89}{See Fears, ¶ 9, 483 P.2d at 727 (noting this under Oklahoma law) (quoted supra text accompanying note 78). See generally 3B ARNOLD & COOPER, supra note 51, § 12.06, at 565; Jeffery C. Clark, Note, Compaq Computer Corporation v. Horton, A Straight Forward Clarifying Statutory Interpretation of Section 220(B) and (C), 20 DEL. J. CORP. L. 622 (1995). Similarly, courts may deny inspections when the shareholder has possession of the requested materials. CM & M Group, Inc. v. Carroll, 453 A.2d 788, 792 (Del. 1982) (citing State ex rel. Miller v. Loft, 156 A. 170, 172 (Del. 1931)).}
\footnotetext{90}{See 18 OKLA. STAT. § 1065(B) (2001).}
\footnotetext{91}{See Mattes v. Checkers Drive-in Rest., Inc., No. C.A. 17775, 2000 WL 1800126, at *1 (Del. Ch. Nov. 15, 2000).}
\footnotetext{92}{Id.}
\footnotetext{93}{Id. at *2.}
\end{footnotes}
shareholders list bear the burden of showing that their inspection is for a proper purpose.

Scholars note that when circumstances warrant, courts may enter orders limiting the scope of inspection or limiting its purpose.94 Delaware courts have recognized that they have the duty to safeguard the rights and legitimate interests of the corporation and the power to limit or restrict a shareholder’s right of inspection.95 In addressing statutory inspections, Delaware courts note that they must strike a proper balance between providing shareholders “a right to at least a limited inquiry into books and records when they have established some credible basis to believe that there has been wrongdoing” and “invit[ing] mischief to open corporate management to indiscriminate fishing expeditions.”96 Delaware courts have also noted they have “the duty to safeguard the rights and legitimate interests of the corporation,” and that they are “empowered to protect the corporation’s legitimate interests and to prevent possible abuse of the shareholder’s right of inspection by placing such reasonable restrictions and limitations as it deems proper on the exercise of the right.”97 Consequently, Delaware courts have reasonably restricted the exercise of a shareholder’s right to inspect, including requiring that the shareholder consent to a confidentiality agreement before disclosure, emphasizing “the need to protect privately-held corporations from the dissemination of confidential business information to curiosity seekers.”98 Accordingly, Delaware courts have restricted a shareholder’s inspection to certain categories of information,99 and have prohibited inspecting parties from disclosing information obtained in the inspection to competitors.100

94. See, e.g., 3B ARNOLD & COOPER, supra note 51, § 12.06(h), at 571-72.
97. CM & M Group, Inc., 453 A.2d at 793-94.
98. See Stroud v. Grace, 606 A.2d 75, 89 (Del. 1992) (relying on these principles to reject claim that directors should have produced confidential information under Delaware shareholders inspection statute). See generally Clark, supra note 89, at 622-23 (noting that Delaware law limits these rights and that Delaware courts have emphasized these limits).
In *Sahagen Satellite Technology Group, LLC v. Ellipso, Inc.*, a corporate stockholder demanded an inspection to investigate waste and mismanagement allegedly diverting corporate assets and failing to take advantage of corporate opportunities. It claimed that the President and C.E.O. of Ellipso, Inc. had used corporate funds to buy a personal computer from a friend at an exorbitant price, to pay for his personal defense in governmental inspections, and to pay for personal travel expenses. Because the corporate shareholders had failed to show that the documents listed in its demand were "essential and sufficient," the Delaware court limited the corporate shareholder's inspection to periodic financial statements and documents related to the company's purchase of computer equipment.

In *CM & M Group, Inc. v. Carroll*, the Delaware Supreme Court placed conditions on the disclosure of information obtained from a shareholder's inspection. In *Carroll*, the shareholder sought financial information to value his stock. The court conditioned the shareholder's disclosure of the information he had received to a prospective purchaser upon the receipt of written representations and an executed confidentiality agreement.

These cases demonstrate the ability of courts to shape equitable solutions to protect a company. Delaware statutorily vests jurisdiction over shareholder requests in the Chancery Court, so principles of equity remain applicable. As a result, equitable defenses may apply as well as overarching principles of justice and equity.

102. Id.
103. Id. at 796.
104. 453 A.2d 788 (Del. 1982).
105. Id. at 792-93.
106. Id. at 794.
107. See DEL. CODE ANN. tit. 8, § 220 (2001). Although, unlike Delaware, Oklahoma has dissolved the split between law and equity, these principles still apply to shareholder requests that are equitable actions, whether the court is a chancellor as in Delaware or a district court judge as in Oklahoma.
108. As an interesting aside, Delaware courts have held that the equitable doctrine of "unclean hands" is unavailable in a section 220 action. See Skoglund v. Ormand Indus., Inc., 372 A.2d 204, 214 (Del. Ch. 1976); 2 FOLK, *supra* note 85, § 220.10. Whether Oklahoma courts would reach the same conclusion is unclear.
109. See Cook v. Fusselman, 300 A.2d 246, 251 (Del. Ch. 1972); see also I BALOTTI & FINKELSTEIN, *supra* note 85, § 7.46.
IV. Directors' Right of Inspection

Shareholders are not the only class granted inspection rights under the OGCA. The OGCA also establishes inspection rights for directors.110 These rights are much broader than the inspection rights granted to shareholders. Consequently, courts note that the right of a shareholder to examine corporate books is a qualified right, whereas the right of a director is usually termed as an absolute right.111

A. Rationale

While a shareholder's right to inspect arises out of his ownership of corporate property, a director's right of inspection "grows out of the fact that he is a representative of all the stockholders and, in a sense, a managing partner of the corporation."112 A director's right of inspection also exists because he is a fiduciary with respect to the corporation and its shareholders.113 The right of inspection, therefore, is necessary to allow the director to perform his duties and to protect himself from liability.114 To meet his fiduciary obligations, a director must have access to books and records and often has a duty to consult such documents.115 Consequently, Delaware courts presume that a sitting director is entitled to "unfettered access to the books and records of the corporation for which he sits and certainly is entitled to receive what the other directors are given."116 As a result, Delaware courts have noted that "[t]he rights of a stockholder to examine books is often called

112. Dixon, 36 A.2d at 31. In the context of describing the inspection rights required of foreign corporations under California law, scholars have noted that broad inspection rights, and even mandatory inspections, provide corporate insiders with an incentive to fulfill their fiduciary duties. Michael J. Halloran & Douglas L. Hammer, Section 2115 of the New California General Corporation Law — The Application of California Corporation Law to Foreign Corporations, 23 UCLA L. REV. 1282, 1323 (1976).
114. See id. at 283; see also 1 BALOTTI & FINKELESTEIN, supra note 85, § 7.49; 2 FOLK, supra note 85, § 220.3.5; William C. McLaughlin, The Director’s Right to Inspect the Corporate Books and Records — Absolute or Otherwise, 22 BUS. LAW. 413, 421 (1967).
a qualified right, while the right of a Director is usually termed an absolute one."117

B. Oklahoma Directors’ Inspection Rights

The directors’ absolute right to examine corporate records is embodied in the OGCA. The OGCA provides that "[a]ny director, including a member of a governing body of a nonstock corporation shall have the right to examine the corporation’s stock ledger, a list of its shareholders, and its other books and records for a purpose reasonably related to his or her position as a director."118 It also provides that an Oklahoma district court may "summarily order the corporation to permit the director to inspect any and all books and records, the stock ledger, and a list of shareholders and to make copies or extracts [of these records]."119 The OGCA also vests the court with discretionary authority to limit or condition the inspection or to award any relief it deems "just and proper."120 Where a party is both a director and a shareholder, the party must bring such a suit in his capacity as director.121

C. Delaware Directors’ Inspection Rights

Because Oklahoma has adopted the Delaware statutes, Oklahoma courts will likely turn to Delaware authority in addressing this issue.122 In 1981, the Delaware General Assembly amended section 220 of its General Corporation Law to expressly recognize an independent, enforceable right of inspection by directors.123 The Delaware statute provides that by making a demand for inspection, a director has the right to examine corporate books and records for a purpose reasonably related to his position as a director.124 Delaware courts presume that section 220 provides sitting directors virtually unfettered access to corporate books and records.125 As a result, a

118. 18 OKLA. STAT. § 1065(D) (2001).
119. Id.
120. Id.
121. Other courts have noted that when a party is both a director and a shareholder and requests privileged information, but sues primarily as a shareholder, that party is not entitled to the same relief as a director because he did not sue in his capacity as director. See Milroy v. Hanson, 875 F. Supp. 646, 649-50 (D. Neb. 1995).
122. See supra notes 61-62 and accompanying text.
123. See DEL. CODE ANN. tit. 8, § 220 (d) (2001); see also Scattered Corp. v. Chi. Stock Exch., Inc., 671 A.2d 874, 876 (Del. Ch. 1994).
125. See McGowan v. Empress Ent’mt, Inc., 791 A.2d 1, 5 (Del. Ch. 2000); Kortum v. Webasto Sunroofs, Inc., 769 A.2d 113, 118 (Del. Ch. 2000) ("As Vice Chancellor Lamb has
director may inspect virtually any corporate document in existence, provided the purpose of the inspection is reasonably related to his position.126 Moreover, once the corporation refuses a director’s section 220 demand for inspection, the director may establish a prima facie case for inspection by establishing two facts to the court: (1) that he made the demand with a purpose reasonably related to his position, and (2) that the corporation denied it.127 From these facts, Delaware courts presume that a showing of entitlement to the documents has been made, and shift to the corporation the burden of showing why the court should either deny or condition the director’s inspection.128

Additionally, Delaware courts note that a director’s right of inspection extends to documents protected by the corporation’s attorney-client privilege, so that “directors have a right to access attorney communications of the company relating to the time that they served as directors.”129 For example, in Moore Business Forms, Inc. v. Cordant Holdings Corp., the Delaware Chancery Court held that a corporation generally cannot assert the attorney-client privilege to deny a director access to legal advice given during his tenure.130

D. Limits on a Director’s Right to Inspection

Although Oklahoma courts have yet to address the director’s right to inspection in a published opinion, Delaware courts have circumscribed this right in certain situations by limiting the agents available to assist with inspections and by making directors accountable for their actions. While granting directors the unfettered right to inspect corporate documents

stated, there is a "presumption that a sitting director is entitled to unfettered access to the books and records of the corporation for which he sits and certainly is entitled to receive what the other directors are given."100) (quoting Intrieri v. Avatex Corp., C.A. No. 16335-NC, 1998 WL 326608, at *1 (Del. Ch. June 12, 1998)

126. See supra note 125; see also DEL. CODE ANN. tit. 8, § 220(d) (2001).
127. Kortum, 769 A.2d at 118.
128. Id.
reasonably related to their position, Delaware courts may limit the director’s choice of agent when exercising his right of inspection.\textsuperscript{131} One court noted that such a restriction is justified where the proposed agent has a conflict of interest and the corporation can demonstrate that conflict.\textsuperscript{132} It observed that courts should use the power to limit a director’s access to information sparingly, as the director, not the court, has fiduciary duties to the corporation and its stockholders.\textsuperscript{133} Another Delaware court limited a director’s choice of attorneys where the court found that allowing attorneys who had brought pending litigation against the corporation to inspect corporate documents would be “back-door discovery unbound by work-product, privilege or any other limitation upon discovery.”\textsuperscript{134}

As a result, where a conflict of interest exists, courts have been willing to limit the director’s choice of agents. Oklahoma courts may adopt this rationale, as it strikes a balance between limiting efforts to circumvent the privileges and allowing directors to fulfill their fiduciary duties.

Delaware courts have also circumscribed the director’s right to inspect corporate documents by holding directors accountable for their actions. They have noted that the corporation has a remedy in court if a director abuses his position, for example by making information available to an individual hostile to the corporation, or to individuals not entitled to the information.\textsuperscript{135}

\textit{V. Creation of Documents for Inspection by Directors or Shareholders}

Under Oklahoma law, shareholders have a broad spectrum of corporate books, records, and papers available to them. Moreover, directors have a broader right of examination than shareholders. They may examine any book or record that is reasonably related to their position as directors. Companies consequently cannot prevent a director from inspecting the vast majority of corporate records. Indeed, the scope of the director’s inspection may be limited only upon a showing that a conflict of interest or other legitimate reason justifying a limitation exists. Occasions will arise, however, in which directors will find the raw information itself lacking. A director may desire compilations or analyses of data, or organization of voluminous information.

\textsuperscript{131} See Kortum, 769 A.2d at 120.
\textsuperscript{132} Id. at 120-21.
\textsuperscript{133} Id.
\textsuperscript{134} Henshaw v. Am. Cement Corp., 252 A.2d 125, 130 (Del. Ch. 1969).
\textsuperscript{135} Id. at 129 (noting that such acts violate the director’s fiduciary duty and give rise to legal remedy).
into an understandable form. The question remains: Does a corporation have to prepare documents at the request of the director or shareholder?

This issue is apparently an open one under Oklahoma law.\textsuperscript{136} Delaware courts have faced this issue in various contexts in which shareholders have requested corporate information. Delaware law requires that corporations prepare certain materials for disclosure and inspection of stockholders.\textsuperscript{137} In *Hatleigh Corp. v. Lane Bryant, Inc.*, the Delaware Chancery Court required that the company provide its stockholder with a "Cede" list.\textsuperscript{138} The corporation could break this list down upon request in a matter of minutes using modern computer technology.\textsuperscript{139} The breakdown disclosed the identity of brokerage firms holding stock under the name "CEDE & Co." to allow the holder to trace the beneficial owner and forward the proper materials to them.\textsuperscript{140} The *Hatleigh* court noted that once a stockholder established a proper purpose, he was entitled to the same lists and data available to the corporation, including magnetic computer tapes and daily transfer sheets reflecting stock transactions.\textsuperscript{141} As a result, the court held that the company should disclose such "Cede" lists because they were readily available and easily produced.\textsuperscript{142} The court noted, however, that the corporation was not obligated to prepare "lists, data, or computer tapes which are not readily available to it and, of course, [the stockholder] must pay any costs involved."\textsuperscript{143}

In analyzing Delaware law relevant to the production of documents for inspection, Delaware courts have noted that

the Cede breakdown has been viewed as something that can, in effect, be produced instantly. It is, therefore, available to the corporation in a proxy contest immediately when needed, even at

\textsuperscript{136} No reported Oklahoma decision deals with this issue.


\textsuperscript{138} *Hatleigh Corp.*, 428 A.2d at 354. Brokerage houses hold stock for their customers' benefit, with actual title held through an entity known as "The Depository Trust Company," which uses the name "CEDE & Co." for this purpose. *Id.* This practice prevents someone from ascertaining which brokerage firms hold shares and the number of shares each holds merely by examining the stock ledger. *Id.; see also* David W. MacDonald, Comment, *The Right to a Nobo List After Sadler v. NCR Corporation*, 5 DePaul Bus. L.J. 163, 212 (1992) (discussing thoroughly the procedure for Cede and Nobo lists).

\textsuperscript{139} *Hatleigh Corp.*, 428 A.2d at 354.

\textsuperscript{140} *Id.*

\textsuperscript{141} *Id.*

\textsuperscript{142} *Id.* at 355.

\textsuperscript{143} *Id.*
the last moment. Accordingly, it can fairly be said that such information is, in a real sense, in the possession of the corporation at all times.\textsuperscript{144}

In \textit{Shamrock Associates v. Texas American Energy Corp.},\textsuperscript{145} the Delaware Chancery Court held that a company that had obtained a list of nonobjecting beneficial owners of the corporation’s stock\textsuperscript{146} must provide access to the list to a record stockholder seeking an inspection. In \textit{RB Associates of New Jersey, L.P.}, the Delaware Chancery Court rejected a claim by a stockholder that the court should require the company to produce a Nobo list and provide it to him.\textsuperscript{147} The court noted that a Nobo list differed from a Cede list because it took approximately ten days to produce and, unlike a Cede breakdown, it was neither immediately available nor essential to the proxy solicitation process.\textsuperscript{148} As a result, the court held that the shareholder’s right to access information did not extend to compelling the directors to obtain Nobo lists when the corporation itself had no need for them and had no intention of obtaining them.\textsuperscript{149} The court noted, however, that if the corporation had such a list or later obtained such a list, it would have to provide that list to the stockholder.\textsuperscript{150}

\begin{itemize}
\item \textsuperscript{145} 517 A.2d 658, 660-61 (Del. Ch. 1986).
\item \textsuperscript{146} These lists, sometimes referred to as “Nobo” lists, are provided to the company by registered brokers and dealers according to SEC Rule 14b-1(c). Rule 14b-1 provides: “The broker or dealer shall . . . [p]rovide the registrant, upon the registrant’s request, with the names, addresses, and securities positions . . . of its customers who are beneficial owners of the registrant’s securities and who have not objected to disclosure of such information . . . .” 17 C.F.R. § 240.14b-1(b)(3)(i) (2001). Rule 14b-1 allows corporations to obtain “Nobo” lists and to contact directly beneficial shareholders, but does not preempt state statutes that potentially provide access to such lists. \textit{See, e.g.}, Burlington Indus., Inc. v. C.H. Masland & Sons, CIV. A. No. 86-3295, 1986 WL 6746 (E.D. Pa. June 12, 1986). \textit{See generally} MacDonald, \textit{supra} note 138, at 212 (discussing this issue thoroughly and noting that states must interpret their statutes to determine whether they will broadly construe them to grant access to Nobo lists or narrowly construe them to limit access to Nobo lists).
\item \textsuperscript{147} \textit{RB Assoc. of N.J., L.P.}, 1988 WL 27731, at *7.
\item \textsuperscript{148} \textit{Id.} at *6.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} at *7; \textit{see} Cenergy Corp. v. Bryson Oil & Gas P.L.C., 662 F. Supp. 1144 (D. Nev. 1987) (applying similar logic to reach a similar result); Bohrer v. Int’l Banknote Co., 540 N.Y.S.2d 445 (N.Y. App. Div. 1989) (same). \textit{But see} Sadler v. NCR Corp., 928 F.2d 48 (2d Cir. 1991) (recognizing that shareholders can obtain a Nobo list even if one is not in the corporation’s possession).
\end{itemize}
Under Delaware law, the right of inspection of a shareholder extends only to material which can fairly be said to be in the corporation’s possession. Given that the statute setting out this right includes both the shareholder’s right and the director’s right, Delaware courts would likely apply these principles to the rights of directors as well. Where the corporation neither needs the document requested nor has the intention of having the document created, courts refuse to require the corporation to produce the document. This rule, therefore, may extend beyond Cede and Nobo lists to apply to all corporate books and records.

VI. Conclusion

If their client is either a shareholder or a director of a corporation, the OGCA provides attorneys with another device to use in their quest for information — corporate inspection rights. While a useful arrow to have in one’s quiver, practitioners must use it at the appropriate time to render it beneficial. In making that decision, Oklahoma practitioners should examine two basic interests.

First, practitioners should evaluate the information sought and the party seeking it. Relevant considerations include whether it is the type of information likely to be found in corporate documents, whether the client is a shareholder or a director, and whether other considerations might limit the disclosure of information, including the motive of their client in seeking the information, any potential conflicts of interest, and the like. These factors will assist practitioners in determining whether such information is available and obtainable through the exercise of corporate inspection rights. These factors will also assist practitioners in determining which of the two available avenues to pursue to exercise the party’s inspection rights. Clearly, practitioners seeking information within the scope of the OGCA may use it to obtain such information. Their colleagues seeking information beyond the scope of the OGCA may also obtain the information they seek under the broader common law inspection rights.

151. See supra notes 137-50 and accompanying text.
152. See supra notes 137-50 and accompanying text.
153. One justification for such a result is that the law should not require the body of shareholders to bear the cost of benefiting a single shareholder. See generally Fred S. McChesney, "Proper Purpose," Fiduciary Duties, and Shareholder-Raider Access to Corporate Information, 68 U. CIN. L. REV. 1199 (2000) (describing several economic approaches to shareholder requests).
154. See generally supra Parts II and III.
155. See supra notes 21, 47-50, and accompanying text.
Second, to serve their clients effectively, practitioners should weigh the need for the information against the potential expense of litigating the request for inspection. In some cases, the cost of litigating the request for inspection will outweigh the value of the information sought. Consider the following two examples. Consider first a party seeking information to value his stock, but already possessing financials received pursuant to SEC Rule 14-b that contain the necessary information. In contrast, consider an attorney facing the potential dismissal of a derivative action for failure to state a claim because his petition does not illustrate why a demand would have been useless. In the first case, the attorney certainly could not justify the expense of litigating the denial of an inspection request if the financials allowed his client to value his stock. In the second case, however, the stakes are much higher, and the attorney is justified in seeking discovery of as many facts as necessary to maintain his client's action.

In summary, the inspection rights granted to an Oklahoma shareholder or director provide Oklahoma transactional and litigation attorneys an effective tool for gathering information where (1) the client is either a shareholder or director; (2) the information sought is within the scope of common law or statutory inspection rights; and (3) the information sought is valuable enough to allocate resources to exercise these rights.

156. For illustrative purposes, this example ignores the fact that the shareholder may face a potential legal obstacle to obtaining the inspection because he already has the desired information.