

Board Basics: What a Nonprofit Board Should Know About Meeting in Executive Session

Rick Marks

Partner, DLA Piper LLP (US)

&

Regina Hopkins

D.C. Bar Pro Bono Center

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Today's Webinar

- What are executive sessions?
- Common myths about executive sessions
 - Recordkeeping requirements
 - Decision-making authority
 - Disclosure requirements
 - Attorney-client privilege
- Best practices for conducting executive sessions

Definition of Executive Sessions

- A meeting or portion of a board meeting where only the board members meet – staff and other attendees are excluded
 - Sometimes referred to as a closed meeting or an in camera session
- Select staff or professional advisors may be invited to join an executive session
- Usually called by the board chair; some boards allow other board members to request an executive session if supported by a majority or supermajority vote
 - Can be called before, during, or after a regular board meeting
- Not to be confused with executive committee meetings, or when board meeting attendees are excluded due to conflicts of interest

Purposes of Executive Sessions

- *Confidentiality*: creates a venue for discussing sensitive or confidential topics (e.g. audit, legal matters, personnel issues)
- *Candid Conversation*: encourages board members to have frank and open conversations, and to explore different courses of action (including difficult or unpopular options)
- *Independent Board Oversight*: enables the board to discuss and make decisions without undue influence of staff, donors, or others

Purposes of Executive Sessions

- *Board Development & Self-Management*: creates a “safe space” for peer-to-peer relationship building, and to discuss and resolve issues relating to the board itself
- *Board-CEO Relationship*: in sessions where the CEO is invited, allows for candid and confidential conversations between the CEO and the board
 - creates a venue for the CEO to express concerns and discuss issues that may not be appropriate to share with staff
 - allows the board to have frank conversations with the CEO without the presence of staff

Executive Sessions: Common Topics

Board-Only

- Annual audit meeting – to receive direct feedback from auditors about the organization's financial health & performance;
- Annual performance review of CEO;
- Discussion of CEO compensation;
- Ad-hoc discussion of CEO-related performance or legal issues;
- Succession planning for CEO;
- Intra-board disputes, practices, and performance issues.

Executive Sessions: Common Topics

With CEO

- Staff performance & disciplinary matters;
- Staff compensation;
- Lawsuits & settlement discussions;
- Crisis management;
- Discussion of major strategic and/or business issues.

Myth 1: No Minutes Required?

- A nonprofit must keep minutes of all its board meetings
 - Section 29-413.01 of the D.C. Nonprofit Code provides:
 - “A nonprofit corporation shall keep as permanent records minutes of all meetings of its ... board of directors....”
 - This includes the part of the meeting that is held in executive session
 - Also the IRS Form 990 requires a nonprofit to disclose if it keeps minutes of its board meetings
 - In order to answer yes, the minutes must be kept “contemporaneously” – within 60 days of the meeting or by the next board meeting, whichever is later

A Sidebar About Minutes

- Organizations generally tend to keep overly detailed meeting minutes
- Minutes should be succinct and provide only a summary description of the meeting
- Minutes are designed to show that an action was authorized by the board and that the board exercised due care in carrying out its duties – minutes should give just the basic information necessary to serve this function
- Minutes are not intended to be a transcript of the meeting; a history of the organization; or a public document
- Minutes are discoverable in litigation

Executive Session Minutes

- Executive session minutes may warrant even more circumspection
- Minutes should contain only that information that is necessary to meet the legal requirements
- If the topic under consideration could involve potential litigation, the organization's attorney should be present during the executive session
- In such cases, the organization should have the minutes of the executive session drafted or reviewed by counsel before they are approved
- Mark all documents distributed for review during executive sessions as “confidential” and limit circulation

Exceptions

- There are special situations that require more detailed minutes
- Setting Executive Compensation: The IRS provides a safe harbor for determining executive compensation. If a nonprofit complies with it, the IRS will have the burden of showing the compensation is improper. Under the safe harbor, the nonprofit must show that the individual is being paid what comparable people are being paid for comparable work at comparable organizations
- The safe harbor also requires that the minutes document the method used for determining compensation, including:
 - the terms of the compensation and the date approved;
 - the board members present and those who voted;
 - comparability data relied on, and how it was obtained; and
 - any actions taken by board members with conflicts of interest

Exceptions

- Approving Conflict of Interest Transactions: business transactions between the nonprofit and an officer, director, close family member or a business entity controlled by them
- A conflict of interest transaction must be approved by a majority of the disinterested directors
- The minutes should reflect:
 - the name of the person with a potential conflict of interest and the nature of that interest;
 - the board's decision as to whether a conflict exists;
 - the names of the persons who were present for discussion;
 - the content of the discussion, including alternatives to the proposed transaction which the board considered; and
 - a record of any votes taken in connection with the proceedings, including the vote to approve the transaction

Exceptions

- Indemnification of Directors: Directors may be indemnified for the costs of any litigation incurred because they are sued in their capacity as directors
- Because a director may have a personal financial interest in the decision to indemnify the directors, it must be treated like a conflict of interest transaction
- The minutes should reflect:
 - those directors seeking indemnification;
 - the persons who were present for discussion;
 - The determination as to whether the director met the appropriate standard of conduct so that indemnification is appropriate; and
 - a record of any votes taken in connection with the proceedings, including the vote to approve the indemnification

Executive Session Minutes

- Best practices:
 - Keep a separate set of executive session minutes from the regular board meeting minutes
 - In the corresponding board meeting minutes, note when the board went into executive session and when the board returned from executive session
 - Do not attach executive session minutes to regular board meeting minutes, and do not circulate the executive session minutes beyond the participants
 - Store executive session minutes in a location that will ensure their confidentiality

Membership Organizations: Special Considerations

- Under DC law, if a nonprofit organization has members, the members have the right to inspect and copy Board minutes
 - This right to inspect applies to full Board minutes from the past 3 years
 - Beyond 3 years, a member can only make a request to see minutes if the member requests in good faith for a proper purpose, which the member must state with specificity
 - The member can only see excerpts of the minutes relating to the matter specified in the request
 - To the extent that minutes reflect privileged communications between attorneys and the board, courts will generally uphold organization's decision to deny inspection (except in limited circumstances)

Membership Organizations: Special Considerations

- Under DC law, members do not have a right to inspect the minutes of committee meetings. Members are only entitled to see a record of any actions taken at such meetings
- Membership organizations should consider reserving discussion of sensitive matters for executive or other committee meetings instead of executive session
- If the matter must be discussed by the full Board in executive session, draft minutes carefully to minimize impact of member inspection or other disclosure (e.g. discovery in litigation) – do not provide more detail than necessary

Myth 2: No Voting in Executive Session?

- The board may vote and make decisions in executive session
 - The same rules and authority apply to the board while it is meeting in executive session as in open session – voting may occur if quorum is met
 - Following a discussion in executive session, a board may vote in open session on the issue discussed if desirable
 - However, voting in open session on sensitive or confidential topics, such as personnel matters, would undermine confidentiality
 - There is no affirmative obligation to vote in open session

Myth 3: Duty to Disclose?

- Discussions and decisions made in executive session do not have to be disclosed when the board returns to open session
 - Again, there is no affirmative obligation to disclose
 - Disclose as needed – while it may be reasonable and appropriate to disclose what was decided in executive session to CEO or staff in some cases, confidentiality should be maintained in others

Myth 4: Attorney-Client Privilege?

- Attorney-client privilege protects from disclosure in litigation confidential communications between an attorney and his or her client for the purpose of securing legal advice
- The privilege is limited, including in executive sessions:
 - Attorney-client privilege doesn't apply just because a lawyer is present in executive session. For example, there is no privilege when an attorney is not acting primarily as the organization's attorney, but as a member of the board;
 - It does not protect the underlying factual information;
 - May not apply if a third party is present in executive session;
 - If a client has disclosed the same information to a third party in a separate communication, the privilege will protect the communication to the attorney, but not to the third party.
- Consult with your attorney before the meeting to ensure discussion is covered by privilege

Executive Sessions: Practice Tips

- Many boards routinely meet in executive session so they can have candid discussions about issues involving board operations and the organization as a whole
- Consider making executive sessions a routine component of board meetings, instead of calling them for a particular purpose
 - Prevents the misinterpretation of executive sessions as “red flag” by staff and observers
 - Gives board members a predictable forum to converse, exchange ideas, and express concerns
 - Keep discussion to appropriate topics – not a venue for conducting regular board business
- Consider adopting board policies that govern the process for calling and conducting executive sessions

Questions?

Regina Hopkins
D.C. Bar Pro Bono Center
1101 K Street, NW
Washington, D.C.
rhopkins@dcbar.org