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

A meeting or portion of a board meeting where only board members meet—staff and other attendees are excluded due to conflicts of interest when board meeting attendees are excluded due to or Not to be confused with executive committee meetings.

Executive Sessions can be called before, during, or after a regular board meeting. Can be called by the board chair; some boards allow other executive session.

Select staff or professional advisors may be invited to join an executive session. Sometimes referred to as a closed meeting or in camera excluded.

A meeting or portion of a board meeting where only the Definition of Executive Sessions
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.

- CEO-Board Relationship: in sessions where the CEO is invited, allows the board to have frank conversations with the CEO without the presence of staff and allows for candid and confidential conversations between the CEO and the board.

- 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.
Executive Sessions: Common Topics

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

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

With CEO
Myth 1: No Minutes Required?

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. Also the IRS Form 990 requires a nonprofit to disclose if it keeps minutes of its board meetings. This includes the part of the meeting that is held in executive session. Also, the D.C. Nonprofit Code provides: 

Section 29-413.01: A nonprofit must keep minutes of all its board meetings.

Section 29-413.02: A nonprofit corporation shall keep as permanent records minutes of all meetings of its board of directors.

Myth 1: No Minutes Required?
Minutes are discoverable in litigation.

Minutes are not intended to be a transcript of the meeting; a history of the organization; or a public document.

Minutes are designed to serve this function just the basic information necessary to show that the board exercised due care in carrying out its duties — minutes should give a description of the meeting.

Minutes should be succinct and provide only a summary of meeting minutes.

Organizations generally tend to keep overly detailed minutes.

A Sidebar About Minutes
Executive Session Minutes

Minutes should contain only that information that is necessary to meet the legal requirements of the executive session. 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 minutes document the method used for determining compensation, including:
  - the terms of the compensation and the date approved;
  - the terms of the compensation and the date approved;
  - the board members present and those who voted;
  - the board members present and those who voted;
  - comparability data relied on, and how it was obtained, and
  - comparability data relied on, and how it was obtained, and
- any actions taken by board members with conflicts of interest.
Exceptions

Appointing 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 name of the person with a potential conflict of interest;
- the board's decision as to whether a conflict exists;
- the nature of that interest;
- 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.

The vote to approve the transaction, including any votes taken in connection with the proceedings.

Conflicts of interest

The minutes should reflect:

- 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.
Exception

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

Indemnification of Directors: Directors may be indemnified

Exceptions
Executive Session Minutes

Best practices:

- Store executive session minutes in a location that will ensure their confidentiality.
- Do not attach executive session minutes beyond the participants.
- Do not circulate executive session minutes, and when the board returned from executive session, note in the corresponding board meeting minutes.
- Keep a separate set of executive session minutes.

Executive Session Minutes
Under DC law, if a nonprofit organization has members, the
members have the right to inspect and copy Board Minutes
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members have the right to inspect and copy Board Minutes.

This right to inspect applies to full Board Minutes from
the past 3 years. The 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 in
the Request for a

Beyond 3 years, a member can only see excerpts of the
minutes relating to the matter specifically in the request.
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minutes relating to the matter specifically in the request.

The past 3 years,

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).

Consequences
Membership Organizations: Special
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 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.

Membership organizations should consider reserving discussion of sensitive matters for executive or other committee meetings instead of executive session.
Myth 2: No Voting in Executive Session?

There is no affirmative obligation to vote in open session under the rules of conduct for the board. The board may vote in executive session on sensitive or confidential topics, such as personnel matters, or on any issue discussed in executive session. Voting may occur if a quorum is met, even if the board did not vote in executive session while discussing it. The same rules and authority apply to the board while it is meeting in executive session as in open session. Following a discussion in executive session, a board may vote in open session on the issue discussed if desirable.
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 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?

- Communication is covered by privilege if a client has disclosed the same information to a third party in a separate communication, the privilege will protect the communication to a third party.
- May not apply if a third party is present in executive session.
- It does not protect the underlying factual information.
- It does not protect the underlying factual information when an attorney is not acting primarily as the organization’s attorney, but as a member of the board.
- 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.
- The privilege is limited, including in executive sessions.
- Her client for the purpose of securing legal advice.
- Attorney-Client privilege protects from disclosure in litigation.

Consult with your attorney before the meeting to ensure discussion is covered by privilege.
Executive Sessions: Practice Tips

For calling and conducting executive sessions, consider adopting board policies that govern the process.

- Conducting regular board business
- Keeping discussion to appropriate topics – not a venue for executive sessions
- Exchange ideas, and express concerns
- Gives board members a predictable forum to converse
- Prevents the misinterpretation of executive sessions as a red flag by staff and observers
- Particular purpose

Consider making executive sessions a routine component of board meetings, instead of calling them for a particular purpose.

Many boards routinely meet in executive session so they can have candid discussions about issues involving board operations and the organization as a whole.
Questions?

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