

We recently received a question from a client regarding who should participate in executive sessions of the board. While we answered based on our experiences with the boards of many different organizations, the question prompted our own deeper dive into some of the available literature on board (and board committee) executive sessions. That research drove our decision to share some thoughts on executive sessions in this issue of *Not-for-Profit Focus*.

According to BoardSource, in its *Executive Sessions: Why, Who, What, and How* “executive sessions are a special meeting-within-a-meeting that provides an opportunity for the board to meet privately to handle sensitive and confidential issues, foster robust discourse, and strengthen trust and communication.” While the word “special” is used in that description, BoardSource recommends that regularly scheduled executive sessions should accompany all regular board meetings.

Starboard Leadership Consulting LLC agrees, and in its post, *Make Executive Sessions the Norm*, says “for some boards and chief executives, it makes sense to conduct the executive sessions in two stages: the first with the chief executive and the second without.” We believe this format works well in most cases, as the board benefits from the chief executive’s knowledge, experience and insight. In addition to the chief executive, the board can choose to invite other non-members as needed.

A posting at jurassicparliament.com, *Executive session at nonprofit board meetings*, posits that “[the chief executive] should always be included in... executive session unless the meeting pertains to their salary or performance.” The literature we reviewed and our own experience suggests that there are other topics and situations where only board members should be present, including legal issues or other concerns regarding the chief executive, intra-board matters and the board’s self-evaluation and, although often handled by the audit committee, executive sessions with the independent auditor and, if applicable, the internal auditor.

We believe that questions in open session, such as ‘does anyone see the need for the executive session today?’ should be avoided. In its *How to conduct an effective audit committee executive session*, the AICPA concurs with that opinion saying “the audit committee would want to avoid asking in open session whether an individual has anything to discuss in executive session [as] that question alone could put the individual in an awkward position in front of others and deter the purpose of executive sessions altogether.”

The watchword for executive sessions is confidentiality. What gets discussed in executive session should (generally) stay in executive session. Violating the confidentiality of an executive session is serious and may warrant disciplinary action. That said, some communications make good sense. There seems to be a consensus that the chief executive should be provided with the executive session agenda and should receive a debrief from the board chair for that portion of the session at which they were excluded. There also seems to be general agreement that should the board take action during executive session, the action taken should be communicated and documented.

The questions surrounding documenting executive sessions received as much attention in the literature we reviewed as any aspect of executive sessions. BoardSource advises “while detailed minutes are often not necessary, the record should include the date, time, and place of the meeting, names of those people present, any actions taken, and any abstentions from voting if voting took place. These minutes are confidential and should be distributed to only those who were in the session.” In his *Documenting executive sessions of the board*, Robert B. Lamm, who chairs Gunster’s Securities and Corporate Governance practice, poses the question “What should the minutes say beyond ‘The board met in executive session?’” He answers “there is general agreement that in most cases any description should be brief and avoid details. For example, the minutes might say ‘During the executive session, the Board discussed management succession planning.’”

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Executive Sessions – Why, When and How posted on governancecoach.com suggests “that a board should document its agreement about why, when and how it will use executive sessions in policy. What should such a policy address? The highest level policy statement might say something like ‘The board recognizes situations arise where sensitive and confidential matters require private deliberation. These items may be considered in Executive Sessions.’” This post goes on to delineate some of the other questions that a board might want to address in its policy. For example, “who has the authority to ask for an executive session?... What measures will the board exercise to ensure an appropriate level of security for documents that are needed in the executive session?... will [required material] be distributed at the start of the meeting and collected at the end?”

This governancecoach.com post briefly addresses the issue of note taking during executive sessions and recommends consulting legal counsel before deciding on the policy guidelines for directors’ notes. Mr. Lamm takes on this issue saying “director note taking should be discouraged and, in those rare cases when it’s arguably necessary, should be minimal and followed by the destruction of the director’s notes... If notes are to be taken, the director chairing the executive session should assign responsibility to one director to do so and should instruct the other directors in attendance not to do so.” Mr. Lamm adds that the destruction of director notes is “good practice for any notes taken by directors, regardless of whether they relate to an executive session or any other aspect of the minutes or board discussions and actions... so that the minutes are the only written record.”

A couple of closing comments – the Lawyers Alliance for New York has issued *Frequently Asked Questions: Virtual Board Meetings* (updated October 15, 2021) which addresses the question, “How should the board handle executive or closed sessions?” The Alliance recommends “boards consider the use of ‘breakout rooms’... or consider other ways to maintain privacy”. Our google search undertaken as we researched board executive sessions led us to the February 15, 2017 webinar presentation (20 slides) hosted by representatives of DLA Piper LLP (US) and the D.C. Bar Pro Bono Center titled *Board Basics: What a Nonprofit Board Should Know About Meeting in Executive Session* which is a worthwhile read for those looking for more on this topic.

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