If It's Not in the Minutes, Did It Happen?

What are the legal requirements for keeping board minutes?

Q: I'm the executive director of a nonprofit organization. I also serve on several other nonprofit boards.

Each board on which I sit has taken a different approach to its minutes. One board writes down nothing except the date of the meeting and a list of motions. Another reflects the meeting's substance with motions interspersed in the body of the minutes. Another summarizes the meeting, listing motions and actions in an appendix. Each organization clings tenaciously to its method.

While I realize there isn't just one way to keep records, it seems to me there should be more uniformity. I think minutes should be detailed enough to give members and other interested people (including auditors) the substance of the meeting. Without complete minutes, it's almost impossible to remember the specifics of a meeting that happened months ago. Also, the public's ever–increasing focus on nonprofit accountability would seem to dictate more comprehensive minutes.

I'm out–numbered in my view, however. Each nonprofit with which I work employs one or more attorneys, all of whom disagree with me. They seem unanimous in their belief that brevity is next to "godliness": The more words, the more potential liability. This scare tactic has all but closed the door on open discussion and public involvement. So, what is my question?

My question: Is there an industry or legal standard regarding board minutes? Does the board have a legal obligation to reflect the substance of its board meetings to the membership? If so, what is that obligation? What liability exposure does the board have regarding its minutes? With the increase of rules mandating nonprofits to make their records more public (for example, the new FASB rules regarding nonprofit financial statements), where do board minutes fit in? Will the days of smoke–filled board rooms and secret decisions soon be history? When will "open–meetings–act" consequences affect nonprofit boards? Is there a middle ground?

A: Good questions. Let me say a few words about minutes generally, then address each of your questions specifically.

If It's Not Documented, Did You Do It?

There is a saying: If you didn't document it, you didn't do it. Minutes are the legal record of the actions of the board, which is the governing body of the nonprofit corporation. If something isn't in the minutes, did it happen? Some courts have said no, limiting evidence of board action to what the minutes reflect. Other courts have allowed "parole evidence" (oral testimony) to supplement the formal minutes. But any corporation should assume that if it isn't in the minutes, then legally the board didn't do it. And if it's in the minutes in a way nobody thinks is what really happened, too bad; the record is the reality.

How Detailed Should Your Minutes Be?

Most states require corporations to keep minutes, but they don't say much about what those minutes must contain. For example, the Model Nonprofit Corporations Act (created by the

Nonprofit World • Volume 14, Number 6 November/December 1996
Published by the Society for Nonprofit Organizations
6314 Odana Road, Suite 1, Madison, WI 53719 • (800) 424-7367

American Bar Association in 1987) says only that "a corporation shall keep as permanent records minutes of all meetings of its members and board of directors." The "Official Comments" say that "the amount of detail is left to the discretion of each nonprofit organization. The minutes or records may merely recite

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that after consideration a certain action was taken or they may go into great detail as to the background, rationale and reasons for the particular action." Not very helpful.

Despite this lack of direction, you mustn't ignore the matter. It's vital that you adopt a policy on how detailed your board minutes will be. Don't leave such an important decision to the discretion of each individual secretary.

To decide how detailed to make your minutes, consider how a court will judge board actions if it should come to that. Most courts use the "business judgment" rule to decide if directors are carrying out their duties. This rule looks not so much at *what* a board did as *how* the board did it. A director must act prudently, in good faith, and in the best interests of the corporation. Nobody has a crystal ball, and the best intentioned decisions will sometimes turn out horribly wrong. The test is not whether in hindsight the decision was the best one, but whether the directors acted reasonably at the time. The question is not, "Did you make the right decision?" but "Did you make the decision right?"

Taking a hypothetical example, assume that a board decides to invest substantial sums with the New Eve Foundation. New Eve then goes bankrupt and the organization loses millions of dollars. Some unhappy members sue the board for breach of fiduciary duty and ask that board members be personally liable for repaying the lost funds. How is a court to decide whether the board acted prudently in deciding to invest in New Eve? Brief minutes might say, "After discussion, the board decided to invest $2 million of its $6 million endowment with the New Eve Foundation." Was this decision arrived at prudently? How can the court know?

Detailed minutes, on the other hand, might document the following:

- Board members investigated by calling New Eve's bank, accountants, and existing clients.
- Board members asked regulatory agencies their opinions of New Eve.
- The board reviewed New Eve's audited financial statements.
- The board's attorney investigated the background of New Eve's principals and found no problems. (Copies of the attorney's letter and subcommittees' reports would be referenced and appended to the minutes.)
- After this investigation, the board discussed the matter for 40 minutes.
- During the board's discussion, such–and–such issues were raised and answered to the board's satisfaction.
- After this discussion, the board decided that it was in the best interests of the corporation to invest in New Eve.

Which set of minutes is more likely to persuade a court that board members carried out their duties in good faith and thus should not be personally liable? If board members testify years later about the detailed discussions they had, which minutes will prove that they are relating the situation accurately, not indulging in after–the–fact justification?

Minutes sufficient to show not just *what* board members did but *how and why* they did it take more time to prepare and may need more editing before they are adopted. They may give ammunition to board opponents or lead to second–guessing. And if the board does something it shouldn't, detailed minutes can become a liability, making the error obvious.

On the other hand, detailed minutes provide a valuable history of why the board did what it did. Such minutes help avoid the need to revisit the same issues again and again. And assuming the board *was* prudent and responsible, comprehensive minutes will help establish that fact if the board is ever challenged.

So, how detailed should your minutes be? The answer is that there is no simple answer. You need to weigh all the above factors in consultation with your board's attorney.

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What Must Your Minutes Include?

However detailed your minutes may be, there are some basics they need to include:

- When and where was the meeting held? Note the time the meeting starts.

- Who convened the meeting? What notice was given? (This information is necessary to prove that this was a legal meeting. Check your bylaws and state law to see what notice is required.)
- Who was present? (A director who is recorded as present but not noted as against an action is considered to have approved that action.)
- Note whether a quorum is present.
- Approve the minutes of the previous meeting. (Always distribute a draft of these minutes in advance. This draft is essential so that people can read the minutes carefully before approving them. If the minutes are just read aloud, it's too easy to miss errors.) If people want to make minor changes, you can correct the minutes at the time of approval. If people have significant corrections, revise the minutes and approve the corrected version later.
- Record every motion made, even if it is withdrawn. Names of people who make and second motions are generally irrelevant unless they ask to be recorded or there is a conflict of interest.
- Note all conflicts of interest. Any director who has a conflict should make sure that it is recorded. (In most states, directors may discuss a matter in which they have a personal interest as long as they disclose that interest and the board formally recognizes it.)
- Record each vote and the numbers of people for, against, and abstaining. The names of those voting against or abstaining need be recorded only if they so request.
- Note the time of adjournment.
- The secretary should sign the proposed minutes. The presiding officer should counter–sign the minutes after they have been approved.
- At the corporate office, keep a formal minute book with the signed minutes from each meeting. At the very least, this should be a three–ring binder. Do not simply file the minutes in a folder; they are too easily lost.

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- Give all directors copies of all board minutes to keep in their own files.

Those are general comments on minutes. Now to your specific questions:

Is There a Legal Standard for Board Minutes?

There is no such standard. There are several handbooks for corporate secretaries which discuss minutes and what should be in them, but there is no body that sets standards for minutes in the sense that FASB and AICPA set accounting standards. Any legal standard would be a matter of state law, but I know of no statute or court decision mandating what needs to be in minutes. In some instances, such as opening bank accounts or approving a registered agent for a corporation, certain language may be required. In those cases, the minutes should reflect the required language. But overall, every organization is on its own.

What Is the Board's Legal Obligation to Members?

I know of no law requiring boards to reflect the substance of its meetings to members. Presumably, if members don't like the way a board is acting, they have the right to replace the board. If a board is fulfilling its legal duty to the *corporation* to keep proper minutes, it's unlikely that any court would impose an additional duty to the membership.

What About Open Meetings vs. Smoke Filled Rooms?

Many recent scandals concerning nonprofits might have been avoided if boards had been more open about their activities. As a matter of law, however, no state has an "open meetings act" for nonprofit boards. Some states do require that various documents be available to members. Washington, for example, requires that bylaws, articles of incorporation, members' and directors' names and addresses, financial records, and meetings' minutes be open to members. Many states have similar requirements. Some grantmakers may require certain levels of openness of their grant recipients. But so far there has been little legislative or judicial interest in imposing more openness on nonprofit boards or meeting minutes.

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