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WHERE MINUTES ARE TAKEN, HOURS ARE UTILIZED AND LAWSUITS ARE WON

This excerpt of the fall 2016 Law Journal features an article written by John D. Hansen, Esq. John's article provides some general guidance on the importance of preparing accurate meeting minutes and "best practices" toward ensuring legal compliance and preparedness in case of subsequent legal proceedings.



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Where Minutes are Taken, Hours are Utilized and Lawsuits are Won

BY JOHN D. HANSEN, ESQ. - BAYDALINE & JACOBSEN LLP

A common cliché says that meetings are where minutes are taken and hours are wasted, but meetings actually are where actions occur and cases are won and lost. Association business takes time, and making decisions thoughtfully and taking adequate minutes is a recipe for success. Minutes of open board meetings are available to the members pursuant to Civil Code § 4950(b) within 30 days of the meeting, and they are the official record of what happened.

Section 4950(b) excludes executive session minutes from member inspection because those minutes contain confidential information. However, this limitation on member review does not necessarily apply in the context of litigation. What you may think is behind closed doors today, could be on a large screen in court tomorrow.

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The Civil Code offers little guidance on what minutes should contain, so latitude for preparation exists. Effective minutes should be prepared ensuring that they:

1. Accurately reflect the decisions of the board so that current or future boards could review them and understand the actions taken;
2. Exclude extraneous statements that could be misconstrued or result in harm; and
3. Provide a sufficient record for action taken that could be subject to litigation.

Generally, open meeting minutes must reflect actions taken by the board. Details on discussions and how each director voted are not required. Comments made by members in open forum should almost never be included. This can lead to inaccurate transcription, and possibly the republication of defamatory or damaging statements. Noting speakers and topics is acceptable if desired, but not needed.

Even though members do not have the right to review executive session minutes, they are discoverable in litigation. Legal counsel will have the ability to redact attorney-client privileged communications, and potentially irrelevant private information about owners or vendors, but the minutes will be otherwise available for review and use by an opposing attorney. Thus, executive session minutes should also reflect actions taken by the board. Discussions need not be transcribed; however, details like the act of consulting with legal counsel, or reviewing multiple bids, or approving a reasonable accommodation, should be noted.

Despite the fear of an adversary obtaining executive session minutes, they can actually be a lifeline for directors and managers in a lawsuit about an event that occurred two or more years before. Memories fade, and the litigation may focus on an act that seemed innocuous at the time. Accurate minutes can refresh memories and help witnesses remember making a decision after seeking advice counsel, and after extensive investigation and deliberation. Minutes can help to remember details, and turn an "I don't recall" into the homerun answer in a deposition that settles or wins a case.

Minutes are admissible in court as a business record so long as the custodian of the records (manager) can authenticate them and verify their preparation. (Evid. Code § 1271.) The minutes themselves can prove that an act occurred. On the flipside, the lack of documentation in minutes can actually be used to prove an act never occurred. (Evid. Code § 1272.) For example, if the board voted to approve rules but cannot produce minutes to prove that this actually occurred, those rules could be deemed unenforceable. The issue was litigated extensively in *Clear Lake Riviera v. Cramer* (20010) 182 Cal. App.4th 459, and that association was able to rely on nearly a decade of rule enforcement to prove the rules were duly enacted. A good set of minutes would have put that issue to rest at an early stage.

Another issue to consider is how "draft" minutes are handled. Minutes can contain mistakes, including leaving out an action item or incorrectly reflecting attendance. Minutes should be signed after review and approval, and draft minutes should be marked "draft" or otherwise handled to distinguish between the official record and drafts. Without a regular practice of distinguishing the official minutes from drafts, witnesses will have difficulty explaining why a set of minutes states "approved" when something was denied, or why not action is reflected.

Meetings take hours, and minutes require a quick hand, but the careful preparation and approval of minutes can enhance the institutional knowledge of corporation actions and save the day in litigation.

It is a great pleasure to present the fall 2016 *Law Journal*. With a focus on meetings, recalls, elections, minutes and other governance issues, this issue should provide you with important information as you move into 2017 with your clients.

The articles contained herein will hopefully provide some general guidance as well as specific tools and "best practices" for your daily efforts toward ensuring legal compliance while maintaining harmony within your associations.

Managers, board members, vendors and other practitioners are often more versed in CID law than many legal experts – even judges overseeing our cases. Yet, at times, the rapid changes in the law, competing timelines and overlapping concepts can become confusing or overwhelming. This issue is an attempt to simplify things and ensure that you have useful tools and creative approaches for problem-solving.

A huge thank you to all of the authors for their insightful contributions and hard work in drafting their articles. Additional thank you's to my co-guest editor, Tina Jackson-Walda, CCAM, PCAM, Editor-in-Chief Fred Whitney, Esq. and of course CACM (and especially Tracy Kreiss) for all of their hard work in producing this issue and for their ongoing dedication to our field.



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