

Guidelines for Effective Board Executive Sessions

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The effective use of executive sessions by non-profit health-care governing boards appears to be overdue for attention.

Compared with other governance practices, relatively little has been written about the use of executive sessions by non-profit governing boards. While some assessments do exist, most are either written about non-profit corporations generally or from the perspective of specific kinds

of non-profits, such as trade associations or educational institutions. By contrast, little or nothing has been written about the use of executive sessions by non-profit hospital and health system boards.

A 2014 literature search framed largely from the perspective of trade associations found that “an exhaustive search yielded one white paper on the

role that executive sessions play in non-profit organizations.”¹ That white paper was first published in 2007 by the non-profit organization BoardSource. According to the authors of the 2014 survey, it was based on “the opinions of an attorney, a non-profit CEO, and a non-profit consultant” rather than on scholarly research.² As a result, the authors of the 2014 literature search concluded that “Within the literature there is no common understanding of who attends executive sessions, when and for what purposes they should be convened, how they should be documented and reported, or the impact executive sessions have on organizational effectiveness.”³

The goal of this article is not to conduct a definitive scholarly analysis of executive sessions. Rather it is an attempt to begin to fill the gap in the current literature with respect to their use by non-profit hospital and health

system boards. It draws on the limited available resources about other kinds of non-profits and our own experiences to focus on whether and how non-profit hospital and health system boards can make effective use of executive sessions.

The Purpose and Reasons for Board Executive Sessions

The use of executive sessions is widely misunderstood and continues to be debated even by governance experts. As a result, it is a practice that can be subject to misuse, which can cause mistrust and bad feelings among board members, and between boards and management. However, there can be helpful and appropriate uses of executive sessions by hospital and health system boards that build (rather than break down) trust and enhance effective leadership.

BoardSource describes executive sessions as “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. They are usually exclusive to board members, but others, such as the chief executive, may be invited to join for all or part of a session.”⁴

Executive sessions can serve several core purposes.

These sessions:

- Assure candor and confidentiality for board members in discussing sensitive matters.
- Create a mechanism for board independence and oversight.
- Provide an opportunity for all board members, not just a select few, to participate in governance.
- Can enhance relationships among board members and with the chief executive and professional advisors.

Key Board Takeaways

- Include an explicit policy statement regarding the use of executive sessions in your bylaws or board charter.
- Regularly schedule executive sessions as part of every board meeting.
- Except in extraordinary/emergency/crisis situations, never call executive sessions on the spur of the moment.
- Have an agenda with specific issues to be discussed at the executive session, and limit discussions to those issues.
- If the executive session includes a period in which board members may be invited to raise new concerns or suggest agenda items for future board meetings, reserve substantive discussion of any such new issues or items for future meetings.
- Conduct some portion of each executive session with the presence of the CEO (and possibly other staff, such as the general counsel, chief compliance officer, or chief medical officer, if needed to discuss specific issues).
- For executive sessions without the CEO, share the topics discussed with the CEO immediately following the session, and include actions that need to be taken by CEO and staff in the report.
- Keep a written record of each executive session, preferably by the board chair or governance support staff. This should be separate from board meeting minutes and kept in a secure place. Such written records should be summaries rather than detailed minutes, except to the extent that certain kinds of discussion and/or decisions are subject to legal requirements (e.g., conflicts of interest, discipline of board member or senior staff, etc.).
- For public hospital boards, the ability to hold an executive session that is not open to the public, and the topics that may be discussed in such sessions, are likely to be governed by state open meeting and open records laws.

Most governance experts who support the use of executive sessions agree that they can also be useful for several more specific reasons, including to:

- Preserve confidentiality when discussing sensitive topics (e.g., audit, legal matters, and personnel issues).
- Permit board members to engage in candid and open conversations

1 Mark Engle and Anne Cordes, “Executive Sessions in Nonprofit Organizations: A Review of Current Literature,” 2014.

2 BoardSource Resources: Outi Flynn, *Meeting, and Exceeding Expectations: A Guide to Successful Nonprofit Board Meetings*, 2009, and *Executive Sessions: How to Use Them Regularly and Wisely*, 2007.

3 Engle and Cordes, 2014.

4 BoardSource, 2007 and 2009.

and to consider a range of options in considering certain confidential matters.

- Allow board members to frankly and honestly assess their own performance and that of the board as a whole.
- Permit the board to raise and discuss sensitive issues related to the performance of the CEO or other C-suite staff.
- When the CEO is included, foster discussion of the relationship between the CEO and the board and discuss difficult or controversial issues that the board and CEO may not wish to share with staff.

What is the difference between an executive session and the use of an executive committee?

While we do not propose to address the topic of executive committees further in this article, it is important to understand the difference. In sum, executive sessions typically involve the entire board, not just a subgroup, while executive committees consist of a small group within the board that is usually empowered to make certain decisions on behalf of the board between meetings. Not all non-profits make use of executive committees, and they are not without controversy, in part because they can create powerful and self-sustaining cliques within boards.

How Are Non-Profit Healthcare Boards Different?

As noted above, much of what has been written to date about executive sessions appears to be aimed at non-profit corporations generally, and educational institutions in particular. For example, a Stanford University professor recently posted an excerpt from a 2018 book on non-profit university governance by Robert A. Scott, the President Emeritus of Adelphi University, in which President Scott states that the “role and use of executive sessions are often misunderstood, even though there are legal standards to follow. For example, there

are boards that misuse the executive session by taking decisions that are inappropriate for a closed meeting.”⁵

While assessments of the practices of educational boards can be helpful, hospitals and health systems are typically more complex than most other non-profit organizations. Healthcare boards must routinely address many thorny issues that require careful analysis, confidentiality, and trust. Hospital and health system boards must routinely deal with issues affecting quality of care and patient satisfaction; mergers, acquisitions, and strategic capital investments; medical staff recruitment, retention, and discipline; and many different kinds of regulatory compliance, potential litigation, conflicts of interest, and financial performance in a world of complex and fragmented payer sources, to name just a few. Finally, these boards require levels of complexity, expertise, and confidentiality beyond that of most other kinds of non-profits.

Without a formal agenda and guidance, a board in executive session may be discussing issues or problems they are not equipped to consider without the CEO and possibly other staff or advisors present.

Basic Policies and Practices for Effective Executive Sessions

Should a hospital or health system board make use of executive sessions, and if so, when? And which topics are suitable for executive sessions held only with board members present, without the CEO (or other staff)?

While there is consensus about what constitutes a “best practice” in many areas of non-profit governance, there appears to be disagreement among governance experts about whether executive sessions are even a good idea, let alone what the best practice might be in convening them. Even those observers who endorse their use often do so with substantial caveats.

Executive Sessions for Public Hospital Boards

Executive sessions in public hospital governing boards are somewhat different than in private non-profit organizations, in that public boards typically must comply with open meeting and open record laws. These laws vary widely from state to state. While most states permit closed meetings (which can include but are not necessarily limited to executive sessions) for certain specific purposes, such as to discuss pending litigation, the exceptions in some states are extremely limited.

For additional information about the impact of state sunshine laws on public hospital boards, see Larry Gage, “Representing Public Hospitals,” in *Representing Hospitals and Health Systems Handbook*, American Health Lawyers Association, 2016; p. 712.

For example, speaking from his experience with governing boards of colleges and universities, consultant and author William Mott is philosophically “very opposed” to executive sessions from which the chief executive is excluded, primarily because they “undermine the climate of trust and respect that is key to organizational effectiveness.”⁶ Mott argues that, other than issues of compensation, there is no reason to keep anything from the chief executive of a non-profit organization.

Another author, writing from the perspective of non-profit trade associations, argues that “As a non-profit, tax-exempt organization, the practices of [the] board should be relatively transparent to the members, and executive sessions throw a cloud of secrecy and suspicion on the activities of the organization...Holding executive sessions and excluding both counsel and the chief executive is a practice that strongly is recommended against.”⁷

On the other hand, other observers agree that there are some discussions that are appropriately held just among board members. One non-profit governance expert, Ann MacFarlane, recently suggested that “there is much

5 Robert A. Scott, *How University Boards Work: A Guide for Trustees, Officers, and Leaders in Higher Education*, Johns Hopkins University Press: Baltimore, MD, 2018, excerpted in Rick Reis, “*The Executive Session: A Misunderstood Dimension of Governance*,” Blog Post, Tomorrow’s Academy, Stanford University.

6 William R. Mott, Ph.D., *Healthy Boards, Successful Schools: The Impact of Governance and Leadership on Independent and Faith-Based Schools*, December 2018.

7 S. Fellman, “Associations Should Avoid Executive Sessions,” *Association Trends*, 2003, quoted in Engle and Cordes, 2014.

confusion about non-profit boards holding meetings in executive session.” In a 2020 article, MacFarlane pointed out that many boards mistakenly believe that executive sessions should be closed to outsiders, and that some boards use terms like “closed session” or “secret session” to describe executive sessions. However, she notes that Robert’s Rules of Order, which are followed by boards of many non-profit corporations, states “that board meetings are open by right only to the members of the board, and any staff or advisers whom they choose to invite.”⁸

By disclosing certain information and creating a transparent approach to executive sessions, boards can keep a strong sense of trust among members and executive staff.

When Should an Executive Session Take Place?

In non-profit environments, executive sessions may take place before, in the middle of, or at the end of a regular board meeting, but should take place at every board meeting. The practice of holding an executive session in conjunction with every board meeting offers the additional advantage of “diffuse[ing] the notion that executive sessions are convened only to deal with matters involving the CEO or in times of crisis.”⁹

Who Should Participate in Executive Sessions?

When a board calls an executive session without the CEO, the board’s relationship with the CEO can become strained. The strain is amplified if the CEO is not aware of the session in advance and/or not informed of the discussion afterwards. This can build mistrust and can hamper the effective working relationship between board and management that is essential in a high-performing organization.

Moreover, without a formal agenda and guidance a board in executive session may be discussing issues or problems they are not equipped to consider without the CEO and possibly other staff or advisors present. While

board members may feel that they can speak more candidly without the CEO or staff present, this could also lead to ineffective discussion of a complex issue and/or poor decision making by the board.

The board’s guidelines for executive sessions should spell out the purposes for having them, when they will be considered, and who will attend. Most executive sessions should include some time when the CEO will be present and participate in the discussion and some time for the board to meet without the CEO.



What Topics Are Appropriate for Executive Sessions?

Governance experts offer a range of specific suggestions with respect to appropriate topics for executive sessions held without the CEO (or other staff or consultants) and those which should be held with the CEO or others present.

Except in highly unusual circumstances, CEOs should be present for all executive sessions other than those that address the specific topics set out below. Moreover, even in those areas in which it may be appropriate to exclude the CEO, the board needs to take certain steps to ensure the best approach for sharing information with him or her following the closed session.

Prior to an executive session, the CEO should be presented with the agenda for the session. After the session, the CEO should also be properly debriefed on what was discussed in the meeting and the nature of the discussion. By disclosing certain information and

creating a transparent approach to executive sessions, boards can keep a strong sense of trust among members and executive staff.

To be clear, many of the topics on the lists below could also qualify for inclusion on the board’s regular meeting agenda; whether or not they require a discussion in an executive session is likely to be based on the subjective assessment that the situation in a particular area requires a higher level of confidentiality or sensitivity.

Potential topics for executive sessions without the CEO or staff may include the following:

- An annual meeting with the hospital or system’s auditor to review the organization’s financial audit and enable the auditor to provide unfiltered feedback about the hospital or system’s financial health and practices
- Conflicts between two board members, or serious criticism of a board member by another
- Legal issues involving the CEO, including investigation into concerns about the CEO, such as allegations of improper conduct and reports from management consultants about such concerns
- Evaluation of the CEO and review of the CEO’s salary and/or bonus, as well as the hospital’s overall compensation policy (provided that IRS requirements are met)
- Approving conflict-of-interest transactions with or by individual board members
- Succession planning for the CEO position

Absent an unexpected emergency or crisis directly involving the CEO, virtually every other topic that might be suitable for discussion in an executive session should include the CEO (and possibly other select employees, such as the general counsel, chief compliance officer, or chief medical officer, as needed for their expertise and familiarity with the topic at hand). Examples of such other topics include:

- Issues that “keep the CEO awake at night”
- Alleged or improper activities of staff other than the CEO
- Ongoing or pending litigation

⁸ Ann MacFarlane, “Executive Session in Nonprofit Board Meetings,” Jurassic Parliament, April 7, 2020.

⁹ BoardSource, 2007 and 2009.

- Major confidential business transactions
- Crisis management
- Responsibilities and expectations for the relationship between the board and CEO
- Quality concerns—adverse care incidents, changes in ratings by agencies or metrics that measure quality relative to other systems, etc.
- Patient satisfaction surveys and steps to improve patient satisfaction
- Employee satisfaction surveys and steps to improve employee satisfaction
- If relevant, sensitive collective bargaining issues and tactics, including preparation for possible strikes or work actions
- To discuss specific issues raised in the financial audit with or without the independent auditor present
- Future retirement plans and succession planning for C-suite management apart from the CEO
- Sensitive regulatory compliance issues¹⁰
- Major confidential strategic and capital plans, including potential mergers, acquisitions, major new service lines, or closures¹¹
- Alleged or actual improper conduct by a board or staff member

Minutes of both regular board meetings and executive sessions should be succinct and provide only a summary description of the meeting, consistent with legal requirements.

Minutes

If the CEO and staff are not included, who should take minutes (and what kind), and how should they be preserved? As a general matter, non-profit organizations tend to keep overly detailed meeting minutes. Minutes of both regular board meetings and executive sessions should be succinct and provide only a summary description of the meeting, consistent with legal requirements. Minutes should provide the information necessary to show that an action was authorized by the board

Additional resource: For more information on what to cover in executive sessions at public hospitals, see “Governing in a Fishbowl: Leveraging the Time and Talents of Community Leaders on Public Hospital Boards” from The Governance Institute’s Public Focus newsletter (available at <https://bit.ly/3M4qjki>).

and that the board exercised due care in carrying out its duties. They are not intended to be a transcript of the meeting or a public document (with the exception of public hospitals). Board members would do well to bear in mind that in many circumstances, minutes are discoverable in litigation. Executive session minutes should be labeled as confidential and kept separately from board minutes in a secure location.

For the portion of an executive session where the CEO is present, he or she can draft a brief summary of the discussion and any actions taken and review it with the board chair after the meeting. For a segment that excludes the CEO, the board chair can provide a brief summary of the discussion and any actions taken. In some cases, hospitals and health systems employ a board support professional who reports directly to the board; in such cases that individual can draft the needed summary, with clear guidance about the need for brevity. In no instance should a board support professional do what one did for a number of years, which was to record every executive session without the

knowledge of the board, creating what can only be called a plaintiff lawyer’s dream with respect to some of the confidential issues discussed!

Both sets of brief notes (those taken with and without the presence of the CEO) should be approved by the board at the next executive

session and filed with the board’s confidential records. The reason for the executive session should be documented briefly in the general meeting minutes.

The reasons for brevity in executive session minutes are two-fold:

1. Board members want the assurance of confidentiality in discussing personnel and other sensitive topics. Board members should feel that they are able speak freely as well as responsibly.
2. There may be a future legal proceeding and deposition requesting the records of confidential deliberations.

Potential Difficulties and Ways to Prevent Them

Handled poorly or without advance planning or a clear purpose and agenda, an executive session can become a major impediment to effective non-profit governance. One governance consultant describes the following example by way of illustrating this concern: “With no warning, the board decides to go into executive session. The Executive Director is asked to leave the room. An hour or more goes by, but to the ED it seems much longer. When it’s over, the ED isn’t told what was discussed.” The author suggests that these unplanned or unpredictable sessions can be “fraught with tension,” even as they can be “a key part of effective governance.”¹²

In some respects, confidential executive sessions can be thought to be anathema to the transparency and duty to the community of non-profit



¹⁰ Rick Marks and Regina Hopkins, “Board Basics: What a Nonprofit Board Should Know About Meeting in Executive Session,” D.C. Bar Pro Bono Center Webinar, February 15, 2017.

¹¹ Scott, 2018.

¹² Joan Garry, “The Problem With Executive Sessions.”

corporations. Yet many issues do require a measure of confidentiality and the opportunity for candid discussion among board members that is not always possible in the presence of staff. Unfortunately, executive sessions can be "...mistakenly used to raise concerns about the CEO or another executive, simply venting about behavior, gossiping, or addressing personal issues," according to one observer.¹³

Executive sessions should be planned in such a fashion as to be predictable for all parties and to preserve trust while maintaining confidentiality.

What can be done in planning and scheduling executive sessions to minimize the awkwardness?¹⁴ First, the board can adopt the policy of scheduling an executive session in every board meeting—usually at the end is best, but if board meetings run long, they can be scheduled earlier in the meeting. Each executive session should have a written agenda, identifying general topics to be covered, while leaving room at the end for board members to raise new issues. However, personal agendas of individual board members should be avoided, and new issues should never be discussed or resolved in the session in which they are raised (unless they involve an emergency). If appropriate, they should be calendared for the next board meeting or executive session.

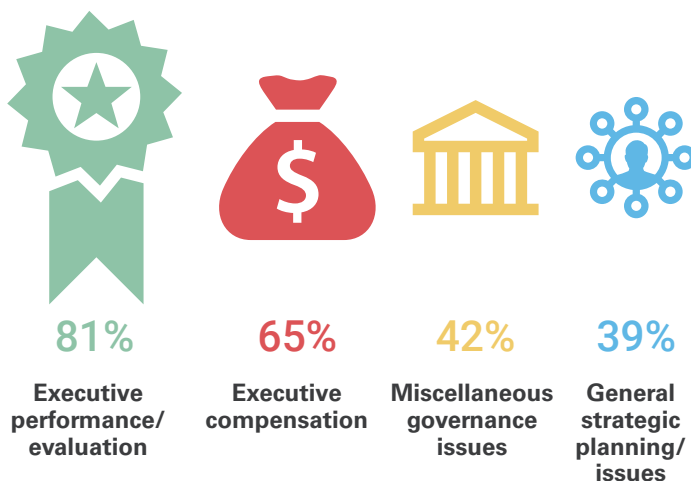
Distrust between the board and CEO is a major problem that should be avoided at all costs. "It demonstrates a lack of understanding that the CEO and board chair have different responsibilities and must work together to achieve the mission and vision of the organization," says author and consultant, William Mott. "Too often this type of executive session includes discussions about issues with which the board has limited or no information, and thus they can devolve into unproductive and inappropriate discussions or even forums to spread gossip."¹⁵

In sum, executive sessions should be planned in such a fashion as to be predictable for all parties and to preserve

According to The Governance Institute's 2021 Biennial Survey of Hospitals and Healthcare Systems:

- 59 percent of respondents scheduled executive sessions (compared with 72 percent in 2019 and 74 percent in 2017).
- 88 percent of respondents with scheduled executive sessions said the CEO attends always or most of the time, 41 percent said clinician board members attend always or most of the time, and 41 percent said legal counsel attends always or most of the time.

The top four topics typically discussed in executive session are:



trust while maintaining confidentiality. Such sessions should be considered routine and, if the CEO is excluded, he or she should be debriefed immediately following the session except in highly unusual circumstances.

Evaluating and Improving Executive Sessions

It is important for boards to keep in mind that there are many positive reasons for holding an executive session to permit candid discussions about issues involving board operations and the organization as a whole. To minimize awkwardness, the board should consider making executive sessions a routine component of board meetings, instead of calling them for a particular purpose. This should enable the CEO and staff to rest a bit more easily, while providing board members with a predictable forum to converse, exchange ideas, and express concerns. Executive sessions should be focused only on those topics that require a measure of confidentiality—they are not intended to be alternative board meetings for conducting regular board business.

The board should consider adopting board policies or even bylaws amendments that create a routine process for calling and conducting executive sessions, including a list of topics that are considered necessary or acceptable for consideration in such sessions. All executive sessions should be held for their determined purpose only. After that purpose has been met, the session should end.

If the chief executive is not in attendance, the board chair should inform the chief executive soon after of any specific conclusions or recommendations that surfaced during the meeting.

It is advisable to keep a written record of all executive session proceedings. 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 present in the session.

Finally, the ability to improve the effectiveness of executive sessions—and of governance generally—may also

13 "Proper Planning and Execution for Executive Sessions," Govenda, 2021.

14 Marks and Hopkins, 2017.

15 Mott, 2018.

depend on paying attention to your board's theory of governance. While this is not a one-size-fits-all approach, there are clearly best practices in non-profit governance generally that, if adopted, could improve the board's ability to benefit from executive sessions.

Engle and Cordes postulate that the concept of an executive session differs from board to board, based on the type of governance, and suggest that there are three basic types:

- A "controlling board": The chief executive serves as the agent of the board, which delegates work to and closely monitors the actions of the agent.
- A "collaborative board": There is a solid working relationship between the board and the chief executive, and the board assumes that, in general, managers can be trusted to be good stewards. That trust, cohesiveness, and openness are core concepts and the board and management share a unified sense of direction, command, and control.
- A "passive board": Governance is dominated by management and is a "creature of the CEO," even though it is the formal governing power, and in which the board is typically little more than a legal fiction.¹⁶

We have encountered examples of each of these boards in our work with

non-profit hospitals and health systems. We would also suggest that there is another way to categorize the governance approach of hospital boards: as "constituency-based boards" with many *ex-officio* members appointed to represent various interests; "professional/expert boards," which are composed of individuals selected to bring a range of skills and experience, as well as a diversity of backgrounds, to the table; and "honorific boards," whose members are appointed primarily because of their social stature in the community and/or their ability to engage in fundraising activities for the hospital or system.

Board self-evaluation is itself a governance best practice that can benefit from the effective use of executive sessions to encourage confidentiality and candor.

Concluding Thoughts

When you combine these governance theories in some manner, it is possible to see that there are likely to be substantially different approaches to executive sessions. To illustrate, a constituency-based controlling board is more likely to make extensive use of executive sessions without the CEO or

other staff. A passive, honorific board, on the other hand, may have little need for executive sessions at all, except perhaps to conduct an annual review of the CEO.

As your board considers the employment and design of executive sessions, it is very important to be mindful of how your organization views the role of governance and how you want your board to function.

It is also important for a board to routinely evaluate how well the board functions. Such an evaluation should extend to both the board as a whole and its components (committees) and individual members. Board self-evaluation is itself a governance best practice that can benefit from the effective use of executive sessions to encourage confidentiality and candor. The Governance Institute advocates a philosophical framework known as Intentional Governance, with the main idea being that boards that regularly look inward, assess how they are doing as a board, and put in place mechanisms for continuous improvement are more effective boards. They honor process and policy while ensuring that they are never satisfied with the status quo. They are more effective in overseeing their organizations and holding management accountable for achieving goals. Intentional boards also tend to have open, transparent, and trusting relationships with their CEO and senior management. The board chair does not overstep, and encourages all board members to voice their concerns, regardless of how sensitive the issue may be. Establishing the best practices and processes for executive sessions demonstrated in this article is a core component of Intentional Governance and has the potential to make a significant positive impact on your board's engagement, dynamics, and culture.

The Governance Institute thanks Larry Gage, Esq., Senior Counsel, Alston & Bird LLP, and Senior Advisor, Alvarez & Marsal, and Lawrence Prybil, Ph.D., LFACHE, Norton Professor in Healthcare Leadership (Ret), University of Kentucky College of Public Health, for contributing this article. They can be reached at larry.gage@alston.com and larryprybil@gmail.com.



¹⁶ Engle and Cordes, 2014.