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## Board Minutes - What to Include and What Can Get You Into Trouble

About this Case: Read this Innovation & Excellence case study if you want to either learn the legal issues (including antitrust) involved in Board minute taking or improve Board and staff interaction.

Developed in partnership with... Tecker Consultants, LLC

Rating: ★★★★★ [1 Reviews](#)

Association: Anonymous

Contact: Anonymous

CEO: Anonymous

Budget: \$3 Million

Staff Size: 14

Vitals:

This anonymous association is a professional society of approximately 6,500 members whose mission is to serve the membership in such a way that its competency and professionalism is recognized and utilized by 90 percent of the population needing their services.

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### The Challenge:

How to construct Board of Directors meetings and record Board minutes that do not put the association at risk of violating the Sherman Anti Trust and Clayton Acts?

For many years, the organization recorded and kept detailed minutes of its Board of Directors' meetings as well as other key committees and decision-making groups. These minutes often included not only motions made, defeated and passed, but also off-handed remarks made during the course of discussion.

When articles began to appear in the local media, the Justice Department began to scrutinize the association's practices with regards to Board meetings. After concluding its investigation, the Justice Department filed a price fixing suit against the association. The Justice Department alleged that the association's practices were in violation of the Sherman Anti Trust and Clayton Acts.

### The Solution:

The organization examined and re-developed its Board of Directors meetings and minutes process to eliminate any possible violation of the Sherman Anti Trust and Clayton Acts.

An investigation and subsequent suit by the Justice Department forced the association to re-examine the manner in which it conducted its Board of Directors meetings as well as the content recorded in its Board minutes. Specifically the association embarked on the following initiatives to correct this enormous legal problem:

- Created agendas and control mechanisms in meetings to assure full compliance with the law.
- Created systems to assure minutes and other official association documents and presentations (both written and oral) were in compliance with the law.
- Provided legal education to members and staff, responsible for areas with possible legal ramifications, to assure discussions and decisions are legally acceptable.

### The Process:

For many years, the organization kept detailed minutes of its Board of Directors meetings and other key committees and decision-making groups. These minutes included motions made, carried or defeated. Frequently, they also incorporated comments made during discussion, member justifications for making decisions and even off-handed comments made by the association's attorney (rather than researched legal opinions) when he was present.

The organization came under Justice Department scrutiny when articles appeared in local newspapers detailing alleged meetings held and their conversations. These media articles alleged that members were engaged in discussions that could be construed as having an effecting upon association decisions and impacting prices charged by members. After concluding its investigation, the Department filed a price fixing suit against the association alleging violation of the Sherman Anti Trust and the Clayton Acts.

The chief staff executive (CEO), who had been in that position less than 2 months when the suit was filed, had not been made aware of the pending investigation prior to being hired. After close scrutiny by the CEO and with the advice of legal counsel, the association fought the suit for almost 2 years. Just prior to trial, immediately after a pre-trial conference with the judge and Justice Department, the organization signed a consent decree agreeing not to do certain things and agreeing to do others. The consent was signed not because there was strong evidence of wrongdoing but because of statements included in written minutes uncovered during discovery. These were from meetings held 3 to 5 years prior to the suit.

When discussing a proposed action, uneducated and prejudicial statements of several board members (which were related to, but not part of, the motion under consideration) were included in minutes. These recorded personal opinions had no effect on either the decisions made or what the association actually did. However, they were imputed to the association because it could show neither proof nor evidence that the statements were repudiated.

In another set of minutes, an action was authorized by Board vote and the off-handed remarks made by legal counsel present, questioning the legality and advisability of the action, were recorded even though no legal opinion had been requested nor provided. Even though it was shown conclusively that the association never implemented the action due to the questions asked and discussions among the leadership after the meeting, there was no official record in any future minutes or in any other form indicating that the original action was reversed. The judge made it clear that this would be considered as intent to violate the statute regardless of whether or not it was ever carried out.

As a result of those minutes and others similar to them, the association and its members had to refrain for ten years from taking certain actions or providing certain services. The organization was also required to do other things not specifically mandated by law to assure the court that both the association and its membership were acting within the letter and spirit of the law.

Some of the specific steps the organization took to address this serious challenge included:

- Minutes thereafter reflected actions taken, not discussions and off-handed comments. No attempt was made to either capture or paraphrase comments made during discussion, or to determine which comments would be included and which would be excluded.
- Tape recordings of meetings were used only for their intended purpose of ensuring the accuracy of minutes taking and the decisions made. Once the minutes were approved, the tape recordings were then destroyed.
- Legal Counsel reviewed all minutes of important decision-making groups prior to their approval at the next meeting. This was to ensure that in the future, nothing could be wrongly implied with regards to the legality of actions taken based on the wording of the minutes.

In any meeting where legally sensitive issues were to be discussed, legal counsel was present and asked to give informed opinions to guide decision-making and propriety of discussion.

- Once a year, all committee chairmen, directors, key staff and others in leadership positions attended a daylong training session where legal issues were discussed in depth. Leaders were charged with assuming responsibility to stop any legally questionable discussions or motions from arising.

Through written articles, oral presentations and other means members in the field, especially heads of companies, were educated on anti trust and other legal issues to help them avoid personal violation of laws affecting their own businesses.

#### Unforeseen Benefits:

Two years after these events, a disgruntled member sued the association. This member claimed injury as a result of being removed from membership for violating association rules. Despite extensive searching of association records, including past minutes, the association was exonerated. There were no side comments, obscure references or personal opinions in any of the minutes or other association documents.

#### Lessons Learned:

Perhaps the most important lessons learned were to keep all minutes precise and reflect actions taken – not conversations and personal opinions - on any significant decisions. In addition, the society began to ensure the presence of its legal counsel at meetings as well as obtain legal review of all meeting minutes before they are sent out to members and/or approved. Currently, the association also obtains legal review and counsel if the meetings or minutes dealt with potentially sensitive issues.

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☆☆☆☆☆ [Steve Henderson](#), January 31, 2008

intended for larger associations, but certainly relevant...reminds you that of course only action items are essential

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