

Hospice Insights: The Law and Beyond



Episode 26: Governance Series: A Good Hospice Board in Action – What it Looks Like

December 16, 2020

Speaker	Statement
Meg Pekarske	Hello welcome to Hospice Insights: The Law and Beyond where we connect you to what matters in an ever-changing world of hospice and palliative care. Governance Series, A good hospice board in action what it looks like. Join me as we further explore good governance in hospice. In this conversation Stephanie Kaiser and I delve into the details about how a good board functions, what are the common attributes and how you measure performance. We discuss the role of sub-committees and term limits. What makes a good board addenda and minutes and the essential elements of effective board infrastructure. If you like this episode join us for our next session in this series where we discuss common board problems and tips for dealing with them. So welcome Stephanie again, I'm so excited to be doing this again with you and thanks for being game. We did our first poll on LinkedIn to get feedback on the governance, the first episode we did and asked people to comment if they'd like to hear more on governance and you're very popular and everyone wanted to hear more from you. So thanks for taking the time to explore these, what I think is really important, issues further. So welcome back.
Stephanie Kaiser	Thanks for having me I appreciate it. It's a fun set of topics.
Meg Pekarske	So for those of our listeners who maybe didn't get a chance to listen to the first session. Maybe you can talk a little bit about your background. You and I got to know each other through a project where we were having to deal with some thorny governance issues. That's sort of an



Speaker**Statement**

everyday occurrence for you because this is your area of expertise and you're very very skilled at this. So why don't you give a little bit of background of what you do.

Stephanie Kaiser

Sure so I've been practicing for about 21 years and as part of that I went to work for a firm where I was one of the only associates getting hired for a while. So what that meant for me was even though I was hired into litigation and bankruptcy, I ended up working for all of the sections of the firm and it was a full-service firm. Over time, my philosophy was never say no. So I ended up getting exposed to a lot of litigation matters that the company faces very early on in a wide variety of matters. And then what I found for my work was I got closer to clients and what have you. I really found that I did a better job if I really got to learn their business and I could represent them better and take a more holistic approach to my role. Just through that I ended up becoming an outside general counsel to a number of companies in fourteen different industries. Literally through that process whenever we had a board problem, we had to deal with it. Whenever we had a management problem, we had to deal with it. So in working with these companies, many of whom we started or merged or acquired, I got a really boots on the ground approach. So I spent about 19 of my 21 years as outside general counsel and about 2 of those years I did go in house for a couple of years to help some entities merge and be a part of an initial merger and then get that process moving up and running and then transition my practice back outside to a firm. So it's really just a natural accumulation. I just do this work on a daily basis. Wherever the problems are I get to go deal with them in board governance and board training is a huge part of my practice as a result of all of that.

Meg Pekarske

Yeah well I think that you have a unique vantage point because you see the good the bad and the ugly and sometimes make the ugly pretty at the end of the day. I think that there's no better opportunity to improve than when you're dealing with some problems and suddenly those limitations are like well yeah I guess we need to do something about that. Next episode we're going to talk about the problems and those sticky situations but in being optimistic let's start with what this particular episode is focused on. What a good hospice board looks like in action. I wanted to talk about first create a visual about what you think a good board looks like and in my experience you know a lot of our hospice clients are not for profits and so they have community members on their board and sometimes their boards are really large. And that can be difficult sometimes. We also have for profit clients too that is a very closely held business and they don't really have boards in the same way. So give me a visual. How many people should be on your board? How often should



Speaker**Statement**

you meet? What are some of those logistical kind of issues.

Stephanie Kaiser

With me discussing what we have today. Part of the answer is going to be you know it depends. Which is a common lawyer answer and I don't like it. So I'm going to take that and distill that and say I'm not just going to give the it depends answer. I'm also going to say it depends based upon the size of the company, the industry that it's in, maybe what its requirements are, and its objectives are. And kind of put on the side how many committees it might need to properly function because you want to make sure you have a sufficient number of folks to serve on those committees without having every board member serve on every committee. Otherwise that defeats the purpose of having that independent committee. So having said that I would say some people, you know I've seen authors write you have to have three board members and I've seen authors write you have to have twenty members. I don't think either one of those answers works for all persons or all entities. So for me you have to have a sufficient number, I like odd numbers, but you have to have a sufficient number of persons serve the needs of the committee and the needs of that board. So sometimes that's seven and sometimes that's thirteen. I generally don't like to create too high as just a practical measure because when it gets to be too big then you start to suffer from some functional issues and organizational inner logistic issues that make it difficult. Then I will say it this way, not that this is ever anyone's intent but the bigger the board is, again it all depends on the industry and what the needs of the committees and things are, but the bigger the board is the easier sometimes it can be to hide. So you will have some members who naturally just participate less because if there's twenty-five members in a room you're one voice is perceptibly watered down that you may not actively participate. That's just something we don't ever want someone to start to feel or do. Everyone has to have an independent voice on that board. So for me it's having the right balance for the size of the company and its committee needs. It needs to be organized and independent making sure its fiduciary duties that we talked about before are in line and carry loyalty and obedience. Critically they need to understand that the company's purpose or its mission however that's phrased for that particular company; What is the purpose of that company? What is its goal? You have to know that to make sure you're serving as a board member the best interest of that company and its purpose or mission. Being competent in that role I think is really important. There are so many times that I've seen folks and it's more in the casual entities not maybe so much a hospice board, but people in this kind of smaller mom and pop shop and they have more of a casual board. Which by the way isn't a thing. They treat it more casually. When they do it that way sometimes they'll forget items on the board or people in the community who they think serve X,Y, Z focused. That may be well and good for



Speaker**Statement**

many purposes, but the problem is they need to be competent for the role of a board member of that particular entity. Do they have the records acknowledged? Do they bring a big skill set to the board that it needs in order for it to properly function and maintained best duties and best roles? Keep a focus on that company's best interests and importantly are they of the kind or of the ilk that board member will maintain a healthy tension with that CEO and that's such an uncomfortable phrase to say but if you really know what it means to say that make sure each board member and the board as a collective is comfortable the right CEO, overseeing the CEO or President. Making sure that they appreciate that there is a line between board and management and are you comfortable challenging the management head in a way that serves the best interest of the company so for me it's all about competence, having that right size, the right limits on those roles. It really helps set a good platform for the board.

Meg Pekarske

So and I think that when you talk about mission and recruiting board members and we're going to stay on the positive side and wait for problems for next time. I think that obviously many people in the community believe in the mission of hospice so you get a lot of people who are connected to that mission but I think what you said is really important is what are the needs of your board? In terms of what skill set do you need to flush out the skills of the company at large because it is the interest of hospice and therefore I want to be on this board or I've given you a lot of money I should be on this board. It really I think that strategic consideration like you were saying, not only the size, I think next time we can talk about as people go through different iterations, if you have a really big board how do you slim that down into something that might be more nimble and better serve the needs of the company. Anyway I think that's really helpful. I think we're never at a loss for people who are committed to our mission but again does that skill set match up, I think is really important. So I do think this varies with different organizations, but you talked about subcommittees and then I think the executive committee is really important. So do you find most boards do have an executive committee and do you think that's really critically important? Should that executive committee meet more than the rest of the board? Tell me a little bit of your thoughts about committees and executive committees in particular.

Stephanie Kaiser

Everything that you're saying Meg is right. Obviously we always focus on what is the goal and purpose of the company. Does the board serve that role? They are the ones ultimately responsible for the direction and tone at the top of that company and they can choose the persons who serve the functions of that board to get you there. But sometimes taking the question you just asked and flipping the pyramid upside down. So if



Speaker**Statement**

you're seeing that the board is on the top and the board is on the top of that pyramid and then seeing the committees below that. Okay so first of all we're going to see what committees are required either by law or by internal guidance or needs of the company. I'll get to that executive part because I kind of want to hold that down and there's a reason why I'll do it backwards. So if you see, depending on who we are and what we do oftentimes we will see committees that are focused on auto review functions. Those are really critical and I want to distinguish that in a moment from risk but auto review committees are common with most companies because they're going to look at everything that's happened up to a date certain or with a strip of period of time historical and seeing how did we do in these areas of testing? How did we survive these issues, making sure you have a competent person to obviously perform the audit and making sure the audit committee is set up to force review of compliance aspects of that particular company or its performance aspects? Risk is also the common committee that we're seeing more and more, and I would say I've seen that more in the last ten years than I have over the life of my career and there's more published articles about the benefits of risk. A lot of times folks will consider audit and risk together they are separate. So let me address and distinguish it from audit and review. Risk is looking forward, audit's looking backward. So risk is appertaining what's appropriate for that company. What are its risk issues? How are they identifying those risks in all the areas of the company? And then they can properly test for it. So having a risk committee can be really instrumental in a company's ability to maintain safe client functioning. Then I often see something like a compensation kind of committee or a finance committee for example or a governance committee and sometimes people will combine them depending on the size of the board or how frequently they need to meet. Sometimes they have been separated. So compensation of governance, there are distinguishable areas but those are two committees that are often either combined or separated but still commonly associated with the company. To help determine the compensation is in line with the industry. Is it appropriate given the roles of the folks in the company etcetera? And governance is making sure we're getting all the right things to comply with the greater requirements, internal and external, when they have. Internal being company-based guidance you develop policies, procedures, via charters. And then of course external being the legal requirements you may operate under in your industry. Then let me get to the initial question which is executive. Oftentimes I do see an executive with certain kinds of companies, many kinds of companies, and that executive will typically take the chairs of each of the various companies or choosing the committees. Take the chairs of those folks for leadership positions and they may have a CEO also be a part of that committee, or not. And then they meet and they really try to assign the issues not



Speaker**Statement**

perfectly addressed by all the other committees or properly addressed and of course they address things in order to remain available to address urgent needs that other committees don't have the time to address due to the urgency of the situation. So executive to me is the penultimate of the board structure. I think it is critical to have. Even if you don't have one at least the chairs of the various other committees that are in place together should be available and you should consider that as a part of your board charter to make sure that your chair persons do serve that functional equivalent if you don't have a separate executive committee. But if you can I do think it's a good idea and let me add on one more thing to response to that initial discussion about board size. If you do find that you need a larger board or if you find that you have to have one for whatever reason. One way to make the board function more logistically and operationally is to have a sufficient number of committees to break up that size to let that board function more nimbly and meet as frequently as they need to address the unique areas within those committees. And then those committees' chairs for example could report up to the board what the board needs to know and make sure those are clear. So executive committees are important. You know you have to have the committees required for your industry but I think audit, review, risk, comp governance, I think all of those are really important and having executive committee or functional equivalent is all really good ideas to have for a hospice board.

Meg Pekarske

Well and I think you know whether or not it falls under risk. I always think of compliance.

Stephanie Kaiser

Right.

Meg Pekarske:

Which, and I know you work in heavily regulated areas too, and compliance is incredibly important. I think one challenge is, and again I'm trying to stay on the good and not go into the challenges but is making sure your board is educated about the issues of your industry because I do think when these things pop up, which they will. I mean we always talk to hospices about it's not a matter of this it's when you're going to get reviewed by the government. Most of the kinds of review we're talking about can have pretty large financial implications for the organization and it's the first time they're hearing about oh my god there's something called statistical extrapolation, the government could take twenty million dollars from us? You know at the time that this is now happening to you they're taking twenty million dollars and thinking oh we're a horrible organization that this is happening to us. That's not the right time to have that conversation.



Speaker**Statement****Stephanie Kaiser**

Right.

Meg Pekarske

I think educating your board on these kinds of issues. Again it's not everyone's skill set. Everyone doesn't have to have some deep knowledge of hospice compliance, but I think everyone and not just the committee be kept sort of what are the base touch kind of issues in our industry and compliance. The federal office of the inspector general has put out on a number of occasions guidance for boards and they specifically talk about the board and we'll get into infrastructure in a little bit. How do you prove that you're doing a good job? Whereas how is the board educated about compliance issues? What do they know about the proactive compliance the organization is doing? Not just reactive of the government told us we did something wrong. What is something that we're proactively doing to ensure our compliance with the various regulations. So I think you're exactly right in whether we call it this or compliance or whatever it is it's really incredibly important and reports are at different levels of sophistication but that is an area I have seen personally of something that we probably can't do enough of, of educating our board about compliance issues. Usually I'm talking to a board because something is pretty seriously wrong and it's having financial consequences. You get that feeling sometimes that people's eyes are glazed over like I don't know what you're saying and sort of in shock. So anyway I think that compliance is incredibly important and keeping up education in that area because that's one of the things OIG talks about is do you have annual training on compliance? Does the compliance officer of the organization report to the board and you know that's getting into some best practices? Something else I thought would be important to touch on when we talk about the who's on the board, committees, those types of things is term limits and obviously hospices are often times community-based organizations and so you might have founders that are on boards. As oftentimes the case I run into a number of boards where they've had, I helped establish this, you know how many years ago. What's your feel on term limits? You want people who have that vested interest but then you know should they pass the baton and what do you see in terms of term limits?

Stephanie Kaiser

Oh gosh it does vary. There are so many different approaches to term limits. I think generally speaking it's not a bad idea to have fresh perspectives. It's not a bad idea to have rotational leadership. It's not a bad idea to have rotational board membership to a certain degree. In my experience board members, let's say you have term limit of three or four years. Generally speaking for a brand new director it takes depending on the industry and what you have to learn, it can take depending on prior experience of course of that individual person, it can take 12 to 18 months to kind of start getting your feet wet, to start getting into



Speaker**Statement**

agreement with the board meetings and start getting truly as effective as you can be. And then you would hate that 18 months later you're going to rotate off. So I say this because the term limit you want to choose, make sure it's mindful of the on ramp, you take that time frame into consideration, the monetary investment the risk-based investment, you make that particular director in the performance. And of course how you treat your directors really goes into that too. So let's say for example some associations or some companies or entities will have three, three-year terms and that's the way they do it. No matter what three three-year terms take a term off and then you're eligible for reelection or reappointment whatever it happens to be in the structure that appellate directors get put on the board. So that's common. Another way you could have a term limit is rotational leadership. That's not an effective term limit that rotational leadership. A person who serves as a board chair for only so long and so many consecutive terms. Because what I have found sometimes is while you may have Sally who is an excellent chair on a particular board. Does it right, does everything great, it runs smoothly. You would hate to lose Sally that valuable board member. The problem is if there is seven or eight other members on that board they can become overly reliant upon Sally and if anything ever happens towards Sally, can't serve on the board or whatever, now you have a disconnect because now you don't have someone else ready to lead. Every director in my opinion on a board should be prepared to take the reins. They should be prepared to lead. If they're not, and this is just for me. If they're not from a mental perspective, if you're not prepared fully why not? How effective are you? Are you truly being independent and as active as you can be? Are you being as diligent and prudent as you can be in your decisions if you're not ready to leave? Now I realize some persons that may be more of a mental exercise than anything else. Some persons really don't have those quote unquote *organizational skills* or leadership or that's not the skill set they bring to the board. I appreciate that. But I do think having rotational leadership does keep everyone fresh and ready to take on that position and be capable even if they are not the ideally suited person, being capable to take on, I think that keeps your board as strong as it could possibly be. Even if you don't ever need to rotate through all board members to be in leadership. So term limits can be through limiting actual terms, the years per term, rotational leadership, executive terms. Some folks do impose term limits in another other way which is through the age. That's a sensitive issue sometimes. That's a delicate issue just outside too. I don't know if there is one age that's appropriate or not, but companies do decide that for themselves. They may decide how many persons between this age range are eligible for consideration and be qualified as the director. I see that in the last few years kind of falling off a little bit. I see it being more effectively addressed through term limits and the other ways we've discussed. I do think those ways are more



Speaker**Statement**

progressive moving forward and recognizing that age doesn't always determine our effectiveness. It really can be everything's like staleness or activity levels or what have you. So as long as your directors are qualified I think having some form of term limits in the ways we've described and maybe some other similar ways are fine as is.

Meg Pekarske

That's really helpful. I think I wanted to turn our attention to, I have a sense, visualizing, we have this board and odd number of members and they're not going to be the same people for the last twenty years around that table but let's talk about, create a visual for how do you run a good meeting from start to finish in terms of what the agenda looks like? I sort of wanted to get into these, sort of both logistical things, but when you and I were preparing for this, you said some things that were really interesting to me about consent agendas and non-consent so I wanted to get into some of that. So maybe we start first with meeting agendas. So maybe before we even go there. Do you feel like most boards are meeting once a month? That's what I hear quite a bit but is that your experience?

Stephanie Kaiser

My clients really are all over the map. Generally it's between one to three months instead of monthly to quarterly. I will say some of the larger organizations tend to meet a little less frequently in my experience. Or because of the size or the number of issues or how much time it takes up to go through the board packet. Or because they can't physically get in a room it's too hard for their calendars, all of those kinds of things. I can vary on what's effective, but I do think monthly is probably the most common if I had to take all my clients and sift them through a sifter, I'm probably going to see more than fifty percent meet monthly for various reasons.

Meg Pekarske

Okay.

Stephanie Kaiser

So to your point yes. That's is the most common, but it really can vary based upon size, logistics, where they're located, those sorts of things. A lot of folks like to meet in person. So that does limit sometimes how much they can meet. Depending on the number of items they have to cover as a board they meet on a quarterly basis for example. For the boards to meet on a quarterly basis. I find very consistently the committees are meeting more frequently. They're meeting in between those times. So the board is meeting through its committees in a more frequent basis on at least a monthly basis. Even for the ones that meet on a quarterly basis. They're maintaining the things they need to maintain in being prepared for those quarterly reports that they need to meet. So audit may meet monthly for example when those sorts of things, a risk type can maybe meet quarterly. Comp and Governance, compensation



Speaker**Statement**

and governance may meet on a quarterly basis depending on the issues that they have to tackle throughout the calendar year. So the boards would be meet quarterly. So whether the boards meet monthly or otherwise the committees need to meet on a fairly frequent basis. Even the board meetings that do happen monthly I'm seeing the committees kind of lead along the lines that I'm talking about. Which is audit tends to meet more frequently. Comp and governance tends to meet, or compensation I should say, meets more quarterly on benefits and compensation cause not as many issues tend to crop up in that area that can't be dealt with on a quarterly basis and I tend to track natural recording as well. Of course then we have comp benefits and it needs to be tracked quarterly and labor and employment needs to be tracked quarterly. Then of course your governance can be a little bit more frequent depending on the client's issues that they tackle. So that's kind of what I mean in terms of frequency of meetings. A lot of folks who like that monthly meeting or monthly touch approach whether it's committee or board. I think the reasons are right which is we need to stay fresh, we need to stay connected we don't need to have that much distance pass between the time that we're meeting so that we can kind of be mindful and on top of the issues that are hitting us as they hit us.

Meg Pekarske

Yeah I think that we need it in work too right? To get something off the ground and create momentum you need to keep people engaged and I think getting connected, and again we're not going to go into problems of you know micro managing and getting involved in day to day operations but I do think you need to have your board be engaged in what you're doing and you know initiatives and what not. I do think finding ways to engage and not in a way that's oh I as the CEO just engage with a few of the board members. I mean you really need to try to, as you said, very importantly, of ensuring that everyone has a voice but expresses their voice at these meetings. So, and I know just in my personal experience sitting on boards, I mean day one you're not like saying everything you think right? Since you're trying to get a feel for the dynamics and learn more about what you're doing and so I think that on boarding point is really important it's hard to on board if you don't meet that often. So in terms of agenda setting, cause in my experience the executive team of the organization is putting together the board packets and a board meeting is a big deal in getting prepared for that. Can you tell me a little bit about what board packets, effective board packets look like? What should be a reasonable expectation about preparation for board meetings and that agenda and all of that stuff. I feel like I've been to many board meetings where you don't get the agenda in advance, I mean these are all non-profit boards where you show up to the meeting and then you sort of talk but that's a not very effective meeting. You want people to have thought about this stuff beforehand. So how do you do that? What does a board



Speaker**Statement**

packet look like? When do you send it out? Who's sending it out? Tell me a little bit about your thoughts on that.

Stephanie Kaiser

Sure so taking both of those concepts. A board packet to me is obviously going to be a mixture of the minutes from the prior meeting or meetings, it's going to include your routine business and reports that are required to be provided, it's also going to include, to me, not everyone does this but it's a good idea of kind of a summary of legal trends or other trends that are going on. If there is proposed legislation that effects your area if there's market trends that effect your area. If there are things on the horizon to be considerate of, opportunities for participation in the community that are relevant to your board. I like having those things in there. So those are kind of the critical things, having your policies, I always see a discussion of policies appropriately rotated you know on a board packet or included as part of a board packet. For example if you have thirty to sixty policies. Some number in that range. If you have thirty or some odd policies. You should have a schedule that those policies are reviewed on a periodic basis. Some should be reviewed annually at least and some maybe every two years but there should be a schedule. So you should see in your board packet and it should reflect that the policies as updated or otherwise are included in that board packet consistent with that schedule. Obviously changes in the law or changes in practice to necessitate a change in policy between time of course having that in there. Not everyone does this, but I think it's a good idea. To include summary pages, I was just talking to someone yesterday who does, works on a board. I asked him when they were describing the reports, I said how do your management represent their information? And they were saying oh well they have a fifty-page report and we just tell them to hit the highlights is that only oral review? They said yes. I said have you considered a one to two-page summary of those highlighted notes and put it on top as a cover page for that fifty-page report that you're describing? They said they hadn't, and I said here's why it could be a good idea. One it's going to you know, board packets are getting, excuse me, board members are getting their packets in advance as they should. Then at least they can go and review everything under their fiduciary duty responsibilities but at least they will know what that particular author's beliefs are as to the key elements that they should be focusing on and prepare to discuss, and they should be able to review that. It's also important if you have a regulator or someone else who ever is in a position to review board packets to know what is the summary of the salient issues? What were the focused issues etcetera? Frankly for one of your other parts of your inquiry Meg, it also helps allow for a more efficient use of board time. So board packets are going to include your minutes. It's going to include your consent agenda items which I'll talk about in a second. Your routine business reports and



Speaker**Statement**

financial reports that you see all the time. It's also going to include new business and policies and a separate section outside of the consent agenda and then you always want to see in my mind on an agenda that is distributed in advance, you're going to see a section periodically, whether it's monthly or quarterly strategic business planning, kind of a marker for the board to talk about those things to be mindful about those things as you prepare to bring this to the table. You want to see at the appropriate time of the year and opportunity to discuss the business plan which should be a three to five-year business plan typically and make sure that they're to look at that in advance. Of course you're also going to want to see opportunities for executive session. Some people like to do that at the outset some people like to do it at the end. I typically like to do it at the end. That way you can kind of run through your day and go into executive. I have a holder for that. On the agenda I also like to see kind of who's the sponsor of the report or who's responsible for delivering that report to the board. So we can kind of know who's in line or who's in queue to deliver those things. It's typically what I like to see in a board packet and what I like to see among other things in an agenda. We have some standards that we often use for clients to get them started in those template-type bases. So when I see those things I do like boards traditionally to get those packets. Depending on size and how much is in there and what needs to be digested and when committees are meeting at least a week in advance if you can. Sometimes I know life happens and sometimes information comes in after that week before and I fully understand that, I have lived through that. I put together board packets every month for certain clients in certain ways. So I notice as things come in late you will have to add them as appropriate. I was talking to someone yesterday who said they try to get theirs out two weeks in advance and that's great. I think at least a week if you can is an ideal time frame. So the agenda I've said a couple of things people may not hear every day that I think are important to kind of keep in mind if you visualize an agenda. So you have your meeting, meeting starts, then you have your minutes and then you have a certain business that may need to be addressed or committee reports that may me need to be made. The next you're going to have a section like what's called consent agenda and that's where your business and financial reports are. Under Robert Rules of Order that's called a consent calendar and basically it's an opportunity for the board to have a group of things like financial or routine business reports, I focus on the word routine, but it can review in group that don't necessarily require individualized discussion on every single line item and that the board at the end for example can say, vote once on a approving assuming you're subject to approval, approving those reports with one motion at the end. Now a director is not precluded from saying look I know it's on the consent agenda but item number 3 relating to X, Y & Z I do think warrants additional discussion and if they're motion is



Speaker**Statement**

made it can be formally moved out of consent agenda and put into the non-consent agenda. That's something that can be done, or it can be addressed at that time in response to the request for that particular board member or group of board members. The consent agenda's really are ideally put together with routine reports that additional discussion absent questions from the board members isn't warranted that you can approve en masse at the very end of that before you go on to review business or other items that do warrant discussion and that consent agenda approach allows for a more efficient disposition and handling of those routine reports so that you can focus on the things that really do and should require more meaningful discussion for the board members in other areas. It makes it much more efficient and a much more focused group of time.

Meg Pekarske

So in terms of minutes and I'm sure you've seen things run the gamut to it almost being a Dictaphone and they wrote every single word down that every person said and then some people their minutes are so sparse you'd have no idea what they actually looked at. So in the spirit of what does good governance look like in action because your minutes serve as some proof that the board is fulfilling its function. So if it is sort of evidenced number one you know that proof that yes we do these things, what is the right level of detail?

Stephanie Kaiser

You're right Meg. It does run the gamut and I've so many variations and not just by client but by personal preference. I mean everybody has their own bent that they bring to it. To me especially a lawyer who has to defend company's minutes and then deal with the aftermath. I think a good opportunity to have a good set of minutes is going to track the agenda it's going to reflect at the top when the meeting started at the bottom it's going to reflect when the meeting adjourned. There should also be a holding item on the agenda. Who attended that meeting and how they attended could sometimes could be relevant whether someone dialed in by phone or over video that's important under the bylaws for reference. Who's responsible for each item? I think the minutes should reflect the amount of time, I'm putting an asterisk mentally next to this comment, some folks such ask the amount of time spent on each item should be reflected. I tend to shy away a little bit from that unless I'm being deliberate on that point. The reason why I tend to shy away is let's say you have something that optically you know was appropriately considered by the board leaders either from the consent agenda or otherwise but it was considered it is uniquely considered and it was approved or whatever happened to that particular item. Do we always want to reflect that it took 27 seconds to do that? No we do not. There's no good that can come out of saying we only spent 27 seconds on an item. If that's truly you know what happened let's say there was various



Speaker**Statement**

reviews of it, everyone was fully vetted on it and so leading up to the meeting we didn't need to spend more time in the meeting. I don't like having that line by line in a deposition transcript. I do not like it I have not found in my experience that it does well to show the brevity of time. Now if there are items that you do want to reflect either by law internal guidance or optics you do want people to appropriately know that you did spend a considerable amount of time and you want the words in your minutes to reflect, after extensive discussion, after sufficient discussion the board you know X, Y & Z decided this. So I think that's an appropriate thing. So I'm not a fan of the line by line time clock but I am a fan of indicating in some other appropriate way of that sufficient discussion was held. Now with that said I do think when you break for lunch for example. You now we broke for lunch at 11:27 am and we resumed at 1:17 pm. Those are okay and those are naturally going to suggest how much time could have been spent on an item without actually doing the line by line. I think that's important. I do think indicating, I think minutes should reflect and include that something like a motion was made, a motion was seconded, that a vote was taken and if it was a 5-4 split or a 7-1 decision or whatever it happened to be. I think that's important. One of the reasons why I think it's important one is it shows that something passed and how it passed. But I also, when I get asked to do minute reviews or board packet reviews or just compliance reviews, and I serve as a board consultant as part of my function for certain entities. When I do that I ought to make sure that we aren't having unanimous decisions all the way across. Some philosophies, I'm going to call it a movement. There is a movement, I've seen it over the last few years but I've seen it more prevalently than I've seen it before historically. There is this kind of movement where everyone thought you had to have a consensus, it reflected that everyone could sit down and collaborate into the point of submission.

Meg Pekarske

Yeah yeah.

Stephanie Kaiser

To me in my experience it is better to have a 5-2 decision than to have a 7-0 decision. Because you can't always have 7-0 decisions and it is perfectly legitimate and warranted and normal but if every decision especially more sensitive decisions or more contentious issues have a unanimous vote every single item, every single meeting then I'm going to question are we really being independent or really exercising our fiduciary duties and our voice? Are we letting our concerns be noted? Very often minds disagree and that's okay and once the board's made a decision than that's the decision of the board. There is no Johnny voted this way and Sally voted that way. It is now the decision of the board. So I do think it's important to make sure that we do have appropriate exercise of fiduciary duties. Then the vote tally can actually reflect that in



Speaker**Statement**

good ways. I do think, I'm going to stress, italicize and bold, I do think that appropriate references to the time and deliberations and questions considered in connection with a hefty topic is appropriate and sometimes that can change. You have to be very discreet. A corporate secretary taking these minutes and reviewed, sometimes they want lawyers to remove these minutes and make sure they have the appropriate balance and don't expose too much. But I do think that there are times when you want to just include questions such as X,Y, &Z were asked. You know in response to the questions raised including questions based on X,Y, & Z the board ended up reaching this decision. So I think sometimes it is appropriate to indicate that there were notable discussions, notable questions, notable considerations and having someone sophisticated and mature in their minute taking it can be very helpful in this regard because it can change depending upon the issue about how much detail you want to have in those particular minutes. I think some kind of final thoughts about those is again making sure your minutes reflect standing items. Making sure that the minutes reflect that your board go into executive sessions. At some point during the meeting I think that's always a really good idea and very very helpful and make sure it collects sufficient coverage and consideration of the agenda items. If something was punted for another meeting or was going to be addressed in a separate way making sure it reflects that. So those are kind of the regular session considerations briefly.

Meg Pekarske

Steph can I stop you there for a second.

Stephanie Kaiser

Yeah of course.

Meg Pekarske

Executive session you said common that you go into that. Can you talk just a few moments about why is that a good thing? Someone could say well jeez they're trying to hide stuff because they're in an executive session. How is that reflected in the minutes? When do you do that and why do you do that? Cause I actually think that's maybe not as common for, so why don't you talk about that and what that is a tool for.

Stephanie Kaiser

Absolutely. So executive session to me and some people like it at the beginning and some people like it at the end. But what it is, is an opportunity for the board to meet as a board. So sometimes in board meetings you will have other members of management present either through scheduled reports to someone paid to pay attention like a corporate secretary a CFO may be there, a CEO may be in the board meeting the whole time. Oftentimes the CEO present will be in the board meeting the whole time. So knowing that the board is meeting members of management either to receive reports or to obviously meet with the CEO to go through all the items that they need to get through for that



Speaker**Statement**

particular packet. Whether they also might need to meet without side stickers who come in and make a presentation on an audit report or on a legal issue or what have you. Generally you will have persons outside of the board attend the regular session of the board whether one or more, CEO and others. The executive session is an opportunity for the board to meet and it should be to me, a standing agenda item for every single board meeting even if it's not ultimately needed. For the board to have an opportunity to say okay we're now going to go into executive session which should be reflected in the minutes. Now a new set of minutes start taking place and the reason why is executive session is an opportunity for the board to meet and I'm going to put the word alone for a second alone. To say does anyone here on the board have an issue to raise that wasn't addressed today. Or let's say there's some coming legislation or litigation that needs to be addressed in a more discrete way without the presence of management. Let's say they want to review or discuss the CEO's performance. That's the opportunity to do that. Let's say they're seeing trends in the company that are not scheduled for discussion or maybe they are but they do need to be discrete. Let's say there's a personnel issue that is super sensitive or a whistle blower investigation that's going on. Those kind of legal investigatory or personnel type matters are commonly dealt with in executive session because they are more sensitive and they should not be readily available in regular session minutes for that particular board meeting. So those are typically one executive session are an opportunity for the board to meet alone. Number two it's an opportunity for the board to meet maybe with the CEO or alone to deal with some sensitive or discreet issues that are coming up in the day to day operations so often the CEO will be there for a portion of that. Or to deal with some legal issues. Of course it is important to note that if you do have executive session and something in that session requires a vote, to come out of executive session and indicate obviously when that happens so you can then vote in a regular session on that sensitive matter without disclosing all the discussions that were held. So to me going back to why I used air quotes. Executive session is an opportunity for the board to meet alone to discuss issues, scheduled and unscheduled for that particular meeting to make sure that every board member has an opportunity to raise issues that maybe aren't appropriate for a broader discussion with or without management or others. I often see the executive session start meeting with the CEO only or start meeting with the CFO only or meeting with a lawyer only and then they excuse that person and meet solely as a group. It's a good practice even if no one has anything to say. But it gives the board members the opportunity to vocalize concerns that aren't appropriate for regular session. It may take five minutes; it may take an hour it may take some other point of time. But it is a good practice to have. Life is happening outside of the schedule and we need to make sure that every director has



Speaker**Statement**

an opportunity to raise issues and for the board to address sensitive matters.

Meg Pekarske

That's really interesting and helpful and thank you. So in terms of, as we wrap up here, it seems like the other chunk of things to just touch on is just board infrastructure in terms of you talked about policies and procedures and if our minutes are evidence are that we're fulfilling our fiduciary duties. What kind of infrastructure shows that we're meeting our fiduciary duties and we have good governance? How would you tell that story through paper?

Stephanie Kaiser

Okay. Through paper. Having a regularly scheduled set of meetings for the board and the committee and obviously having agendas for those and attendance markers for those to reflect the boards compliance and good structure of governance as well as each individual directors' participation. Having training. Having appropriately scheduled amount of training. Boards need to have training and they should have a training calendar and they also should read the agendas and meetings schedule to reflect that the meetings schedule trainings on topics relevant to that particular entity or industry. Another way to kind of demonstrate that compliance that you're talking about is through charters. Charters or committees and even the boards should be in writing. When I draft them I like them to have a purpose section just to kind of give the overarching view. I like to have a composition and terms section which helps make the minimum number of members. Who can be the chair and vice chair? How those are selected. What the qualifications are for that particular committee. So it can vary by committee. The frequency of the meetings the agenda requirements for those meetings, responsibilities and duties for that particular committee. The resources that are available to that committee external and internal. Training requirements and construction application section and I will say too. That if the board does or the committees do self-assessments which I do think are good ideas, it can really flush these sorts of things out in your charter. The charter is one of those really good ways to keep each committee and each board on track with what it's role and focus is and what its responsibilities are and stay within their swim lanes. Especially like you were asking Meg about initially. If you consider having executive committees as a part of that. Because executive committees typically cover things outside the other committees' roles at their leadership positions for those things. Then also they cover things other committees can't handle on an emergency basis that's my typical experience. Outside of that of course, compliance is demonstrated by having your requisite number of policies that appropriate schedule we were talking about earlier. Making sure the board members review the information provided in their packet we were talking about. Making sure the minutes reflect that sufficient discussion. I



Speaker**Statement**

think it is important to have internal and external reviews of information. Sometimes that's required to be an audit in the form of an external auditor. At least having reviews on areas stoked by an audit or review committee for example or a risk-based committee. Making sure you retain competent folks to do the training or to advise the committees and the board as appropriate. For me as something near and dear to my heart is conflicts of interest. All companies have some version of conflict of interest analysis they should be engaging in. I do think it's important on at least an annual basis for each committee and each board to be analyzed in terms of each member to see if they have impermissible conflicts of interest. For the appropriate person external to the board and external to the committees like in some worlds it's called a compliance officer, in some worlds it's called an ethics officer, in some worlds it's called the standards official. They can make sure on at least an annual basis that person gets the requisite information consistent with a policy and they can certify to the board and certify to the committee a review has been performed at the requisite membership of the composition and no conflicts were found or here's the conflicts that were found and here's how to address those, or here's the actions we've taken. So those are some things to do. The last thing that I'll say that I like to do and not all boards do but I do think they should consider doing is having a confidentially non-disclosure agreement because one of the major violations I see, and I test a lot and I call a lot of regulators to get their perspectives and I call a lot of auditors and perspective on what are the number one violations you're seeing from boards and committees? And they always say it's breaching confidences. So largely I'm going to say that those are inadvertent and people just not knowing the boundaries. So I do think having some sort of confidentiality non-disclosure reminder every meeting as well as having an agreement on at least an annual basis is a really good thing to do. As well as making sure they agree to return confidential information at the end of their term or as otherwise requested by the company. So those are some documentable ways to show and evidence compliance and frankly get some good guidance with people to operate within the board of committee structures they have.

Meg Pekarske

And that's a great place for us to end because the leaky board is top on the common problems of boards. I think is like you said I think often times I can be inadvertent but either having offline discussions or just talking to your neighbor or whatever. I think that's a really important place to end. A good transition to our next riveting session on governance. This has been a really interesting and very helpful cause it's an area that I'm learning from you cause obviously I present to boards and whether it's through board training or reporting on various legal issues. But as to the good governance and how you do that. I see the problems that exist but not it's not my area of expertise of having



Speaker**Statement**

managed so you don't have those problems or at least identify them and then what's your actual plan for improving. So thank you so much for your time this has been a lot of fun and I look forward to, lawyers are always more comfortable talking about problems right? So we can say there's a hundred things wrong with like anything but I think you and I have had a number of chats and I think we have a good laundry list of challenges but then how do you manage towards those because I think all of these problems are nothing like you've ever seen before. You have some really good strategies on how to sort of turn the corner on some of these things. So including like where people sit. That was a good comment you made. So we'll leave it there but thanks so much for your time Stephanie it was great conversation.

Stephanie Kaiser Oh my gosh thank you for the opportunity.

Meg Pekarske Well that is it for today's episode of Hospice Insights the Law and Beyond. Thank you for joining the conversation. To subscribe to our podcast go to our website at Huschblackwell.com or sign up wherever you get your podcasts. Until next time may the wind be at your back.

Stephanie Kaiser **END RECORDING**

