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## Commentary

### Avoiding the gray areas: Setting minute limitations

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For years, assn lawyers have been preaching that board minutes should be clean, simple and neat. Board minutes should follow the agenda and report on action taken, but there should be no detailed description of every comment made by every board member. Nor should there be a description of how each member voted. Although your assn might have such a policy in place, it might have been submarined by board members using e-mail.

#### The right way...

As an example, let us assume your assn was considering the purchase of a building. Proper minutes would state:

*"Purchase of Assn Office Building:* In accord with the recommendation of the executive committee, the staff presented the board with proposed contracts for the purchase of 3 office buildings. The board reviewed the proposed contracts and discussed the merits of the various properties. Counsel advised that bylaws authorized the board to purchase an assn office building. Upon motion made and seconded, the board authorized the assn president to purchase the property located at 123 A Street for a price not to exceed \$2-million."

#### ...And the wrong (and long) way

Following is an example of how minutes should *not* be written:

*"Purchase of Assn Office Building:* On January 4, 2004, the executive committee recommended that the board consider the purchase of an office building and directed the staff to obtain proposals for the purchase of 3 buildings having at least 50,000 sq. ft. of office space available. The executive committee recommended that each property be located in the Northwest quadrant of DC. Of the 5 person executive committee, members Able, Baker and Christopher voted in favor of the recommendation, executive committee member David voted against the recommendation, and committee member Eli abstained.

"In accord with the direction of the executive committee, assn EVP Cornish interviewed 4 real estate brokerage firms that had experience in assn office building transactions. Each firm submitted a formal proposal to the assn and EVP Cornish selected Association Real Estate Brokers Inc. The brokerage firm provided the EVP with a list of 10 possible office buildings. EVP Cornish visited each of these office buildings and narrowed the choice down to 3 buildings and presented the board with specific information regarding each of the buildings.

"Board member Yee objected to the locations of all 3 buildings. Board member Zither said that 2 of the buildings were poorly designed..." *and 2 more pages describing what all board members think, followed by 2 additional pages describing the discussion.*

"Director Falk made a motion to purchase the building located at 123 A Street. The motion was seconded by Director Gold. Director Hellen asked that a copy of the bylaws be provided to each board member so they could determine whether or not bylaws permitted the board to purchase a building..." *(Comments of all directors on board authority as set forth in the bylaws.)*

"The Board then asked that counsel Smith be called and placed on the conference telephone so that all board members could listen to his opinion. Counsel Smith was asked whether the board had authority under the bylaws to purchase an assn office building. Counsel Smith was not sure and decided to call in one of her partners, Ms. Thomas..."

As you can see from the above, minutes involving the purchase of an office building could go on for 20 pages or more. Minutes should be kept in a much simpler form.

#### Gray-mails

In today's business environment, there might also be a set of "gray minutes" that are as ungainly, inappropriate, and troublesome as the lengthy version described above. These "gray minutes" take the form of indiscriminate e-mails among board members.

Let us assume that the assn executive director calls the assn president and advises her that there was an excellent opportunity for the assn to purchase an office building. The president told EVP Cornish to survey the board by e-mail. Cornish sent an e-mail to all board members soliciting their opinions regarding the purchase. All 25 members responded, and most copied all the other board members. What then followed was a series of e-mails going back and forth among board members. Of the 25 board members, each member either responded or sent out a new e-mail at least 3 times.

Our "gray minutes" now include 75 e-mails from board members commenting on the specific proposal.

Let us go one step further, the building is purchased and litigation arises. One issue is the board's authority to approve the purchase of the building. The minutes of the board meeting are provided to opposing counsel. These minutes succinctly show that upon advice of counsel the board voted to purchase the building and directed the EVP to make the purchase.

However, opposing counsel has subpoenaed the e-mail records of the assn and all board members. Opposing counsel is now able to piece together much of the discussion that occurred. Comments such as "to buy this building would be a breach of our fiduciary duty," "we did not set up our reserve fund to buy a building," "the largest tenant in the building is a law firm of shysters who would sue their mothers if they could earn a dime," "the existing owner of the building is a crook," etc.

Do I have to draw you a picture? The "gray minutes" are devastating. They contain inaccurate information, libelous statements, and subject the assn and individual board members to potential liability.

Not to worry! The president of the assn told all the board members to delete the entire discussions on purchasing the building from their computers. However, the fact that the e-mail has been "deleted" does not mean that it cannot be recovered by a knowledgeable computer expert.

The bottom line is simple. You don't want to have a trail of "gray minutes" following your assn boards. Board members should be informed as to the proper use of e-mails, and limitations should be set on their use to develop board consensus.