

Formation and Use of Executive Committees

By [Karyn A. Larko, Esq.](#) and [Christina S. Saad, Esq.](#)

A committee is a group of persons appointed by an association's board of directors to perform a specific task or tasks.

The scope of authority of a committee is largely dependent on its composition. A committee composed solely or partially of persons other than board members is generally tasked with advising the board on specific matters or exercising powers granted to that committee by the governing documents (e.g., some [architectural review committees \("ARCs"\)](#)).

Conversely, executive committees ("ECs") are composed of two or more current directors and only current directors in accordance with [California Corporations Code § 7212](#). ECs are given decision-making power that would otherwise be exercised by the board. An example of an EC is a litigation committee comprised solely of directors, established to communicate with the association's legal counsel and make decisions pertaining to a lawsuit. Another example is an ARC comprised solely of directors tasked with exercising the board's authority under the governing documents to approve or reject architectural applications.

Forming an EC

An EC should be formed when a board needs to delegate tasks for which it is responsible. This need may arise when a board is dealing with a complex, time-consuming matter that is ongoing and necessitates attention between board meetings. This need also exists when a dispute exists between a director and the association. In the latter example, the interested director (i.e., the director whose interests are contrary to the association's interests) should not serve on the EC due to their conflicting interests.

[California Civil Code § 5350](#) requires directors to recuse themselves from voting on certain matters. In some instances, it may also be prudent to form an EC to address these matters.

ECs should not be formed to exclude a director from generally participating in board discussions and votes. However, if a director is jeopardizing the interests of the association by, for example, revealing confidential or privileged information to others, it may be appropriate to form an EC to exclude that director from meetings whereat the Board discusses matters that, if made public, might expose the association to liability or disadvantage the association in a dispute. Your boards should consult with their association's legal counsel before forming an EC for this purpose as taking this action can also create legal issues for the association.

Why Form an EC?

There are benefits to having ECs. An EC comprised of directors willing and able to volunteer more time to the association can address complex, time-consuming matters more quickly than the entire Board. Additionally, since an EC has fewer members, scheduling meetings and coming to a collective decision on matters is often easier. Finally, if less than a quorum of directors serves on an EC, the EC meetings are not subject to the [Open Meetings Act](#) (i.e., the meetings are not subject to the same notice and agenda requirements as board meetings).

In the event of a dispute involving a director, especially a dispute that could lead to litigation, there are important additional benefits to establishing an EC of disinterested directors (i.e., directors not adverse to the association in the matter) to handle the dispute. By establishing the EC, the board can prevent the interested director from obtaining privileged or confidential communications and documents related to the matter (e.g. correspondence between the EC and the association's legal counsel, expert findings), thereby better protecting the association's attorney-client privilege and its interests. The board can also avoid the appearance of impropriety and better protect the association and directors individually against potential liability.

In order to preserve the association's attorney-client privilege, however, all EC meetings pertaining to the director dispute must be held in executive session and all legal guidance, EC discussions, meeting minutes and other documents and information related to the dispute cannot be disclosed to persons outside of the EC, including other directors.

Forming an EC

Have your boards review their governing documents prior to establishing an EC. The governing documents may already establish the EC, grant the board committee-making authority or, conversely, limit the board's committee-making authority, as well as impose requirements on how ECs are formed or who may serve on them.

Unless otherwise provided for in the governing documents, ECs may be formed by a resolution or charter adopted by a quorum of the board pursuant to [Corporations Code § 7212](#). A resolution is an official expression of the opinion or will of the board that includes the reasons for that opinion or will. A charter is a founding document that is typically more detailed than a resolution and outlines the EC's responsibilities and authority.

When forming an EC, your boards should consider: 1) whether any directors have conflicts of interest that disqualify them from appointment or perceived conflicts that make appointment unwise; 2) whether certain directors have knowledge and experience that would benefit the EC; 3) the time commitment needed to serve on the EC; 4) whether the governing documents dictate which directors serve on the EC (e.g. based on the offices they hold); 5) whether California law dictates the composition of the EC (e.g. [Civil Code § 5501](#) requires the treasurer to serve on an EC that reviews the association's financials); and 6) the willingness of directors to serve on the EC.

The board should also keep in mind that if the EC is composed of a majority of the board, the same notice and agenda requirements for board meetings will apply to EC meetings. Having said this, the authority of an EC composed of a quorum of the Board is less likely to be challenged. Thus, ECs established to handle controversial matters should generally include a quorum of the board.

Multiple Choice Questions (correct answers highlighted in yellow)

An executive committee may be composed of two or more:

- a) current and former directors.
- b) current directors and general members.
- c) current directors and non-member experts on the matter.
- d) current directors only.

Which of the following is not an appropriate reason for a board to form an executive committee?

- a) a complex, time-consuming matter has arisen for the association
- b) a majority of directors do not like the personality of another director
- c) a dispute exists between a director and the association
- d) the governing documents have granted the Board the authority to do so

Which of the following statements pertaining to executive committees is accurate?

- a) An executive committee must be formed by a quorum of the board, and all executive committee meetings must be properly noticed pursuant to the Open Meetings Act.
- b) An executive committee may be formed by a quorum of the board, in which case the executive committee meetings must be properly noticed pursuant to the Open Meetings Act.
- c) An executive committee may be formed by a quorum of the board, but, in either case, notice of executive committee meetings should not be provided to the membership.
- d) An executive committee may not be formed by a quorum of the board, and notice of executive committee meetings should not be provided to the membership.