

IN CAMERA MEETINGS



By Paul Dubal, FCIS, P.Adm.

Introduction

Having had the privilege to work with many diverse and unique boards over the years, I have been asked some very interesting and sometimes unexpected questions from directors. One of those was when a director asked me about the *in camera* session listed at the end of the agenda. “Are we going to be filmed?” he asked. I politely explained that there would be no filming today, but it reminded me that *in camera* meetings are one of the most widely misunderstood governance practices.

Why the term *In Camera*?

The term is derived from Latin and essentially means “in chambers” or in legal terms “in private”. From a practical perspective it means that the discussions are not in a public forum. They are often referred to as “executive sessions,” particularly in the United States.

Why use *In Camera* meetings?

In camera meetings play an important role in board deliberations. During the orientation process, part of our education to new board members is to stand up and be candid. The *in camera* forum is ideal for that purpose. It is useful to address issues that boards may feel uncomfortable tackling with management in the room. This could be due as a result of some sensitivity around the subject or where there is a clear conflict that excludes management (such as a discussion on CEO performance and compensation). A closed session such as this facilitates the opportunity for more candid discussions and robust challenge.

Who attends?

Only board members are entitled to attend *in camera* board meetings. In fact they have a duty to attend, unless subject to a conflict of interest on the matter(s) in question. All others attend by invitation, for example, an audit committee may wish to invite the audit partner and his/her team to discuss the audit report and any issues arising before the committee approves the financial statements. This provides them with comfort that there are no underlying issues related to the audit or the veracity of the financial statements. Equally they may wish to speak to an internal auditor to ensure that the company’s internal controls are in place, respected and working effectively to mitigate risk.

When would we use them?

Typical scenarios where *in camera* meetings are used are on sensitive matters, for example:

- Where the CEO’s performance and compensation is being discussed, or where executive succession planning is required;
- Litigation or major transactions;

- Adverse audit findings (in which case the *in camera* discussion would be with the audit committee);
- Contentious areas where the board/management may be divided;
- In situations requiring that difficult issues are not overlooked or addressed superficially;

The *in camera* meeting should be included as a standing item on the board calendar.

Who decides if an *in camera* meeting is required?

Usually the Chair and/or the CEO will set the agenda, in conjunction with the corporate secretary. They may decide if an *in camera* is needed. The boards I work on consider it good governance to include time for an *in camera* session at each meeting. The board can then take a “group” decision as to whether to actually hold one. On my boards the Chair asks the board members if anyone has any matters they would like to discuss *in camera*.

When should the *In Camera* item be on the agenda?

An *in camera* can be placed anywhere on the agenda. If at the beginning, it may be used by boards that like to have a “pre-meeting” to review items before the meeting formally commences with management attending. This can help to frame the discussion and questions about certain aspects of the meeting materials.

In my experience, the session is usually at the end, i.e. at the conclusion of ‘normal’ business. It allows the board to assess the meeting and discuss whether management has answered all the questions to their satisfaction. They have a chance to discuss further any burning issues arising from the meeting.

The *in camera* can be held in the middle of the meeting. This is often done by the audit committee when the audited financial statements are due to be approved. It is an opportunity to discuss the matter with the auditors, particularly any specific audit findings. The committee can then move out of *in camera*, approve the financial statements and the auditors depart.

What are the mechanics for an *In Camera* meeting procedure?

There are generally few differences in procedure relative to open meetings. The presence of the *in camera* meeting should be noted as an agenda item. The matter for discussion would rarely be noted on the agenda, just the existence of the *in camera* itself. Indeed for some sensitive matters it may be that the directors don't even want management to know that a specific matter is being discussed.

There are exceptions to this. For example, my current boards conduct an annual board self-assessment. This allows the board to self-review its performance and to discuss the conduct of the meetings generally. In this case the item for discussion is duly recorded and materials sent confidentially to the directors in advance.

Confusion can often occur when some directors are not physically present. As secretary my role is to ensure that only directors remain on a conference line. The approach we use is to ask all non-directors to hang up off and the Chair has a roll call to check that only directors are on the telephone. If necessary we email the required non-directors when it is time to rejoin the call. An alternative to this is to set up a separate conference dial-in specifically for the *in camera* meeting. It is potentially more secure but can be inconvenient for those directors calling in.

Should a record be taken of *In Camera* meetings?

This is a question I am often asked. As corporate secretaries, we are used to drafting minutes to achieve an accurate, succinct record of the meeting and any decisions made. Minutes are generally not kept of *in camera* meetings. If a difficult matter merits a frank and unrestrained opinion, the board may decide that the best forum is *in camera* to avoid potential liability for comments or criticisms they have made. Also on a particularly contentious matter, those records could be subpoenaed and used against the company, so avoiding records is a form of risk mitigation. An exception to this general rule is where an outcome from the meeting requires a formal record.

Should the corporate secretary attend?

I have been asked many times to attend *in camera* sessions and many more times have I been specifically excluded as part of "management." I have often declined the invitation to attend. Depending on the matter being discussed, it could create a conflict with my dual reporting role (in many cases the direct reporting line for a corporate secretary is the CEO with a dotted line to the Chair). This could place the secretary in the awkward position of knowing facts that may not be known by his/her management colleagues. Additionally, directors may be less frank if a person perceived to be management is present which may impede the discussion.

My preference is not to attend and to meet the Chair afterward to discuss any outcomes that might need to be recorded; for example, a follow up action item (such as a request for a report) or a resolution/decision for inclusion in the board minutes.

Are the directors hiding something?

Sometimes management will question the need for *in camera* meetings. There is a concern that directors are talking about them behind their backs; the *in camera* is some form of "star chamber" that works against transparency, one of the cornerstones of good governance.

In fact, rather than breeding mistrust and doubt, *in camera* meetings can achieve the opposite over the longer term. Making them an established part of a board meeting agenda will allay management's fears and allow for resolving possible areas of conflict in the appropriate forum. It is important that the board uses the forum judiciously and for the right reasons.

In camera meetings are really about utilizing the board to add value as much as possible. They can only be truly effective if they are given latitude to express their opinions in an unfettered environment. Allowing a board to "vent" in a constructive way is the best approach to tackling the tough issues of the day. Of course, in that environment, it also needs a strong Chair. That's a subject for another article!

Surely *In Camera* meetings work against transparency?

In today's social media world, there is arguably more openness than ever before. There is a tendency to view "secret" meetings with distrust, particularly in the political arena but equally so in business. As corporate governance steers toward greater transparency and disclosure in so many areas, *in camera* meetings have been scrutinized for continued validity. I believe they promote good governance for the reasons above, and remain a critical component of the work of the board. There are far too many corporate governance scandals to mention where the board failed in its duty to stand up and be counted. It's a fact of business life that some things are best said in private.

Conclusion

In camera meetings are a valuable forum supporting a strong corporate governance framework. Used in the proper manner, they are a valuable tool to allow the board unfettered discussion, a necessity when difficult decisions are required. Providing the option for *in camera* meetings at any time and making them a regular part of the meeting agenda removes the uncertainty around them. A strong Chair ensures that discussions are robust but stay on track. Used for the right purpose, they are an important governance tool.

Disclaimer: This article is provided for information purposes only and is not intended to be relied on for practical purposes; neither does it constitute legal advice. Any reliance on the contents of this article is at the reader's own risk.

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FALL 2017 PROGRAMMING DATES

October 1 - National

Deadline to register for the Chartered Secretaries Qualifying Scheme November Exam Session (certification program)

October 2-4 - Vancouver, BC

Directors' Education and Accreditation Program (certification program)

November 16 - Montreal, QC

Succession Planning with Dora Koop (professional development)

Registration for the Professional Administrator Program (certification program) is welcome at any time.

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