

BEST PRACTICES FOR NONPROFIT BOARD MEETINGS

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I. INTRODUCTION

Under Texas law, by default, a nonprofit corporation's affairs are managed by a board of directors, which may be referred to by any name appropriate to the customs, usages, or tenets of the corporation. As a body, a board of directors has significant power, but an individual director acting alone has very little. It is through their participation as members of board—generally at board meetings—that individual directors influence the actions of a nonprofit corporation.

At their best, nonprofit boards of directors focus on three areas:

- Direction—steering the organization towards its mission;
- Oversight—monitoring the organization's activities, health, and ethical behavior; and
- Resources—ensuring that the organization is well-equipped to fulfill its mission with adequate finances, capable staff, and solid reputation.

Board meetings are the forum through which governance decisions are made and board business is conducted, and an organization's effectiveness at conducting board meetings contributes to the organization's effectiveness overall. And, well-run board meetings provide a mechanism by which board members fulfill their duties of care, loyalty, and obedience to the corporation.

This article discusses various aspects of board meetings and offers suggestions for making meetings more productive. Many of the practices described automatically are permitted under the Texas Business Organizations Code ("BOC"). As a practical matter, however, directors and staff will look to an organization's Bylaws—not the BOC—to determine whether a particular practice is permissible. As a result, efficiency may be enhanced if those permissive provisions of the BOC are incorporated into the Bylaws, even though they apply automatically in the absence of a Bylaw provision to the contrary. And, certain practices (such as taking action by majority vote over email) must be permitted by the Certificate of Formation or Bylaws in order to be lawful. A review of the Bylaws, oriented towards meeting procedures, is helpful to ensure that the Bylaws are effective for facilitating good board meetings and efficient board action.

II. NOTICE REQUIREMENTS

Regular meetings of the board of directors may be held with or without notice as prescribed in the nonprofit corporation's Bylaws. For example, an organization's Bylaws might provide that meetings will be held at 7 p.m. on the second Thursday of each month at the organization's headquarters. As a practical matter, to encourage attendance at to facilitate rescheduling without amending the Bylaws, an organization should make a practice of providing notice for all meetings of the board of directors.

Special meetings may be held with notice as prescribed by the Bylaws. The BOC provides that notice may be delivered personally or by mail, facsimile, or e-mail. However, an organization that has not had its Bylaws reviewed or updated recently may find that the Bylaws do not refer to e-mail notice, and the BOC's notice provisions are "subject to the governing documents". Accordingly, a director seeking to challenge the validity of a meeting might point to Bylaws authorizing notice in person, by mail, or by facsimile to argue that email notice was not sufficient. To avoid a dispute regarding whether a meeting was lawfully convened, the Bylaws should refer to all permissible forms of notice that the organization intends to use.

Unless required by the Bylaws, the business to be transacted at, or the purpose of, a regular or special meeting of the board of directors is not required to be specified in the notice or waiver of notice of the meeting. However, the notice must provide:

- The date and time of the meeting; and
- If the meeting is not held solely by remote communications technology, the location of the meeting, or
- If the meeting is held solely or in part by remote communication technology, the form of communication system to be used and the means of accessing the communications system.

A director's attendance at a meeting constitutes a waiver of notice unless the director attends the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting was not lawfully called or convened.

III. QUORUM

In simple terms, a quorum is the minimum number of voting board members who must be present at a meeting in order for business to be conducted. The existence of a quorum prevents action from being taken by a small or non-representative group of directors.

Under Texas law, a quorum for the transaction of business by the board of directors is the lesser of:

1) The majority of the number of directors set by the corporation's Bylaws, or in the absence of a Bylaw setting the number of directors, a majority of the number of directors stated in the corporation's Certificate of Formation; or

2) Any number, not less than three, set as a quorum by the Certificate of Formation or Bylaws.

A director present by proxy at a meeting may not be counted towards a quorum.

The larger the number at which quorum is set, the more representative of the entire board a convened group of directors will be. Setting a low quorum and permitting action by a simple majority of those directors present may result in decisions being made by too few—or a non-representative group of—directors.

Example: When it was founded, the hypothetical organization, CharityTogether, had five directors. The directors adopted Bylaws that provide that any three members of the Board of Directors constitute a quorum and that directors may act by majority. Over time, the board has grown and now comprises fifteen individuals. Under CharityTogether's Bylaws, action can be taken by only two of fifteen directors.

Challenges also arise if quorum is set too high: the more directors required to make quorum, the less likely enough individuals will be present in person so that business can be conducted.

In the absence of a quorum, the only options available are to take measures to obtain a quorum, to fix the time to which to adjourn and then adjourn, or to take a recess. Even if everyone present agrees to continue with the meeting, the prohibition on transaction business without a quorum cannot be waived. According to BoardSource, the mission of which is "to inspire and support excellence in nonprofit governance and board and staff leadership,"

Under very special circumstances, if an important opportunity would be missed, members might consider taking a risk and act in an emergency,

with the hope that their decision will be ratified later during a meeting when quorum is present.

One way to balance between the benefits and challenges of small and large quorum requirements is to set a more manageable quorum (such as a majority of the directors set by the Bylaws) for routine matters and a higher quorum requirement (such as two-thirds of the directors set by the Bylaws) for more important meetings (such as the annual meeting) or issues (such as amendments to the Bylaws or Certificate of Formation).

Robert's Rules of Order suggests that "the Bylaws should provide for a quorum as large as can be depended upon for being present at all meetings when the weather is not exceptionally bad."

If an organization struggles to make quorum, the following questions might help identify the reasons:

- Are all of the meetings necessary, or could business be deferred to less frequent meetings, or handled by an executive committee or written consent?
- Would attendance improve if directors could participate by conference call?
- Are the meetings boring, badly prepared, or poorly run?
- Are directors aware of the requirement to attend meetings and notified of scheduled meetings well in advance?
- Are the meetings too long, held at an inconvenient time or place, or not scheduled far enough in advance?
- Do the Bylaws contain an automatic removal provision for directors who miss a certain number of meetings?

IV. PROXIES

If authorized by the Certificate of Formation or Bylaws, a director of a nonprofit corporation may vote by written proxy. A proxy expires three months after it is executed and is revocable unless otherwise provided by the proxy or made irrevocable by law.

Despite the fact that the BOC permits a nonprofit corporation to allow proxy voting, this author does not make a practice of including proxy provisions in nonprofit Bylaws. Each director has fiduciary duties that cannot be delegated (including to another director who holds a proxy), and the discussion at a board meeting might have influenced an individual's vote had he or she been there to vote in person. In such case, a

proxy vote might not reflect the principal’s position had he or she attended the meeting in person.

V. MEETING BY REMOTE TECHNOLOGY

The BOC permits directors to meet by remote electronic communication (such as conference call, videoconference, or the Internet) provided that

- 1) Each person entitled to participate in the meeting consents to the meeting being held by means of that system; and
- 2) The system provides access to the meeting in a manner or using a method by which each person participating in the meeting can communicate concurrently with each other participant.

If voting is to take place at the meeting, the organization must:

- 1) Implement reasonable measures to verify that every person voting at the meeting by means of remote communications is sufficiently identified; and
- 2) Keep a record of any vote or other action taken.

The BOC does not preclude directors present by remote communication from counting towards a quorum. Thus, by investing in remote communication technology, an organization can better ensure that quorum is met and may be able to adopt a higher quorum requirement, resulting in more people contributing to board deliberation and decision-making.

VI. ACTION BY WRITTEN CONSENT

In this author’s experience, the concept of action by written consent most often arises when boards of directors seek to allow “e-mail voting.” E-mail voting is a form of written consent. For purposes of the BOC, the terms “writing” and “written” includes stored or transmitted electronic data, electronic transmissions, and reproductions of writings. A “signature” is any symbol executed by a person with present intention to authenticate a writing. Unless the context requires otherwise, the term includes a digital signature, an electronic signature, and a facsimile of a signature.

A. Unanimous Written Consent—Automatically Permitted

Unless the Certificate of Formation or Bylaws provide otherwise, the board of directors can take action by unanimous written consent. Specifically, “the members of the governing authority may take action without holding a meeting, providing notice, or taking a vote if each person entitled to vote on the action signs a written consent stating the action taken.” A unanimous written consent has the same effect as a unanimous vote at a meeting.

B. Less-Than-Unanimous Written Consent—Must Be Permitted in Governing Documents

Unlike with unanimous written consent—which the BOC automatically permits—in order for directors to be able take action by less-than-unanimous written consent (for example, by majority or supermajority), the Certificate of Formation or Bylaws must explicitly permit it.

The Certificate of Formation or Bylaws of a nonprofit corporation may provide that an action required or permitted to be taken at a board meeting may be taken without a meeting if a written consent, stating the action to be taken, is signed by the number of directors needed to take that action at a meeting at which all of the directors are present and voting. The consent must state the date of each director’s signature, and prompt notice of the directors’ action by less-than-unanimous written consent must be given to each director who did not consent in writing to the action. The BOC does not define “prompt.” Accordingly, it would be good practice for the provision in the governing documents that permits action by less-than-unanimous-written consent to provide a specific timeframe (such as one week) to cue officers, directors, and/or staff to the notice requirement and the precise deadline.

Though convenient, routine use of e-mail voting (or other action by written consent) is not a substitute for regular board meetings, because it does not give board members the same opportunity to share their points of view or the focused time to deliberate that meetings do. For this reason, it is best reserved for relatively routine matters or for matters that have been fully discussed at prior board meetings.

VII. CONSENT AGENDA

The consent agenda model allows a board to bundle together minutes, committee reports, routine ratifications, and other routine business such as

approval of banking relations into one item for approval. During the meeting, no questions or comments on consent agenda items are allowed, and items are approved either without a vote if there is no objection, or by formal vote. Note that as a matter of risk management, the Treasurer's report should not be put in a consent agenda, because the board does not want to be held accountable for unaudited—and potentially inaccurate—numbers. Single items can be removed from the consent agenda and considered separately, even if only one director wishes to do so. Removal must be requested ahead of the meeting.

The consent agenda model allows most of the board's tactical work to be done in committees and the board to use its meeting time for strategic or generative conversation, or for board education or development. The model helps drive a board toward a strategic (rather than tactical or operational) orientation, because it focuses the board's time and attention on the future, rather than on events that already have occurred or decisions that already have been made.

In order to follow a consent agenda model, a board must ensure that:

- Committees distribute reports or minutes well in advance of board meetings so that directors have a chance to read and absorb them.
- Directors actually take the time to read the material in advance.
- All board members understand which items can be placed on a consent agenda and the process for taking an item from the consent agenda and onto the regular agenda for discussion.

VIII. STAFF ATTENDANCE

In this author's experience, the Executive Director/Chief Executive Officer of an organization (regardless of title) attends board meetings. This practice is extremely beneficial, as it allows a free exchange of information between the strategic board of directors level and the operational or tactical staff level. In this author's opinion, it is very good practice to have other staff members attend board meetings, including lower-level staff on a rotating basis.

From a practical perspective, staff participation at meetings helps both board members and staff to understand the other's perspective and the challenges. Staff members can provide the detail that informs board strategy. From an engagement perspective, board members can be energized and inspired by the mission-serving work different staff members perform, and staff

members can be motivated and feel appreciated by the opportunity to join a board meeting. Most importantly, from a risk-management perspective, inviting key staff members to attend and present at board meetings prevents all information on which the board relies from being funneled through a single chief executive

IX. EXECUTIVE SESSION

The BOC does not specifically provide for closed meetings or Executive Sessions of nonprofit corporations. Subchapter D of the Texas Open Meetings Act provides certain narrow exceptions to the requirement that meetings of a governmental body be open to the public. The Open Meetings Act does not apply to nonprofit corporations that are not "governmental bodies." Nevertheless, in this author's experience, nonprofit corporation boards of directors do undertake Executive Sessions from time to time.

Executive Sessions provide the board a confidential forum to discuss matters without staff or any other third parties (other than the organization's legal counsel) present. They are useful when discussing:

- The annual audit;
- The Executive Director/Chief Executive Officer's annual performance review or compensation;
- Legal issues; and
- Board practices, behavior, or performance issues.

An Executive Director/ Chief Executive Officer may have concerns about what is discussed during an Executive Session. To help encourage what should be a relationship of trust between the board and staff, whenever possible, directors should share the agenda for the Executive Session with the Executive Director/ Chief Executive Officer and, after the session, update him or her with the nature of the discussions.

Executive Sessions should not be overused. Just because a conversation will be frank or uncomfortable does not mean that it cannot be had with the Executive Director/ Chief Executive Officer in the room. Boards and executive staff should be able to handle candor. At the same time, by allowing time for Executive Session on every meeting agenda (or perhaps quarterly, or semi-annually), a board gives itself the opportunity to have confidential discussions as part of its routine, thereby minimizing undue distress to the Executive Director/ Chief Executive Officer.

X. EXECUTIVE COMMITTEE

Some organizations have a regular need for board-level action or oversight. These needs may be more frequent than regular (even monthly) board meetings can accommodate and more substantive than e-mail voting or other action by written consent reasonably should be used to address. The BOC allows a board of directors to designate one or more “management committees” to exercise the authority of the board, provided that the Certificate of Formation or Bylaws authorizes it to do so. A committee that acts in place of the full board commonly is referred to as the “Executive Committee.” An Executive Committee must be designated by a resolution adopted by a majority of the board of directors and has the authority of the board to the extent provided by the resolution, the Certificate of Formation, or the Bylaws. An Executive Committee must consist of at least two persons, the majority of whom are directors (unless the organization is a religious institution). As a practical matter, Executive Committees typically include the board officers such as the President, Vice-President, Secretary, Treasurer, and—perhaps—the Immediate Past President.

It is important that all directors understand that the use of an Executive Committee does not operate to relieve the board of directors or any individual director from any responsibilities imposed by law. Further, an Executive Committee member who is not a director has the same responsibility with respect to the committee as a committee member who is a director. Thus, while an Executive Committee facilitates board-level attention between meetings, all directors—including those not on the Executive Committee—should remain engaged with the governance process. Good practices include:

- Clearly identifying the limits of the Executive Committee’s authority (for example, preventing the committee from amending governing documents or exercising authority granted to other committees);
- Requiring the Executive Committee to report actions taken to the full board of directors at the next board meeting;
- Making sure that board members who do not serve on the Executive Committee participate in other committees; and
- Regularly rotating board officers so that a variety of individuals serve on the Executive Committee across time.

When an organization uses an Executive Committee, the other board members should be informed of any actions taken by the Executive Committee since the last board meeting as promptly as practical.

XI. EMERGENCY GOVERNANCE

The BOC permits a nonprofit corporation to adopt emergency governance provisions. An emergency exists if a majority of the governing persons cannot readily participate in a meeting because of the occurrence of a catastrophic event. Except as prohibited by the corporation’s governing documents, the board of directors may adopt provisions in the governing documents regarding the management of the corporation during an emergency, including provisions:

- 1) Prescribing procedures for calling a meeting of the governing persons;
- 2) Establishing minimum requirements for participation at the meeting of the governing persons; and
- 3) Designating additional or substitute governing persons.

The emergency provisions must be adopted in accordance with the requirements for governing documents and the applicable provisions of the BOC.

The emergency provisions take effect only in the event of an emergency and are no longer effective after the emergency ends. Any provisions of the governing documents that are consistent with the emergency provisions remain in effect during an emergency.

An action taken in good faith in accordance with the emergency provisions is binding on the corporation and may not be used to impose liability on a managerial official (such as an officer or director), employee, or agent of the corporation.

XII. MINUTES

A nonprofit corporation is required to maintain minutes of the proceedings of the board of directors and any committees. Minutes may be kept in written paper form or another form capable of being converted into written paper form within a reasonable time (i.e., electronic Word or pdf documents that can be printed out). A member of the board of directors may examine the minutes for a purpose reasonably related to the director’s service as a director. A member of the organization may examine the minutes to the extent

provided by the governing documents. Regardless of the provisions of the governing documents, a member of a nonprofit corporation also may examine the minutes on written demand stating the purpose of the demand at any reasonable time.

In addition to facilitating compliance with the BOC, meeting minutes serve a number of important functions. The basic elements of good minutes include:

- Name of the organization
- Date and time of meeting
- Board members in attendance, excused, or absent and that quorum was established
- Names and titles/roles of any others present at the meeting
- Motions made and by whom
- Brief account of any debate
- Voting results
- Names of abstainers and dissenters
- Reports and documents introduced
- Future action steps
- Time meeting ended
- Signature of Secretary and President (or Chair)

If an Executive Session is held as part of a board meeting, the minutes should reflect that fact and should report on the topic of the discussion (without specifics). Confidential-to-the-board minutes or other notes can contain more detail.

Different organizations will have different perspectives about exactly how much detail to include in the minutes. Some organizations err on the side of a more exhaustive or complete historical record. Others prefer the minutes to be more summary and uncluttered. A good rule of thumb is that someone looking at the minutes should be able to understand what decisions were made and the reasons why. The minutes should not be a verbatim transcript of the discussion, but they should be a record of decisions made and actions taken. Where there is debate or discussion, the major points for or against a decision should be included. In order for directors to have meaningful discussion without being concerned about individual liability, names or direct quotations should not be recorded.

Regardless of the level of detail ordinarily used in an organization's minutes, certain details should be included in special circumstances. One situation is when a director dissents to the distribution of assets other than to pay creditors. Under the BOC, a director who is present at a meeting at which a distribution of assets was approved is presumed to have assented to that action (and thus may have personal liability) unless certain requirements are met, including that the director's dissent was entered in the minutes of the meeting. More broadly, any individual board member who is concerned about personal liability arising from any board action should ensure that his or her dissent to the action is reflected in the meeting minutes.

Another situation involves potential excess benefit transactions. In order to avail themselves of the rebuttable presumption that a transaction was not an excess benefit transaction, board members should ensure that the documentation required by Treas. Reg. §53.4958-6 is included in the minutes and, if the transaction relates to compensation, that the minutes reflect all of the economic benefits flowing to a disqualified person that are intended to be treated as part of "reasonable" compensation.

XIII. CONCLUSION

Well-run board meetings provide a forum in which directors of nonprofit corporations can carry out their fiduciary duties and help ensure that the organization achieves its mission in the most efficient and effective way.