



Webinars for Wise Nonprofits: Board Meeting 101

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Disclaimer

Please note: Today's presentation is informational only and is not intended to constitute legal advice.

Be sure to consult with appropriate counsel for guidance pertinent to your organization or situation.



Agenda for Today's Training

- Scope of training
- Board meeting fundamentals
- Board committees
- Summary



Presenter Bios

- **Hedwig O'Hara** – Legal Director, at Lawyers Alliance for New York, 2020 – present, Senior Staff Attorney, 2002 - 2020. Fordham University School of Law, J.D., 1991. Hedy oversees Lawyers Alliance's legal representation, educational, and client outreach services for nonprofits, and manages the staff attorneys.
- **Rafi Stern** – Staff Attorney at Lawyers Alliance for New York. Cornell Law School, J.D., 2017, *cum laude*. Rafi is responsible for Lawyers Alliance's Economic Opportunity program area, assisting community development and nonprofits that are providing investment capital and credit services, pursuing earned revenue activities, stimulating and revitalizing commercial activity, and sponsoring job training and job placement programs in New York City.
- **Jenny Dai** – Extern/Staff Attorney at Lawyers Alliance for New York. University of Chicago Law School, J.D., 2020. Jenny is an associate at Davis Polk & Wardwell LLP and practices full-time in the Finance Group.



Scope of Training



Scope of Training

This training will:

- ✓ cover New York nonprofit law requirements
- ✓ provide practice tips for board meetings, board committee meetings and the role of management; and
- ✓ highlight important best practices to follow for each aspect of running board meetings

This training will not focus on:

- other aspects of serving on the board of directors of a non-profit, such as elections, fiduciary duties etc.
- member meetings and the role of members



Importance of Board Meetings

- Crucial way for a board to perform its role
 - ensuring compliance with laws and funding restrictions,
 - providing oversight of finances and operations
 - overseeing and supporting management
- Procedural compliance with bylaws and statutory requirements are important so that board decisions and actions won't be invalidated if challenged (e.g. generally by IRS, NYS Charities Bureau or another board member)
- Adherence to meeting formalities shows that the Board is fulfilling its fiduciary duties.



Board Meeting Fundamentals



Time and Place of Meetings

- May be established in the bylaws or by the Board
- May be virtual, unless prohibited by the bylaws
- Special meetings may be called by the president or another officer as provided in the bylaws or as determined by the Board; or by any board member with the support of 1/5 of the Board

Best Practice

Boards should meet at least quarterly.

Model bylaws provision: *“Regular meetings of the Board shall be held no less than [____] times at a time and place fixed by the Board.”*



Meeting Notices

- Bylaws may specify notice requirements
- Notice is required for *special* meetings
- Notice is not required:
 - for regular meetings if set in the bylaws or by the Board
 - for any director who attends without protesting beforehand or at the commencement meeting or for any alternate director
- Waivers of notice may be written or electronic and may be submitted before or after the meeting

Best Practice

The meeting materials - agenda, minutes from the last meeting, any materials or contracts for discussion, annual reports or other relevant materials – should be circulated *at least a week in advance* to facilitate informed, effective discussion.



Poll

Does your organization circulate meeting materials to the Board a week before the meeting?

- Yes, always.
- No
- We try!



Agenda

- Before the meeting: share agenda with the Chair for approval
- Depending on practice, it may be helpful for the agenda to include annotations for the Chair or Committee Chairs

Sample Agenda

1. Welcome/call meeting to order
2. Attendance (confirm quorum)
3. Approval of minutes from last meeting
4. Updates of ongoing projects
5. Discuss new programming or current topics
6. Presentation of committee reports, if applicable
7. Present Board resolutions, if applicable
8. Open floor
9. Executive session, if any



Opening Procedures

Begin board meetings with an established procedure and record attendance and approval or comments (on prior minutes) in minutes

Sample Procedure

1. Establish whether a quorum is present
2. Call meeting to order
3. Approve minutes from last meeting:
 - a. Confirm everyone has read the minutes circulated prior to the meeting
 - b. Respond to any requested corrections
 - c. Request a motion to approve, as corrected (needs to be seconded)
 - d. Take vote
 - e. Record vote in minutes
4. Discuss agenda items for present meeting



Quorum Required

- If quorum is not established, meeting must be adjourned or postponed
 - Decisions made without quorum are invalid and can be subsequently attacked
- Statutory requirements for quorum
 - a majority of the Entire Board (every available board seat, even if not filled) or as required in the bylaws or certificate of incorporation
 - for a board of 15 or more, must be at least 1/3;
 - for a board of more than 15, quorum must be at least 5 plus an additional member for every 10 members (or fraction thereof)
- *For more information, see the Lawyers Alliance legal alert “Board Meeting Math Calculating the Quorum” in the handouts*



General Board Meeting Procedures

- No statutory requirements as to process
- Unless otherwise specified, directors can participate in board meetings by phone or video conference, provided that all parties can hear and participate simultaneously
- Unless otherwise specified, directors can raise a motion during a meeting, which must be seconded by another director before it is deliberated and voted on

Best Practice

When conducting board meetings virtually:

1. verify participants and maintain a record of attendance, any votes or other actions taken by electronic communication
2. pay attention to software security and watch out for any confidentiality issues (e.g. when certain board members need to 'step out' of the virtual meeting)



Voting Requirements and Thresholds

- Director voting restrictions:
 - For classified boards, bylaws may specify that certain classes do not have voting rights or do not count towards quorum
- Board action restrictions:
 - Approval by two-thirds of the board is required for certain major decisions (e.g. purchase of real property or the sale of all or substantially all assets)
 - Higher vote threshold for other actions may be required if specified in the organizational documents/internal policies and procedures
 - Conflicts of interest (e.g. compensation discussions) may require certain directors to be excluded from voting
- Proxy voting for directors is NOT allowed
- All persons must be able to hear each other and participate simultaneously



Hypothetical – ABC Corp.

- ABC Corp. has 4 directors: Andrew, Benjamin, Caroline, and Diana
- Prior to the June board meeting, the directors received the agenda and all relevant materials:
 - *“At the June 15th meeting, there will be a resolution presented seeking approval to purchase 666 Fifth Street for ABC Corp. for \$2M.”*
- Diana had COVID and did not attend. Caroline had a conflict of interest and left the room during deliberations and voting. (Under NY law, Caroline’s presence counts for purposes of meeting quorum.)
- Andrew voted “Yes” and Benjamin voted “No”.



Poll

- Can ABC Corp. purchase the building with 1 out of 4 directors voting to approve the purchase?
- Yes
- No



Executive Sessions

- Generally, a Board member-only portion of a board meeting (i.e. no staff or guests included)
- May allow the Board to discuss sensitive matters with confidentiality and candor and avoid outside influence when making decisions.
- Matters might include:
 - Evaluation and compensation of the executive director
 - Sensitive matters that might require special handling or investigation by the Board (e.g. security breaches, whistleblower claims)



Conflicts of Interest

For conflict of interest transactions, an interested party:

Do

- May present information prior to deliberation
- Must leave the meeting during deliberations and voting

Don't

- Must not attempt to influence voting (in or out of the meeting)

Importantly, all of the above must be documented in the minutes

For more information, see the Lawyers Alliance legal alert in the handouts “Conflict of Interest Policies”



Related Party Transactions

- For any related party transaction where the conflicted party has substantial financial interest, minutes must document:
 - Related party's recusal and departure from physical or virtual room
 - Board consideration of alternative options (if available)
 - Approval by not less than majority vote (check bylaws)
 - If approved, basis for Board approval
- If a transaction is not fair, reasonable or in the nonprofit's best interest, the Attorney General can bring an action to void the transaction, seek restitution from the organization or the insiders who benefitted or remove directors of the nonprofit's board. The IRS also has a right to revoke tax-exempt status in circumstances where there was private benefit or private inurement

Best Practice

1. document the recusal of related parties and deliberation of related party transactions in board meeting minutes
2. Make sure that directors fill out a conflict of interest disclosure questionnaire when they join the board and annually after



Hypothetical – Hamilton Island Parks Alliance

- In an effort to promote recreational activities and community farming around Hamilton Island, the Hamilton Island Parks Alliance (HIPA) is planning to host monthly workshops in various parts of the island from April to November of next year and a summer camp for kids
- In order to keep workshop equipment nearby for recurring use, HIPA needs to rent a large storage space in a nearby building
- The nearest building with rental space is owned by a HIPA board member. Other buildings are too difficult to access from the Island



Poll

Could HIPA rent storage space from the board member?

- Yes
- No
- It depends



Hypothetical – Hamilton Island Parks Alliance

- How the board should handle the decision process:
 - Compare at least 2 alternative spaces
 - No attempt to influence vote by the conflicted board member
 - Board member with conflict recuses themselves during discussion and board vote
 - Meeting minutes memorializing the board deliberation and the recusal
 - Transaction is fair, reasonable and in the best interest of the corporation
 - Minutes document compliance with bylaws and internal policies
 - If there are no comparable spaces, minutes should document the reason for the board's decision; the factors considered; lack of a reasonable alternative space



Annual Meeting and Annual Report

- President and treasurer present annual report
- File annual report with minutes
- Annual report must:
 - be verified by the president and treasurer or by a majority of the directors, or certified by an independent public or certified public accountant or firm selected by the board
 - include:
 - assets and abilities as of the end of a 12-months fiscal period ending not more than 6 months before the meeting
 - principal changes in assets and liabilities
 - revenue and expenses, both unrestricted / general or restricted during said fiscal period

Best Practice

Model bylaws provision: *“The annual meeting of the Board shall be held in [month] of each year or at a date, time, and place fixed by the Board, and at such meeting, the Board shall receive an annual report.”*



Meeting Minutes

- Keep correct and complete minutes for board and committee meetings
- Save executive session minutes or other confidential in a place where non-participants cannot access
- Minutes may be used as evidence in a proceeding or trial

Best Practice

Circulate draft minutes to Board members for review and comment before the next meeting as approving minutes from the prior meeting should be one of the first actions of the board meeting.



Case Example: Manhattan Eye, Ear & Throat Hospital

- Manhattan Eye, Ear & Throat Hospital received an offer to purchase its hospital facility.
 - Signed sales contract
 - Court and Attorney General reviewed minutes
 - Contract was voided
 - Hospital Trustees didn't fulfill their fiduciary duties
 - Hospital didn't comply with its mission
- *"Then, without a record of further discussion or Board authorization following this May 5th meeting, MEETH submitted a closure plan to the DOH on June 14, 1999..."*
- *"One has to wonder what the Board thought it was doing."*



Minutes: Recording Votes and Director Objections

Minutes should:

- Note parties in attendance
 - Directors; staff; guest presenters
- Record recusals and departures from the meeting
- Record decisions made
 - show compliance with policies and procedures
 - for major transactions, note votes for and against

Best Practice

1. Establish a template to use for board or committee minutes with blanks for basic information
2. Be mindful of both internal and external audiences for the minutes



Role of the Executive Director and Senior Management

- Hold regular board meetings: prepare agenda, provide financial and program reports
- Engage the Board: communicate the Board's responsibilities, keep directors apprised of program updates, financial status or risk assessment
- Keep governance documents accessible
- Review documents with the Board and update them as needed



Board Committees



Board Committees

- Two types: board committees and committees of the corporation
- Board committee must have at least 3 directors
- May have delegated authority to bind the corporation on any matter other than certain specified actions reserved for the board
- *See our legal alert “Committees of the Board or Corporation”*
- Examples include:
 - Executive Committee
 - Nominating Committee
 - Finance Committee

Best Practice

Committee charters should memorialize committee structure and powers (such as which contracts the committee can consider), along with responsibilities of the committee (maintain minutes, regularly reporting to the Board on committee findings and providing recommendations)



Board Committee Meetings

- Unless specified by the Board or the bylaws, committees may set their own meeting procedures, including frequency of meetings, what constitutes a quorum, and any voting requirements
- Staff and non-directors may attend board committee meetings as needed and advise but they have no voting rights

Best Practice

1. Committee charters should set forth notice requirements, meeting procedures and define quorum for each committee
2. As a reminder, minutes should also be kept for all committee meetings



Executive Committee

- Members appointed by a majority of the entire board; for boards with ≥ 30 member, appointed by $\frac{3}{4}$ of the directors present at the time of the vote (provided a quorum is present)
- A committee of the board and, to the extent provided for in a board resolution or in the certificate of incorporation or bylaws should have power to bind the board
- Keep records of Executive Committee actions and decisions

Best Practice

Ensure Executive Committee has at least 3 independent directors so that Board/corporation can act between Board meetings if needed and for strategic oversight



Audit Committee

- Audit oversight may be done by the Board or audit committee
- Minutes should be clear that statutory requirements and audit oversight responsibilities are met
- Greater requirements if annual revenue is > \$1M

Statutory Requirement	Sample Minutes
The audit committee must be comprised solely of independent directors	List directors and others in attendance with role and affiliations
The audit committee shall review the results of the audit and any related management letter with the independent auditor	“The committee reviewed the auditor’s findings with the auditor.”



Audit Committee: Revenue > \$1Million

Role of the Board or Audit Committee:

- Review scope and planning prior to audit's commencement
- Discuss with the independent auditor:
 - Material risks and weaknesses in internal controls with auditor
 - Any restrictions on auditor's activities or access to info
 - Any significant disagreements between auditor and management
 - Adequacy of the corporation's accounting and financial reporting
- Annually consider performance/independence of auditor
- If audit duties are performed by a committee, report to the Board

Best Practice

Audit committees should aim to meet at least twice a year: once to select or renew the auditor and a separate meeting to review and accept the audit.



Finance Committee

- Oversight of budget and financial statements; administration of financial resources; advise about significant decisions
- Finance Committee performs an important role in corporate governance
- Finance Committee meeting formalities and procedures
- Finance Committee should be separate from the Audit Committee

Best Practice

Finance committees should aim to meet quarterly.



Audit Committee vs. Finance Committee

Audit

- Oversees that the audit reports are received, monitored and disseminated
- Makes sure transactions are done pursuant to policy and with adequate controls
- Ensures independent oversight including from outside auditors

Finance

- Ensures budgets and financial statements are prepared
- Monitors financial transactions and overall financial position
- Provides guidance about strategic financial direction



Summary

- Board members should maintain familiarity with the bylaws and statutory requirements
- Executive staff need to aid and guide that process
- During Board meetings be sure to allow and facilitate discussion and deliberation
- From time to time, review your bylaws and amend as needed
- Keep accurate and complete minutes!
- Questions?

Resource call hotline:

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