



Webinars for Wise Nonprofits

Bolstering Board Governance Webinar Series, Part II: Board Meetings 101

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Disclaimer

Please note: Today's presentation is informational only and is not intended to constitute legal advice. This presentation references both federal and state laws and regulations but primarily focuses on New York law. Please consult with appropriate counsel for guidance pertinent to your organization or situation.



Presenter Bios

Lori Moses, Senior Staff Attorney

Lori Moses provides real estate, corporate, and other legal guidance to community development and other organizations involved in program preservation and evolution. She is responsible for Lawyers Alliance's [Housing and Human Services](#) program area, which serves nonprofits providing affordable housing, supportive housing, and services to the homeless. Prior to joining Lawyers Alliance, she was Assistant General Counsel at TF Cornerstone Inc. and an Honor's Fellow at the New York City Housing Authority. Lori received her J.D. from Fordham University School of Law and her B.A. from Wesleyan University.

Frances Tyler, Equal Justice Works Fellow

Frances Tyler is a Legal Fellow sponsored by DLA Piper and Verizon through the Equal Justice Works Design-Your-Own Fellowship program. Frances' project supports the provision of critically needed services to survivors of domestic violence by furnishing nonprofits who serve these clients with transactional legal services to enable the continued success of these institutions throughout New York City. Frances graduated from New York University School of Law and earned a B.A. from Georgetown University.



Agenda

- Scope of Webinar
- Board Meeting Fundamentals
 - Procedures and Voting
 - Board Minutes
 - Special Scenarios
 - Board Committees
- Summary



Scope of Webinar

This presentation 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

- X other aspects of serving on the Board of directors of a nonprofit, such as elections, fiduciary duties, etc. nor
- X member meetings and the role of members.



Importance of Board Meetings

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



Board Meeting Fundamentals



Meeting Basics

- Types of nonprofit governance meetings:
 - Board meetings
 - Board committee meetings
 - Member meetings (for membership corporations)
 - Committees of the corporation meetings*
- Must give proper notice of meetings (check bylaws)
- N-PCL requires minutes to be kept at Board, Executive Committee, and member meetings

**Advisory only*



Time and Place of Meetings

- May be established in the bylaws or by the Board
- May be virtual, unless prohibited by the bylaws, as long as all persons are able to hear each other and participate simultaneously
- 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 director 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
- 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 the 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”](#)



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



Conducting a Meeting: General Procedures

- No statutory requirements as to process:
 - Should come up with an approach and process that works for your organization
 - May differ depending on size and/or experience of Board
- 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)



Hypothetical 1

- ABC Corp. has 4 directors: Andrew, Ben, Candice, and Dawn
- 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 111 Fifth Street for ABC Corp. for \$2M.”*
- Dawn had COVID and did not attend. Candice had a conflict of interest and left the room during deliberations and voting. (Under NY law, her presence counts for purposes of meeting quorum.)
- Andrew voted “Yes” and Ben voted “No.”

Can ABC Corp. purchase the building with 1 out of 4 directors voting to approve the purchase?



Annual Meeting & Annual Report

- President and treasurer present annual report to Board
- 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
- Report must 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.”*



Acting Outside of a Meeting

- Board action outside meetings requires **unanimous**, written consent
- Process:
 - Circulate resolution setting out proposed action or decision
 - Directors indicate clear consent to resolution
 - Reply from an email address that clearly identifies the person
 - Be clear it's the consent for the resolution that was circulated
 - Resolution and director consents filed with meeting minutes
- Also applies to committee action outside meeting



Open Meetings Law

- Certain nonprofits are subject to the Open Meetings Law
 - E.g., under Section 2854(1)(e) of the Education Law, charter schools are subject to the Open Meetings Law
- Open Meetings Law requires:
 - Advance public notice of time and place of certain governance meetings
 - Meetings must be open to public (other than executive sessions)
 - Special procedures and limitations on moving into executive session (e.g., can't be called for any topic)
 - Minimum required contents of minutes specified in law (including minutes taken during executive sessions)
 - Minutes must generally be prepared and made available within 2 weeks of meeting



Role of 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



Minutes



Why are meeting minutes important?

- Organizational Records
 - Goal: Preserve an accurate, balanced, and official record of the proceedings of governance meetings
 - May serve as legal evidence in a proceeding or trial
 - Show that a Board is complying with law and fiduciary duties
- Required under New York Not-for-Profit Corporation Law (“N-PCL”): “[E]very corporation shall keep ... correct and complete books and records of account and minutes of the proceedings of its members, board and executive committee, if any[.]” N-PCL § 621(a)
- Best practice and a topic of interest for IRS
 - Reported on Form 990



Drafting Pointers for Minutes

- Date and place of meeting; time meeting begins and ends
- Attendance (including guests)
 - Should indicate if quorum is established!
 - Note absences and/or recusals during meeting
 - Arrivals and departures of directors and attendees during meeting
- Headings may track agenda items
- Record corporate decisions
 - Indicate any corporate actions taken (e.g., items “resolved” or “approved”)
 - Reflect challenge or dissent, when appropriate
 - For major transactions, note votes for and against
 - Show compliance with policies and procedures
- Note if any executive sessions were held

Best Practice

1. Establish a template to use for Board or committee minutes with blanks for basic information.
2. Refrain from using first person (e.g., “us” and “we”).
3. Don’t produce verbatim transcript of meeting.



Useful Phrases for Minutes

Opening & Reporting:

- *The Chair welcomed members to the meeting and highlighted the following:*
- *The Board received a report from the CEO advising of the following ...*
- *Ms. Smith provided an update on ... and summarized the following matters:*
- *Mr. Green reported on the ... and focused on:*
- *An update on [TOPIC] was received and noted by the Board*
- *The Board noted that ... or was informed that ...*
- *The Board considered an update on ...*

Comments and Questions:

- *A Director commented that...*
- *A member of the committee asked...*
- *In response to a question from the Chair, it was confirmed that ...*
- *The Executive Director expressed her concern around...*
- *The consensus view of the Board was that...*
- *The Board approved [MATTER]. The dissenting view of Mx. Doe relating to ... was noted.*



Audience: Who reads the minutes?

- Executive director and Board members
 - Record of important decisions and areas of focus for future
- Members (if any) who have been a member for 6 months or more
 - Inspection rights under N-PCL as to meetings of members
- Funders (especially government funders)
 - E.g., NYC Human Services Standard Contract
- Regulators/litigation
 - Attorney General



Preparing, Reviewing, and Approving Minutes

- Secretary is typically responsible for minutes (check bylaws) and should take detailed notes during the meeting
- Share draft minutes with Board members before the next meeting for review and comment
- Present for Board or Committee approval at next meeting
 - Timing (Form 990): “contemporaneous” means the later of (1) next meeting of Board or Committee, and (2) 60 days
 - Approval can also happen outside of meeting, if required
- Draft minutes as soon as possible after the meeting to ensure accuracy
- Discard drafts and notes; approved minutes are the record of the meeting
- Keep copies of approved minutes with books and records (at office of the nonprofit or electronically)



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
- “One has to wonder what the Board thought it was doing.”



Cont.

- “...*two months after the Board initially had voted to sell its real estate, the minutes for the first time* identify... that the Board had decided that "the Hospital was going back to its original mission of serving the poor in underserved areas, and redirecting its charitable assets to accomplish this goal." Other than the Shattuck Hammond report, which discusses the Hospital's "original" mission, ***there is no written record concerning this momentous decision.*** There had been no study concerning this so-called return to the "original mission" and ***no proposal or recommendation on the subject was provided to the Board for its review and deliberation.*** Notably, there was no management plan or recommendation discussing the need to return to this "original" mission, ***nor do prior Board minutes report any discussion held on the subject.***”



Cont.

- “The May 5th minutes record that after the decision to sell was approved, “[t]he Board *then* discussed the issue of closing the Hospital. The Board noted that *no* actual decision had been made to close the Hospital.” ...Previously, on April 29, 1999, the Board had terminated the residency program and authorized the President to prepare for possible hospital closure. ***However, even as of May 5th, as the minutes show, the Board did not seem to believe that it was actually closing the Hospital. One has to wonder exactly what the Board thought it was doing.*** 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... It was after this that [the Board Chair] sought (and obtained) “a resolution reaffirming the Hospital's intent to close the East 64th Street facility.” This occurred at the July 26, 1999 Board meeting.”



Cont.

- Sale was ultimately blocked by court
- MEETH was unable to show
 1. the consideration and terms of the transaction were fair and reasonable, or
 2. that MEETH's purposes would be promoted by the sale.
- **Key Takeaway:**
 - Minutes may be scrutinized to determine whether
 - a Board fulfilled its fiduciary duties (care, loyalty, and obedience)
 - avoided conflicts of interest (both internal and of third party advisors)
 - determined matters on an informed basis
 - relied on the advice of experts
 - duly approved particular transactions



Special Situations



Executive Session

- 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)

Best Practice

Executive sessions should be noted in minutes. Generally, executive sessions should not be heavily minuted but ensure enough information to indicate legal compliance and/or approval of decisions made.



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 [“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



Determining Executive Compensation

- Nonprofits prohibited from providing private benefit to individuals (vs. serving charitable class)
 - Includes prohibition on excessive executive compensation
- If certain procedures followed, Board's determination of executive compensation *presumed* to be set at a reasonable level (but not absolute defense)
- Three requirements to establish rebuttable presumption:
 - (1) Compensation arrangement approved in advance by authorized body (like Board) comprised only of disinterested directors
 - Reminder: Note attendance/recusals in minutes
 - (2) Authorized body obtain and relied on appropriate comparability data
 - (3) Authorized body adequately documented basis for its determination
 - Including: terms of transaction; date of approval; individuals present during deliberation and vote; comparability data; any conflicts; basis for determination



Hypothetical 2

- 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 on 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



Cont.

Could HIPA rent storage space from the Board member?

- Yes
- No
- It depends



How the Board should handle the decision process:

- Compare at least 2 alternative spaces
 - 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
- 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 must be found to be fair, reasonable, and in the best interest of the corporation
- Minutes document compliance with bylaws and internal policies



Board Committees



Board Committees

- Two types: Board committees and committees of the corporation
 - *See our Legal Alert on [Committees](#)*
- 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
- 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 > \$1 M

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?



Thank you!

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