

## Frequently Asked Questions: Virtual Board Meetings

Since the start of the COVID-19 pandemic, boards of nonprofit corporations have been forced to conduct much of their work online. While much of this work easily translates to a virtual environment, boards should be sure to consider what changes they may need to make to run an efficient and legally compliant board meeting. This Legal Alert provides answers to some frequently asked questions on virtual board meetings and includes some tips to help board members successfully navigate virtual board meetings.

Note that while this Legal Alert addresses commonly asked questions, it is always a good idea to work with an attorney to understand what the law and your organization's governing documents allow before changing how your board operates. The law of the state in which your nonprofit organization is incorporated may also contain specific requirements for board operations.

### 1. Who can hold virtual board meetings?

The New York Not-for-Profit Corporation Law (the NPCL) explicitly allows virtual meetings of the board, so long as they are not prohibited in a nonprofit organization's Certificate of Incorporation or bylaws.<sup>1</sup> Nonprofit boards should first check their bylaws and governance documents to make sure virtual meetings are not prohibited. Typically, these documents remain silent on or expressly permit virtual meetings, but if the bylaws require in-person meetings, the board will need to amend its bylaws to allow for virtual meetings.

Organizations should generally check the state law in which they are incorporated, as each state may have additional restrictions, special requirements, or exceptions for virtual meetings. In addition, a single state may have one set of rules for board meetings and another for meetings of the members of a nonprofit membership corporation. New York, for example, has, for the time being, explicitly suspended the requirement for membership nonprofit organizations to hold in-person membership meetings.<sup>2</sup> The New York Charities Bureau has issued guidance for the conduct of remote meetings of the members.<sup>3</sup>

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<sup>1</sup> N-PCL § 708(c). "Unless otherwise restricted by the certificate of incorporation or the by-laws, any one or more members of the board or of any committee thereof who is not physically present at a meeting of the board or a committee may participate by means of a conference telephone or similar communications equipment or by electronic video screen communication."

<sup>2</sup> N-PCL 603(a). This explicit authorization for remote meetings of the members is in effect through the end of the pandemic emergency declared by the Governor. The legislature has passed a bill extending that authorization at least through December 31, 2021, although as of the date of this Legal Alert it has not yet been signed by the Governor. A1025/S.3917-A of 2021.

<sup>3</sup> See "Guidance for Conducting Virtual Meetings of Members of New York Not-for-Profit Corporations" available at <https://www.charitiesnys.com/pdfs/guidance-electronicmeetings.pdf>. Note that this guidance applies to membership meetings only. The Attorney General has not issued specific guidance with respect to board meetings.

## **2. What are the legal requirements of a virtual board meeting?**

Generally speaking, directors should try and conduct virtual meetings as similarly as possible to in-person meetings. That means adhering to bylaws in terms of frequency of meetings, giving proper notices, taking attendance and confirming quorum, keeping minutes, and voting.

In some states, like New York, boards must also consider the requirement that every participant be able to hear each other at the same time and to be able to fully participate in all deliberations and voting. This could mean, for example, that requiring participants to be muted may be prohibited.<sup>4</sup>

## **3. Should we record the meeting or take minutes?**

It's now easier than ever to record entire board meetings, but the board should carefully consider before doing so. Remember that every recording or transcript will be considered part of the board's records and could become discoverable in a legal proceeding. Consider keeping the recording only as long as it takes and for the purpose of drafting the minutes.

If your nonprofit organization does decide to record the meeting, make sure that every board member, and anyone else who may join the meeting, knows that the meeting will be recorded. If your organization is in a one-party consent state, like New York, express permission from each participant is not required.

## **4. Can the board or a committee vote electronically *without* holding a meeting?**

Under the NPCL, the board can make decisions without a meeting, but only if *all* voting members of the board consent in writing. This is called making a decision via "unanimous consent."<sup>5</sup> Directors cannot vote by proxy. These rules also apply to committees of the board, which are committees with the power to bind the corporation.

## **5. How should the board handle executive or closed sessions?**

As would be the case with in-person meetings, there will be instances when only a part of the board should be present for the discussion and/or voting. Meetings related to conflicts of interest, whistleblower complaints or executive committee meetings are a few examples. In a virtual meeting setting, boards should consider the use of "break out rooms" for these sessions, or consider other ways to maintain privacy.

## **6. How can we make meetings as efficient as possible?**

By this time, everyone is probably aware of "Zoom fatigue." To make meetings as efficient as possible, try to keep the meetings short and prioritize the agenda. Following the meeting, consider adding a summary of the meeting to the minutes. This, along with more frequent email communication between

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<sup>4</sup> N-PCL § 708(c). "Participation by such means shall constitute presence in person at a meeting as long as all persons participating in the meeting can hear each other at the same time and each director can participate in all matters before the board, including, without limitation, the ability to propose, object to, and vote upon a specific action to be taken by the board or committee."

<sup>5</sup> N-PCL § 708(b).

meetings, may be helpful so that board members can easily stay up to date and can spend board meeting time on staff reports and discussion of items up for a vote.

**7. What are some other considerations for a successful virtual board meeting?**

- Make sure that each board member has the resources necessary to effectively join the virtual meeting. Consider any accommodations that may need to be made for board members with a disability.
- Ask board members to confirm their attendance in the chat and/or email for the records, especially if you have participants who are not visible on the screen.
- Encourage everyone to have her/his camera on. This helps with active participation.
- Mute everyone who is not speaking so that the speaker can be heard clearly, but allow people to unmute at will to participate so as to ensure the ability to fully participate.
- Utilize the hand-raising, chat box, or other similar features in your virtual meeting platform, as well as visual clues, to help with voting.
- Consider giving more board members a short speaking role in advance, to encourage attentiveness and participation in discussion.

For more information on nonprofit governance during COVID, please see [Lawyers Alliance Legal Alert on Nonprofit Governance](#).

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***This alert is meant to provide general information only, not legal advice. If you have any questions about this alert, please contact Ciarra Chavarria at [cchavarria@lawyersalliance.org](mailto:cchavarria@lawyersalliance.org) or visit our website at [www.lawyersalliance.org](http://www.lawyersalliance.org) for further information. To become a client, visit [www.lawyersalliance.org/becoming-a-client](http://www.lawyersalliance.org/becoming-a-client).***

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