

# Get Out the Vote

## A primer for board voting procedures without a meeting

by Kathryn M. Vanden Berk

**B**ecause the Internet has become an integral part of daily life, it's not surprising that it has changed the way nonprofit boards function. Email and web portals are increasingly popular for sharing meeting materials, distributing updates, and coordinating meeting times and locations.

Using electronic means to gather votes and document decisions between board meetings can also be a tremendous time-saver. However, for electronic votes to be legitimate, certain rules must be followed.

Voting rights and processes are established by state legislatures. Because most states have adopted a version of the Model Nonprofit Corporation Act<sup>1</sup>, I use it as my starting point for this column. However, it is very important that you consult your local statutes for variances.

### Voting Without a Meeting

First, let's discuss what it means to gather votes without a meeting. Unlike regular or special meetings, there is no formal notice, and votes are collected without convening the board in a physical location or by telephone.

Voting without a meeting should only be used when there is no need for the board to discuss the matter at hand. If discussion is needed, save the issue for the next meeting.

When votes are taken without a meeting, each board director receives and signs a resolution, then returns it via email or fax. When all consents are received—from 100 percent of the



directors—the action is as legally valid as votes taken at a meeting.

The most important difference between voting during meetings and voting without a meeting is that the vote conducted without a meeting must be unanimous. This is based on the Model Act<sup>2</sup>, which most states have adopted in some form.<sup>3</sup>

I strongly support the Model Act's requirement of unanimity because it provides a balance to the fact that, when voting without a meeting, directors don't have a chance to ask questions or address lingering concerns through general discussion.

Thus, the matter must be noncontroversial and ready for approval. If a director is uncertain how to vote, it is best for him or her to insist the matter be set for discussion during the next meeting.

### Administrative Oversight

Votes without a meeting require significant administrative oversight to ensure all directors have voted. I advise my clients to prepare a written resolution (a link to a sample resolution is available in the online version of this column at [alliance1.org/magazine](http://alliance1.org/magazine)), and I instruct

*Continued on page 28*

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them to deliver the resolution to each director by mail, fax, or email. The important elements to include are:

- acknowledgment and consent for the vote to be taken without a meeting,
- acknowledgment of relevant state law and/or a specific provision in the board's bylaws,
- a short statement of the factual background information related to the issue at hand,
- the proposed resolution in plain language, and
- a signature line for each director.

Also, be sure to document the vote as you would any other vote. If the vote is cast by signing and faxing a document, save all transmissions. If it is by an emailed statement of approval—such as, “I vote yes.”—save the emails. If there is any dissension later, you have proof all directors voted, and that all were in favor of the resolution.

#### Alternative: Call a Special Meeting

If you cannot achieve unanimity but must act before the next board meeting, call a special meeting by telephone. Follow notice requirements for a special meeting, and provide a call-in conference line so all participants can attend and be heard.

Standard board meeting rules apply. That is, first, you need a quorum in order to conduct business and, second, you need only achieve a majority rather than 100 percent agreement.

#### Hybrid and Proxy Voting

I have a few final words of caution.

First, you should never, ever allow ballots to be cast in a hybrid way: partly in-person at a meeting and partly by a mailed, faxed, telephoned, or emailed ballot prior to the meeting. *Robert's Rules of Order* is firm on this.<sup>4</sup>

This is because every board resolution should be thoroughly discussed. Your directors should be confident that they understand the underlying facts, policies, finances, and effects on operations. If you allow them to call in their votes before the discussion begins, they are missing important information that might change the way they look at an issue.

Second, directors should never, ever, ever vote by proxy. Proxy voting means giving one's vote to another person to exercise. This is tolerated as a way to engage shareholders of a for-profit corporation or the members of a nonprofit membership organization, but it is forbidden for the directors of any corporation—be it for-profit or nonprofit.

If you have been permitting proxy voting at your board meetings, you should immediately cease this practice. It is a violation of every state nonprofit corporation law, and a breach of your board's fiduciary duty. ■

#### ENDNOTES:

1. See the Model Nonprofit Corporation Act, Third Edition (August 2008), which is published by the

American Bar Association Section on Business Law's Committee on Nonprofit Corporations.

2. See Section 8.21 of the Model Nonprofit Corporation Act.

3. In Illinois, the board may provide an alternative voting process in its articles of incorporation or bylaws (see the Illinois General Not For Profit Corporation Act of 1986, 805 ILCS 105/108.45). The Model Act does not allow for this kind of variance.

4. See *Robert's Rules of Order*, Tenth Edition, Chapter XIII Voting, p. 409.



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