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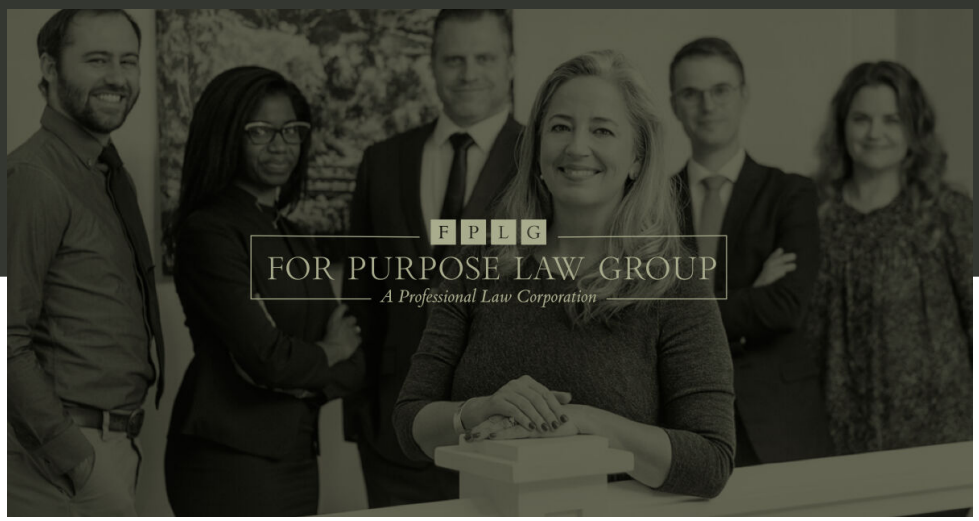
# Next Time, Let's Text in our Votes!

07.29.14 | Linda J. Rosenthal, JD




As the foundation board members wrapped up their meeting, one of them wondered out loud why they had to meet in person every month. "We text all day for business. Why don't we just put a few issues on an agenda, email it out, circulate online comments and questions, and then vote by text message?"

Sounds reasonable, right?

If nonprofits routinely conduct business by email and text — like all other sectors of the population — why can't they create customized board-meeting procedures including voting by however is most convenient?

They can't, because it's not legal. Not in California. Not yet — at least for nonprofits organized as nonprofit corporations. In this way, at least, California hasn't yet fully embraced the digital revolution.

(But there may be a [legal] way around this!)

***What's the Problem?***

The simple answer is in the California Corporations Code, itself. Nonprofits that are corporations — that's the majority of them — have to follow these rules. The nonprofit chapters of the Corporations Code include specific, detailed procedures for board meetings, including who may call meetings, how and when to schedule them, and what constitutes a quorum — to name just a few.

For some of these rules, nonprofits are allowed to tweak them a bit in their articles of incorporation or bylaws. But not for the requirement that there be formal, face-to-face meetings or the electronic equivalent of them.

***More Specifically, Here's Why Not***

For California nonprofits that are tax-exempt 501(c)(3) organizations, the rules are in Section 5211(b). (Mutual benefit corporations and religious corporations have separate governing statutes with similar rules.

Simply put, directors have to be able to ***hear one another at board meetings and to debate and deliberate together***. A hundred years ago, this was a no-brainer. Meetings could only be in-person events.

As technology developed, the Legislature has made some accommodations.

But where are we in 2014?

"Meetings of the board may be held at a place within or without the state . . ." In-person gatherings are still the presumptive rule.

The exceptions are participation "through use of conference telephone, electronic video screen communication or electronic transmission by and to the corporation . . ."

A conference-call meeting or one held via electronic video screen communication "constitutes presence in person at that meeting so long as all directors participating in the meeting are able to hear one another."

For the electronic transmission exception, there are some added requirements. Using that technology constitutes "presence in person at that meeting" — but only if two more requirements are met:

> (1) "Each director participating in the meeting can communicate with all of the other directors concurrently" and
> (2) Each director is provided the means of participating in all matters before the board, "including, without limitation, the capacity to propose, or to interpose an objection to, a specific action to be taken by the corporation."

***So, That's It? There's No Wiggle Room?***

Under these rules, a text-in-the-vote "meeting" would be out. So would email voting.

But there *is* a round-about — and perfectly legal — way to get to this result.

Let's go back to the "everyone-in-the-same-room" kind of meeting. There's one exception to this called "unanimous written consent." If all the directors — 100% of them — consent afterwards in writing to the actions taken, or that would have been taken if a meeting had been held, the matters on which the directors signed this consent are validly adopted.

What's the reasoning behind the 100% requirement for this later written consent? After all, a measure can pass at a regular board meeting by a simple majority vote. It's to protect "principles of

democracy and due process" – and really, it prevents board leaders from holding secret meetings and excluding dissenters from voting.

There's a tiny exception to this unanimity requirement, but only when there's a potential conflict of interest and one or more directors have to recuse themselves. Generally, though, it's 100%.

***So How, Exactly, does this Alternative Help with Voting?***

Here's how.

The words "writing" and "written" are defined in the Corporations Code to include email, provided that the general electronic transmission requirements of the Code are met.

So, it looks like email "voting" might be ok. But it may be a good idea to add some safeguards.

There's nothing yet specifically about texting a written consent. Who knows – maybe next year.***What About In Other Jurisdictions?***

Each state has its own set of corporate governing laws. Since — except for Louisiana — all of the U.S. jurisdictions follow the English common law, there are many similarities. Some may permit this kind of voting; others don't.

***So Now That There's a Way to Do It, Is It a Good Idea?***

There are mixed reviews and opinions. We'll discuss that soon — including ways to make it work well.