

Nonprofit Law Section

State Bar of Montana

GUIDE FOR NONPROFIT ORGANIZATIONS

Directors of Nonprofit Organizations: Voting by Proxy

In Montana, a nonprofit's members may cast their votes by proxy by following the procedure described in Montana Code Annotated section 35-2-539. But what about those decisions that are left to the board of directors? Can directors vote by proxy?

Chapter 2 of Title 35 of the Montana Code Annotated (Nonprofit Corporations) is silent regarding the ability of directors of nonprofit corporations to vote by proxy. Without an affirmative provision allowing directors to vote by proxy, and considering that the Montana Code Annotated expressly allows voting by proxy in *other* situations, the most prudent interpretation is that directors of Montana nonprofit corporations cannot vote by proxy.

The job of a director and the duties they have to the organization are to participate in the decision making process. This includes the contemporaneous discussion and debate of the issues being decided. By granting a proxy to another person, it is impossible for the director to meet these duties of care to the organization, and may expose the organization to claims that the individual voting the proxy did not have the facts necessary to make an informed and prudent decision.

However, it is important to point out that Montana law contains other provisions that should reduce the necessity for directors to vote by proxy. Understanding and making use of these provisions should lessen the “burden” of disallowing director voting by proxy. For example, section 35-2-427, Montana Code Annotated provides that, unless restricted by the articles or bylaws, the directors may participate in a meeting by telephone or other means, so long as all persons participating can hear each other. As such, it is very easy for a board to electronically “assemble” for a meeting, and the statute specifically states that someone participating in this manner is “considered to be present in person at the meeting”.

Additionally, the board has the power to delegate certain actions to a committee of the board if it determines that it would be too difficult or time consuming to assemble the full board for such project.

Finally, the board can take action by unanimous written consent without a meeting pursuant to the terms of § 35-2-428, Montana Code Annotated. This allows the board to take a designated action following the signature and approval of all members of the board. However, it is essential that any vote taken without a meeting is unanimous, or it will not be valid. Nonprofit corporations frequently take votes from directors via email without a meeting. This is permitted in Montana, but a majority vote is not enough, as it would be in an actual meeting. If the vote is to be taken via email, or by any other form without an actual meeting, the action cannot be taken unless the vote is unanimous.

Although Montana law is silent on the issue of director voting by proxy, the most prudent interpretation of the law is to assume that directors of a Montana nonprofit corporation cannot

Nonprofit Law Section

State Bar of Montana

GUIDE FOR NONPROFIT ORGANIZATIONS

vote by proxy. To avoid any uncertainty, the nonprofit corporation's bylaws should expressly prohibit director voting by proxy.

* * * * *

NOTICE: THIS GUIDE IS NOT LEGAL ADVICE

This guide has been prepared as a public service and for general information purposes only. The information in this guide is not legal advice. Legal advice is dependent upon the specific facts and circumstances of each situation. Furthermore, the information contained in this guide is not guaranteed to be up to date. This guide should not be used as a substitute for obtaining legal advice from an attorney licensed or authorized to practice in your jurisdiction. You should always consult a suitably qualified attorney regarding any specific legal problem or matter.