



## News & Publications

### Video and Telephone Meetings for Corporations and Limited Liability Companies

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#### COVID-19 Update: Video and Telephone Meetings for Corporations and Limited Liability Companies

With shelter in place orders in effect throughout California, and as Californians resign themselves to the need for social distancing, corporations and other business and non-profit entities need to examine ways to conduct corporate business remotely, without in-person meetings. This alert is a summary of California law, as reflected in the California Corporate Code (the “**Code**”), governing the methods of conducting and participating in remote corporate and limited liability company meetings.

This alert covers only entities formed under California law, not other states, although it does briefly address Delaware limited liability companies, as these are so commonly used in California.

#### 1. CORPORATIONS

##### a. Shareholder and Member Meetings

California law governing remote corporate meetings is essentially the same for all types of corporations, both for-profit and non-profit. Unless prohibited by the bylaws of the corporation, shareholders or members of a corporation may participate in meetings through either (i) video communication or (ii) “electronic transmission.” The Code defines electronic transmission as faxes, emails, or posts to the corporation’s officially designated fax number, email address, or message board, respectively.

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Interestingly, there appears to be no authority under the Code allowing meetings of shareholders or members of a corporation (even a small, closely held corporation) to be held by telephone alone, without concurrent video conferencing or electronic transmissions. This could possibly include telephone meetings where agendas, resolutions and other matters to be considered are shown in real time on a computer.

Also, if a corporation conducts a meeting by either electronic transmission or video communication, shareholders or members must be given a reasonable opportunity to participate in the meeting and vote on the matters submitted to them. They must be able to read or hear the proceedings of the meetings concurrently with those proceedings. If voting or other official action is done by electronic transmission or video communication, the corporation must maintain a record of such vote or action. See below for other restrictions on communication by “electronic transmission.”

#### b. Board of Director Meetings

In contrast to shareholder and member meetings, the Code authorizes directors and officers of a corporation to participate in board meetings by either telephone, video communications or electronic transmission. For telephonic participation and video communication, the Code simply requires that all participants in the meeting must be able to hear one another. For electronic transmission (not involving video communications or telephone), (i) each director or board member participating in the meeting must be able to communicate with all of the other members concurrently; and (ii) each director or board member must be provided a 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.

#### c. Electronic Transmission

The Code imposes strict guidelines on communications by electronic transmission. It allows them only if: (i) the recipient has provided an unrevoked consent to the use of this type of communication, and (ii) the transmission creates a record that is capable of retention, retrieval, and review, and that may thereafter be rendered into clearly legible tangible form. In addition, if the transmission is to a shareholder or member who is a natural person, the consent to the transmission must be preceded by or include a clear written statement to the recipient as to (a) any right of the recipient to have the record provided or made available on paper or in non-electronic form, (b) whether the consent applies only to that transmission, to specified categories of communications, or to all communications from the corporation, and (c) the procedures the recipient must use to withdraw consent.

## 2. LIMITED LIABILITY COMPANIES

### a. California

Members of a limited liability company (an “**LLC**”) governed by California law may participate in member meetings by telephone, electronic transmission or video communication, subject to any prohibitions on electronic transmission and video communication in the company operating agreement or articles of organization. If member actions are to be taken at the meeting, the notice of the meeting must indicate the method of video communication or electronic



transmission, if applicable.

For telephone and video conference meetings, all members participating must of course be able to hear one another. For electronic transmissions and video conferencing (i) the LLC must implement reasonable measures to provide members a reasonable opportunity to both participate in the meeting and vote on submitted matters, including an opportunity to read or hear the proceedings concurrently with those proceedings; and (ii) the company must maintain a record of any vote or action taken by a member.

b. Delaware

Most of this alert applies only to entities formed under California law. Many LLCs in California, however, are for various reasons formed under Delaware law. In that case, Delaware law applies.

Managers or members of a Delaware LLC may participate in a meeting by means of telephone or other communications equipment, provided that such means are permitted under the LLC operating agreement. To use these remote means of communication, all members or managers must be able to hear each other. Unless otherwise provided in the LLC agreement, managers or members may also vote on matters by means of electronic transmission. Under the Delaware Code, “electronic transmission” means any form of communication not involving physical transmission of paper that (i) creates a record that may be retained, retrieved and reviewed by the recipient thereof and (ii) may be directly reproduced in paper form by the recipient.

CONCLUSION

It is perhaps more important during these unprecedented times to maintain proper social distancing than to observe corporate formalities to the letter. Still, to avoid any question of proper corporate or LLC action, it is best to hold remote meetings by videoconference if possible, rather than solely by conference telephone. Meeting notices should specify the communication means to be used, and participating members or directors should confirm, in advance, their consent to the mode of communication. Be sure the corporate bylaws or LLC operating agreement do not prohibit remote meetings. Above all, be safe and smart by postponing any meetings that may only be conducted in person unless essential and critical.