



South Carolina Bar

Continuing Legal Education Division

2024 SC BAR CONVENTION

**Corporate, Banking & Securities
Law Section**

“Back to the Basics What They Didn’t
Teach You in Law School”

Friday, January 19

SC Supreme Court Commission on CLE Course No. 240018

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How to Conduct a Board of Directors Meeting

*Jennifer Blumenthal
George Morrison*

BURR  **FORMAN** LLP



Background

- ABC, Inc. wants to acquire XYZ, Inc. and change its name to Acme.
- The Board of Directors of ABC, Inc. needs to approve (and recommend to the Shareholders for approval those matters requiring shareholder approval):
 - (i) The acquisition of XYZ, Inc.;
 - (ii) The commitment from Big Bank for a mega loan to finance the acquisition of XYZ;
 - (iii) The recommendation to change the company's name to Acme Corporation, by filing articles of amendment (which amendment requires shareholder approval – Section 33-10-102); and
 - (iv) The authorization of the president, Wile E. Coyote, to execute and deliver all documents necessary to effectuate the transactions.

Governing Documents and Applicable Law

- Articles of Incorporation (and amendments)
- Bylaws
- The South Carolina Business Corporation Act of 1988
 - Title 33 of the Code of Laws of South Carolina, 1976, as amended
 - Chapter 8 of Title 33 (Directors and Officers)
 - All corporate powers must be exercised by or under the authority of, and the business and affairs of a corporation must be managed under the direction of, a board of directors. (Section 33-8-101.)
- Parliamentary Procedure (refer to the Bylaws)

Taking Board Action

- Board action can be taken:
 - a) By vote of the directors at a (i) regularly scheduled or (ii) duly called special meeting of the board of directors (Section 33-8-200), or
 - b) By unanimous written consent of all of the directors (Section 33-8-210).
- Meetings by teleconference are permitted.
 - A board meeting may be conducted by any means of communication by which all directors participating may simultaneously hear each other during the meeting. (Section 33-8-200.)

The Agenda

Though not required by law (except under FOIA for meetings of public bodies), an agenda should be provided for the orderly conduct of business, as a governance best practice, and typically includes the following items:

- Call the Meeting to Order
- Confirm Notice properly given
- Establish Quorum
- Approval of Minutes
- Old Business/New Business
- Adjourn

Meeting Notice

- The Bylaws should establish the time and place of regular meetings of the Board and the procedure for calling a special meeting to conduct official business between regularly scheduled meetings.
- Section 33-8-220, Notice of Meeting. Unless the articles or bylaws provide otherwise:
 - (a) Regular meetings may be held without notice of the date, time, place, or purpose.
 - (b) Special meetings must be preceded by at least two days' notice of the date, time, and place of the meeting. The notice need not describe the purpose of the special meeting unless required by the articles or bylaws.
- Notice of the meeting can be waived in writing or by attendance (without objection or voting). (Section 33-8-230.)

Quorum and Voting

- The presiding officer (chairman or president) calls the meeting to order and confirms notice has been provided (or properly waived).
- Establish Quorum – The corporate secretary confirms the presence of a quorum.
 - Unless the articles or bylaws require a greater number, a quorum of a board of directors consists of a majority of directors. Section 33-8-240.
 - The articles or bylaws may authorize a quorum to consist of no fewer than one-third of the fixed or prescribed number of directors.
 - Official action cannot be taken at a meeting of the board without a quorum of the directors present. The meeting may be held for informational purposes only.
- If a quorum is present when a vote is taken, the affirmative vote of a majority of directors present is the act of the board of directors unless the articles of incorporation or bylaws require the vote of a greater number of directors.

Making a Motion and Taking the Vote

- After presentation of a matter for board approval, the presiding officer might ask for a motion to approve the matter. (The formality of the proceedings may depend on the adopted parliamentary procedure.)
 - Then, a director makes a motion to approve the matter,
 - another director seconds the motion (unless a second is not required, such as a motion coming from committee),
 - followed by any discussion on the motion,
 - then the motion is called by the presiding officer, and the vote is taken.
- The vote is announced by the presiding officer.
- The vote becomes part of the record.

Conflicts of Interest

- What if one of the directors, or the spouse of one of the directors, of ABC, Inc. owns shares in XYZ, Inc.?
 - Section 33-8-310, Director or Officer conflict of interest.
 - A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest.
- The director should not expect to receive a personal benefit from the transaction (apart from any other director).
- Duties of loyalty and care, and the business judgment rule.
- A conflict of interest doesn't mean the transaction is automatically void or voidable. However, the director should disclose the conflict of interest.
- The benefit of a Board of Directors Conflicts of Interest Policy.

Board Resolutions

- A board resolution documents the action taken by the board.
- The corporate secretary typically prepares the resolution based on the meeting minutes.
- It often contains recitals providing the background for the action taken and then states the action taken in the form of resolutions (BE IT RESOLVED THAT...).
- The corporate secretary typically signs the resolution as being the true and correct action taken by the board.

Meeting Minutes

- The bylaws or the board must delegate to one of the corporate officers the responsibility for preparing minutes of the directors' and shareholders' meetings and for authenticating records of the corporation. (Section 33-8-400(c).)
- A corporation must keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation. (Section 33-16-101.)
- "Secretary" means the corporate officer to whom the board of directors has delegated responsibility pursuant to Section 33-8-400(c) for custody of the minutes of the meetings of the board and of the shareholders and for authenticating records of the corporation. (Section 33-1-400(24).)
- Often, the corporate secretary may be asked to certify the records of the corporation, including the motions made and resolutions passed by the board.

Questions

About the Presenter



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Jennifer serves as the Vice-Chair of the firm's Lending Practice Group. She practices corporate, banking, and business transactional law, with a concentration on commercial lending, real estate finance, and UCC secured transactions, including loan workouts. Her practice also covers local government law, including public utility law and municipal election law, public meeting law, public records (freedom of information), and procurement matters.

Jennifer is the former President of the South Carolina Bar Foundation. She also serves as Chair of the Legal Opinion Ad Hoc Committee and is Chair-Elect of the Corporate, Banking, and Securities Law Section of the Corporate, Banking and Securities Law Section of the South Carolina Bar.

Jennifer earned her J.D. from Wake Forest University and her B.A. from the University of North Carolina at Chapel Hill.



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How to Conduct a Shareholder Meeting

Benjamin A. Barnhill

No Materials Available



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**Parliamentary Procedure - Robert's Rules of
Order**

James H. Slaughter

Parliamentary Motions Guide

Based on *Robert's Rules of Order Newly Revised (12th Edition)*

The motions below are listed in order of precedence. Any motion can be introduced if it is higher on the chart than the pending motion.

YOU WANT TO:	YOU SAY:	INTERRUPT?	2ND?¹	DEBATE?	AMEND?	VOTE?
§21 Close meeting	I move to adjourn	No	Yes	No	No	Majority
§20 Take break	I move to recess for	No	Yes	No	Yes	Majority
§19 Register complaint	I rise to a question of privilege	Yes	No	No	No	None
§18 Make follow agenda	I call for the orders of the day	Yes	No	No	No	None
§17 Lay aside temporarily	I move to lay the question on the table	No	Yes	No	No	Majority
§16 Close debate	I move the previous question	No	Yes	No	No	2/3
§15 Limit or extend debate	I move that debate be limited to ...	No	Yes	No	Yes	2/3
§14 Postpone to a certain time	I move to postpone the motion to ...	No	Yes	Yes	Yes	Majority
§13 Refer to committee	I move to refer the motion to ...	No	Yes	Yes	Yes	Majority
§12 Modify wording of motion	I move to amend the motion by ...	No	Yes	Yes	Yes	Majority
§11 Kill main motion	I move that the motion be postponed indefinitely	No	Yes	Yes	No	Majority
§10 Bring business before assembly (a main motion)	I move that [or "to"] ...	No	Yes	Yes	Yes	Majority

¹ *Some more formal requirements, likes seconds to motions, may not apply in smaller boards or any size committee.*

Parliamentary Motions Guide

Based on *Robert's Rules of Order Newly Revised (12th Edition)*

Incidental Motions - No order of precedence. Arise incidentally and decided immediately.

YOU WANT TO:	YOU SAY:	INTERRUPT?	2ND?	DEBATE?	AMEND?	VOTE?
§23 Enforce rules	Point of order	Yes	No	No	No	None
§24 Submit matter to assembly	I appeal from the decision of the chair	Yes	Yes	Varies	No	Majority or tie sustains
§25 Suspend rules	I move to suspend the rules which ...	No	Yes	No	No	2/3
§26 Avoid main motion altogether	I object to the consideration of the question	Yes	No	No	No	2/3 against consideration
§27 Divide motion	I move to divide the question	No	Yes	No	Yes	Majority
§29 Demand rising vote	I call for a division	Yes	No	No	No	None
§33 Parliamentary law question	Parliamentary inquiry	Yes (if urgent)	No	No	No	None
§33 Request information	Request for information	Yes (if urgent)	No	No	No	None

Motions That Bring a Question Again Before the Assembly - no order of precedence. Introduce only when nothing else pending.

§34 Take matter from table	I move to take from the table ...	No	Yes	No	No	Majority
§35 Cancel or change previous action	I move to rescind/ amend something previously adopted...	No	Yes	Yes	Yes	Varies
§37 Reconsider motion	I move to reconsider the vote ...	No	Yes	Varies	No	Majority

Handling of a Motion

Based on *Robert's Rules of Order Newly Revised (12th Edition)*

I. BRINGING A MOTION BEFORE THE ASSEMBLY

1. A member makes the motion ("I move that ...")
2. Another member seconds the motion
 Secunder does not need to be recognized
3. The chair states the question
 "It is moved and seconded that (or "to") ..."

II. CONSIDERING THE MOTION

1. Members debate the motion (unless undebatable)
 Preference in recognition:
 1. Member who made motion
 2. Member who has not spoken first time
 3. If possible, alternate for and against
2. Chair puts question to a vote
 "The question is on the adoption of ..."

 (Voice vote)
 "Those in favor of the motion, say aye."
 "Those opposed, say no."

 (Rising vote)
 "Those in favor of the motion will rise [or "stand"]. Be seated."
 "Those opposed will rise [or "stand"]. Be seated."
3. Chair announces result of vote
 "The ayes have it and the motion is adopted." (or)
 "The noes have it and the motion is lost."

 "The affirmative has it and the motion is adopted." (or)
 "The negative has it and the motion is lost."

American Institute of Parliamentarians, 888-664-0428, www.aipparl.org

National Association of Parliamentarians, 888-627-2929, www.parliamentarians.org

Minutes

Based on *Robert's Rules of Order Newly Revised (12th Edition)*

***THEME: Minutes are a record of what was done at the meeting
NOT what was said by members or guests.***

INCLUDE:

- ✓ First Paragraph:
 - Kind of meeting (regular, special, adjourned)
 - Name of board
 - Date and time of meeting
 - Place of meeting, if varies
 - Fact that Chairman and Clerk were present or name of substitute
 - Whether minutes of previous meeting were read and approved
- ✓ Separate paragraph for each subject matter with name of mover:
 - All main motions or motions to bring a main question again before the assembly (except any withdrawn, *see below*) stating
 - The wording in which adopted or disposed of
 - The disposition of motion (including amendments or motions)
 - Secondary motions that were not lost or withdrawn
 - All notices of motion
 - All points of order and appeals, whether sustained or lost
- ✓ Last Paragraph:
 - Hour of adjournment
- ✓ Number of votes if count ordered or ballot vote
- ✓ Names and votes if roll call vote
- ✓ Signature of Clerk (“Respectfully submitted” unnecessary)

DO NOT INCLUDE:

- ✗ Secunder’s name
- ✗ Remarks of guest speakers
- ✗ Motions that were withdrawn (see *RONR* § 48, page 469 for exceptions)
- ✗ Personal opinion on anything said or done

Sample Minutes

Based on *Robert's Rules of Order Newly Revised (11th Edition)*

The regular monthly meeting of the Alpha County School Board was held on Tuesday, November 6, 2020, at 7:00 p.m., at Smith High School, the Chairman and the Secretary being present. The minutes of the October meeting were read and approved as corrected.

The report of the Superintendent was received and placed on file.

The motion relating to the public comment period of the meeting, which was postponed from the October meeting, was then taken up. On motion of Mr. Smith, the motion was referred to a committee of three to be appointed by the chair with instructions to report at the next meeting.

Mr. Rogers moved “that the Board participate in a leadership retreat to be held the second weekend of February.” After amendment and further debate, the motion was adopted as follows: “That the Board participate in a leadership retreat to be held on two consecutive weekends beginning the first weekend in June.”

The meeting adjourned at 8:40 p.m.

Wyatt Freeman McKinley, Secretary



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Nonprofit Board Considerations

James T. Buxton

SERVING ON NONPROFIT BOARDS

PRESENTED BY

JAMES T. H. BUXTON, ESQ.

SC BAR CONVENTION 2024

Fiduciary Duties of Directors

- ▶ S.C. Code Ann. § 33-31-830(a)
- ▶ Duty of Care
 - ▶ Director shall discharge his duties:
 - ▶ (1) In good faith
 - ▶ (2) With the care of an ordinarily prudent person in a like position would exercise under similar circumstances
- ▶ Duty of Loyalty
 - ▶ Director shall discharge his duties:
 - ▶ (3) in a manner the director reasonably believes to be in the best interests of the corporation

Fiduciary Duties of Directors

- ▶ S.C. Code Ann. § 33-31-834(a)
- ▶ Directors are immune from negligence claims to the extent they are not grossly negligent or willfully or wantonly negligent.
- ▶ To be willfully or wantonly negligent one must have participated in conscious wrongdoing. *Osborn v. Univ. Med. Assocs. of Med. Univ. of S.C.*, 278 F. Supp. 2d 720, 730 (D.S.C. 2003)
- ▶ To be grossly negligent one must have “failed to exercise a slight degree of care.” *Id.*
- ▶ The business judgment rule is available to nonprofit board members

Ethics - Conflicts

- ▶ Blurred line between board decisions and legal services
- ▶ Friction between director duties and ethical duties as a lawyer
 - ▶ MR 1.7 → Conflicts of interest – a lawyer cannot represent an individual or entity adverse to the organization
 - ▶ This rule is imputed to all members of the firm

Ethics – Attorney-Client Privilege

- ▶ Professional rules and higher standards are triggered if legal services are provided by a board member
 - ▶ Attorney-Client Privilege
 - ▶ Communication between a board member who is also a lawyer and an organization may not be protected
 - ▶ MR 1.7 cmt 35 → a lawyer for an organization who is also a board member must warn the organization of loss of attorney-client privilege

Ethics - Competence

- ▶ A lawyer may not have knowledge in every area of law in order to provide the best services to the organization
- ▶ If asked to provide paid or volunteer legal services, keep in mind MR 1.1 to avoid potential malpractice claims
- ▶ MR 1.1 – a lawyer must always provide competent representation to the client

Heightened Liability Exposure

- ▶ Heightened knowledge standard
 - ▶ A board member who is also a lawyer is expected to have more extensive knowledge and is held to a higher standard of care than a regular director
 - ▶ While there is no caselaw concerning this heightened standard for nonprofit boards, it is fair to assume the standard of for-profit boards would apply to nonprofits
- ▶ Willard L. Boyd III, *Lawyers' Service on Nonprofit Boards*, 18 ABA J. 2 (2008).

Due Diligence – Understanding Roles

- ▶ Understand the duties and expectations of the board
 - ▶ Understand financial and time commitments
- ▶ Check that the organization has legal counsel to ensure a separation of legal services and business decisions

Due Diligence – Governance Docs

- ▶ Review the organization's Articles of Incorporation and Bylaws
 - ▶ Specifically, check for indemnification provisions to ensure the organization can incur the cost of legal defense and liability if board members are sued in their individual capacity

Due Diligence – 501(c)(3) Status

- ▶ 501(c)(3) companies receive favorable tax treatment
- ▶ Ensure the organization still has its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code

Due Diligence - Conflicts

- ▶ Run a conflicts check to make sure the firm won't be disqualified from representing a client
- ▶ MR 1.7

Due Diligence - Insurance

- ▶ Ensure the organization has Directors and Officers (D&O) insurance coverage
 - ▶ Amounts, limits, and actions it covers
- ▶ To make sure the directors and officers will not be exposed to liability in their personal capacity

Insurance Considerations

- ▶ Directors and Officers insurance protects the personal assets of directors
- ▶ Without D&O insurance the directors may be liable for all litigation related expenses
- ▶ D&O policies may not apply if the director is also providing legal services to the organization
- ▶ If legal services are provided, there may be a gap in D&O and professional liability insurance

D&O Insurance - continued

- ▶ Three types of D&O coverage
 - ▶ A-Side – all claims for direct payments to a director for defense costs and liability damages if directors cannot be indemnified
 - ▶ B-Side – reimburses the nonprofit corporation for indemnification to directors and officers
 - ▶ C-Side – To the entity for wrongful acts
- ▶ A-Side likely offers the most protection to individual directors and officers

John H. Warren III, *Liability for Directors of Nonprofit Corporations*, S.C. Law., March 2017.

Resources: Don't Re-Invent the Wheel

- ▶ Together SC (f/k/a S.C. Association of Nonprofits or "SCANPO") is and has always been an excellent resource for nonprofit organizations.
- ▶ www.togethersc.org



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The Lender's Entity Due Diligence

Hal E. Cobb

No Materials Available