Phoning it in: The rule that corporate directors cannot vote by proxy

By Brian O’Connell

A plain reading of the Illinois Business Corporation Act (“Act”) suggests that directors cannot vote by proxy at board of directors’ meetings. According to the Act, “[t]he act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors, unless the act of a greater number is required by the articles of incorporation or the by-laws.” 805 ILCS 5/8.15(c) (emphasis added).

Although Illinois has not had extensive case-law discussing this issue, this rule is shared by many states. “The general rule is that directors cannot vote by proxy, but must be physically present to act themselves.” In re Audubon Quartet, Inc., 275 B.R. 783, 787 (Bankr. W.D. Va. 2002). “[T]he reason a director cannot act by proxy is that “his [or her] associates are entitled to his [or her] judgment, experience and business ability, just as his [or her] associates cannot deprive him [or her] of his [or her] rights and powers as director.” Klaassen v. Allegro Dev. Corp., No. CA 8626-VCL, 2013 WL 5967028, at *5 (Del. Ch. Nov. 7, 2013) (citing Lippman v. Kehoe Stenograph Co., 11 Del. Ch. 80, 85, 95 A. 895 (1915)). “It is well settled that a director of a corporation cannot be present and vote at a directors’ meeting by proxy.” Dowdle v. Cent. Brick Co., 206 Ind. 242, 189 N.E. 145, 159 (1934). See also State ex rel. Schroeder v. Perkins, 90 Mo. App. 603, 609 (1901) (“Directors can not [sic] act by proxy”). The affairs of the corporation “require[ ] the physical presence of a director at directors’ meetings, and he [or she] cannot act by proxy.” Greenberg v. Harrison, 143 Conn. 519, 523, 124 A.2d 216, 218 (1956). Hence, directors must be “physically” present to vote.

While presence is required, under the Act communication via telephone constitutes presence:

Unless specifically prohibited by the articles of incorporation or by-laws, members of the board of directors or of any committee of the board of directors may participate in and act at any meeting of such board or committee through the use of a conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other. Participation in such meeting shall constitute attendance and presence in person at the meeting of the person or persons so participating.

805 ILCS 5/8.15(d). As the Act states, to be present, directors must be able to hear one another. Participation via videocall, skype, or telescreen constitutes presence as well, provided the directors can all have a live audio conversation. Delaware’s Corporate Code contains a similar provision in which directors are allowed to participate via “conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other.” Del. Code Ann. tit. 8, § 141(i) (West). Bylaws should be drafted to avoid any prohibition on audio presence if directors frequently travel and need to rely on telecommunications to be present.

The Illinois Act does not provide for voting by e-mail, instant messaging, or any other form of long distance communication where the directors cannot hear one another. California’s Corporations Code allows directors to vote by “electronic transmission,” if “[e]ach member participating in the meeting can communicate with all of the other members concurrently… [and] [e]ach member 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.” Cal. Corp. Code § 307 (West). Section 20 of the California Corporations Code defines “electronic transmission” to include instant messaging.

The rule that directors must be present is consistent with the rule that directors have a fiduciary duty to the corporation and their shareholders and that they are expected to serve as active participants in the decision-making process. “It is [the directors’] duty to administer the corporate affairs for the common benefit of all the stockholders and exercise their best care, skill and judgment in the management of the corporate business solely in the interest of the corporation.” Stamp v. Touche Ross & Co., 263 Ill. App. 3d 1010, 1015, 636 N.E.2d 616, 620 (1993)(emphasis original). “[D]irectors must exercise in the management of corporate affairs the degree of care which prudent [individuals], prompted by self-interest, would exercise in the management of their own affairs.” Id. Hence, directors must practice a degree of attention that requires physical presence or virtual physical presence. “Under this standard of care, directors have a duty to attend and to participate in regular board meetings … and the duty to inform themselves of the material facts necessary to exercise their judgment.” Id. Without requiring attendance of directors, it would be meaningless to have fiduciary duties for directors because duties could simply be delegated.
Further, the Act’s silence regarding the use of the word “proxy” in the section on acts by the board of directors does not appear to be by mistake. In another section, the Act allows shareholders the right to vote by proxy. 805 ILCS 5/7.40; 805 ILCS 5.7.50. Shares accounted for by proxy voting do count towards a quorum of shareholders. 805 ILCS 5/7.60. If proxy voting were assumed throughout the Act, these sections allowing shareholders to vote by proxy would be superfluous.

Unanimous Written Consent

If a physical meeting is not practical, the directors may act “without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the directors entitled to vote with respect to the subject matter thereof, or by all the members of such committee, as the case may be.” 805 ILCS 5/8.45 (emphasis added). The practical downside with written consents, as the Act provides, is that the vote must be unanimous.

Conclusion

Because the directors have fiduciary duties to execute the best interests of the company, their physical presence is required. Illinois defines physical presence to include telecommunications where all the directors can hear one another.

About the author: Brian O’Connell is an associate attorney with Kopecky Schumacher Bleakley Rosenburg PC, a Chicago law firm. Previously, Brian was a legal fellow at the chambers of Judge Marvin E. Aspen in the United States District Court for the Northern District of Illinois. Brian interned at the Chicago Board Options Exchange and for Susquehanna International Group, a quantitative trading firm. Brian earned his J.D. from Northwestern University School of Law in 2013 and graduated from Stanford University in 2009, where he majored in political science and minored in economics. During his senior year, he served as Editor-in-Chief of The Stanford Review.

1. The rule that Directors cannot vote by proxy is common but not universal. An attorney should consult the corporate laws in the applicable jurisdiction. In Louisiana, for instance, the articles of incorporation may specify that a director may send another director or shareholder to vote on his or her behalf. However, without such a provision in the articles of incorporation, a director may not act by proxy. LA. R.S. 12:1-812 (effective January 1, 2015, previously La. Rev. Stat. Ann. 12:81).