



CORPORATE RECORDS IN THE DIGITAL AGE

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In many settings, digital records are replacing paper. The boardroom and the corporate book are no different. This article addresses the most common uses of electronic records and transmission permitted under Nevada law, and it concludes with a discussion of potential problems with digital records.

Electronic Storage of Corporate Records

Every Nevada corporation must keep records. NRS 78.105 requires a corporation to keep a certified copy of its articles of incorporation, bylaws certified by an officer of the corporation and a stock ledger, duplicate stock ledger or a statement where the stock ledger is kept. These records are, of course, a bare minimum. Corporations should also keep minutes of stockholders' and directors' meetings (or written consents adopted in lieu of meetings), notices of meetings, proxies and other written records.

Each of these documents may be kept in electronic format. Chapter 75 of the Nevada Revised Statutes

broadly defines record as: information that is inscribed on any tangible medium, including, without limitation, any writing or written instrument, or an electronic record. NRS 75.060. Electronic records must generally be convertible to paper through an automated process used in conventional commercial practice. Any record kept by the corporation may be kept as an electronic record. NRS 78.0297. If the corporation does keep electronic records, it must convert the records into a clear and legible paper form within a reasonable time after request to inspect the records is made. Electronic record keeping is entirely optional, and no record is required to be kept in electronic form. NRS 78.0298.

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Electronic Notice

Nevada law requires notices to be given of stockholders' meetings. The notice must specify the time and place of the meeting and, if stockholders will be permitted to participate electronically, must describe the means of electronic communications by which stockholders may participate. Recently, the notice statute has been amended to permit notice of stockholders' meetings by electronic means. NRS 75.150(2) permits electronic transmission of the stockholders' meeting notice if either electronic notice is authorized by the corporation's articles or bylaws or if the recipient of the electronic notice has consented to electronic notice and the electronic transmission contains or is accompanied by information from which the recipient can determine the date of the transmission.

Like electronic records, electronic transmissions must generally be retrievable and reproducible in paper form by the recipient. Interestingly, however, if the sender and the recipient consent to an alternative method, the notice may be given in an alternative perceivable form, even though the notice cannot be directly reproduced in paper form. This more liberal permissive notice provision suggests that so long as the sender and recipient agree, notice by such means as voicemail or text message may be sufficient.

Electronic Signatures

Conducting corporate business inevitably requires stockholders or directors to execute written consents. One question that often arises is whether or not these consents can be executed and delivered to the corporation electronically – rather than printed, ink-signed and mailed back to the corporation's secretary. Fortunately for Nevada

corporations, Nevada has adopted the Uniform Electronic Signatures Act (UETA) at NRS chapter 719.

The UETA applies to parties who have agreed to conduct transactions electronically. The simplest way to establish the framework for the use of electronic signatures is to specifically permit their use in the bylaws. Parties who have agreed to conduct transactions electronically may use an electronic signature for any transaction for which an ink signature would be sufficient. NRS 719.240. The UETA defines electronic signature as: "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." NRS 719.100. This broad definition covers many possible electronic transactions. An electronic signature is attributable to a person if the sound, symbol or process utilized was "the act of the person as determined from the context of the signature and surrounding circumstances." NRS 719.260. Thus, a corporation permitting the execution of corporate documents by electronic signatures must make certain that it has sufficient protocols in place to ensure that signatures purportedly utilized by a specific individual can be properly attributed to that person.

Litigation practitioners will be aware of the requirements for electronically signing pleadings. Nothing within the broad definition of electronic signature found in chapter 719 would prevent a corporation from using a similar electronic signature format (i.e. "/s/ FIRST LAST"). However, the best approach for a corporation will be to authorize the use of electronic signatures in the bylaws and require an agreement between the director or stockholder and the corporation in which the director or stockholder selects the letters or symbols which will constitute his or her signature.

Electronic Meetings

In addition to electronic records storage and electronic notice, Nevada law now permits corporations to conduct their directors' and stockholders' meetings electronically. Prior to 2011, the rule was that a meeting could be valid with remote participation only if all participants could hear one another. Now there is no requirement that the meeting occur in real time, or that participants must hear each other. A meeting may be conducted by electronic means if:

1. The identity of the participant can be verified;
2. Participants can communicate and read or hear other participants; and
3. Communication between participants occurs in a substantially concurrent manner. See NRS 78.315 and NRS 78.320.

The legislative history from the 2011 changes to the meeting statutes makes clear that the changes were intended to permit meetings by

expanded means, like a webinar or chat room format, where participants can interact with one another from a keyboard. The concept that the meeting must be conducted in a “substantially concurrent” manner was added in 2011, and was intended to draw upon similar language in the Revised Model Business Corporations Act.

Potential Issues with Digital Records

Even though electronic storage, notice, meeting and signature provisions exist in Nevada law, lawyers will be wise to consider the potential drawbacks of each. A brief, and certainly not exhaustive, discussion of potential pitfalls of each provision follows below.

Record Storage Issues

Traditionally, corporate records have been kept in a “corporate book,” a binder that contains the corporation’s articles of incorporation, bylaws, minutes of stockholders’ and directors’ meetings, and a stock ledger. These corporate books follow a time-tested structure and format. Those familiar with corporate books can easily review them and identify deficiencies. Electronic record keeping, on the other hand, is new. While electronic data storage may allow for unique storage and cataloging techniques, those keeping electronic records would be wise to keep them in an organizational structure similar to the traditional book. Records should be organized by type and cataloged chronologically.

Electronic Notice Issues

Because electronic notice requires the consent of the recipient, the careful corporate record keeper will be sure to store consents to electronic notice for future reference. Although not required by statute, it would likely also be wise to point out to shareholders when seeking their consent to electronic notice, that the notice will be effective when delivered to the approved electronic protocol, and that if, for instance, the notice is by e-mail, that notice will be effective whether or not the recipient actually receives the notice in his or her inbox. It is quite possible, for instance, that electronic notice may be marked as spam or junk mail and filtered before the intended recipient ever sees it.

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Electronic Meeting Issues

Those considering conducting meetings by non-verbal electronic means are well advised to do so cautiously. The identity of participants must be verified, and corporate officers must consider how verification will be conducted. Further, consideration must be given to how, or whether, a record of the meeting will be kept. Traditionally, minutes are kept as a record

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of corporate meetings. These minutes generally summarize the result of corporate deliberations and do not serve as a transcript of the proceedings. For a variety of reasons, a transcript is often undesirable. However, the chat room model may lend itself to the creation of just such an undesirable record and potentially by a mere participant in the meeting who copies the transcript, rather than by the secretary of the meeting alone.

Electronic Signature Issues

The primary issue with electronic signatures is tying the signature to the purported signer. Whether the electronically-executed document is delivered via email, fax or some other electronic means, the other parties will want verification that the sender is who he or she purports to be. A common question is if a written board consent may be adopted by an exchange of emails. A circulated email consent certainly is legally possible, but not necessarily advisable without a clear protocol to insure that each email is signed,¹ that the board members each adopt the same resolution (i.e. that directors refrain from editorializing when granting their consent) and that once adopted, a record of the email consent is kept in the corporate records in the same way that a paper consent would be kept. Before permitting email consents, a board would be well advised to adopt a resolution setting the ground rules for addressing these issues.

1. Some potential electronic signature issues can be avoided by complying with the digital signature provisions set forth in NRS chapter 720 and its applicable regulations. If the process set forth in NRS chapter 720 is utilized, a licensed third party holding a public key utilizes a series of algorithms to verify the electronic signature utilized by the private key holder/signer. Adopting this process should help to avoid any potential attribution problems. ■



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