

RISKY BUSINESS: RECORDING BOARD MEETINGS

Sep 30, 2021

With the Delta variant surge, many companies have delayed plans for a return to in-person board and committee meetings. The go-to alternative, in many cases, will be a return to video conferences, which worked well in the early stages of the pandemic but also raised security concerns because of recording issues, among other things.

The temptation to record board meetings has increased, in part because of better and more user-friendly technology to both record the meetings and to adequately notify users that the meeting is being recorded, as well as easily available and cost-effective options for storing recordings. As a general rule, however, it is best not to record board meetings without considering three primary legal concerns: (1) discovery, privilege and confidentiality, (2) consent requirements and (3) privacy concerns.

Discovery, Privilege and Confidentiality

Recorded video conferences could be subject to discovery in the litigation context. Board discussions are not inherently privileged, and thus board members who become witnesses may, under some circumstances, be asked about what they discussed at a meeting. But a recording of the meeting is likely to provide a fuller account than participants' memories or written minutes, and so may yield more powerful evidence. Further, to the extent all or part of a meeting is subject to the attorney-client privilege or other confidentiality provision, the existence of a recording that can be distributed raises the risk of waiver through sharing of the document with parties outside the scope of the privilege.

Consent Requirements

In the early stages of COVID-19, some video conference services allowed a host to record calls without expressly obtaining consent from participants. While the majority of states require that only one party consent to recording of a call or meeting, certain states require that all parties consent to the recording.

It may be advisable to adopt a policy that requires meeting company hosts to obtain affirmative consent from all meeting participants each time a meeting is recorded. In addition, a host should

remind all meeting participants at the beginning of each meeting (and perhaps after breaks or at other points of the meeting, if long enough) that they are not permitted to independently record the meeting in any format, including the video conference platform, on a mobile device or otherwise. Policies relating to video conference protocols may further protect the company's confidential and privileged information from discovery and evidentiary uses in litigation.

Privacy Concerns

Companies that permit employees to record video conferences may subject themselves to liability for violations of data privacy laws, especially in situations where employment and personnel matters are discussed. This liability could arise in situations of unauthorized access to meeting records, stemming from a company's failure to enact strict security procedures to limit the chances that such recordings end up in third-party hands.

If companies elect to record video meetings, it is advisable to provide training to ensure employees understand the legal implications and also understand how to use the technology platform.

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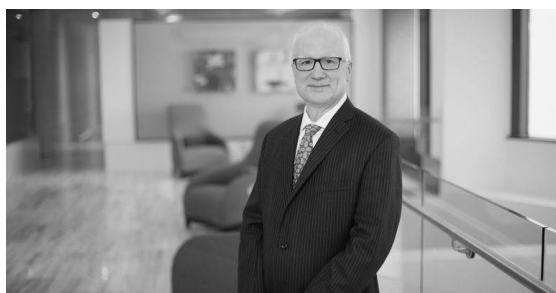


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