Building Better Bylaws - A Primer on What Should and Should Not Be Included in Your Organization’s Bylaws

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D.C. Bar Pro Bono Center

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- We match nonprofit organizations with pro bono legal counsel.
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Today’s Webinar

- What are bylaws?
- How are they adopted and who is responsible for them?
- What should be included in the bylaws?
- Do you have to follow what is written in your bylaws?
- When should you amend the bylaws and how?
Golden Rule

- Bylaws should say what you do, and you should do what they say.
- Otherwise, you call into question the legality of the organization’s actions because they are not properly authorized in accordance with the bylaws.
Second Golden Rule

Bylaws should be written in a way that minimizes conflict within the organization. The terms of the bylaws should not be ambiguous.
Nonprofit Governance

- Most nonprofit organizations are corporations that are governed by their articles of incorporation and bylaws.

- The articles of incorporation are like the constitution – they set forth broad principles for the operation of the nonprofit (i.e., the corporation shall not be operated for the benefit or private individuals and its affairs shall be managed by a board of directors.)

- The bylaws are like statutes – more specific rules that govern the general operations of the nonprofit and are consistent with the principles set forth in the articles of incorporation. (i.e., the Board shall consist of at least 3 and not more that 15 directors.)
Nonprofit Governance

- The bylaws are first adopted by the initial board of directors. They can be amended by subsequent boards.

- The best practice is to build in as much flexibility as possible. Facts change, and they should allow the board to adjust to such changes without having to amend the bylaws.

- The D.C. Code contains default provisions that apply in cases where the bylaws are silent. (i.e., can the Board hold a meeting via conference call? D.C. Code says yes, unless the bylaws say otherwise.)

- But unless you want to memorize the Nonprofit Code, good to include these provisions in your bylaws.
Members versus Non-members

- Nonprofit corporations can take one of two forms – membership versus non-membership.
- In a membership organization, the members are like stockholders in a for-profit corporation. They elect directors and sometimes officers and they approve major corporate transactions, such as corporate mergers.
- In a non-membership organization, these decisions are made by the Board.
- Depending on which form the organization takes, the provisions of the bylaws will vary significantly.
Membership Organizations

- If a nonprofit has members, the bylaws must contain a provision for determining membership. Individuals must consent to be a member, so it is not permissible to say all donors are members.
- The Board should establish membership criteria (i.e., anyone who pays the annual dues or volunteers who work a certain number of hours can apply to be members.) Once the criteria are set, the nonprofit then admits members in accordance with the criteria.
- The bylaws should also contain a provision for terminating or suspending members. How and why a member is terminated should be spelled out either by the Board or in the bylaws – avoid vague terms like “good cause.” If bylaws don’t authorize, the member cannot be suspended or terminated.
Membership Organizations

- Membership organizations must also provide for an annual membership meeting. At this meeting members receive a report of the affairs of the organization, elect directors, and if applicable, elect officers.

- The bylaws should provide a method for determining the “record date” – the cut-off date as of which the Board determines who is a member entitled to vote at the meeting. (i.e., everyone who is a member as of October 21 can vote at the Nov. 15 meeting.)

- The bylaws should also contain a date by which notice of the meeting must be given (i.e., at least 21 days before the meeting.)

- The bylaws should also provide for calling and holding special meetings.
Membership Organizations

- Among the provisions the bylaws should include:
  - What constitutes a quorum (50%, unless bylaws provide otherwise.)
  - Who presides over meeting.
  - Can the members vote by proxy (yes, unless bylaws say no.)
  - How many votes are needed to approve measures (plurality for election of directors, simple majority otherwise, unless the bylaws say differently.)
  - Whether members may vote by ballot instead of at a meeting (permitted unless the bylaws provide otherwise.)
Non-membership Organization

- In the case of a non-membership organization, the initial board of directors will be specified in the articles of incorporation.
- Thereafter the board members elect new directors.
- Directors must be elected by a majority of all the directors then serving.
Board of Directors

- Bylaws should set forth the number of directors, director qualifications and how directors are elected.
- There must be at least three directors, but the number is typically expressed as a range (i.e., three to nine directors.)
- Only individuals can serve as a director – for example, cannot have an XYZ Org. seat – although you can give the XYZ org the right to appoint such individual. The director does not have to be a resident of D.C.
- The bylaws should specify a director’s term of office (one year, unless bylaws provide otherwise.) It is better to have multi-year terms that are staggered, so a completely new Board is not elected each year.
Board of Directors

- The bylaws may contain term limits, which put a cap on the number of terms a director can serve. It is considered a best practice. But if you have term limits – follow them.

- With a non-membership organization, directors may remove a fellow director with or without cause, unless bylaws say otherwise.

- Thus, organizations have option of providing that a director can only be removed for cause, but this is not advisable. Otherwise, could get into a legal dispute about whether there was adequate "cause."

- Include a provision that if a director misses a particular number of meetings in a row or over the course of a year, the person is off the Board. This saves directors from having to remove the non-attending director.
Board of Directors

- In the case of a membership organization, directors elected by the members can be removed by the members with or without cause.

- Under DC law, the board can remove member-elected directors only if they violate certain duties or engage in certain conduct, such as if the director is convicted of a crime or found by a court to have failed to fill fiduciary duties.

- This should be specified in the bylaws, so there is no dispute among the directors.
Ex Officio Members of the Board

- *Ex officio* members of the board mean people who are members of the Board because of their position. Common *ex officio* members include immediate past president of the board or the CEO.

- *Ex officio* does not mean non-voting. In fact, *ex officio* members almost always have the right to vote. (It is not a good practice to have non-voting members of the board – they have the potential legal liability of Board members without actual authority.)

- When *ex officio* member votes, rules regarding conflicts of interest apply. For example, a CEO should not vote on compensation matters, the election of officers or directors, or to amend the bylaws.
Board Meetings

- The bylaws should provide for regular board meetings. The specific dates can be in the bylaws (i.e., third Monday of every month) but better to have the Board adopt a resolution scheduling the meetings at the beginning of each year.
- The nonprofit does not have to provide separate notice of a regularly scheduled board meeting.
- The board can call special meetings. The bylaws should specify who can call and how much notice is required. In the bylaws are silent, then the chair, the CEO or 20% of the Board can call a special meeting of the board on 2 days’ notice.
Board Meetings

- The Board may take action without an in-person meeting. The Board may meet by conference call, unless bylaws say otherwise.
- The Board can also act by unanimous written consent. (This means that all directors vote in the affirmative by signing a written resolution.)
- Board members cannot vote by proxy. Being a Board member is an individual responsibility that cannot be delegated to others.
- Board members cannot vote by ballot – only by unanimous written consent.
- Quorum is typically majority of the members, but cannot be less than one-third of the members.
Officers

- The bylaws must provide for the selection of officers. They are appointed by the Board or elected by members. If by the board, bylaws should require a majority of all directors to appoint.

- DC law does not specify the number and title of officers, except that a nonprofit must have a chief management officer and a chief financial officer. One person cannot hold both positions.

- Also someone must be responsible for maintaining the books and records of the organization. This responsibility can be given to one of the other officers.
Officers

- Except in the case of an all-volunteer organization, the most senior staff person would normally be the chief management officer.
- In smaller organizations, the chief financial officer would be the treasurer, but in larger organization this is typically a staff position.
Board Officers

- Typically, the officers of the board are chair, vice chair, treasurer and secretary. These positions are usually filled by directors.
- The chair presides over the meetings of the board, and vice chair does in the absence of the chair. The chair and vice chair are always directors.
- The secretary and treasurer have duties that are specific to the whole organization and not just the board, and these positions can be filled by staff persons. It is increasingly common to provide that the treasurer and secretary may, but need not be, directors.
- However, the most common practice is for these positions to be filled exclusively by board members. This helps with succession planning and with the executive committee, if the nonprofit has one.
Administrative Officers

- The bylaws should authorize board to appoint administrative officers.
- But there is a different between an office and a title. Someone can have a title – such as Vice President of Programs – and not be an officer.
- An officer has the authority to perform certain activities on behalf of the nonprofit, such as sign government filings, execute deeds and open bank accounts, that other employees do not have.
- People with certain responsibilities will always be considered an officer under local law and by the IRS. An E.D. will be an officer, unless it is clear that he or she does not have the actual authority of an E.D.
Committees

- Under the DC Code, a Board may establish two types of committees – board committees and advisory committees.

- Board committees have the authority to make decisions on behalf of the Board. For example, if the Board appoints a finance committee, it can make changes to the budget in the same way the Board can.

- Because board committees have this power, under DC law only directors can serve on a board committee. Also, the creation of the committee and the appointment of committee members must be approved by a majority of all directors serving on the Board.
Committees

- Typical Board committees include audit, finance and executive.
- The executive committee acts on behalf of the board when the board is not meeting. It usually consists of Board officers - the chair, vice chair, secretary and treasurer, plus the CEO if he or she is a member of the Board. May also include some at-large members.
- With the exception of the executive committee, the general practice is not to specify the exact committees in the bylaws. Rather, the bylaws give the board the authority to create committees as appropriate and appoint members.
Committees

- Board committees generally can do anything the board can, if authorized by the board, with a few exceptions. A board committee cannot:
  - Elect or replace directors;
  - Amend the bylaws;
  - Dispose of a substantial portion of the nonprofit’s assets; or
  - Recommend that a matter be put before the members for a vote.
- The bylaws can also authorize the Board to create advisory committees.
- These are committees that can make recommendations to the board, but not final decisions. Example: fundraising or PR committee
- Non-board members can serve on advisory committees.
Amending the Bylaws

- In the case of a non-membership organization, the board of directors has the authority to amend the bylaws.

- Typically, the bylaws require a supermajority to do so – such as a 2/3rds vote of all the directors.

- The idea is that it should be a little difficult to amend the bylaws.
Amending the Bylaws

- With a membership organization, the board may amend the bylaws, but will also need member approval if the amendment:
  - provides that some members have different rights from other members,
  - relates to the termination or suspension of membership rights,
  - requires cause or changes the definition of cause with respect to the removal of a director elected by the members,
  - levies dues or assessments on the members,
  - deletes the requirement of member consent to such amendments, or
  - amends the quorum requirements for board meetings if the members set the requirements, unless the bylaws allows the board may do so.
Other Provisions

- The bylaws can contain other provisions, such as provide for the indemnification of officers and directors.

- This permits the Board to reimburse a director if the director is sued as a result of his or her service on the Board.

- This is put in the bylaws to provide certainty to board members that they will be protected. This is a case where it may be better to be certain rather than flexible.

- Rules on conflict of interest are typically contained in a policy and not in the bylaws.
Other Resources

- www.lawhelp.org/dc/ced
- Sample Articles of Incorporation and Bylaws
- Summary of the DC Nonprofit Corporation Code
- Indemnification of Directors
Questions?

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