# Board Basics: Board Voting and Other Board Actions – How to Get It Right

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DC BAR Pro Bono Center

# D.C. Bar Pro Bono Center – About Us

- We match nonprofit organizations with pro bono legal counsel.
  - Pro bono attorneys help with many different types of legal matters including corporate governance, IRS compliance, employment law, and real estate matters.
- We host in-person legal clinics to address specific issues (e.g. governance policies, risk management, intellectual property)
- We sponsor trainings, webinars, and podcasts on important, real-world legal issues facing nonprofits.
- We provide written resources and archived training sessions on our website: www.lawhelp.org/dc/ced

# Today's webinar

- Background: Legal duties of directors
- How does voting work?
- Alternatives to voting at meetings – unanimous written consent
- Can the board delegate its decision making authority to a committee?
- Why create committees, who can serve, and what can committees do?

# What does it mean to be on a board?

- Directors are fiduciaries, and owe *fiduciary duties* to the nonprofit:
  - Duty of Care
  - Duty of Loyalty
  - Duty of Obedience
  - Duty to Inform

# Duty of Care

- Must act in good faith and as a reasonable, prudent person would act under similar circumstances. Be informed, use common sense, and be diligent.
- Act in the honest belief that your actions are in the organization's best interests.
- Review financial records.
- Attend Board meetings and committee meetings, participate, and vote.
  - It is important for the Board to engage in open debate.

* * * The Board should create minutes demonstrating reasoned decisions.

# Voting Terminology

- Quorum: Refers to the number or percentage of board members that need to be present to hold a Board meeting and take effective action
  - Unless articles or bylaws indicate otherwise, a majority of the Board's directors must be present in order to establish a quorum.
  - D.C. law allows organizations to set the quorum at less than 50% in its articles of incorporation or bylaws, but cannot be less than 1/3 of directors or less than 2 directors
  - If a quorum is not present, the Board can still meet and discuss issues, but cannot take any Board action with respect to any matters
    - Attendance matters: a Common bylaws provision that if a director has more than two or three unexcused absences in a year, they're automatically off the Board

# Voting Terminology

- Majority vote: Vote by more than 50% of the directors present at the meeting
  - Unless the nonprofit code, articles of incorporation, or bylaws provide for a greater vote, most votes can be taken by a majority of directors present
- Absolute majority vote: Vote by more than 50% of the directors on the Board, not just those present at the meeting. Common example – bylaws often require absolute majority for the election of directors and officers
  - For example, if there are 11 directors in total and 9 are present at a meeting, a quorum is present, but the Board can only elect an officer or director if 6 directors vote yes.
  - 5 votes would be sufficient for a majority vote at this meeting, but not an absolute majority

# Voting Terminology

- Ex officio board members: ex officio directors are members of the board by virtue of their office – e.g., Executive Director/CEO might automatically be a member of the board
  - Common misconception is that ex officio members are, by default, non-voting members – this is not the case. Directors have voting powers by default under the Nonprofit Code
  - Bylaws should explicitly state that ex-officio individuals are non-voting
  - Generally speaking, it's not recommended to have non-voting members of your board

# Do you have to be physically present to vote?

- Directors must be “present” at meetings to vote on matters before the Board
- Unless your bylaws provide otherwise, you can be considered “present” at a meeting, even if you are not physically at the meeting place, by participating electronically. (Some bylaws explicitly allow this – a good idea!)
- Electronic presence at the meeting requires that the director:
  - Hear all of the other directors at the same time
  - Is able to participate in the meeting (ask questions, provide input, and cast a vote)
- This could be achieved through:
  - Conference call
  - Video conference/Skype

# Can you send an alternate or proxy?

- Because directors must be “present” at meetings to vote, they ***cannot***:
  - Use proxies
  - Send an alternate to vote on their place
  - Send their vote in advance by email or paper ballot
- Board members may not delegate to anyone else their responsibility to attend meetings or vote on matters before the board, including other directors
- Only individuals can serve on a Board.  A nonprofit cannot have institutional seats. A director cannot send someone else from his/her organization to a meeting.

# Other Ways to take Board Action

- When an organization cannot take board action at a Board meeting, it can still act:
  - Using Unanimous Written Consent
  - Through board committees

# Acting by Unanimous Consent of the Directors

- Instead of holding a board meeting, a board can vote on an issue by unanimous written consent.
- The consent must:
  1. Be in writing;
  2. State with specificity the action being taken;
  3. Be signed by every director on the board
     - i.e. if there are 9 directors on the Board, the consent must be signed by all 9. It is not sufficient if 7 sign, and two do not respond;
  4. Clearly state that a vote is being taken by written consent, and that the vote must be unanimous to pass.

# Vote by Unanimous Consent of the Directors (cont.)

- Electronic signatures are generally acceptable in D.C., but the signature on a director's written consent must be identifiable to a specific individual and tied to a specific action.
  - *For example, the following would be acceptable :*

    [From: jqu@dcbar.org]
    I consent to the proposed action set forth in this email. [Resolution attached]
    Jason Z. Qu
    Managing Attorney
    D.C. Bar Pro Bono Center
    901 4th Street NW
    Washington, D.C. 20001
    jqu@dcbar.org

  - *This is not acceptable:*

    [From: jcool@gmail.com]
    Hi Susan, that's fine by me. – Jason

# Vote by Unanimous Consent of the Directors (cont.)

- A record of the unanimous consent must be kept, and should be stored with the minutes of the organization.
  - Include copies of all of the responses from the directors.
- If your organization has been voting outside of meetings but has not been requiring unanimous votes (e.g. ballot voting) – you can go back and ratify those decisions
- Bylaws don't have to explicitly allow actions by unanimous consent, but a good practice to write it in

# Actions by Board Committees

The DC Nonprofit Code provides for two types of committees:

- Board committees
  - A committee composed of only directors
  - The board may delegate some of its fiduciary duties to the committee
    - Examples: finance, audit, compliance, or compensation committees; executive committees
  - Board committees can vote and take action on issues within their subject area
- Advisory committees
  - Can be composed of non-directors
  - Do not have the authority to act on behalf of the Board
  - Can take non-board actions (e.g. actions that could otherwise be delegated to staff), and/or issue advisory opinions to the board
  - Examples: fundraising, special events, or public relations committees

# Why create committees?

- Board committees help:
  - Divide the Board's work among the directors into manageable amounts
  - Decrease the amount of issues that must come before the full Board
  - Directors with special expertise can concentrate on the subject matters they know best, and to which they can contribute the most
- Advisory committees can:
  - Help the Board and staff manage their work loads
  - Bring expertise to the Board
  - Encourage donor, member, and volunteer participation
  - Serve to recruit and "test drive" new Board members

# How do you create a Board Committee?

- Bylaws should empower the Board to create committees as needed
- The creation of each committee has to be approved by an absolute majority of the Board, not just by a majority of those present at the Board meeting
  - e.g., a Board of eleven directors requires the affirmative vote of six directors
- The resolution creating the committee should specify:
  - The duties and authority of the committee;
  - The number of directors to be appointed to the committee; and
  - Its composition (i.e., the finance committee resolution could provide that the treasurer is automatically a member of the finance committee)
- An absolute majority must also approve which directors are appointed to the committee

# What can Board Committees do?

- Board committees may take actions that would otherwise require Board approval
- They can exercise the same authority as the Board in their subject area
  - Ex: the finance committee will typically have the authority to approve changes to the budget, without requiring further Board action.
- For example, the Board could delegate duties to a Board committee including:
  - Selecting the independent auditors for the organization;
  - Approving the CEO's compensation;
  - Approving changes to the annual budget;
  - Appointing investment advisors.

# What can Board committees do?

- Some duties cannot be delegated to a Board committee per the Nonprofit Code, including the right to:
  - Authorize the distribution of the organization's assets;
  - Adopt, amend, or repeal the organization's articles of incorporation and bylaws;
  - Fill vacancies on the Board of Directors or any Board committees;
  - Dissolve the organization; and
  - In the case of a membership organization, propose any action to the members that requires the members' approval.

# Executive Committees

- An Executive Committee is a committee of the board which is given the authority to make any decision that the whole board could otherwise make, subject to the exceptions in the D.C. Nonprofit Code (see previous slide);
  - The bylaws/authorizing resolution can carve out additional exceptions, such as hiring or firing the CEO;
  - The bylaws/authorizing resolution may also limit the committee's authority to overturn a board decision;
  - The bylaws/authorizing resolution may also require the board to ratify certain decisions made by the executive committee.

# Executive Committees (cont.)

Executive Committees have traditionally served five main purposes:

1. A board may not meet often, and convening a special meeting of the full board may be logistically difficult – EC allows the board to make routine decisions between regular meetings;
2. The members of the executive committee are typically people in leadership positions/officers within the organization – they may be more informed and can make decisions more easily;
3. The executive committee can convene and make decisions more quickly in times of crises;
4. By handling routine matters, they can free up time for the board to handle more important/more strategic matters;
5. The executive committee serves as a sounding board for senior management in a way that a larger group of directors cannot.

# Executive Committees (cont.)

There are very mixed opinions about whether a nonprofit board should have an executive committee. Concerns raised by executive committees include:

- The executive committee may become cliquish or secretive, and exclude other directors from decision-making;
- The board may become disengaged and take a back seat to the executive committee, resulting in a board that fails to meet its fiduciary duties – and risk exposing all directors to liability for actions taken;
- By establishing an executive committee, the board may fail to address systemic problems like board attendance;
- Availability of teleconferencing and unanimous email consent make it easier to take actions using the full board.

# Advisory Committees

- The Board can create advisory committees – these committees do not have any of the Board's powers and responsibilities and serve only as advisors to the directors
  - The Board must subsequently approve any of the advisory committee's policy recommendations
- Advisory committees can also perform other non-board functions that would otherwise be handled by staff
- Non-directors, volunteers, or individuals outside of the organization, as well as directors, may serve on advisory committees
- Can help encourage the involvement of donors, members of the community, or experts that may not have the time to serve on the Board

# Relationship between Committees and the Full Board

- Directors must still oversee the work and actions of the committees
  - Board committees are required to take minutes of their meetings, and these should be distributed to the Board
- The directors may rely on the information or recommendation of a committee if it is reasonable to do so
  - ex: the Board should not rely on the financial information provided by the finance committee if the Board knows the committee never met or reviewed the organization's financial information
- The Board must step in and take action if a committee fails to act in a prudent and diligent manner

# Questions?

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Resources: www.lawhelp.org/dc/ced

"Serving on the Board of Directors" resource collection: https://www.lawhelp.org/dc/resource/serving-on-the-board-of-directors