

Nonprofit governance						

Acknowledgements

- This is one in a series of webinars dealing with the operation of small nonprofit organizations.
- It is being conducted in partnership with Weil Gotshal and Manges and the following organizations



Corporate Governance Basics

- ❑ Nonprofit corporations are legal entities authorized to carry out the charitable mission of the organization.
- ❑ Nonprofit corporations are required to have a Board of Directors (known as Boards of Trustees in some states) that is responsible for the overall management of the organization.
- ❑ Nonprofit corporations may also have voting members – who, like for-profit shareholders, have the right to elect Board members and vote on other major corporate transactions.

Articles of Incorporation

- Nonprofit's articles of incorporation (also known as the certificate of incorporation) contain basic governance provisions such as:
- Charitable purposes.
- Provision for the Board of Directors.
- Whether the organization will have members. (Except for membership orgs. in NY.)
- Provision authorizing the indemnification of officers and directors (optional).
- Provisions regarding the registered agent of the organization. (The person authorized to receive legal papers on behalf of the organization.)

Bylaws

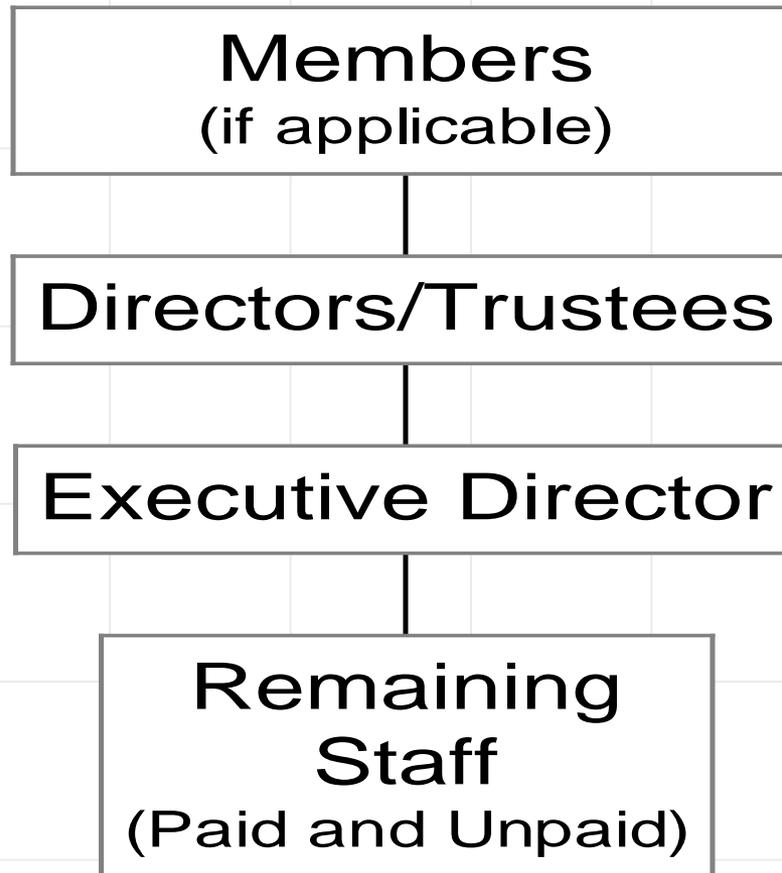
- ❑ Bylaws are the “internal operating manual” for the Board of Directors.
- ❑ State law gives organizations great flexibility in how they can construct their bylaws.
- ❑ Best to keep them streamlined and flexible.
- ❑ Make sure that the organization’s actual practices conform to the bylaws.
 - If they don’t, then you either need to change practices, or amend the bylaws.

Recommended Bylaw Provisions

□ Bylaws should contain provisions for:

- Voting rights of members, if applicable, and procedures for calling member meetings.
- Directors' election, number, qualifications, term lengths and limits, resignation and removal.
- Board Meetings/Action in lieu of meetings.
- Appointment of Committees.
- Appointment or election of Officers/Executive Director.
- Financial matters.
- Indemnification provisions.
- Procedure for amending.
- Bylaws should not contain programmatic information, or serve as the personnel policies for the organization's employees.

Organization Chart for Nonprofits



Members

☐ Membership vs. Non-Membership Organizations

- Membership organizations – have “legal” members who elect the Board (and may vote on other “big ticket” items)
- Non-membership organizations – directors elect themselves (a “self-perpetuating” Board)
 - These groups may have nominal members, but they have no legal right to participate in the running of the nonprofit so are not “members” for legal purposes (i.e., NPR, PBS, AARP)
- Organizations can choose whether or not to have legal members; this will be noted in the Articles of Incorporation and/or bylaws

Members

- ❑ For legal membership organizations, qualifications for membership are specified in Articles of Incorporation, bylaws or resolution of the Board.
 - Who is a member? Must develop clear criteria.
 - Members have right to:
 - ❑ Notice of membership meetings
 - ❑ Access to information about nonprofit
 - Quorum requirements – specified in article of incorporation or by-laws. If no quorum is specified must check local law.
 - Board must report to the membership annually on financial condition of the corporation.
 - Board must make sure all rules are being followed.

Board of Directors

□ The Board of Directors **is** accountable to:

- The public
- The Attorney General
- The Internal Revenue Service
- Members (if you have them)
- Donors/Clients/Beneficiaries
- Employees and volunteers

□ The Board:

- Sets the tone for the organization. Staff and volunteers take their cue from the ethical climate established by the Board.
- Should adhere to the highest ethical standards.
- Should ensure that the organization complies with all applicable local/state/federal laws.

The “buck” stops with the Board!

Board of Directors

- ❑ Number of Directors – governing documents and state law dictate the minimum **number** of Board members (usually three).
- ❑ Other qualifications for Board service (e.g. age? residency?) – the governing documents and state law dictate these qualifications.
- ❑ Term of office
 - CT, MD** – One year term, unless Board is staggered, in which case term cannot exceed five years (The maximum number of years equals the number of classes.)
 - DC** – One year, unless other term is specified. Maximum term is five years.
 - GA & VA** – One year unless other term is specified. No maximum.
 - NY** – Terms may be between one and five years. For staggered board, the number of years must equals the number of classes.
 - NJ** – Terms may be between one and six years. Election of some members must take place at least every two years.

Board of Directors

- Board must have regular elections as required by the governing documents. Cannot stay on the Board past term unless re-elected in accordance with governing documents.
- Term limits - are optional in all of these states.

Fiduciary Duties of Board Members

□ Duty of Care

- The Board must perform its responsibilities with the same care as an ordinarily prudent person would use in managing his/her own affairs.
- The Board must act in good faith, stay, be active, make sound and informed decisions, and exercise independent judgment.
- The Board may delegate the day-to-day management of the organization to employees, and certain decisions to Board committees.

Fiduciary Duties of Board Members

❑ Duty of Care

- In fulfilling the Duty of Care, the Board may rely on:
 - ❑ Information provided by employees.
 - ❑ Advice from others – attorneys, accountants, insurance professionals, and other experts acting in their field.
 - ❑ Information provided by Board committees.
 - ❑ But reliance must be in good faith.
- ❑ Ultimately, the Board of Directors bears the responsibility for determining what is best for the organization.

Fiduciary Duties of Board Members

❑ Duty of Loyalty

- The Board must act in the best interests of the organization, and not for personal benefit.
- A Director cannot take advantage of business opportunities that would be of interest to the organization without first offering it to the organization.
- Boards should adopt a written conflict of interest policy, and make sure it is followed.

Fiduciary Duties of Board Members

□ Duty of Obedience

- Directors must make sure that the organization acts in a manner that is consistent with its governing documents, mission and tax-exempt status.
- Must ensure that the organization complies with all federal and state laws as they apply to the organization.
- Must ensure that all grant requirements are being followed.

Directors' Responsibilities

- ❑ The Board is responsible for general administration of nonprofit:
 - Hold regular meetings.
 - Establish committees.
 - Elect officers/directors and supervise senior management.
 - Set policies for all aspects of the program and operations.
 - Ensure filings are made in a timely manner.
 - Provide adequate insurance.
 - **Caveat** - the Board shouldn't micromanage!

Directors' Responsibilities

- ❑ The “corporate checkup” – Board members should check:
 - Application for Tax Exemption and Certificate of Incorporation - do they accurately reflect the organization’s current activities?
 - For membership organizations: is there a current list of members? Are the members getting notice of meetings?
 - Bylaws – do they accurately reflect how the organization currently operates?

Directors' Responsibilities

□ Program Matters:

- Ensure organization's programs are consistent with its mission and regularly evaluate the program to ensure that it furthers the mission.

□ Strategic Planning:

- Ensure organization has a strategic plan for carrying out its mission.

□ Fundraising:

- Ensure organization has sufficient funds to carry out its mission.
- Participate in the fundraising activities of the organization.
- Ensure nonprofit engages in legal and ethical fundraising practices.

Directors' Responsibilities

□ Finance:

- Formulate/approve operating budget with assistance of Executive Director.
- Monitor income and expenses on a regular basis.
- Review/approve year-end financial report.
- Retain independent auditor and supervise the audit process.
- Establish financial management procedures - e.g., check writing, expenditure controls.
- Ensure required reports submitted to funding sources.
- Review Form 990 before it is filed with IRS.
- Ensure tax payments are made timely.

Directors' Responsibilities

☐ Personnel Matters:

- Determine what kind of people/staff the organization needs to accomplish its mission.
- Hire a qualified Executive Director; evaluate his/her performance periodically.
- Set executive director and other key employee's compensation in accordance with IRS guidelines.
- Develop/implement personnel policies, and make sure they are followed.
- If the organization has volunteers, consider developing/implementing policies for them, too.

Officers

- Which officers are required by state law? By the bylaws?
 - Typically President. Vice President(s), Secretary, Treasurer.
 - Check local law to see what is required. Ask:
 - What officer positions are required? CEO? Chief financial officer? Secretary?
 - Can a person serve in more than one officer position at the same time?
 - Can the same person serve as chair/president/CEO and CFO or secretary?
 - Does someone have to be designated as the person responsible for maintaining minutes?
- Term of office and responsibilities of officers are set out in bylaws.

Board of Directors

- ❑ Board meetings are an integral component of Board service
 - Quorum – the minimum number of members necessary to have a meeting; usually a majority of the Board, but some states (such as DC) allow a minimum of 1/3. (Not recommended.)
 - May hold meeting via conference call provided all directors can hear and participate simultaneously. Generally permitted unless Articles of Incorporation or bylaws say otherwise. MD & GA – Must be authorized in bylaws.
 - Board members may vote in writing, only if **all** Board members then serving vote, and all vote yes on the issue.
 - Email from a director qualifies as signature on a consent. Must sign full name – i.e., “John Doe” not “John” or “John D.” Bylaws should contain a provision to this effect.
 - **Proxy and Ballot Voting**
 - Not allowed for directors; does not allow for necessary discussion and deliberation.
 - Allowed for members (if you have voting members).

Board Committees

- Appointed by the Board. Each committee's authority is determined by the Board.
 - CT, DC & VA – committee must have at least 1 director (2 in VA). Creation and appointment of committees requires majority vote of all directors then in office. In DC & VA–Committee members must be directors.
 - GA & NJ– must have at least 1 trustee/Board member.
 - MD - only directors on committee; must be at least 1 director.
 - NY – must have 3 or more directors, appointed by a majority of all directors then in office.
- Advisory Committees do not have authority to bind organization, may have non-Board members.

Board Committees

- Most states do not allow committees to vote on “big ticket” items such as:
 - approving action that must also be approved by members.
 - filling vacancies on Board or any of its committees.
 - adopting, amending or repealing bylaws.
 - approving a disposition of all or substantially all of the organization’s assets.
 - approving a plan of merger.

Filing Requirements

- ❑ Each state may have **corporate filing requirements (with the Secretary of State/Department of State)**, for entities incorporated in that states.
 - CT, GA, MD, NJ, NY and VA – annual report
 - DC –corporate registration every two years
 - An out of state organization may have to register as a foreign corporation in other states where it does business
- ❑ If fail to file, corporate charter will be revoked by state.
- ❑ **Also** – states and local jurisdictions may require basic business license.