

CLM + PLAN A EBLAST SPRING 2023 / Boards & Bylaws Part II v1.1

March 21 -

April 4 -

April 18 -

May 2 -

STANDARD INTRO (repeats)

Join colleagues from management consultants [Plan A Advisors](#) and law firm [Carter Ledyard & Milburn](#) on a lively exploration of nonprofit boards and bylaws. This two-part series will help nonprofit executives and board members consider revisions and amendments to make your bylaws more congruent with the way your nonprofit actually operates, improve governance, and ensure compliance with current law.

This series is designed to offer principles of broad applicability, but laws vary by state, and what is best for your organization will depend on your unique circumstances. We encourage you to consult with an attorney who practices law in the state of your organization’s incorporation. This series is not legal advice.

NOTE: Some portions of this series may not apply or may apply differently to a membership organization, meaning one with both a board of directors and a separate class or classes of voting “members”. In a membership organization, the members have certain governance rights, such as the right to elect directors and officers or to amend the bylaws. If yours is a membership organization, feel free to contact us to discuss those differences.

Boards & Bylaws Part II: Officers – 5th in a series of 8

Hello officer. While laws differ from state to state, most require that a nonprofit board have one or more “officers” who are elected for a specified term. Many organizations’ bylaws provide for a chair and/or president (to run meetings), a secretary (to record or oversee the recording of minutes, the sending of meeting notices, and the keeping of corporate records), a treasurer (to keep or oversee financial records, make financial reports, and sign checks), and others as the board may determine are necessary. Most states allow the same person to hold more than one officer role, but, in general, the officer who chairs meetings should not be charged, as well, with taking minutes. Bylaws typically spell out the basic roles and responsibilities of each officer. In general, officers may be removed with or without cause unless the bylaws say otherwise.

Officers versus officers. Some nonprofit professionals have the word “officer” in their title, implying power they do not have. A Chief Executive Officer and a Chief Financial Officer – to give two examples – are not necessarily elected officers (sometimes called “board officers”) within the meaning of the bylaws and statute unless the bylaws say so. Ditto for a paid President. Each may have certain responsibilities that a board officer has (like the power to sign checks), but only if the board says so (or their employment contract says so). A paid staff person may also be an *ex-officio* board officer or member of the board, if the bylaws say so. But, unlike board officers (and all board members), a paid staff person

typically is not a fiduciary of the nonprofit within the meaning of the bylaws and applicable law (though this may vary by state, e.g., New York law was recently amended to make individuals – other than board members and board officers – who meet the definition of “key persons” fiduciaries).

Bylaws set the terms for and method of removal of board officers. By contrast, many executive level employees’ terms (duration) of employment and the conditions under which they can be terminated are laid out in detail in an employment contract. Complicating matters further, bylaws or an employment contract may provide that an executive level employee is an *ex-officio* board member and/or board officer. In these instances, organizations need to take extra care to ensure that the provisions of bylaws governing board officer removal and term duration apply to the officer role only and do not contradict the removal and term provisions of an employment contract; and, more generally, to ensure they understand whether an executive level employee (who may have the word “officer” in their title) is or is not a board officer within the meaning of the bylaws. Moreover, since the board sets or oversees executive compensation, and evaluates their performance, any paid CEO/Executive Director/President with an *ex officio* role on the board must recuse themselves from the deliberation and voting around their own employment terms, evaluation, and compensation.

Founder keepers. It is not uncommon in founder-led and some other nonprofits for the CEO to be an *ex-officio*, voting or non-voting member of the board. In general, as a nonprofit matures and its board grows, it’s healthier for the founder or other senior paid professional to be a non-voting (ex-officio) member of the board or not a board member at all, since the board needs to set or oversee their compensation and evaluate their performance. If the bylaws provide for a paid professional to be an *ex-officio* board officer or member of the board, their employment contract should indicate that their officer or board service is only for so long as they are employed.

Officer terms. In practice, it is best for a nonprofit to enjoy several consecutive years of leadership under a single board chair or president; it can take a year for a board officer to learn the role and ease into their responsibilities! In general, three-to-four consecutive years of service is a preferred practice. As a practical matter, however, organizations can get into trouble with math and term-tracking when their bylaws provide for different term lengths for board members and board officers, particularly when their bylaws also provide that only board members may serve as board officers. For that reason, organizations may wish to set officer terms as one year and then re-elect those officers annually to avoid the complication that comes when the term for a board member misaligns with their term as an officer. (Unless the bylaws provide otherwise, board officers can be re-elected for any number of consecutive terms.)

In two weeks:

Boards & Bylaws: About Committees – 6th in a series of 8

Committee functions. The real work of a high-functioning board often happens in committee. But which ones and how many? Bylaws typically describe how a board may establish committees and delegate responsibilities to them (as well as a handful of responsibilities that must remain with the board and may not be delegated to a committee of any kind), and may enumerate a core group of committees, such as Executive, Finance, Audit, and Governance & Nominating. Laws differ from state to state on the nature and composition of committees, but, in general, committees with the authority to bind the board may only include voting members of the board while other committees may include non-board members. In New York, for example, the law distinguishes between “Committees of the Board” (which

can bind the board and must consist solely of voting board members) and “Committees of the Corporation” (which do not have the authority to bind the board and may include non-board members). In some states, an Audit Committee must be comprised of people who are not directly involved with the organization’s finances. Good bylaws are written with an economy of required committees and the flexibility for a board to create and dissolve committees to meet current needs. Committees may also have a fully fleshed-out and board approved charter, even if bylaws offer some overview of their responsibility, so their jurisdiction and authority is clear.

How many is too many? High-functioning boards operate best with an economy of committees for several reasons. Each committee should be effectively staffed and supported to do its best work; having too many committees may overwhelm the organization’s staff. Each committee should be populated by members who have sufficient time and interest to devote, which means board members should not be required to serve on more than one or two committees (though some may be allowed to do so if they wish). The size of the board may necessarily limit the number of board committees possible.

Who gets to serve? In general, committees with the authority to bind the board (e.g., by hiring an auditor or authorizing litigation on behalf of the organization) may only include voting members of the board (though others may be nonvoting or advisory members) while other committees may include non-board members.

Committees that are open to non-board members can help bring a welcome diversity of thought, experience and expertise to discussion and debate. They can also serve to interest and test prospective members before they are elected to the board. Note that staff can serve on certain committees but not as voting members of any that make binding decisions for the board.

In two weeks:

TO BE EDITED NEXT

Boards & Bylaws Part II: Essential Committees – 7th in a series of 8

Executive Committee composition. The prototypical and most powerful of board committees, an Executive Committee is empowered to act in between board meetings and take action that is binding on the board’s behalf. With board officers typically at its core, some bylaws allow for inclusion of additional board members, often by vote of the board, and sometimes by appointment. In practice, a good Executive Committee has a diversity of thought that represents a microcosm of the board so it doesn’t become just an echo chamber or rubber stamp for a powerful and activist board chair. No matter what, only elected board members can serve.

Executive Committee limitations. Statutes in some states as well as nonprofit bylaws themselves may put limitations on an Executive Committee’s authority and require a full board vote for important actions. These actions may include filling board or committee vacancies; determining compensation of board members in nonprofits that allow for it; the election or removal of officers; approval of a merger or corporate dissolution; the sale, lease, or exchange of major assets; and amending bylaws. Today, electronic conferencing makes it possible to assemble a board quickly for most any emergency, so good bylaws should strictly limit what an Executive Committee can and can’t do.

Executive Committee leadership. A useful role for good Executive Committees is providing operational oversight for the board itself. Executive Committees can take a year-long view of the board’s slated work and be thoughtful about agendas and meeting content that can make it most productive. What are

the big issues that the board should address over the course of a year of meetings? What learning can it do? What opportunities might be created for building board camaraderie – or at least familiarity amongst members?

Finance and Audit Committees. Finance Committees and Audit Committees are required in some state statutes; some require a clear separation between the two. Second to the Executive Committee, a Finance Committee should be requisite on any fully-functioning nonprofit board with responsibilities that include helping to set and monitor an annual operating budget and regular reporting to the full board. Audit Committees typically have a more limited function, selecting an auditor and reviewing the audit on behalf of the board. Audit Committees typically overlap with the Finance Committee in membership (or are a subset) but function best when they include at least one independent board member who does not sit on the Finance Committee; and Audit should exclude the board's treasurer.

Governance & Nominating Committee. A good Governance & Nominating Committee is concerned with the overall function and performance of a board, its composition, and the performance of its individual members. A Governance & Nominating Committee should assess board performance regularly through survey or analysis. It should be strategic in recruiting and seating board members who bring needed skills, talents, connections, and diverse perspectives – and in nonprofits that provide a service, are representative of a broad cross-section of its constituents. An annual evaluation of the performance of individual board members helps ensure that the board is populated by active and contributive members. Among other functions, the Governance & Nominating Committee should ensure a thorough orientation and onboarding process for new members, and that a succession plan is in place for officer roles.

In two weeks:

Boards & Bylaws Part II: Add-ons & Amendments – 8th in a series of 8

Making amendments. Bylaws should contain the prescription for their own amendment. Typically, bylaws require that proposed amendments be circulated well in advance of a vote with notice describing the changes in detail. State statutes may require a majority vote for bylaws amendments, but it may be wiser to include a higher threshold, particularly in nonprofits with a small number of board members. (For example, an amendment might require passage by 2/3 of a majority of all board members.) A board's Governance & Nominating Committee should review bylaws periodically and work with counsel to consider changes to improve the way the board operates, or to comply with changes in state law. Sign onto the email distribution list of an attorney in this area of practice for their published advisories! (For Carter Ledyard Milburn's XXXXX [click here](#).)

Less is more. In general, the simpler the bylaws, the better. Bylaws should be less prescriptive in certain areas and instead reference policies and practices that the board may determine from time to time, making it easier for a board to function efficiently without the more onerous task of amending bylaws. For example, policies like Conflict of Interest or Gift Acceptance, the formation and dissolution of committees, the appointment of additional officers (such as an Assistant Treasurer or a second Vice Chair) are easier to accomplish outside the bylaws. These would carry a lower threshold for board approval, typically a simple majority when a quorum is present.

To the board...or not? Nonprofits often have policies that govern their work and that of their employees, like a museum's collections policies, a human service agency's volunteer policies, or an independent school's medical leave or travel reimbursement policies. None of these, by law, require board approval, but the board should be informed of policy changes because they may, in aggregate, have a material impact on the organization. (And of course, every nonprofit should have personnel policies contained in a Personnel Handbook.)

Starting from scratch. If your bylaws are antiquated, overlong and over-prescriptive, describe a board structure that does not exist in practice, or an organization that is materially different from the one that was founded originally, start from scratch and work with counsel to write them anew. There are so many examples of streamlined bylaws available online, and your attorney will have good examples from similar nonprofits to build on.

For the complete packet of seven eblasts on Boards & Bylaws, visit Plan A's Library at PlanAAdvisors.com or Carter Ledyard Milburn at xxxxxxx.

Plan A's next eblast series begins in September.

ELIMINATED

Boards & Bylaws Part II: Directors – 5th in a series of 9

What's in a name? Members of a board can be called "trustees" or "directors" according to the nomenclature used in the nonprofit's bylaws. There is no legal distinction between the two! Organizations that are composed of paid members (such as certain professional, fraternal and advocacy organizations), may grant certain powers to their general (non-board) membership that in most other organizations would be reserved for the board, such as electing board members, electing officers, and amending bylaws. Others, like museums, may have a membership program with no role in governance but serve to connect the organization to its supporters and provide a source of revenue for the nonprofit. Additionally, it is not uncommon for a family foundation to have a sole member who maintains fundamental control, or for a subsidiary nonprofit to have as its 'sole member' (and controlling body) the board of its parent organization.

Note that this series is targeted to nonprofits without a voting membership; laws in some states may give voting members certain rights that your attorney can help to determine.

SOMETHING ON CHAIR VS. PRESIDENT

In two weeks: