

Nonprofit Corporate Governance:

Bylaws & Articles of Incorporation



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Mission of Pro Bono Partnership of Atlanta

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

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In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

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Hierarchy of Sources of Corporate Governance for Non-Profits

- State Nonprofit Corporation Law
 - Also remember U.S. Internal Revenue Code if a 501(c)(3)
- Articles of Incorporation
- Bylaws
- Policies and Procedures

Governing Documents

- **Articles of Incorporation**

- Filed with the GA Secretary of State to create the corporation
- Details purpose of the corporation and contains other key governance provisions

- **Bylaws**

- Body of rules governing the corporation (“internal operating manual”)
- More detailed than the Articles of Incorporation

- **Policies and Procedures**

Benefits of Good Corporate Governance

- Quality of Board of Directors and Officers
 - Clearly defined roles/responsibilities
 - Increased assessment and oversight
- Compliance with applicable laws and regulations
- Reduced risk of scandal/negative publicity
 - Documented processes
 - Improved internal controls
 - Active management of risks
- Access to and cost of capital
 - Lenders like to see high quality governance – improves predictability and reliability of operating results, etc.

Articles of Incorporation

- Filed with GA Secretary of State to form the corporation
- Contain Key Governance Provisions, including:
 - **Charitable Purpose/Mission** Statement
 - Whether the Corporation will have **Members**
 - Provision for the **Board of Directors**
 - **Exculpatory Clause** – limits liability of directors

Articles of Incorporation: Mission Statement

- Needs to be **accurate, complete** and described in a **clear and specific** manner
 - Reflects the **mission/purpose** of the nonprofit
 - Must be **clear but adaptable**
 - Look at **what is actually written** (not interpretation)
- Crucial to **tax-exempt status**
 - Language in Articles should **convey the nonprofit's tax-exempt status** (similar to language in IRS Form 990)
- If mission of nonprofit changes, Articles should be amended to reflect new mission

Articles of Incorporation: Members

- Nonprofits *may* have members but are not required to (many do not)
 - With Members – Members elect and oversee the Board, can dissolve the Corporation and may vote on certain matters
 - Without Members – Board is self-governing and directors elect themselves (“self-perpetuating”)
- Member qualification, quorum and similar requirements are specified in Articles/Bylaws
- If Articles provide for Members but there no longer are or vice versa, Articles must be amended

Articles of Incorporation: Members (cont.)

- Rights and Responsibilities of Members
 - **NO** right to profits/distributions
 - In GA, members have very few legally required rights, but may be granted additional rights in Articles or Bylaws
 - Articles or Bylaws may differentiate between rights and obligations of certain members
 - Right to elect directors and vote on merger, dissolution and other matters specified in Articles or Bylaws
 - Annual and Special Meetings
 - Access to certain information about nonprofit (including financial condition)
 - May be assessed dues/assessments/fees

Articles of Incorporation: Exculpation

- Corporation may limit liability of directors for monetary damages for acts/omissions in their capacity as directors
 - **Cannot** limit director's liability for:
 - **Appropriation of business opportunity** of the corporation
 - **Unlawful distributions**
 - Transactions where director received **improper personal benefit**
 - Actions involving **intentional misconduct** or **knowing violations of law**
 - **Does not** limit liability for actions **prior to adoption**
- **Must** be included in Articles (not Bylaws)
- Check your Articles – if missing, amend them

Articles of Incorporation: Other Key Restrictions

- Best Practice to also include other key restrictions in Articles, such as:
 - Prohibition against **private inurement**
 - Restrictions on **political activity**

Bylaws

- “Rules of the Road” for how corporation operates
- Unlike Articles, Bylaws are **not** filed with GA Secretary of State
 - However, if a 501(c)(3) they are filed with tax authorities
- Although Bylaws are **not** required by GA law, Bylaws can **help a nonprofit function effectively**
 - Allow nonprofit to adopt procedures that are tailored to its needs
 - Can help resolve internal disputes
 - Often expected by donors and foundations

Bylaws: Key Provisions

- State law gives corporations **a lot of flexibility**
 - Should be **tailored** to nonprofit's mission, goals and activities and reflect how nonprofit **actually operates**
- **Mission Statement**
 - Needs to be clear, accurate and complete and **conform to Articles of Incorporation**
- Details on **Members** (if any), including:
 - Roles/responsibilities
 - Term Lengths
 - Procedures for resignation/removal

Bylaws: Key Provisions (cont.)

- Details on **Board of Directors**, including:
 - Size/Composition (include minimum and maximum)
 - Term Lengths, Limits, Vacancies and Election Mechanics
 - Roles/Responsibilities
 - Meeting Provisions (Regular and Special Meetings)
 - Frequency, Notice Requirements, Quorum, Voting and Required Approvals, Written Consents and Electronic Mediums
 - Committees (Standing and Ad Hoc)
 - Procedures for Resignation/Removal
 - Include a **No Compensation Clause** (Directors cannot receive compensation for service)

Bylaws: Key Provisions (cont.)

- Description of **Officer Roles and Titles**
 - Must have **Secretary** and **President/CEO/ED**
 - Distinguish between director vs. officer responsibilities
 - Customize to fit needs and activities of nonprofit
- Director and Officer **Indemnification**
 - Corporation may indemnify so long as director/officer:
 - Acted in **good faith**;
 - **Reasonably believed** conduct was either in the best interests of the corporation (actions in official capacity) or not opposed to best interests of the corporation (all other actions); and
 - **No reasonable cause to believe** it was unlawful (criminal actions)
 - May be mandatory or permissive

Bylaws: Common Pitfalls

- Don't make Bylaws **Too Specific** – They Need Flexibility
 - Should provide *governance framework*, not dictate day-to-day operations
 - Do not include information that will change frequently/need constant updating
 - Policies and procedures can elaborate on topics raised
- Practices must **Conform to Bylaws**
 - Otherwise, either change practices or amend Bylaws
 - Includes overly strict deadlines for notices, meetings, reports, etc.

Bylaws: Common Pitfalls (cont.)

- **Overly Complicated Procedures**
 - E.g., overly complex “due process” procedures for removal of members, directors or officers
- **Inconsistency** with Articles of Incorporation or Policies/Procedures
 - In a conflict with Articles, Articles control
 - In a conflict with policies/procedures/actions, Bylaws control

Take-Aways

Questions?

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