

California Nonprofit Members: Statutory or Honorary?

10.05.16 | Linda J. Rosenthal, JD



Founders of startup charities face key decisions well before submitting the documents for federal tax-exempt status. Should the proposed new organization incorporate – or operate as an association or a charitable trust? Should it be director-driven or member-driven?

State law applies to these choices. Although there are many similarities in the nonprofit laws of the various jurisdictions in the United States, they are not identical.

For the first of these two questions, the choice is fairly straightforward. Many, though not all, 501(c)(3) charities opt for the corporate format because it offers a level of protection against personal liability.

In California, an organization (other than a religious group) that will qualify for a 501(c)(3) federal tax exemption will incorporate under the state Nonprofit Public Benefit Corporation Law. Unlike a for-profit business, the entity does not have shareholders. The board of directors will govern the group.

The next decision – about offering memberships – can, and should be, a more carefully considered matter. A public benefit corporation in this state may, but is not required to, have “members.” There’s also an important distinction between “statutory” (voting) members and honorary members. No matter how they are described by the organization, state law governs which is which. And the significance cannot be overstated, especially if the group wants to avoid the sort of unexpected and catastrophic coup d’etat and ugly, protracted litigation described in [*Memberships: What Could Possibly Go Wrong for a 501\(c\)\(3\)?*](#)

Memberships: What are They?

“As to the concept of ‘members’, the term itself is the source of endless confusion for members of nonprofit organizations, board members, members of the public, and members of the legal profession....”

Essentially, the term is used in two ways. First, it describes what may be referred to as corporate members: those individuals who have some legal rights in the organization, usually the right to elect or approve a slate to the board of directors, and approve of major corporate changes. * * * The other type of member is simply one who in return for a membership fee or other donation receives a benefit of some kind, usually a newsletter, use of the organization’s facility, or preferred seating or admission. This type of member has no legal rights or legal standing in the organization.

The California Attorney General offers this summary:

- *What is the difference between honorary and statutory members? A. Unlike the honorary members, statutory members are given legal rights to protect their membership interests. They are allowed to inspect corporate records, attend meetings, and have other privileges outlined earlier in the chapter. Honorary members are usually contributing donors who do not have legal rights as members. Consult the bylaws of your organization to determine your status.*

In part because California permits the flexibility of statutory vs. honorary members, “public benefit corporations frequently do not have voting members....Not only is this easier to administer, the nonprofit does not run the risk of having outsiders try to hijack the organization.”

The “...most common governance structure under the California Nonprofit Public Benefit Corporations Law today” is the “board-elected board of directors.” How does it work?

[T]he sitting Board of Directors elects its successors as vacancies are created, whether by resignation, removal, death, or expiration of term. A non-member corporation can still have dues-paying members, but its bylaws should state clearly that they do not have the right to vote for directors or upon other major corporate decisions.

There are other ways to create opportunities for dues-paying – but nonvoting – members to participate in governance. They can “be asked to respond to internal opinion surveys or can be polled on nominations for the Board.” They and other people outside of the Board can be offered positions on an advisory council or board.

How to Create – or Negate – Voting Memberships

In California, the term “member” is explicitly defined as a person who, under a “specific provision” of the corporation’s articles of incorporation or bylaws, “has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a corporation or on a merger or on a dissolution.”

Although a public benefit corporation has the power to create classes of members and offer membership to individuals or corporate entities, there is no requirement at all that a public benefit corporation in this state have members at all. “Depending on the bylaws, members may be vested

with significant voting and other statutory rights, or they may simply be donors who enjoy honorary membership without voting or statutory rights.”

Here’s how these rules and definitions are set out in the California Nonprofit Public Benefit Law. Under California Corporations Code section 5310(a) –

A corporation may admit persons to membership, as provided in its articles or bylaws, or may provide in its articles or bylaws that it shall have no members. In the absence of any provision in its articles or bylaws providing for members, a corporation shall have no members. (bolding added)

The definitional statute is at California Corporations Code section 5056(a):

‘Member’ means any person who, pursuant to a specific provision of a corporation’s articles or bylaws, has the right to vote for the election of a director or directors or on a disposition of all or substantially all of the assets of a corporation or on a merger or on a dissolution ‘Member’ also means any person who is designated in the articles or bylaws as a member and, pursuant to a specific provision of a corporation’s articles or bylaws, has the right to vote on changes to the articles or bylaws.

There is a caveat in subsection (b): “The articles or bylaws may confer some or all of the rights of a member, set forth in this part and in Parts 2 through 5 of this division, upon any person or persons who do not have any of the voting rights referred to in subdivision (a).”

Section 5332(a) makes clear that “[...]a corporation may refer to persons associated with it as ‘members’ even though such persons are not members within the meaning of Section 5056...[that is, voting members].”

Memberships can be issued “for no consideration or for such consideration as is determined by the board”; that is, individuals who obtain either statutory or honorary memberships rights may not have to pay them. It’s entirely a matter of board policy and determination. Customarily, though, there are some dues payments required for membership or, in the case of honorary memberships, they may be issued in return for dues payments, ticket sales or other purchases, or services.

Additional Member Rights

Under California law, voting members have the right not only to elect (and remove) directors, but also are entitled to:

- Inspect certain corporate records;
- Receive notice of meetings;
- Sue the directors in derivative actions, or third parties on behalf of the corporation, under certain circumstances and subject to specified limitations;
- Other rights spelled out in the statutes and in the corporation’s bylaws.

These rights can be enforced in a lawsuit in civil court.

Conclusion

The California statute is remarkably flexible. It works well in many circumstances.

Organizations that make the careful, reasoned decision to adopt a “member-driven” form of corporate governance want and need a reliable and clear-cut roadmap; it’s provided by these laws.

Other organizations – community groups like arts and cultural institutions, for instance – want the option to invite the general public to support them by offering “membership” status and recognition – without risking an insurgency. The statute provides for this, too. Everyone is clear about these honorary, non-voting memberships. When, for example, a PBS viewer calls in during pledge week, orders that special three-volume, two-CD set of retirement-planning tips, and becomes a new member, that person isn’t buying anything other than financial peace-of-mind.

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