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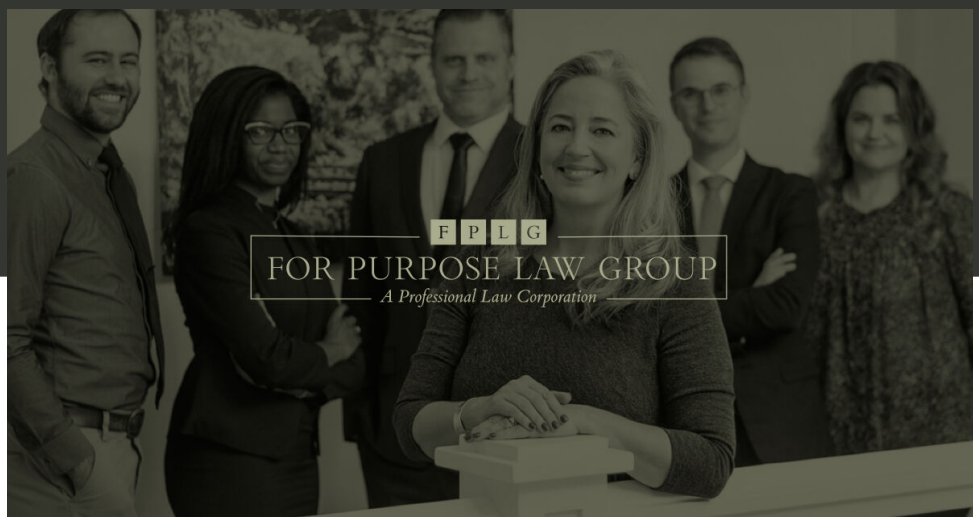
“Ex-Officio Director”: What Does That Mean?

06.03.15 | Linda J. Rosenthal, JD



In “Bylaws are Sometimes Like a Decades-Old Hairstyle,” we pointed out that many nonprofits continue to operate, year after year, under the same bylaws that were prepared and adopted when the organization was formed. In some cases, these crucial operating rules have remained the same for 25 years, or even 50 years or longer.

Why is that a problem? Organizational missions evolve, circumstances change, and groups grow in size from small startups to large community institutions.

And if the bylaws were from a “canned” source – form bylaws from an attorney’s dusty old file cabinet or the internet, or borrowed from another nonprofit – they probably weren’t workable or satisfactory in the first place. Bylaws are not a “one-size-fits-all” type of legal document. They should be custom-tailored to each organization’s particular needs, subject to certain mandatory legal provisions or rules.

Sometimes, too, the law changes and nonprofits must amend their bylaws to comply with these new restrictions or requirements.

In that earlier blog post, we gave a recent example illustrating this second point. There was an amendment to California Corporations Code section 5047, effective 2010, that amended the definition of “director” for California Public Benefit Corporations. This is how we explained that amendment:

> *For instance, nonprofits sometimes give honorary titles to key supporters or professionals — (titles like "honorary directors," "directors emeritus," "advisory directors") — or make them non-voting directors who have the same powers and duties as other directors other than the vote. These positions are often mentioned in the bylaws. The new law clarifies that this is not allowed.*

So Far, So Good. Why Are We Discussing This Again?

Here's why: Legislators realized that, a few years after this amendment, nonprofits and their counsel were still confused, still misapplying the law, and failing to amend their governing documents correctly – or at all.

So, they went back to work and played around with the 2010 language a bit – hopefully, to put the confusion to rest.

So we're back on this topic: explaining these amendments *and* underscoring the original point that the law changes periodically in a way that may make your bylaws slip out of compliance with current law.

The Definition of Director: Now

This may appear at first blush to be incredibly boring nit-picking about subtleties of legislative semantics. For those of you who want to know how these changes occurred, go here for the language as it appeared in the 2010 version, highlighted by additions and deletions in the 2014 version.

Here's the bottom line: A "director" isn't really a director under the California Corporations Code unless that person has the right to vote.

In the legislative history, there's an explanation that the 2010 and the 2014 versions aren't changes to the original definition of "director," but are clarifications of the original intent:

Section 5047 [as amended effective 2010] does not specify with sufficient clarity that, as was the intent of the statute, (i) a person is only a director as defined in the statute if that person has the right to vote as a member of the governing body, and (ii) a person who is a director by virtue of occupying a specific position within or outside the corporation (an ex officio director) can only be a director if that person has the right to vote as a member of the governing body.

...From a practical standpoint, a reference to an ex officio board position means that person has the right to vote, unless specified to the contrary . . [and] that someone without voting rights on the board is not a director. Such person could be an invitee to board meetings, but would not be bound by all of a director's fiduciary duties. Previously the language turned on a person's ability to 'act' as a director....

So, lifting a bit from the current statute's text:

If the articles or bylaws designate that a natural person is a director or a member of the governing body of the corporation by reason of occupying a specified position within or outside the corporation, without limiting that person's right to vote as a member of the governing body, that person shall be a director for all purposes and shall have the same rights and obligations, including voting rights, as the other directors.

Conclusion

For many nonprofits, it may be desirable, or even required (for instance, according to the terms of certain grants) to have "ex-officio" directors – that is, directors who occupy the board seat by virtue of holding a particular office or position in the nonprofit or with another corporation. That's permitted – but only to the extent permitted under section 5047 and if the governing documents are written properly.

In other cases, an honorary title of director really means that the person does not have voting or other rights and responsibilities of true directors, and are more correctly viewed as advisors. The title (and the governing documents) should reflect this honorary status, and be changed to omit the word "director."