

Getting Together to Get the Work Done

*Creating effective group-working
relationships in today's world.*



A Boredwork into BoardWorks Series

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Understanding legal structures for your group can streamline your work.

Getting Together to Get the Work Done

A good idea, an important mission or a noble cause and not enough time or resources to make our dream reach its potential cause most of us to give up or get help. When we find that there is more work to be done than any one person can do, we usually ask someone to help us. Then as the work grows or we find new work to do, we ask more people to help. We start to organize our group to get the work done. People organize in many ways to accomplish the work that they consider important. When there is work to be done, we form committees, taskforces, ad hoc groups and advisory boards. Often we first form a committee, meet, and share the responsibility. And, at some point, the complications of multiple tasks, commitments of time and amounts of money reach a critical level. Then the group decides that a more formal and permanent structure is desirable. The group will consider whether to affiliate with another incorporated entity or form a new separate legal entity, a corporation. Incorporation is advisable when the complexity of the work has become such that using an ad hoc group or advisory board affiliated with another corporate body is no longer workable or the work has diverged from the original entity's mission.

Groups can decide whether a formal or informal structure will work best by understanding the legal differences. Corporate boards, advisory boards and committees differ in both scope and legal responsibilities. The unincorporated committee or advisory group is without legal capacity to enter into contracts or own property. Its responsibilities are merely to advise or plan and carry out activities or programs. It may give advice

and guidance but does not have legal existence or governance authority. The only exception to this statement is a committee, a commission, or a board created by statute. An entity created by statute has whatever power is granted by the statute creating that body.



Are these people a committee, a group, an ad hoc task force, an advisory board, or corporate board? How do you know?

In clear contrast to an unincorporated board, a corporate board, as a board, may hold or own property, may hire staff and generally act with the same legal standing as a person may act. That statement simply means that any thing a person can do with legal standing, a corporate board may do unless there is a statutory prohibition. The board of directors or trustees as provided by the articles of incorporation has the complete governing authority for the corporation. The corporate board acts with all powers provided by the state's corporation laws. Each board member has the individual requirement to act in a fiduciary role for the corporation as well as to act as a member of a corporate body.

The decision to incorporate should be made with consideration of the group's ability and willingness to oversee all business responsibilities. Any incorporated entity, whether for profit or not for profit must comply with certain legal requirements. While those

requirements may be simple, they require timely and competent attention. The decision as to what organizational structure is best for the work should be premised on a basic understanding of the legal requirements of each. Let's look at how one community might decide to organize to meet the lifelong learning needs of the people who live there.

Joe noticed that he is hearing a language in addition to English in his store. He thought about the increasing number of people who are speaking Spanish and realized that they are good customers. At his service club meeting he asked about hiring a clerk who speaks Spanish. The insurance broker commented that she would like to take Spanish. But no one seemed to know how to organize a class for business people to learn basic Spanish. Finally, the truck repair shop owner suggested talking to the Extension office because his wife took a class on money management organized by Extension. And so the Extension office was asked to join the effort. While doing a needs assessment, the Extension educator identified a number of learning needs in the community. The educator was also pleased to find a number of financial resources to create a community learning network. So as the community pulled together to create a Utopia County Learning Network, the group had to think through how to organize to accomplish the tasks needed for a vibrant learning network. They decided to make sure they understood the differences between being incorporated and not being incorporated. They read the following discussion:

I. Legal Overview

Each state has its own set of statutes providing for the creation of corporations and governing corporate existence. A corporation is created when the requirements for incorporation have been met for the state in which the incorporation will take place. An Indiana corporation is supervised by the Secretary of State and can only exist while in compliance with the statutes and regulations of Indiana Corporation law. While states other than Indiana may have similar statutes, they also have their unique provisions. The model codes are only recommended models and have not been uniformly enacted by the fifty states. The federal provisions that relate to corporations are, for the most part, tax, commercial trade and trust statutes and regulations, or concern the rights of individuals relating to discriminatory issues. The relationship between the state requirements and the federal is complicated for special industries and certain activities. For example, the not for profit corporation that is a foundation has different tax rules than other corporations. A not for profit corporation's status as a 501-C-3 is determined by the U.S. Internal Revenue Service. If a corporation is formed in Indiana as a non-profit group, the corporate board has to authorize application for a 501-C-3 status and then must remain in regulatory compliance to maintain that status.

States and the federal government exclude corporations from certain benefits and rights by various statutes. The question of how any of those apply to a specific corporation or corporate activity is beyond the scope of this article and requires the advice of a competent lawyer.



A. Questions that can guide the decision making process for determining the structure of an organization.

1. What is the "work" of the organization?
2. Is the organization needed? Can another organization do this work as well or better?
3. Is there another organization that can partner with the new group to provide the business and financial management thus freeing the group to focus on program and policy?
4. Has the group stated their specific purposes or goals for the group's existence?
5. What are the lengths of time for the existence of those purposes?
 - a. Long Term or Short term
 - b. Are they short term but reoccurring on a predictable basis?
 - c. Will the reoccurrences be within a period of three years?
6. How complex are the activities to be performed under the direction of or by this group?
 - a. Are the activities single events or multiple activities?
 - b. Are the activities parts of various programs that are of an ongoing nature?
 - c. Are there liability and safety issues?
7. Does the group need to handle money?
 - a. Own property?
 - b. Hire employees?
 - c. Raise funds from other corporations?
 - d. Purchase insurance?
 - e. Receive grants from foundations or other gifts?

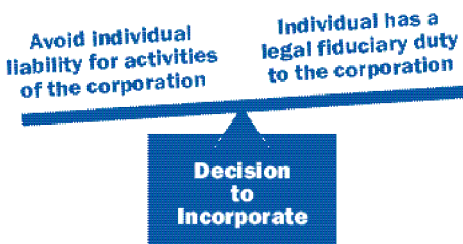
8. Who are the core supporters? Who will provide the money to start?

9. Do the volunteers have adequate interest, energy, and knowledge to keep the corporation in good standing?
 - a. Who will do the business planning and legal work of incorporation?
 - b. Who knows the requirements of reporting and accounting to maintain corporate status?
 - c. Who will do the paperwork maintenance of the corporate structure?

One way to think of a corporation as a legal entity is to imagine that it is a person just like you are with the same rights and the ability to act. *The two differences are:* (1) a corporation lacks a physical body, (2) a number of people do the thinking and acting necessary to conduct corporate business. A corporation is a legislative creation that allows the right to a group of people to act with a single or, in another word, corporate, identity. The corporation may own property, hire staff, accept donations, incur debts, and have bank accounts that are not the liability of the individual board members except within their capacity as a board member. One reason often given to promote the incorporation of a group is to reduce the exposure of individuals for the group activities. Desire to avoid legal liability is not a good reason to incorporate. Incorporation is not going to prevent many, if any, lawsuits. Lawsuits are filed for reasons other than the defendant's legal status. Additionally, in considering reasons to incorporate, an equally significant factor in potential litigation is the fiduciary duty of a board member to act in the best interests of the corporation. A board member who carelessly ignores the responsibility to

conduct the business of the nonprofit in a competent and ethical manner incurs liability. That liability is as great as if the organization were not incorporated. A board member must avoid conflicts of interest and give the business of the board adequate attention. For a board member to properly meet the responsibilities of the fiduciary duty will take a commitment of time and energy. Board service may include the responsibility of dealing with unpleasant issues and disputes. Incorporation does not protect a board member from the consequences of the member's personal dishonesty or negligence that results in damage to another. A decision to form a corporation requires careful balancing of the interests involved.

Passion to a cause and determination are important but are not sufficient justification to form a new corporation.



Understanding your liability versus responsibilities can be critical.

B. Tax Numbers

If the group needs a tax identification number, they may with permission, use a number belonging to an affiliated or parent entity. The problems with the use of tax numbers by different groups are several. The most important consideration is that the entity, individual or corporate that obtained the number

has the legal responsibility for all use and taxes due under the number. Any misuse will fall against the entity holding the number. If a corporation obtains a tax identification number, then the board could in the event of misuse or fraud become individually liable for the payment of taxes and penalties. This is because individual board members have the fiscal responsibility to pay taxes owed and to file such returns as the law requires.

C. Not-for-Profit Status

The legal status of a corporation in Indiana is determined at the time of filing the required forms and information with the Secretary of State. Indiana allows the incorporation of two basic classes of corporate entities, for profit and not for profit. At the timing of filing of the Articles of Incorporation the group declares whether for profit or not for profit status is desired. Members of boards of older Indiana corporations may want to seek the advice of an attorney about restructuring of the corporation if they were incorporated prior to 1935.

D. Articles of Incorporation

A common question is what should be contained in the Articles of Incorporation. The answer is not much more than the Indiana statutes require. The official forms for filing to incorporate can be obtained from the office of the Indiana Secretary of State. If completed properly they meet the requirements of Indiana law. Indiana provides a statutory process to amend the articles of incorporation, but the amendment of the articles of incorporation can be more cumbersome than amending the By-laws. With less pomp and documentation and with no

filing fees, the By-laws can be amended so that they better meet the organizations' needs as needs, times, and statutes change. The By-laws are the actual governance document of the corporation. They are the rules for operation and governance. They set out the officers and board structure.

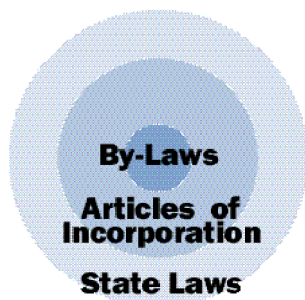
A corporation's By-laws are the third leg of the three-legged milking stool that supports the seat of power of the corporation. The other two legs are the statutes and the Articles of Incorporation. Another way to see this is with three concentric circles; state law as the outermost, the Articles of Incorporation next and the By-Laws as the innermost and smallest circle providing a clear statement of the rights and responsibilities of the members and governors of the organization. In particular, the By-Laws provide the actual and most detailed provisions for the operation of the business of the organization. The By-Laws are the internal document that will contain the basic rules on how the corporation is to be run. Every profit or not for profit corporation must have a set of By-Laws. Many of the provisions cover relatively standard procedural questions, relating to quorums, voting, officers, and boards. Other provisions may describe the membership and are specifically tailored to the type of organization for which the

By-Laws are intended. Amendments to the By-Laws are often made by vote of the board of directors, unless the Articles of Incorporation or the By-Laws themselves have transferred that authority to the membership. The By-Laws can contain very specific or very general provisions for the internal management of the corporation. **Typically, the By-Laws cover 5 general areas:**

- The rights and responsibilities of the membership
- The rights and responsibilities of the directors
- The rights and responsibilities of the officers
- Financial matters
- Methods for amending the By-Laws

Each state has different requirements for the degree of detail contained in the Articles of Incorporation and By-Laws. The following is a checklist of necessary provisions for use in preparing your By-Laws. These are recommended provisions.

- Authority to designate the location of principal office of corporation
- Authority to designate the registered office and agent of corporation
- Date, time, and place of annual members meeting
- Procedures for special member meetings
- Notice and waivers for member meetings
- Voting eligibility requirements for members and membership classes, if any



- ✓ Quorum and votes required for actions by members
- ✓ Powers and duties of the directors in the conduct of the corporate business
- ✓ Number of directors
- ✓ Term of office for directors and eligibility requirements
- ✓ Date, time and, place of directors meeting
- ✓ Procedures for special directors meetings
- ✓ Notice and waivers for directors meetings
- ✓ Quorum and votes required for actions for directors
- ✓ Removing and filling vacancies of directors
- ✓ Eligibility to serve as an officer
- ✓ The number of officers and length of the term of office
- ✓ Removing and filling vacancies of officers
- ✓ Duties of the officers of the corporation
- ✓ By-Law amendment procedures and...

Rules for the conduct of meetings can be a part of the By-Laws or the group can defer to *Roberts's Rules of Order*.

II. Corporate governance culture and a way of working together

As people come together to work, each group creates its own way of doing things and, in time, the group has grown its own culture. For profit groups often appear to be more aware of the corporate culture than non-profit groups. The various studies of explanations for the "Motorola Way" or other companies' corporate culture make interesting and helpful reading for those who want to maximize nonprofit performance. Some lessons

from the profit making world are transferable but a non profit board member is well advised to consider the group's purpose and values before assuming that what is good for business is good for a community based organization.

But before the group begins to create their corporate culture, members of the group should take the time to understand governance and how the governance style will influence the nuances of the corporate culture. An excellent discussion is reprinted here.

What is the role of governance?

In the aftermath of every "nonprofit mismanagement" news story is the question: Why didn't the Board do something? Yet the boards of the United Way of America, Covenant House and others did not do any less than most nonprofit boards. The reality is that most nonprofit boards are ineffective in their governing function. Only when gross mismanagement occurs does a failure at governance come to the fore.

The overlooked reason is that the prevailing "team" model for the relationship between boards of directors and their staff is only half of the story. "Team" members are understood to bring different skills and play different roles to support and build the organization, working toward common goals. But while board members should and do act as supporters and builders, they have another role to play as questioners and monitors of the organization. As part of the team, the board stands with their well-intentioned organization as it operates in a demanding world. In contrast, in their governing role, the board must stand



outside the organization and hold it accountable to the public interest.

Both these roles--supporting and governing--are critical to effective work by nonprofit organizations. Rather than try to eliminate the contradictions and tensions of their governance role, boards must find techniques for strengthening their independence and creatively using this tension for the good of the organization and the purpose it was created to serve².

What is governance?

The two roles of support and governance encompass different tasks. In the role of supporters board members strive to ensure the success of the organization. Boards raise money, bring contacts and clout to the organization, provide special skills such as in law or accounting, and act as ambassadors to the community. The many books, articles and seminars on the subject testify to the emphasis on helping boards help--on strengthening organizations by means of board assistance.

The governance role, on the other hand, has as its goal protection of the public interest. Governance responsibilities for boards include selecting the top executive (the Chief Executive Officer) and assessing his or her performance, reviewing and authorizing plans and commitments, ensuring compliance with legal and contract requirements, and evaluating the organization's work.

Both of these board roles are distinguished from that of management, the province of the Chief Executive Officer³.

Two excellent resources for more discussion and opportunities to learn about board governance are John Carver, University of Georgia and the staff at the Robert K. Greenleaf Center for Servant Leadership. Robert K. Greenleaf spent a great deal of time observing and thinking about how people organize to get their work done. Now, more than ever, the key to accomplishing important community work is deliberate and constant attention to structure and process. To be or not to be a corporation is a question that deserves a broad based consideration.

III. Individual considerations in selection of the initial and subsequent board members

Once the decision has been reached to incorporate the next critical step is the selection of the initial board members. The initial organizers may or may not be the best choice of board members. Without attention to the selection of a strong board, the corporate entity may never reach its potential for service.

There are two terrible reasons for serving on a non-profit board that also are the most common reasons stated. One, "the somebody has to do it reason" is an invitation to people who lack the skills and knowledge to serve as the business arm of the organization. Asking people to serve in ways that frustrate them and do not best utilize their talents is a mistake. Putting a great volunteer on the board may lose a great volunteer and some good board members as well. The second reason is "the honor" of the board position. Serving as a board member is not about prestige, but about duty and

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responsibility. It is not a token position for the member to show up and rubberstamp the executive director. But neither does a good board member micro manage. Indeed, the times are changing and board membership is hard work. A board member has two duties that are most often described as a duty of care and a duty of loyalty. Some commentators have added the third duty of obedience to the mission. This is an emerging discussion about keeping the activities of an organization true to its mission. The first two have been imposed by law as well as community ethics. The question of whether the organizations' activities further the mission has not been widely explored in the nonprofit community organizations. In Indiana, as many board members have learned in the last few years, you have to understand how the law governs the corporate board and its responsibilities.

An invitation to become a board member usually feels like a compliment. Somebody wants to work with you. Do you want to work with them?

You will save yourself time and grief by asking a few questions about the board before you agree to serve.

You and the Organization

- What is the "the work" and do you believe in it?
- Do the current programs accomplish the work for which the corporation exists?
- Have you had an opportunity to observe the organization's program activities firsthand?
- Does the organization have a strategic plan?

- Does the board regularly review the plan?
- Do the Board and the management value and perform regular evaluation of the organization?

Money and the Organization

- Is the organization operating within fiscally sound principles?
- Does the board review and approve the annual budget?
- What level of attention does the board give the financial situation of the organization?

Who is served by the Organization?

- Are those served well served?
- Are they satisfied with the organization?

Board Questions

- What is the board structure?
- How does the board function?
- Are there written descriptions of the responsibilities of the board, the members, and the committees?
- How are assignments made?
- Is there a policy and procedure document to handle conflicts of interest and to prevent such conflicts from being perpetuated? When was it written and is it up to date?

General Questions

- Do you know the other board members?
- Do you know the executive director?
- Are biosketches available for the key staff and directors?

What about you?

- Should you be a board member or a volunteer? Do you understand the difference in the roles?
- Do you know and are able to meet the time commitments of board service?
- Will there be board development?
- Are you comfortable with the organization's approach to openness and inclusion?
- Can you make decisions in trust for the organization regardless of your own financial, political, and personal interests?
- Can you build a mutually respectful but independent relationship with the other board members?

Have you reviewed the following documents?

- The most recent annual report
- The most recent audited financial statement
- The strategic plan and a long-range program and financial plan
- A board organization chart
- A staff organization chart
- The conflicts of interest policy and procedure to disclose and handle disclosure documents
- The affiliation disclosure list of the board members
- The directors and officers liability coverage

What are the fundraising practices?

- What is the expectation for a board member's participation in fund raising?
- Are you comfortable with the philosophy and practice of the board fundraising efforts?
- Can you contribute the support in fundraising efforts expected of you?



As the group considers potential board members, these questions can help match talents to positions. The reverse is true for the potential members to consider where they want to spend their time, where their interests and talents lie. When individuals work to their strength, the whole organization will be stronger.

These sections have presented the basic considerations for a group thinking about incorporation. The focus has been on three areas: whether to incorporate, the critical elements of the legal process of incorporating, and who should be a board member. The decisional process highlighted here is important and should be undertaken with deliberation. Next we will follow the Utopia County Learning Network as they explore possible affiliations and how to manage their work if they do not incorporate. That learning process will be described in *Living the Mission without a Corporation of Our Own*. Later, we will review the management of an Indiana not for profit corporation with a closer look at the business and reporting requirements that are the result of federal and state laws.

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