

## ED Bylaws Review and Proposed Amendments

Prepared by Christopher Hassell, February 8, 2018, with ongoing updates

**Background on non-profit basics:** <https://www.nolo.com/legal-encyclopedia/nonprofit-formation-documents-articles-incorporation-bylaws-minutes-30311.html>

Germane sections of NMSA 1978 statute (all emphasis and language within [square brackets] added):

### **53-8-11. Members.**

A corporation may have one or more classes of members or may have no members. If the corporation has one or more classes of members, the designation of such class or classes, the manner of election or appointment and the qualifications and rights of the members of each class shall be set forth in the articles of incorporation or the bylaws.

### **53-8-12. Bylaws.**

The power to alter, amend or repeal the bylaws or adopt new bylaws shall be vested in the board of directors unless otherwise provided in the articles of incorporation or the bylaws.

The bylaws may contain any provisions for the regulation and management of the affairs of a corporation not inconsistent with law or the articles of incorporation.

The initial bylaws and any subsequent bylaws whether by amendment, repeal or new adoption shall be executed by two authorized officers of the corporation.

The bylaws in effect for the corporation shall be maintained at the corporation's principal office in New Mexico

and shall be subject to inspection and copying by the public.

### **53-8-15. Voting.**

The right of the members, or any class or classes of members, to vote may be limited, enlarged or denied to the extent specified in the articles of incorporation or the bylaws. Unless so limited, enlarged or denied, each member, regardless of class, shall be entitled to one vote on each matter submitted to a vote of members.

If a corporation has no members or its members have no right to vote, the directors shall have the sole voting power.

### **53-8-17. Board of directors.**

**The affairs of a corporation shall be managed by a board of directors.** [This is clear, simple, unqualified and not mitigated by anything allowed to be modified by the Bylaws.] Directors need not be residents of New Mexico or members of the corporation unless the articles of incorporation or the bylaws so require. The articles of incorporation or the bylaws may prescribe other qualifications for directors.

### **53-8-21. Committees.**

If the articles of incorporation or the bylaws so provide, the board of directors, by resolution adopted by a majority of the directors in office, may designate and appoint one or more committees each of which shall consist of two or more directors. [Our amended bylaws allow for an Executive Committee to include three directors, but the Community approved the formation of the EC with only one director in violation of law and our bylaws.] The committees, to the extent provided in the resolution, in the articles of incorporation or in the bylaws of the corporation, shall have and exercise all the authority of the board of directors, except that no committee shall have the authority of the board of directors in reference to amending, altering or repealing the bylaws; electing, appointing or removing any member of any committee or any director or officer of the corporation; amending the articles of incorporation...

**The designation and appointment of any committee and the delegation thereto of authority shall not operate to relieve the board of directors, or any individual director, of any responsibility imposed upon it or him by law.**

### **53-8-23. Officers.**

One of the officers shall have the duty to record the proceedings of the meetings of the members and directors in a book to be kept for that purpose. In the absence of any provision, all officers shall be elected or appointed annually by the board of directors.

The articles of incorporation or the bylaws may provide that any one or more officers of the corporation shall be ex officio members of the board of directors.

The officers of a corporation may be designated by such additional titles as may be provided in the articles of incorporation or the bylaws.

### **53-8-27. Books and records.**

Each corporation shall keep correct and complete books and records of account and shall keep minutes of the proceedings of its members, board of directors and committees having any of the authority of the board of directors. Each corporation shall keep at its registered office or principal office in New Mexico a record of the names and addresses of its members entitled to vote. All books and records of a corporation may be inspected by any member, or his agent or attorney, for any proper purpose at any reasonable time.

### **53-8-35. Right to amend articles of incorporation.**

A corporation may amend its articles of incorporation, from time to time, in any and as many respects as may be desired, so long as its articles of incorporation as amended contain only such provisions as are lawful under the Nonprofit Corporation Act [Chapter 53, Article 8 NMSA 1978].

### **53-8-36. Procedure to amend articles of incorporation.**

(2) if there are no members, or no members entitled to vote thereon, an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.

### **53-8-82. Annual report.**

A. Each domestic corporation and each foreign corporation authorized to conduct affairs in New Mexico shall file, within the time prescribed by the Nonprofit Corporation Act [Chapter 53, Article 8 NMSA 1978], on forms prescribed and furnished by the commission [secretary of state] to the corporation not less than thirty days prior to the date such report is due, an annual report setting forth...

### **Introduction and Background:**

EmbodyDance, Inc., was organized on September 22, 2005, with a basic set of bylaws that were both too vague and too specific to possibly maintain compliance with under the evolving conditions which Community “ownership”, “decision making” and “management” allows and encourages. Amendments were filed on 8/2/06, which only furthered this predicament, and the distance between the letter of the

bylaws and our actual practices has widened by degrees ever since to a point of significant disconnect, which imperils the organization, ethically and legally.

The structural problems of the bylaws are myriad, but in short: there are several undefined terms and parties, such as “Community”; we are locked into specifics, such as the day of the week meetings are to be held, with no provision of the authorized powers to change these details without filing new amendments; and while two section changes are noted on the first page of the Amendments, there are in fact changes throughout the document that are not noted. The conceptual problems are legion and listed throughout the following.

During the years that followed, our records show and our current SOPs (Standard Operating Procedures) indicate many substantive changes that now result in us doing almost nothing in the manner prescribed by the bylaws. This is of course a problem that needs immediate attention and remediation.

Because of these changes, the means by which we will now make further changes that are legal and proper – or unmake changes that were/are not, need to be reviewed, and with the assistance of counsel. Indeed, the question of the legitimacy of many changes and decisions already made will be brought into question and need to be resolved, both in terms of effect and efficacy (relative to the intentions and will of the Community), and in terms of their legality, before we will be back on a solid footing. The review of this history and charting the course of our arrival to this point may be moot and a waste of our resources to undertake, and in the absence of a compelling reason to do otherwise, ratifying new amendments that are congruent with our current SOPs (under the presupposition – which may need to be questioned, of whether our current SOPs should be allowed to stand) and the decisions made on record will probably be sufficient – so long as we (the Community, the Board, the CC, etc.) can agree on what constitutes a legal and proper means of ratification. And this is the crux of our predicament...

### **Membership:**

The original Articles state in Article VIII that “...the corporation shall have no members.” The Bylaws filed concurrently state “...This corporation shall have one class of membership. Any person shall be qualified to become a member...”, though no mechanism for this is stipulated. And the Amendments state “...Membership in the corporation shall vest no voting rights or other rights in the members except those which may be conferred upon them by the Community. For the purposes of decision making, the Community shall consist of all those present at a monthly, special or annual meeting.” See the problem? These are circular references that lack definition or end points.

By my non-legally qualified reading, there have been issues of legitimacy from the gitgo – at least in terms of the legal documents. Assuming (!) the latest-filed Amendments represent the latest legal position of the organization, as properly ratified, the “Community”, a term undefined and not clearly communicated as distinct from Members (who are, again unclearly, de-facto so by virtue of their

participation) consists of all who show to any meeting to make decisions – which violates the law in attempting to deprive the Board of their legal powers and duties.

The Amendments also state that “...The Community may... provide for such classes of membership as it deems advisable...”. While not arguing the fine semantic points, this seems to indicate that a decision taken by the “Community” to establish a class of membership called Community Council Member may be legitimate (if that was indeed the intent), and implies that, as members of the Community, said special members might have the authority to make decisions as proxies for the Community as a whole. Maybe. That’s certainly what we’ve been doing.

### **The Evolution of our Decision-Making Powers:**

Leaving aside for the moment the question of the legitimate and legal role of the Board of Directors, let’s look at how decisions have actually been made in the history of the organization by reviewing Tracy J’s ED History Document, available minutes, etc.

In the beginning, there were community meetings as stipulated in the bylaws and amendments – all Community members being equal in the process and representation, and the consensus process was used to come to decisions. By the telling I’ve heard, this was a slow-moving and often fraught process with episodes of significant drama, crisis, and interpersonal strife. It was idealistic, hard work and untenable.

In 2009, the Executive Committee (EC), with members “elected” by the Community (as the corporation membership?), was formed to meet once a month and set agenda items for community meetings, and the General Manager position was created. “Consensus minus one” was adopted, though not as restrictive as the interdiction of consensus blocking by “persons immediately concerned” per 08 Amendments, Article V.

However, the EC was not in compliance with either the law, which mandates at least two Directors be members, or the bylaws, which mandates three Directors plus all officers of the corporation, with the President serving as Chair. The bylaws (and law) also require all minutes to be kept, and we seem to be missing more than some.

In 2010, the EC began meeting once a week, and this check on their authority was established: “In the event there is a consensus of 8 or more community members to challenge or questions a decision made by the EC, that group may send a written and signed request for reconsideration of an EC decision at the next Community Meeting. The group is responsible to provide additional information and a recommendation for alternative action. The number 8 was chosen because it represents about half of the average attendance at community meetings.” [I’m going to refer to this hence as an/the “Action of Eight”.] The process was later elaborated further.

Also the role of the Executive Committee was defined: 1. To listen at community meetings to inform our decision-making. 2. To participate in effective, consistent and efficient ED consensus decision-making

meetings, empowered as your community representatives. 3. Hire a general manager. 4. Set the agenda for community meetings. 5. Listen and respond to ideas, needs, and concerns.

(Note of interest: In 2010, General Manager position was paid \$1,000/month for 10-15 hours, meaning \$66-100/hr.)

2012, EC becomes CC, but I don't see entries as to how or why, nor what powers were vested in it, nor what the legal basis of its legitimacy is. What is perhaps implied, however, is the Community continued the special member status of the EC to the CC under its new name, asking it to act for the Community as proxies in decision making, with the Community reserving its rights of protest through the Action of Eight, the APF, and annual Community meetings. It may not matter.

At the last recorded Community meeting, Dec 12, 2013, minutes report that "Board reads minutes, officially approve them, and also there is a Board Rep at the CC meetings... Potential Change from Elections to Consensus Processes: Move to Consensus Process for CC Nominations to become CC Members via the Community at annual meeting. Full Consensus was reached on this proposal."

By 2016, the annual Community meeting was combined with a CC meeting and Community participation was very low generally. The CC appears to be making all decisions with very little Community involvement, formal and scheduled or otherwise, and taking no direction from the Board – which was in turn offering no direction per the Community removal of its legal mandate.

In 2017, the fundraiser was canceled, Community participation dropped consistently, and the CC was left to make some hard decisions, with considerable pushback from the Community, though no formal protest processes were engaged, such as the still-available APF. I began attending CC meetings in the spring, and we have not had even one APF presented since – though contacts are out of date on the website and the system may not be working. Community involvement has been limited to online protest/attack postings and direct emails (both arguably inappropriate channels for constructive participation), resulting in a lot of unconstructive process and eating a lot of CC energy and time. There's a clear rift between the CC and the Community in evidence, one that appears to be giving rise to both apathy and outrage. And the common understanding within the CC has been that the Board is simply advisory, with the CC holding actual management and control of the corporation. Not good.

The CC in summer 2017 adopted new rules for new CC members that don't involve Community election or vetting or approval, meaning that without ever intending it, we have effectively become a self-authorized body with no procedural accountability or oversight. This has been pointed out, most recently and effectively by Samwell, but not in terms of references to the bylaws or documented history, per se, and not in a way that suggests a path forward. It is my intention to now do that with the support and input of the Community as a whole, and the vigorous participation of the Board.

My review of the history indicates that "The Community" was never an effective or efficient decision-making or governing body and pure Democracy, aka Mob Rule, (or the new notion of co-creation) has never been a successful model, only an idealistic one. The USA is a Republic, not a Democracy, and for good reason (though I suppose that's not a conversation I'm really trying to start here). So there would

be no consensus involving me or most of the CC or regular volunteers, I believe, in going back to the not-so-good old days before the EC/CC, or of undoing most of the changes made over the last years, which for the most part seem to have been successful in achieving a financially viable, administratively stable, well attended dance – our ultimate (non-legal) mandate. Yet we have lost the checks and balances on CC membership and conduct, and these need to be restored, with bylaws that reflect the changes.

**Board of Directors:**

In the original Bylaws, the “...Board of Directors shall have the general management and control of the activities and affairs of the corporation...”, per statute. However, “...the decision-making power of this corporation shall rest in the monthly member meetings...” – not that a “meeting”, per se, has any agency whatsoever. In effect, the Board was made legally responsible (and is so de-facto), but utterly powerless and merely perfunctory in their role. Not a good setup, and one that has contributed significantly, in my estimation, to the legally untenable status quo.

The Amendments do not improve this predicament, though it changes the language some.

**Proposed bylaws fixes:**

Every core document needs to be thoroughly reviewed and assessed in terms of legality and congruency with the will of the Community (in spirit, if not in letter), as to a great extent expressed in the functional status quo of the organization – which is to say that we’ve arrived to where we are by many decisions, whether or not legally proper, and so for the most part (I believe, and we need to agree or disagree that) we want our documents to reflect our current structure and function to the extent they are legally able.

The “Community” needs to be defined and properly enfranchised as the legal or de-facto membership of the corporation and given defined rights and duties, with all participants in “the Dance” having de-facto standing... assuming direction from the Community is still the collective will.

CC members and their powers and duties need to be somehow legitimized. They could perhaps be explicitly created as a special class of membership as Community proxies and their powers and duties defined, or maybe there’s some other mechanism involving the Board, Committees, Officers or Advisors, etc., that is both legal and in alignment with Community will that would give the CC either direct executive powers or to act or as an advisory body only, with all executive authority resting with the Board, which could ratify CC advice as if it were “decisions”. TBD by legal assistance.

The Action of Eight or other mechanisms for the Community to have recourse to challenge or reverse CC decisions needs to be added to the bylaws, and the Community needs to be reminded (posted on website) that it has the power to challenge the CC decision through established procedures at any time – while being discouraged from using inappropriate channels that create chaos and discord.

Meeting requirements need to be redefined and brought into accord with current SOP (or vice versa), and meetings need to include a provision for input from the Community on (defined and scheduled)

items, such as elections, in which the Community has the right to a voice affecting procedure and decision – in addition to a chance to be heard on any topic at any meeting. Meetings also need to be run according to the legal and bylaw formats and proper procedures followed (notice, format, etc.), and such reflected in the minutes.

Decisions requiring notice to the Community need to be defined (application for CC membership, for instance), as well as the nature and instance of such notice.

A mechanism for the regular and special ratification of major decisions needs definition, and the bylaws need the flexibility to include decisions that give rise to substantive change without having to re-file (“statement-of-latest-consensus-decision...or as time to time modified by the CC or the Board...”). And a period should probably be defined for a regular re-filing of Amendments to bring the bylaws up to date (every 3, 5 years?).

A consensus needs to be reached on if and how to ratify past decisions, or whether to accept the entire slate of past decisions as approved and ratified, concurrent with the ratification of the new bylaws that update our current SOPs accordingly.

We must resolve a dilemma arising from the inherent conflict between the interests and powers granted (improperly and perhaps even illegally, I believe) to the “Community”, and the responsibility for “general management and control” still borne by the Board as the legal fiduciaries of the organization. By my reading of the law, the Board is the only body with the power to ratify changes to the bylaws or changes that nominally violate the bylaws (if that can even be proper) or rely on provisions of necessity, as taken by the CC as the executive functionaries under Board authority. I believe, therefore, that the Board needs to be intimately involved in this review and in deciding when and if to involve legal counsel, which will certainly be appropriate after we consense a draft, if not before.

**We must further resolve the dilemma and balance, real and perceived, between the upward and downward flow of powers and duties. On a legal basis, the Board is the highest authority of the organization. Yet the clear original and ongoing intention of the organization is that it be “Community owned and operated” and “co-creative” in spirit as well as in practice. Giving the full power of Democracy to the Community proved untenable and wasn’t even legal – at least not in the way it was done, yet I think none of us want a purely conventional “power” structure – some maybe not even a structure at all. I think our next set of bylaws should more explicitly name this paradox and seek to deal in the nuances by declaring a wish for the balance between ideal and functional efficiency; between the intention of inclusion and participation and the need to conform to legal requirements and create accountability; and the balance between our continuing evolution and the need for enough stability and continuity that we can enjoy the dance along the way.**

Generally, we, the CC and contractors authorized by the Board and Community, need to update the bylaws, clean up our administrative processes, regularly ratify and update documents at annual and regular meetings, dutifully post notices and otherwise give opportunity and encouragement for the

Community to engage in the administration where required or allowed, and know and conduct ourselves in accordance with the law and with the directives of the Community... keeping all in balance.