

Governance and Legal Trends for 2023: Foundations

Presented to The Funders Alliance

Presented by Jeffrey Fromknecht and Hayley Haldeman

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Jeffrey Fromknecht

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Jeffrey Fromknecht is Counsel in Dentons Cohen & Grigsby Pittsburgh office and a member of the Nonprofit and Tax-Exempt Organization Practice Group. He holds graduate degrees in both social work and law and has over 20 years of experience working at nonprofit organizations in a variety of direct-service and administrative roles. He earned his Master of Social Work degree from the University of Pittsburgh School of Social Work, where his concentration was on community organizing, nonprofit administration, and disability studies. Jeff has served Outside General Counsel to a variety of nonprofit and tax-exempt organization assisting clients understand and navigate the corporate, tax and compliance legal issues impacting tax-exempt organizations and their work.

Experience

- Jeff has helped hundreds of start-up nonprofits through the incorporation process and application for recognition of exempt status.
- Jeff has provided counsel to help organizations through the dissolution process, including successfully obtaining Letters of No Objection from the Pennsylvania Attorney General's Office.
- Jeff regularly advises clients as to their obligations under state solicitation requirements, including managing registrations in every US jurisdiction that requires registration for charitable solicitation activities.
- Jeff provided counsel to formally merge two nonprofits in the Pittsburgh area.

Insights

- Co-author, "Case Note: Americans for Prosperity v. Attorney General of California," The Florida Public Interest Journal, Vol. 8, Issue No 1, 2021
- Co-author, "Somewhere to Live, Something to Do, Someone to Love: Examining Levels and Sources of Social Capital Among People with Disabilities," Canadian Journal of Disability Studies, 2016
- Co-author, "Positional Conflicts and Pro Bono Publico," Florida Coastal Law Review, 2015
- Co-author, "Social Capital: The Key to Macro Change," Lash Publishing/Training Inc., 2014
- Co-author, "Social Capital: A View from the Field," Journal of Vocation Rehabilitation, 2008

Activities and Affiliations

- Pennsylvania Bar Institute Nonprofit Law Institute Planning Committee (2022 & 2023)
- Florida Bar Public Interest Law Section - Executive Council & Chair of the Nonprofit Legal Issues Workgroup

- Pennsylvania Association of Nonprofit Organizations, Member
- IRS TEGE Exempt Organizations Council, Member
- American Bar Association Nonprofit Organization Committee, Member

Community Involvement and Pro Bono

- Lawyers for Nonprofits, Staff Legal Hotline
- Center for Social Change, Meet with a Lawyer Day
- Nonprofits First, Meet with a Lawyer Day
- Forbes Funds, Meet with a Lawyer Day

Presentations

- Co-Presenter, "Fiscal Sponsors & Fiduciary Duties," Pennsylvania Bar Institute Nonprofit Law Institute, May 2022
- Co-Presenter, "Understanding Your Roles and Responsibilities: Ethical Considerations When Serving on a Nonprofit Board of Directors," Dentons Cohen & Grigsby Academy Presentation, June 2022
- Co-Presenter, "Issues to Consider Prior to Joining a Nonprofit Board of Directors," Dentons Cohen & Grigsby Academy Presentation, March 2022
- Co-Presenter, "Fiscal Sponsorship: For the Funders, Sponsors and the Sponsored," webinar for Nonprofit Issues and the Pennsylvania Association of Nonprofit Associations (PANO), November 2021
- Co-Presenter, "Nonprofit Lobbying and Advocacy," webinar for Greater Pittsburgh Nonprofit Partnership, September 2021
- Co-Presenter, "Nonprofit Law Update 2021," webinar for the Spirit of Giving Network, 2021
- Co-Presenter, "Fiscal Sponsorship as a Tool for Community Organizing," webinar for University of Pittsburgh School of Social Work Office of Professional Development, 2020
- Presenter, "Social Workers on the Board: 101 for 501s," webinar for University of Pittsburgh School of Social Work Office of Professional Development, 2020
- Presenter, "Starting Your Own Nonprofit: Where to Start and Top 6 Legal Considerations," webinar for University of Pittsburgh School of Social Work Office of Professional Development, 2020
- Co-Presenter, "Fiscal Sponsorship: For the Funders, Sponsors and the Sponsored," webinar for Nonprofit Issues and the Pennsylvania Association of Nonprofit Associations (PANO), 2019/2020
- Co-Presenter, "So You Want to Start a 501(c)(3)," RMU Bayer Center for Nonprofit Management," May 2019
- Co-Presenter, "Clearing the Path: Top 5 Things to Do Before Starting a Nonprofit," EAGALA's 18th Annual Conference, March 2017
- Co-Presenter, "101 on 501s: A Review of Legal Issues Faced by Tax-Exempt Nonprofit Corporations," Duquesne University School of Law, October 2017

Prior and Present Employment

- CEO, Side Project Inc, and managing attorney for their Lawyers for Nonprofit division

- Community Partner, Community Living and Support Services (CLASS)

Areas of Focus

Practices

- Charities and Nonprofit Taxation
- Political Law, Ethics and Disclosure

Industry Sectors

- Nonprofit Entities

Education

- Duquesne University School of Law, 2012, JD
- University of Pittsburgh, 2007, Masters in Social Work
- Allegheny College, 2004, B.S. Psychology

Admissions and Qualifications

- Florida
- Pennsylvania
- US Tax Court



Hayley Haldeman

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Hayley serves as Counsel in the Firm's Nonprofit and Tax-Exempt Organizations Group. She is an attorney and nonprofit leader with a decade of hands-on experience in nonprofit governance, law, and strategy.

From 2019 through 2022, Hayley served as interim, then permanent, Executive Director of the Mattress Factory, a contemporary art museum in Pittsburgh, PA. During her tenure, she steered the organization through institutional transition and the COVID-19 pandemic, erased a significant projected deficit and grew the organization's endowment, and established and strengthened partnerships with community stakeholders. Through this role, Hayley has strong first-hand experience managing the unique challenges that nonprofit boards and leaders face.

Prior to her role at the Mattress Factory, she was a litigator for seven years in the Pittsburgh office of a large international law firm. Her pro bono practice focused on nonprofit formation and governance, and she counseled various regional nonprofit organizations on a variety of issues. Pennsylvania Super Lawyers recognized Hayley as a "Rising Star" throughout her practice (2014 – 2019).

Hayley is an adjunct faculty member at Carnegie Mellon University's Heinz College of Information Systems and Public Policy. Her current courses focus on museum operations and workplace management for nonprofits, respectively.

A Pittsburgh native, Hayley is active in civic and community affairs and currently sits on the Board of Directors for the United Way of Southwestern Pennsylvania, among other engagements. She has previously served in leadership and board roles with various nonprofit organizations and civic initiatives, including as the former chairwoman of the Allegheny County Bar Association's Arts & Law Committee. *Pittsburgh Magazine* recognized Haldeman as a "40 Under 40" awardee in 2018.

Recognition

- Awardee for Community Service, Josh Gibson Foundation (2021)
- *Pennsylvania Super Lawyers* Rising Star (2014-2019)
- *Pittsburgh Magazine* 40 Under 40 (2018)

Activities and Affiliations

- Board of Directors, United Way of Southwestern Pennsylvania
- Steering Committee, 2022 Eradicate Hate Global Summit

- Allegheny County Bar Association Arts & Law Committee (Committee Chair: 2016-2018)
- Weekly mentor for Sarah Heinz House MACS student, Be a Middle School Mentor (2014-2019)

Prior and Present Employment

- Adjunct Professor, Carnegie Mellon University – Heinz College of Information Systems and Public Policy

Areas of Focus

Practices

- Charities and Nonprofit Taxation
- Corporate Governance

Industry Sectors

- Nonprofit Entities

Education

- University of Virginia School of Law, 2012, J.D
- George Washington University, 2009, B.A., *summa cum laude*, International Affairs with Minors in History and Art History

Admissions and Qualifications

- Pennsylvania
- US District Court for the Western District of Pennsylvania

Languages

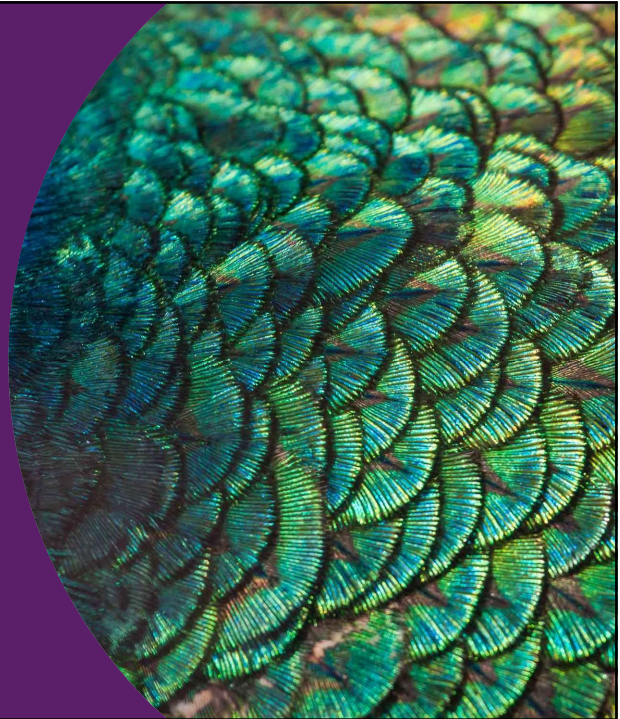
- English

Governance and Legal Trends Agenda

1. Bylaws
2. Conflicts of Interest
3. Political Activity
4. Grant Agreements
5. Fiscal Sponsorships
6. Q & A

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Bylaws



Bylaws: Overview

- Internal governance rules for a nonprofit organization.
- Federal law has limited requirements; state law and best practices govern.
- Beyond legal requirements, importance of:
 - Clarity
 - Comprehensive
 - Alignment with actual practices
 - Appropriate balance for rules (board/governance) v. policies (staff/operations)
 - *Above all: Are your Bylaws usable?*

Aim for regular review, with revision as needed.

Bylaws: Review Process and Considerations

- **Distribute annually; review every 2-3 years.**
- Look for/consider:
 - Do Bylaws reflect operations?
 - If not, review/change operations as a starting point.
 - Practical/required updates (e.g., hybrid meetings)
 - Clarity/comprehensive/balance
- Who conducts review?
 - Governance Committee/Executive Committee
 - Executive Director/senior staff
- Report out review process to the full Board
 - Vote on any amendments

Bylaws: Comprehensive Reviews

- **Overhauling Bylaws**
- Occasionally, may be prudent/easier to do comprehensive revision.
 - Consider org changes (structural and operations), workability, language, impact of past revisions, significance/scope of other revisions
- Can plan for and budget time
- How to handle?
 - Board buy-in
 - Work with attorney (but organization sets priorities)
 - Awareness of dormant issues / appropriate time to address strategic considerations
 - Celebrate and share

Bylaws: Revision Tips and Hot Topics

Practical tips during revisions

- Follow relevant state law
- Avoid changing information
- Save detail for policies and protocols
- Reflect the organization/Board you have – capacity and culture

Provisions of note in 2023

- Hybrid/remote meetings and notice
- Committees: Creation and composition
- Emeritus directors
- Voting methods (electronic, proxy, etc.)

Bylaws: Voting Methods

- **Avoid/limit voting by email and voting by proxy.**
- **Fiduciary Duty and Practical Concerns**
 - Discourages rigorous review (lack of discussion and debate)
 - Inadequate oversight
 - Lack of statutory authorization
 - Ambiguity of response
 - Record keeping
- **Alternatives**
 - Modify quorum requirements
 - Hybrid meetings
 - Unanimous written consent

Conflicts of Interest



What is a Conflict of Interest?

A conflict of interest will be present if an individual knows that they or a related party has a **material affiliation** with or a **material financial interest** in the entity or with the individual involved in the transaction, or will otherwise benefit financially or derive a significant personal benefit as a result of the transaction.

MacArthur Foundation. Conflict of Interest Policy accessed March 16, 2023 (<https://www.macfound.org/about/our-policies/conflict-interest-policy>)

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Conflicts of Interest and Self-Dealing

1. Is this transaction a conflict of interest or could it be perceived as such by others?
2. Is it prohibited by the self-dealing rules under the Internal Revenue Code?
3. Has the foundation followed its conflict-of-interest policy and documented that fact?
4. Even if the transaction is not prohibited by the self-dealing rules, is it unfair to the foundation? i.e., does it improperly benefit another person or organization?
5. Does the transaction create an appearance problem? How would it look on the front page of tomorrow's newspaper or to the foundation's founders?

Conflicts of Interest at Foundations: Avoiding The Bad and Managing the Good. 2005. Council of Michigan Foundations

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Political Activity



What is Advocacy, Lobbying & Political Activity?

Advocacy

- Public Education & Awareness on Issues of Social Importance
Connections to mission
- Community Organizing Efforts
- Nonpartisan Voter Education & Registration

Lobbying

- Attempts to directly or indirectly influence legislation

Political Activity

- Attempts to participate or intervene, directly or indirectly, in any political campaign on behalf of, or in opposition to any candidate for public office

The Basics – A 501(c)(3) is prohibited from political campaign advocacy

- Although nonprofits enjoy some constitutionally recognized First Amendment rights of free speech, the price tag of Section 501(c)(3) tax exemption includes (a) **an absolute prohibition on political campaign advocacy**, and (b) lobbying restricted to only “insubstantial” levels ((b) discussed later)
- Penalties:
 - Taxes (Sec 4945 for private foundations; Sec. 4955 for charities) and/or
 - Loss of tax-exempt status
- How is this different from the lobbying rules?
 - Total prohibition
 - Harsher penalties
 - Fewer bright-line definitions (as compared to Section 501(h))
 - No safe harbors for grants to public charities

The Basics - 501(c)(3) Public Charities Ways to Engage

- Education
- Issue Advocacy
 - Full and fair disclosure of pertinent facts as to permit an individual or the public to form an independent opinion or conclusion
- Events
- Get Out the Vote Drive & Voter Registration Drives
- Limited Lobbying
- Employees' Personal Activities

Permitted: Nonpartisan Education

- May provide education to
 - Parties and candidates AND
 - Voters
 - On the organization's issues

- MUST be neutral among candidates, not showing a preference for or against any particular candidate or party

Lobbying

- Attempts to influence legislation
- The insubstantial part test requires that “no substantial part of a charity's activities...be carrying on propaganda or otherwise attempting to influence legislation.”
- State & Federal Reporting Requirements (if applicable)
- Direct Lobbying
 - Communications with members or employees of a legislative body or with any other government official or employee who may participate in formulating the legislation, if the principal purpose of the communication is to influence legislation.
 - In other words, direct lobbying is any form of communication with a legislator that expresses a view about specific legislation.
- Grassroots Lobbying
 - any attempt to influence legislation through an attempt to affect the opinions of the general public or any segment of the public.
 - *Grassroots lobbying* is effectively
 1. communication with the public that
 2. expresses a view about
 3. specific legislation and
 4. includes a call to action.

Grant Agreements



Grant Agreements

General guidance: Use templates – but should not mean:

1. One size fits all
2. Revision immunity

Be aware of and address, as needed, aspects relating to grantor/grantee structure.

- Grantor: Public charity v. private foundation, trust, supporting org., etc.
- Grantees: Type of activity; individual versus entity; different types of 501c organizations
 - Consider template language, if needed, for different (1) organizations; (2) activity; and (3) amount.
 - Meant to **simplify**, not complicate.

Plan on regular and routine review (recommended every other year).

- Work with legal counsel to develop tailored agreement, with provisions important to your organization.

Practical Tips for Grant Agreements

Check for clarity regarding:

- Dates
 - Grant period
 - Payment schedule
 - Reporting deadlines (both interim and final)
- Records and reporting requirements
 - Make any recordkeeping requirements explicit and include time periods
 - Reporting: Consider attaching template report (with subject to change caveat)
- Notification of changes
 - Balance breadth with relevance
- Publicity
 - Proper name/logo and attribution
 - Right of approval

Topics for Consideration with Grant Agreements

Use of Unused Funds and Protocol for Reallocation Requests

- Protocol for grantee's handling (e.g., notification to and approval from foundation)
- Consider creation of internal guidelines for unused funds and reallocation requests
- Related: Multi-year gifts (with contingencies), matching grants

Intellectual Property Issues: Fit funder and the project

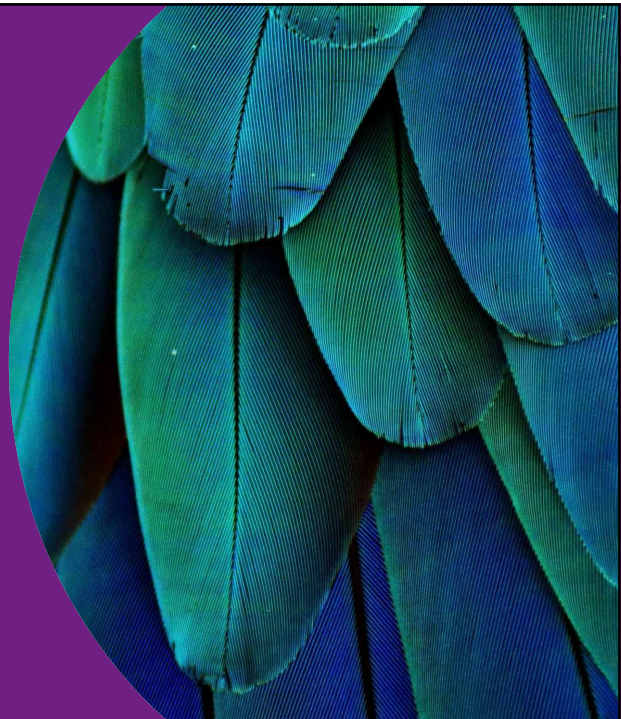
- Ownership and trademark
- Access rights (e.g., digitization, paywalls)
- Preservation and care

Unrestricted Gifts and Trust-Based Philanthropy

Legal Considerations for Trust-Based Philanthropy

- **Trust-Based Philanthropy:** Growing emphasis on multi-year and/or unrestricted grantmaking, with greater thoughtfulness around application and reporting requirements.
- **Generally – for grants to 501(c)(3) public charities:**
 - Funder can provide multi-year, unrestricted grants without legal issue.
 - Grant agreements and grant reports legally not required.
 - Funders still required to comply with mission, know grantee's tax and organizational status
 - Additional requirements/limitations are triggered with different types of organizations (e.g., other private foundations, international organizations, Type III supporting organizations, 501(c)(4))
- **Considerations: Evidencing and Expectations**
 - Balance against risks of misuse (private inurement, diversion of funds, self-dealing)
 - Note: Potentially limited utility of grant agreement here
 - Administration: E.g., taxable expenditure calculations (private foundations)
- **Fiduciary responsibilities:**
 - Staff capacity/processes to assist board in meeting fiduciary duties in lieu of reports and/or requests
- *If considering a shift, review current grant agreement, approval process with legal counsel to assess priorities and process.*

Fiscal Sponsorships



Common Types of Fiscal Sponsorship Arrangements

1. Model A: The Comprehensive Fiscal Sponsorship Model

2. Model B: Independent Contractor Project

3. Model C: Pre-Approved Grant Relationships

4. Model D: Group Exemption

5. Model F: Technical Assistance

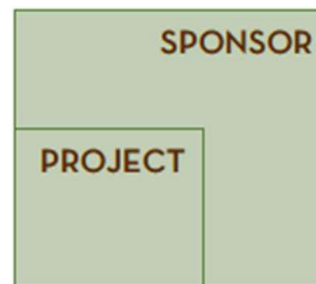
6. Model L: LLC

Gregory Colvin, *Fiscal Sponsorship: Six Ways to Do It Right*, Silk, Alder, Colvin, San Francisco, Ca. 1992

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Model A Comprehensive Model

- Projects are fully integrated
- Sponsor maintains all legal and fiduciary responsibility
- Project director is employee of the sponsor



Gregory Colvin, *Fiscal Sponsorship: Six Ways to Do It Right*, Silk, Alder, Colvin, San Francisco, Ca. 1992

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Model B Independent Contractor Model

- Projects are fully integrated
- Sponsor maintains all legal and fiduciary responsibility
- Project director is an independent contractor of the sponsor

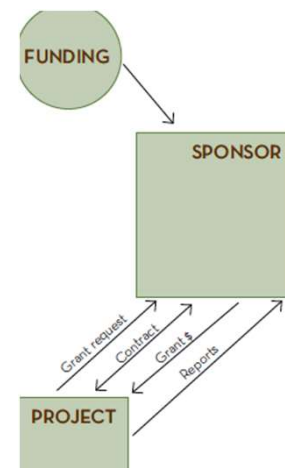


Gregory Colvin, Fiscal Sponsorship: Six Ways to Do It Right, Silk, Alder, Colvin, San Francisco, Ca. 1992

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Model C Pre-Approved Grant Relationship

- Project is a separate legal entity, and is in a grantor/grantee relationship with its sponsor
- Many times a one-time arrangement, in which the project receives proceeds from a grant or donation



Gregory Colvin, Fiscal Sponsorship: Six Ways to Do It Right, Silk, Alder, Colvin, San Francisco, Ca. 1992

Trust for Conversation Innovation, Fiscal Sponsorship: A 360 Degree Perspective (March 2014)

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Fiscal Sponsorship Considerations for Funders

The IRS prohibits
“Conduit” relationships

Compliance with IRS grant
requirements

Which model is the
project using?

Less risk than funding
new entities

Using restrictions on grant
awards

MobilizeGreen Inc. v.
Community Foundation for the
Capital Region

Q & A

