

Avoid Board Deadlock with Comprehensive Bylaws

Checklist for reviewing your bylaws, working with the board

by Kathryn M. Vanden Berk

Disagreements about a nonprofit organization's bylaws can cause intense headaches for staff and the board.

What may begin as a disagreement about the board of directors' voting procedures, how to remove a board director, or conflicts of interest, can quickly spiral into a hostile situation that distracts the board from its true purpose. By the time an organization seeks my help, or the help of another legal professional, the agency's leaders and board directors are frustrated and exhausted. Often, the fighting results in the board delaying some or all of its usual business.

As demands on boards of directors continue to increase and gain complexity, and as technology evolves, new questions related to an organization's bylaws will emerge. However, there are several steps organizations can take to minimize their chances of future disagreements over their bylaws.

Bylaw Basics

First, it's helpful to review the basics—as rudimentary as this may seem.

By definition, bylaws are self-imposed rules that describe the rights and duties of the organization's board of directors as it carries out its governance functions. Bylaws define the structure of the organization's governance, including specifying officer positions. Even if they haven't been updated for years, bylaws remain active until they are repealed.¹

To protect the organization and avoid disagreements, it's important to:

- **Stay Organized.** If the bylaws have been amended over the years, be sure the current version is readily available. It is helpful to provide a date at the bottom of the document to identify the



most recent amendments to any given version. Dispose of old versions.

- **Go Digital.** Be sure a current version is available in digital form. If the most recent set of bylaws is in print only, or the digital file has been lost, assign someone the task of transferring the print version to an editable software version.
- **Provide to the Board.** All new directors should be given a copy of the bylaws as part of their orientation packets. The bylaws also should be available for reference at every board meeting.
- **Identify a Parliamentarian.** If someone on the board is willing to serve as a parliamentarian, it will serve the agency well. Look for someone who is attentive for detail and extremely familiar with *Robert's Rules of Order*.²

Review, Correct, and Update

Many bylaw-related questions arise from inconsistency, error, or omission. The following checklists will help organizations ensure their bylaws contain

the critical minimum elements and are error free. Of course, organizations are wise to also seek the guidance of an attorney who understands corporate law when they undertake a bylaw review.

Standard Bylaw Provisions. Bylaws should contain, at a minimum:

- statement of the organization's tax-exempt purpose;
- documentation relating to the Internal Revenue Service's limitations for tax-exempt organizations;
- explanation of the governance role played by members if the organization is a membership-based nonprofit;
- requirements for directors, including qualifications, the selection process, term limits, and the process for removal;
- explanation of the powers, responsibilities, and limitations of directors and officers;
- procedures for filling vacancies;

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- explanation of annual, regular, and special business meetings;
- requirements for notice, quorums, and voting at meetings;
- procedures for amending the organization's Articles of Incorporation and bylaws;
- designation of standing and special committees; and
- procedures for dissolution of the organization and the distribution of its assets.

Correcting Bylaw Errors. Common problem areas include:

- **Conflicts with State Law.** Bylaws that are inconsistent with state statutes are void. Consult the nonprofit corporation statute for the state the organization is incorporated in. If the bylaws violate state statutes, amend them.
- **Conflicts Between Articles and Bylaws.** Bylaws that are inconsistent with the organization's Articles of Incorporation are void. If the organization's Articles of Incorporation are inconsistent with the bylaws, amend one of the two.
- **Conflicting Internal References.** A common mistake is to incorrectly refer to sections. For example, the bylaws may refer to "Section 5.A" when that section now appears as "Section 6.01." In this example, both the section and the system of enumeration are different. Also, check for internal inconsistencies. For example, make sure that notice of meetings isn't addressed differently in two separate areas of the bylaw document.
- **Use of Officer Titles.** Be sure the bylaws are in sync with the organization's everyday practices. Sometimes organizations begin referring to the executive director as the president and CEO and the president of the board as the board

Updating the Bylaws

As technology has modernized, board procedures also have changed. Organizations should ensure new practices are reflected in their bylaws.

Go to magazine.alliance1.org for a list of 10 items that have been adopted widely in recent years as best practices and should be enumerated in the bylaws if your organization is using them.

chair, but they forgot to update the bylaws accordingly.

- **Ambiguous Voting Procedures.** Be sure the bylaws are not ambiguous about what constitutes a valid vote. Boards typically act by the vote of a majority of those directors present at any duly convened meeting of the board. This is a different requirement than a vote of a majority of directors currently in office. Also, if the organization's bylaws require a super majority—three-fourths or two-thirds approval—for actions such as removal of directors and amending bylaws, be sure these are allowable under state law.
- **Proxy Voting.** Be sure that directors cannot vote by proxy. Directors must vote for themselves, and they must be present for both the discussion and the vote in order to effectively exercise their fiduciary duties.
- **Committees References.** Committee names and assignments may change over time. To eliminate the need for constant bylaw revisions, provide for committees in general terms instead of specifically naming them. Committees can then be created by board resolution, and a job description can be generated in separate documents. Also, be sure that committees are limited in their authority to act for the organization; most boards today want to approve committee recommendations so

that the authority to bind the agency remains with the board.

Handling disagreements about bylaws can be a fun challenge for the lawyer in me; they test my ability to read and understand an organization's bylaws, the nonprofit corporation statute for the state the organization is incorporated in, case law, and sometimes *Robert's Rules of Order*.

But, what's fun for me is agonizing for my clients. I have found that agencies whose leaders are familiar with their bylaws and conduct meetings according to these enumerated provisions are the best governed and least likely to develop board disagreements and deadlocks. ■

ENDNOTES

1. *Schraft v. Leis*, 236 Kan. 28, 686 P.2d 865 (Kan. 1984).
2. Gen. Henry Martyn Robert was a U.S. Army Engineer who published the first edition of *Robert's Rules of Order* in 1876. It is now in its 10th edition and is still under the care of Gen. Robert's descendants.



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Sources of Guidance for Common Governance Scenarios

Scenario: An amendment is proposed and the vote is to take place at the next board meeting. Is notice in the board packet sufficient to validate the vote?

The online version of this column, available at magazine.alliance1.org, provides responses to this and several other common governance questions. Readers also will find several examples of bylaw disputes the author has recently experienced in her practice.