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### The 15 Most Common Nonprofit Bylaw Pitfalls: How to Avoid the Traps

Although it might not be the document most commonly on the minds of nonprofit directors, officers or staff, bylaws form the backbone of governance for nonprofit organizations and, therefore, are a very important document. When nonprofits need to consult their bylaws, such as when a membership dispute, concern about an errant director, meeting notice, or voting issue arises, they are often surprised to find that the bylaws are outdated, do not conform to the law, or do not reflect the organization's current practices. Regular bylaw reviews are key to ensure both that the organization is compliant with the state of the law and that the bylaws reflect enough flexibility to accommodate the manner in which the organization's operates today.

#### 1. Understand your state's nonprofit corporation law.

A state's nonprofit corporation statute – a nonprofit is governed by the statute in place in its state of incorporation, regardless of where the organization is located – supersedes any provision of the organization's bylaws. The nonprofit corporation act will contain default rules for areas that the bylaws might not address, such as specifying the minimum number needed for a quorum for a director or member vote; and it will contain prohibitions, such as not permitting directors to vote by proxy, among other provisions. Organizations should review the default provisions in their state's nonprofit corporation act and determine if there are any defaults the organization would want to override by including a specific provision in the bylaws (for example, if the organization wanted to establish a lower quorum for a membership vote than the default number). Nonprofits also need to be sure that their bylaws do not permit practices that are prohibited by the state nonprofit corporation act; if so, those bylaw provisions will have no force or effect, and any actions taken pursuant to those provisions will be null and void. In addition, because nonprofit corporation statutes vary from state to state, it is important when drafting new bylaws to review the relevant state requirements as opposed to simply using another organization's bylaws as a base since, even if the organizations' missions and operations are similar, the requirements, prohibitions, and default provisions of the relevant state nonprofit corporation acts may be – and often are – different.

#### 2. Make sure your bylaws are consistent with other regulatory documents.

Be sure to double-check your bylaws for both internal consistency as well as external consistency (including keeping in line with the articles of incorporation, the state's nonprofit corporation act, and any policy or governance manual). Note that if your organization is governed or licensed by another state agency, such as a state department of education or department of banking, other state laws might provide additional mandatory bylaw provisions for your organization.

#### 3. Be sure to address all foreseeable scenarios.

Sometimes, for example, bylaws will contain a provision about removing a board member, but leave out any provision covering how that position gets filled upon removal. It is important to take the time to carefully walk through all of the "what-if" scenarios to avoid holes in the bylaws.

#### 4. Populate your bylaw committee with an accurate cross-section of your organization.

Use of a bylaw committee is one of the most common ways nonprofit organizations go about the bylaw review and amendment process. If the bylaw committee is comprised of individuals that do not represent

a full cross-section of your organization's membership or constituency, they may find some opposition when sending bylaws to the full membership for approval (for nonprofits with voting members) or to the full board of directors. By creating a bylaw committee that fully reflects your organization's population, you are less likely to run into this problem, and you will have more success vetting potential issues early on in the process.

#### **5. Coordinate the actions of your bylaw committee with legal advice.**

When rewriting bylaws, almost inevitably, a legal adviser will be able to spot inconsistencies and potential problems. Try to coordinate with legal counsel from the beginning of your process, not after all of the committee's work has been done, when it can be very difficult to start over.

#### **6. Create bylaws that reflect the appropriate political climate of your organization.**

Bylaws should reflect the appropriate balance of power among the members (if there are members), the board of directors, and the executive committee (or other bodies within the organization's governance structure, such as a house of delegates, key committees, or other structures). Some newer nonprofit corporation acts allow for more flexible governance arrangements, such as the creation of "designated bodies," which provide another option for spreading out the balance of power. Designated bodies, which hold some, but not all, of the power of members or boards of directors, can be particularly helpful in more parliamentary style organizations. Depending on the state in which your organization is incorporated, there could be several options for the disbursement of governance responsibilities; carefully weigh all available options.

#### **7. Keep your bylaws current.**

Frequently, organizations inherit bylaws that have been patch-worked together over time. Thus, nonprofits sometimes end up with antiquated bylaws that are not appropriate for how the organization functions today. Sometimes the best solution is to scrap the original bylaws and start over from scratch, using a good, proven model provided by legal counsel or others as a starting point.

#### **8. Keep your bylaws flexible.**

How the organization functions today may not be exactly the same as it will need to function in the future. Building flexibility into the bylaws, such as including a range for the exact number of board members and allowing the board to designate additional officers not named in the bylaws, can help the organization moving forward. Bylaws should provide an outline of the governance structure but also should allow some flexibility if and when changes are needed in the future.

#### **9. Reserve the details for policies, not bylaws.**

Some details are more appropriately placed in board-approved policies rather than in the bylaws. These often include items such as membership criteria, membership dues determinations, and the operation of committees. It also is helpful to place all board-approved policies into a single physical and/or electronic policy manual. Bylaws generally should be a relatively concise and easy-to-navigate document, leaving the details to policies, which can be more easily revised in the future. This way, bylaws will not need regular amendment.

#### **10. Ensure that your purposes clause reflects your organization today.**

This is actually a tax-exemption issue, first and foremost. The IRS generally will refer, among other things, to the purposes clause in a tax-exempt organization's articles of incorporation to determine what is a related versus an unrelated activity. Most nonprofits also have a purposes clause contained near the beginning of their bylaws, and many times that purposes clause will differ, in one or more material respects, from the purposes clause in the articles of incorporation, the latter of which is controlling. The two clauses should be fully consistent and, therefore, an organization might want to include a clause in the bylaws which simply refers to the purposes clause as written in the articles of incorporation. In addition, the purposes clause in the articles of incorporation should be reviewed, keeping in mind that a clause drafted 30 or more years ago may not accurately or fully reflect your organization today.

### **11. Closely review the meeting and voting procedures for members and directors.**

This is an area where we commonly see bylaw provisions that are inconsistent with the governing state law. Nonprofits should closely review how members (if there are voting members) and directors are permitted to meet and vote under the relevant state law. Keep in mind that many state nonprofit corporation acts do not allow directors to vote by proxy, and instead require a director to attend the meeting in-person or via telephone to be counted as present at the meeting for purposes of quorum and voting. Also, although the trend is certainly changing, some state nonprofit corporation statutes still do not allow members to vote outside a meeting unless by unanimous written consent (with the written approval of all members); even for the many state statutes that do permit member voting by email, sometimes specific procedures or prerequisites are prescribed.

### **12. Look at committee composition.**

Some state nonprofit corporation acts are very specific as to who can serve on a committee of the board and how such persons may be appointed. For example, the District of Columbia and several states require that “committees of the board” only be made up of directors and that those committee members must be appointed by at least a majority of *all* directors in office (as opposed to a majority of those directors present at a meeting at which a quorum is present, which often can be a lesser number). This requirement applies to those committees exercising the power of the board, such as an executive committee or an audit committee. In these jurisdictions, other committees not exercising the power of the board, such as fundraising committees or nominating committees, can have committee members who are not directors.

### **13. Pay attention to the approval process.**

For organizations with voting members, amendments to the bylaws will almost always require member approval (check the applicable nonprofit corporate statute for the specific requirements). Approval also may be required by the board of directors. Many times, written notice of the proposed amendments will be required to be given a certain number of days in advance of the meeting. It is important to note the required timeline at the beginning of the process, so that your organization does not go through the entire bylaw review process only to realize it will be another year before the required membership approval can be obtained due to failure to adhere to the minimum notice period.

### **14. Do not make your bylaws too difficult to amend.**

Some bylaws may require that amendments be approved by a two-thirds vote of the membership (for organizations with voting members), or contain other super-majority or burdensome requirements for approval. Focus on creating a bylaw amendment provision and process that is not overly difficult to execute and that is appropriate for the history, culture, and politics of your organization.

### **15. Keep a pulse on the bylaws.**

After engaging in a bylaw amendment process, make sure that your bylaws do not become dusty. Some nonprofits maintain a standing bylaws committee comprised of board members that can speak up at meetings when issues implicating the bylaws are discussed. Other organizations place the bylaws as an agenda item at each annual meeting of the board of directors, to prompt consideration. At the same time, as discussed above, well-drafted bylaws should be flexible enough to not require regular amendment, and constant deliberation over revising the bylaws generally is unhealthy, unproductive, and diverts attention from the more pressing business and issues facing the organization.

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