



By Mitch Dorger

## In the Board Room

# Are Your Bylaws Helpful or Hurtful?

From a legal standpoint, an organization's bylaws are one of the most important, if not the most important, documents relating to the organization. The bylaws contain the legal description of what the organization is, how it is organized, and how it operates. More importantly, failure to follow the provisions of the bylaws can have devastating legal consequences for an organization and perhaps even for individual board members.

Despite their importance, bylaws are often neglected and misunderstood. For many nonprofit organizations, the bylaws are just some old document, hidden away in a book on the executive director's desk. They are not read, the provisions are not known, and if they do happen to be read, they are written in such legalese that the normal person cannot understand them. If this description sounds like your organization, then let this be your wake up call!

It is imperative that Board members know what the bylaws say and then work to ensure they are followed by the organization. They should also be reviewed periodically to make sure they are consistent with the corporation law in your state and that they accurately reflect the way the organization operates. Do not do this without legal help. As mentioned, bylaws are a legal document. Moreover, they are subordinate to the corporation law of the state – which can change. I recommend that any bylaws review be conducted by a board committee in conjunction with the organization's legal advisor. Do this annually or no less often than every two years.

As a general rule, bylaws should be written with four basic guidelines in mind. The first is consistency. Bylaws must be consistent with Federal, State and local laws and with the provisions of the organization's articles of incorporation. They must also be internally con-

sistent. Nothing creates more confusion than to have bylaw provisions that conflict. The second guideline is permission, not requirements. Avoid specific requirements in the bylaws and specific structures, activities, and deadlines. These only create problems if they are not followed. Write bylaws in a way that permits actions but does not require them. The third guideline is importance. Keep the bylaws at a level that reflect the most important activities and rules for the organization -- do not bog them down in details or minutia like meeting management procedures, etc. The fourth general guideline is currency. Make sure the provisions of the bylaws are current with the mission and activities of the organization and with the changing realities of the times.

The internet is full of advice from experts on what to include and what to avoid in bylaws. Here is my take on some of the specifics that are important to consider in preparing or reviewing your bylaws.

**1 Mission.** Do the bylaws reflect the current mission of the organization? You would be surprised at how many times an organization's mission as stated in the bylaws does not coincide with actual practice. Sometimes missions become outdated or sometimes an organization moves away from its original mission. It is not a good situation when the organization's stated mission is not consistent with what it is actually doing. It may even lead to problems with tax exempt status if the original mission stated in the bylaws is also the basis of the organization's tax exemption and that is no longer what the organization stands for.

**2 Members.** Nonprofit corporations are not required to have members, but if you do have them, you need to ensure that the rights of the members are clearly delineated and that member rights

are not being ignored or abused by the board. Boards have been known to have members sue them for violating their rights and/or benefits.

**3 Rules of Order.** If yours is one of the thousands of organizations whose bylaws adopt Roberts Rules of Order for the organization, you should understand that when you adopt Roberts, you have just added hundreds of pages of parliamentary minutia to your bylaws. In the last year, I have heard a number of recommendations from attorneys that organizations move away from Roberts Rules of Order and create their own procedures which are simpler, more understandable and more straightforward.

**4 Adverse Actions.** Boards occasionally face situations that call for adverse actions of some sort, including director or member removal. It is imperative that procedures in the bylaws specify how such adverse actions will be conducted and how they will incorporate any due process required by your state. Then the organization must follow the procedures specified. If not followed, bylaws create the basis of a legal challenge to actions taken. At the same time, don't make these rules so detailed and cumbersome that no one wants to undertake an action that should be taken simply because it is too hard to do. The rule ought to be "simple but fair" when dealing with bylaw provisions concerning adverse actions.

**5 Officer Duties.** Make sure the descriptions of the officer duties are accurate and current. Do not include a bunch of extraneous duties to make the positions sound important and do not include duties that the officer really does not do. For example, I found one set of bylaws that stated that the Treasurer would deposit all checks. The organization had a full

accounting staff, and the Treasurer had not deposited checks in over 50 years. So why keep that language in there? If there is a prescribed duty and it is not being done, someone may challenge the performance of that officer. Also spend some time accurately describing the job responsibilities of the senior volunteer vis-a-vis the senior member of the staff. Some organizations like to designate the senior volunteer as the chief executive officer of the corporation when in reality that individual does not have the skills, time or wherewithal to carry out the assigned responsibilities. This can lead to poor relations between the CEO and the Board Chair if duties are not appropriately defined.

**6 Committees.** To the extent possible, don't create a lot of committees in the bylaws and define their activities and responsibilities. These may change over time and committees might even become obsolete. Instead of defining and requiring committees, the bylaws should authorize the board to create committees as circumstances require and define their responsibilities and, if appropriate, their life span. Another key area to watch is assigning an Executive Committee too much power. Most states have laws that require the full board to act on certain matters. Do not assign powers to the Executive Committee if such authority is not permitted by state law.

**7 Bylaw Changes.** Think carefully about how the bylaws may be changed. Bylaws need a sense of continuity, so they should not be changed willy-nilly. At the same time, don't make change requirements so onerous that a small minority of directors can block adoption of new bylaws provisions and changes.

**8 Term Limits.** Most organizations define director terms, but not all of them set a maximum number of terms that a director can serve. The prevailing thought today is that some form of term limits is needed to keep a board fresh and revitalized. The argument against term limits is that organizations do not want to lose expertise. While this is a real consideration, it is both possible and important to balance the need for continuity and expertise with the beneficial effect or new thinking and new energy.

**9 Director Performance.** Many boards suffer because there are no provisions in the bylaws to remove a director who is not performing. This can include excessive absentee, breaches of director legal duties, or failure to perform up to expectations in other ways. Most experts agree that boards are better served if they

have provisions in the bylaws for director removal. Opinion is split, however, as to whether these removal actions should be automatic and defined in the bylaws or whether they should be permitted in the bylaws with the specifics defined periodically by the board. Some attorneys argue that putting automatic removal procedures in the bylaws makes them fairer and cleaner, while others argue for maximum board flexibility. But I think all agree that some statement about removal authority for directors not fulfilling expectations is appropriate in the bylaws. Again such removal procedures should reflect any due process requirements specified in state law.

**10 Quorums.** Quorums should be set high enough that a small group of directors (or members, if appropriate) cannot hijack the organization, but not so high that it is impossible to do any business because quorums cannot be achieved. As is the case in many areas, state law may have a say in establishing quorum requirements. State law must be consulted before decisions on quorums are finalized.

**11 Notice.** All bylaws should contain procedures notifying directors or members about upcoming meetings and the topics to be addressed. Certainly it is good practice to allow sufficient time for directors or members (if appropriate) to prepare for the matters to be addressed. However, many state laws will not allow actions to be taken if appropriate notice has not been given. It is therefore important that notification requirements are reasonable, balancing the positive effects of preparation against the possibility of restricting the board's ability to act in the event of an emergency.

**12 Electronic Actions.** There is no doubt we have moved away from a paper-based business world to one of electronic actions. Unfortunately, many state laws contain restrictions against electronic board actions. Those that do permit electronic actions often have very detailed requirements about how matters can be decided and verified. For example there may be provisions permitting electronic meetings. Or there may be provisions that say electronic meetings are only permissible if members can hear all the discussion and participate in debate. Likewise if electronic votes are permitted in the state, there may be requirements that the vote must be unanimous or about how the vote of a director may be verified. At the risk of sounding like a broken record, this is an area that needs legal expertise and guidance to help compliance with state law.

**13 Indemnification.** Indemnification is a very important part of director and officer protections. You certainly want to protect directors and officers from legal actions, particularly ones that are unfounded. At the same time, indemnification should not be so automatic that the organization ends up paying for the legal fees of an individual the organization itself is taking action against. Another consideration is whether the indemnification process has to wait until all legal decisions are made or whether advance payments may be authorized by the board to help the director/officer in question defend against legal actions. Decisions regarding indemnification should only be made after a careful review of possibilities and consequences with a qualified risk management specialist.

In closing, remember bylaws are important. They should guide actions and purpose within an organization. It is essential that organizational leaders ensure that their bylaws are positive and helpful to the organization and not prohibitive or harmful impediments that get in the way of organizational progress or expose them to legal challenges either from inside or outside the organization. Remember that the first document an opposing attorney will ask for when attacking an organization's actions or decisions are the bylaws. Don't find yourself caught short by taking actions not compliance with the bylaws!

Recently retired as the CEO of the Pasadena Tournament of Roses, Mitch Dorger brings to his new consulting practice more than 40 years of work experience including 20 years as a chief executive officer. His experience as a CEO was consistently characterized by successful performance improvement programs and high employee morale and achievement. He believes the fundamental goal of leadership is to inspire teamwork and the spirit of continuous improvement. He has recent expertise in the world of non-profit organizations and is well versed in corporate governance, volunteer management, financial planning and management, government relations, and large event management. As a public speaker he has lectured on non-profit organizational management, strategic planning, change management and leadership. He has also served as a keynote speaker for four different festival and event association conventions.

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