

# A Legal Roadmap to More Effective Association Governance

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# Introduction

- Who we are
- Who our clients are
- Major areas of focus

# Roadmap

- Governance ecosystem
- Common governance pitfalls
- Bylaws vs. policies/procedures
- Maintaining a strategic board
- Effective governance structures

# Governance Hierarchy

# Hierarchy of Governing Documents



# Common Governance Pitfalls

# Losing Sight of Your Mission

- Forgetting to fulfill your federal tax-exempt purposes
- Keeping track of the big picture
- Risk of losing federal tax-exempt status
- More isn't necessarily better

# Staying Focused

- Many nonprofit organizations, including trade and professional associations, attempt to do too much – far more than their federal tax-exempt purposes allow. Less can be more in your purposes statement!
- Pressure from members, Board members, and others often lead to a nonprofit acting beyond its scope and outside of the legal parameters of a nonprofit.
- Having a regular strategic planning session that results in achievable goals can help nonprofits stay focused and work towards their tax-exempt mission and purposes.
- Expansion and growth should be considered under the lens of the primary purpose of the organization – refer back to your governing documents.



# Cutting Through the Noise

- Conflicts of Interest
- Competing Interests
- Micromanagement of Staff by the Board
- Fiduciary Duties

# Stale Voices and Perspectives

- Ensure regular turnover on the Board
- Keep focus on diversity in Board and other leadership representation (in the broadest sense of the term)
- Have a defined role for former leadership

# That's The Way We've Always Done It

- Many associations fall into the trap of lifetime appointments (“Founders Syndrome”) or lengthy terms for Board members which can put the organization into a programmatic rut.
- New voices representing diverse perspectives are important to ensure an association’s continued success.
- Extended participation for past chairs or other Board leaders can hamstring the organization’s forward progression and get stuck in the “that’s the way we’ve always done it” mentality.
- Many prospective members and sponsors will now look to the diversity of the Board to find a connection.

# Bylaws vs. Policies/Procedures

# COMMON MISUSE OF BYLAWS

## Reactionary provisions

- Address bad behavior
- Resolving ambiguities with excess detail
- Removing Board discretion

## Member engagement tools infused into Bylaws

- Program and governance committees conflated
- Member rights vs. benefits



# Common Bylaws Pitfalls

Too Much  
Detail

Little  
Flexibility

Unwieldy  
Structure

Conflicting  
Terms

Governance  
vs. Ops

Outdated

# Too Much Detail/Lack of Flexibility

- Bylaws should allow an association to remain flexible
- Overly detailed Bylaws restrict the association from being nimble
- Reserve the detail for policies and procedures, which are generally easier to amend

# Unwieldy Governance Structure

- Large Board of Directors
- Overinvolvement of previous leaders (e.g., past Presidents)
- Too many layers of governance and approval processes
- High voting thresholds for members and Directors/Boards



# Conflicting Terms

- Piecemeal amendment processes create confusion
- Details that are better placed in policies may conflict with practice
- Forgetting to check your Articles of Incorporation

# Governance vs. Ops

- Are we including information that is day-to-day operations?
- Governance is about high-level direction and framework – not the smaller details
- Language that restricts evolution of the organization

# Out of Date

- No longer reflective of the practices of the association
- Includes practices that are not followed
- Inconsistently applied to the management of the association

# Policies and Procedures

## Policies, Procedures, & Charters

- Purpose-built documents with details
- Plain English
- Simple to adopt and amend
- Support continuity of operations

# Policies, Procedures & Charters

## Leadership

- D&O Elections Procedure
- Committee Charters
- Job Descriptions

## Ethics

- Code of Ethics
- Code of Conduct
- Appeals

## Finance

- Investment Policy
- Membership Dues
- Audit Policy

## Legal

- Volunteer Policies
- Intellectual Property

# Bylaws or Policy?

## Considerations:

Required by law to be in Bylaws?

“In the weeds” or general framework?

Strategic vs. operational

Potential for more regular amendments or change?

# Crafting an Effective Policy

Purpose-built for single topic

Applicable to discrete group of members – e.g., candidates for office, committee volunteers, event attendees

Complement Board fiduciary duties – conflict of interest policy, investment policy, audit policy

Protect association – IP and confidential info, liability releases, limit bad behavior, protect industry reputation

# Committee Charters

Permanent or ad hoc?

How are committee members selected?

How long do they serve?

What is the committee's task?

Who does committee report its activities to?

Deliverables?



# Case Studies

# Case Study #1 – Membership Structure

## Scenario:

Bylaws detail multiple categories and tiers of membership

Some members have a pipeline to “councils” and Board leadership positions

Bylaw amendments involving membership changes must be approved by members (under CA law)

## Issues:

Organization wants to eliminate the multi-tiered governance/pathway to the Board, eliminate councils

Discord within small group of members who would be affected by this change

# Case Study #1 – Membership Structure

## Solution:

Reformat membership structure in Bylaws to create more flexibility and develop standalone, Board-developed Membership Policy.  
PR campaign to align members on the need for governance and membership restructuring.  
Additional pathways to leadership through Election Policy.

# Case Study #2 – Reactionary Governance

## Scenario:

Organization formed in 1990s; minor amendments to Bylaws, “in a bubble”

Policies/procedures not adopted to implement operational pieces of Bylaws

Conflicting language in the Bylaws regarding elections and petitions

## Issues:

Vocal minority of members files lawsuit alleging Bylaws have been misapplied in election procedure

Org has spent six figures (\$\$) defending lawsuit and filing countersuit

Current leadership and staff attempt to revise Bylaws to account for every scenario the litigious members could bring up

# Case Study #2 – Reactionary Governance

## Solution:

Complete rewrite of Bylaws, with PR campaign to members  
Maintain basic structure of elections and petitions (in current Bylaws) to appease those who may raise issues, implement Member Petitions Policy  
Propose Nominating Committee (via new charter) to manage elections, implement Election Policy

# Case Study #3 – Officers and Directors

## **Scenario:**

Two officers resigned, including Chair-Elect, following misconduct investigation

Automatic succession of officers creates third vacancy

Annual election resulted in single officer winner

## **Issues:**

Bylaw provisions on elections conflicted with vacancies provisions

Little flexibility

Board proposed additional officer succession rules and election procedures in Bylaws, and adding conduct rules to Bylaws

Member rights to run for elected office

# Case Study #3 – Officers and Directors

## Solution:

Rely on creative, but reasonable, interpretations of Bylaws:

- Existing provision provides for runners-up to be “elected” to vacant offices
- Because same election procedure used, no members denied opportunity to run

After dust settles, association needs full Bylaw overhaul – remove officer succession, create Election Policy, provide Board with flexibility and ability to fill vacancies on temporary basis

Draft and implement Code of Conduct, allow Board flexibility to remove officers for violations

# Legal Considerations



# Acting in the Best Interests of the Organization

- With so many competing voices (Board, staff, members), associations face serious risks that could jeopardize the organization's federal tax-exempt status.
- Associations need to have a robust conflict-of-interest policy that Board members should sign and agree to on an annual basis. In addition, the procedures for handling conflicts are critical in the event of an IRS audit or litigation, among other things.
- Board members and staff must put the interests of the organization first – even if the Board member serves on another Board as well.
- The Board is the strategic overseer of the organization. Getting in the weeds or micromanaging the staff is ineffective and inefficient. Organizational staff will lose motivation and become resentful of the Board and senior leadership.

# Legal Fiduciary Duties – Overview

- **Duty of Care**
  - Prudent steward of the organization
  - Due diligence in decision-making
  - Exercise good business judgment at all times
- **Duty of Loyalty**
  - Act in the best interests of the (entire) organization
  - Avoid conflicts of interest that are harmful to the organization
  - Includes a duty of confidentiality
- **Duty of Obedience**
  - Faithful to the mission and purposes of the organization
  - Follow the governing documents and external laws and rules

***Material breaches of fiduciary duties create liability risk for the Board members, officers, and senior staff who breach them; can be enforced by the association and by the applicable state's Attorney General's office***

# Effective Leadership

# Expectations of Board Members

- Attend all Board and committee meetings
- Understand the purposes/mission, Bylaws, and policies
- Prepare for meetings by reviewing the agenda and supporting documents
- Stick to established agendas during Board meetings
- Treat information and discussions as confidential
- Ensure the important protections of the attorney client and qualified privileges by keeping discussions and communications limited to Board members, officers, senior staff, and legal counsel
- Be respectful of staff as well as your fellow Board members
- Promote the association and its goals and be an advocate to others (though you cannot speak for or act on behalf of the entity without authority); **apparent authority doctrine**
- Stay current on issues and trends impacting the association and its membership
- Serve on committees and task forces
- Follow through on assignments and deliverables
- Readily communicate with staff for needed information and assistance

# Traits of an Effective Board

- Upholds **fiduciary duties**
- Understands **roles** and responsibilities
- **Cultivates a healthy, respectful relationship** with its CEO/Executive Director and other staff
- **Delegates** appropriate decision-making authority to committees
- Sets the **strategic direction** and then staying out of the weeds
- **Empowers** staff
- Is **led** by an effective chief volunteer/elected officer (i.e., President or Board Chair) and other officers
- Holds **trust** and **respect** among each other

# Key Takeaways

Understand the hierarchy of governance documents

Be aware of common pitfalls and take proactive steps to avoid them

Let each document do its job; avoid creeping details

Changes in one document can create cascading conflicts

No reactionary governance

Encourage and lead with strategic objectives in mind

# QUESTIONS?

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