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# Maximizing Your Nonprofit's Efficiency and Effectiveness Through Your Bylaws

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# OVERVIEW

- Where do bylaws fit in the “governance hierarchy”?
- Role of articles of incorporation
- Role of state nonprofit corporation statute of state of incorporation
- Role of board-approved policies
- Characteristics of well-designed and well-functioning bylaws
- The “process” for review and amendment of bylaws matters – a lot

# The Top 15 Most Common Nonprofit Bylaw Pitfalls

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

*Borrowed from an Article of the Same Name:*

<https://www.tenenbaumlegal.com/articles/the-15-most-common-nonprofit-bylaw-pitfalls-how-to-avoid-the-traps/>

# #1 Understand Your State's Nonprofit Corporation Law

- A state's nonprofit corporation statute supersedes any provision of your bylaws.
- Your nonprofit is governed by the nonprofit corporation statute of your state of corporation – not where you may otherwise be located.
- The nonprofit corporation statute will contain default rules for areas that the bylaws might not address, such as specifying the minimum number needed for a quorum for director or member voting; it will also contain prohibitions, such as (usually) not permitting directors to vote by proxy, among other provisions.
- Your Board should review the default provisions in your state's nonprofit corporation statute and determine if there are any defaults your 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 membership meetings or voting than the default number).
- Ensure that your bylaws do not permit practices that are prohibited by the state nonprofit corporation statute. If so, those bylaw provisions will have no force or effect, and any actions taken pursuant to those provisions will be null and void.

## #2 Make Sure Your Bylaws Are Internally and Externally Consistent

- 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 statute, and any policy manual).
- 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 Address All Foreseeable Scenarios

- Sometimes, 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 Bylaws Task Force With an Appropriate Cross-Section of Your Organization

- Use of a bylaws task force is one of the most common ways nonprofit organizations go about the bylaws review and amendment process.
- If the bylaws task force 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, where membership approval is required for bylaw amendments) or to the full board of directors.
- Create a bylaw task force that fully reflects your organization's population, so 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 Bylaws Task Force With Legal Advice

- When rewriting bylaws, almost inevitably, legal counsel 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 task force'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, 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 statutes allow for more flexible governance arrangements, such as the creation of "designated bodies," which provide another option for spreading out the balance of power.
- 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.
- You may consider scrapping the original bylaws and starting over from scratch, using a good, proven model provided by legal counsel or others as a starting point.

## #8 Keep Your Bylaws Flexible

- How your 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

- Details such as membership criteria, membership dues determinations, and the operation of committees are more appropriately placed in board-approved policies rather than in the bylaws.
- It also is helpful to place all board-approved policies into a single policy manual.
- Bylaws 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 a federal tax-exemption issue. 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, you might want to include a clause in the bylaws which simply refers to the purposes clause as written in the articles of incorporation.
- The purposes clause in the articles of incorporation should be reviewed, keeping in mind that a clause drafted, for instance, 20 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

- Your organization 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: most state nonprofit corporation statutes do not allow directors to vote by proxy, and instead require a director to attend the meeting in-person or virtually to be counted as present at the meeting for purposes of quorum and voting.
- Although not the norm anymore, 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 majority of state statutes that do permit member voting electronically outside of a meeting or that permit virtual membership meetings, sometimes specific procedures or prerequisites are prescribed, and, sometimes, such provisions must be contained in the articles of incorporation and/or bylaws.

## #12 Look at Committee Composition

- Some state nonprofit corporation statutes are very specific as to who can serve on a committee of the board and how such persons may be appointed.
- In the District of Columbia and several other states “committees of the board” may only be made up of directors and 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 Bylaw Amendment Approval Process

- For organizations with voting members, bylaws can be written so that they may be amended by the board of directors alone, by the voting membership alone, by either the board or members, or by both; all four options are possible; be sure that the bylaws amendment provision is clear and specific in this regard.
- Often, 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 bylaws 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; be sure that the approval threshold is made clear and not ambiguous (e.g., two-thirds of all voting members or two-thirds of those voting, presuming a quorum exists).
- 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 Your Bylaws

- After engaging in a bylaw amendment process, make sure that your bylaws do not become “dusty.”
- Be sure that your board of directors occasionally critically revisits the bylaws, and as circumstances arise that warrant bylaw reconsideration.
- 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.

# Questions?

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