

“What Ought to Be in an Organization’s Bylaws” Betsy Buchalter Adler, Adler & Colvin, *Journal of Taxation of Exempt Organizations*, Volume 10/Issue 5, March/April 1999, Copyright © 1999 the RIA Group, or copyright owner as specified in the Journal

## What Ought to Be in an Organization’s Bylaws:

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Bylaws are the internal governance rules of a group of people who have organized for a common goal. Most commonly, the word refers to the rules that govern the operations of a corporate board of directors. A trust will also have internal governance rules, usually in the form of provisions contained in the trust instrument rather than in a separate document called bylaws.

Bylaws are a necessity for a nonprofit corporation because the IRS requires a charity to submit its internal governance documents as part of the tax exemption application. Moreover, organizations that are corporations must have bylaws as a matter of state corporate law. There is a more fundamental reason, though—bylaws serve as preventive medicine for disputes over governance. Procedural nitpicking is often a screen for what is really at stake. If the procedures for making decisions are clearly spelled out in the bylaws, the decision-makers are more likely to focus on the substance of the choice facing them.

Every state has a slightly different form of corporate law, so the details of what must be in a charity’s bylaws will vary from state to state. The basic elements, however, are likely to be the same.

- The composition of the governing body (usually, as below, the Board of Directors, though many foundations refer to their governing body as the Board of Trustees). The bylaws may set a specific number of directors or merely provide maximum and minimum numbers, allowing the board to decide the size from time to time. The bylaws may also specify qualifications for serving as a director, such as a minimum and maximum age or a particular family relationship with the founder. There may be classes of directors, defined perhaps by generation, by family branch in a family foundation, or by geographic region in a trade association.
- The length of a director’s term. Directors might serve for a term of years, for life (some states do not allow this, or allow it only under limited circumstances), or at the pleasure of whoever appoints the directors. The bylaws may also specify whether consecutive terms are allowed.

- Who selects and removes directors. The bylaws can provide for new directors to be elected by a vote of the currently sitting directors, appointed by individuals or institutions, or elected by voting members. If directors are appointed by individuals, the bylaws should also specify what happens when the appointing person dies or becomes incapacitated. In most states, directors may be removed only by those who elected or appointed them.
- Voting procedures. The bylaws must settle several questions about votes of the board. How many directors must be present at the meeting for the meeting to proceed (in technical terms, what are the quorum requirements)? Are decisions made by majority vote, or is a super-majority required for certain decisions if there are several classes of directors? Must each class of directors be represented in order for a meeting to take action? Are votes weighted in any way?
- Officers. What officers the charity will have, and what their duties are, are another subject for the bylaws. State law usually requires a corporation to have a president, a secretary, and a treasurer. Some states allow one person to hold multiple offices; others do not. Some charities have a chair in addition to a president; some have vice presidents; others prefer the simplest legally permitted approach. In any case, the bylaws should specify how the officers are chosen and what their term of office is.
- Committees. State law generally allows boards to delegate responsibilities to committees. The bylaws may authorize specific committees and provide detailed guidance about their composition and duties, or may simply authorize the board to create committees at its discretion.
- Members. If the charity has voting members, the bylaws should specify the qualifications, rights, and obligations of voting members, and should also make clear how a member may lose that status. Most states give voting members some procedural protections in connection with removal from membership. In a state where that is so, the bylaws should include those rules.
- Conflicts of interest. To guide the directors, the bylaws should include any state law rules on conflicts of interest within nonprofit corporations. Many charities go beyond the minimum legal requirements in dealing with conflicts of interest and other questions of ethics, both in defining what constitutes a conflict of interest and describing how conflicts should be handled. Some charities include these internal policies in their bylaws.

In almost all states, statutory corporation law (including statutory nonprofit corporation law) has become comprehensive, providing detailed rules for formation, operation, and dissolution. The bylaws of any nonprofit corporation cannot possibly include all of the corporation laws that are relevant to the issue of internal governance. All bylaws, therefore, omit pertinent operating rules. If the bylaws conflict with statutory corporation law, the latter will prevail. Establishing a process of periodic bylaw review by the foundation's legal counsel will help avoid problems. Perhaps the most helpful advice is to keep in mind that bylaws can mislead as well as guide. When bylaws are consulted on

an important issue of governance, it might also be worthwhile to consult legal counsel to make sure that the bylaws correctly reflect current law.

## CONCLUSION

Preparing bylaws that are useful to the directors (as opposed to bylaws that take up file space but give no practical guidance, or merely recite the law without more) is a challenge. A lawyer who is experienced in working with charities can produce basic bylaws that contain the legally required elements, but these “plain vanilla” bylaws may not fit the particular needs of a particular charity. Board members will be aware of those needs, but they are not likely to know the legal rules, some of which can be very technical. The directors and the lawyer need to work together so that the bylaws are both technically correct and practically useful.

This is not always an easy process, either for the lawyer or for the organization. This is doubly true when the organization is a family foundation. Family dynamics are challenging enough in private; explaining them to an outsider can feel like a betrayal. If the lawyer is to come up with a governance structure that works for the family controlling a foundation, however, he or she needs to know as much as possible about these dynamics, and the family needs to understand the legal framework that governs the foundation’s operations. Some matters of governance are completely controlled by state or federal law, while in other areas the law leaves a wide range of choices up to the organization itself. While the family should educate the lawyer about its issues and concerns, the lawyer should educate the family about the laws that affect their governance choices. Together, they can produce bylaws that are effective both in terms of law and of practice.