HOW TO AMEND NONPROFIT BYLAWS

Before you change your nonprofit's procedures, your board of directors should update the bylaws.

Nonprofit bylaws are a legal document that sets the rules and procedures for running the organization. As the nonprofit grows or changes, the board of directors can amend the bylaws, such as increasing the number of directors or allowing for virtual meetings. The board must verify that the amendments comply with the state's nonprofit laws and the organization's procedures. Depending on the type of amendment, the law might require the nonprofit to report the update to state agencies, the IRS, or both.

When to Update Your Bylaws

Your board of directors should regularly review the bylaws to ensure they are following the procedures outlined in the document, and to make updates as necessary. At the minimum, the board should go over the bylaws whenever your organization undergoes a major change, such as expanding to a new state or merging with another organization. It is also good practice to review the bylaws **annually**. Your nonprofit might plan on reviewing and updating the bylaws at the annual meeting (when the board adds and removes members and creates the strategic plan for the upcoming year).

No matter when the review occurs, the board should take the time to carefully go over the entire document. Some of the provisions your board might update include:

- the number of directors (you might want to increase them as your nonprofit grows)
- directors' term lengths and limits (you might decrease term lengths and set limits to bring in fresh ideas and perspectives, or increase term lengths to maintain board consistency)
- your nonprofit's offices (the organization might add a position such as vice president)
- your quorum requirements (the number of votes the board needs to make decisions, which might change as the number of directors grows)

- your method of notice for meetings and other updates (you might want to add email or phone, in addition to mail)
- the rules concerning virtual meetings (for instance, should you conduct them by video or just telephone), and
- For membership nonprofits, member dues and qualifications.

Review Your State's Laws

Before you amend your bylaws, review your state's nonprofit laws to ensure the updates comply. For instance, before changing the number of directors, check your state's laws regarding the minimum number of directors. Similarly, your state's nonprofit laws might dictate the minimum quorum requirements, required offices (such as president or secretary), or prohibit the same person from holding more than one office.

Draft the Amendment

Once you confirm that the change complies with state laws, you can draft the amendment. Sometimes the process is as simple as adding a new provision to the bylaws, while other changes can affect several provisions and will require you to make updates throughout your bylaws. Be sure to review the entire document to ensure that the language is consistent. If you have any question as to the legitimacy of your proposed changes, consult with an attorney who is well-versed in nonprofit law.

For example, when you change the month of your annual meeting, you will likely update only the section on meetings. In contrast, when you add an officer position and assign duties in the bylaws, you should review the sections on other officer roles (to ensure there is no overlap in duties) and the total number of directors (to see if you have enough people fill the required roles).

Changing Your Nonprofit's Mission

It is more challenging to change your nonprofit's mission than to make other amendments to your bylaws. If your organization is a 501(c)(3), you should consult with an attorney to ensure that your proposed new mission will not put your tax-exempt status in jeopardy. In some states, you must first seek approval from the state Attorney General. After you have approval, you must notify the IRS, update your state

fundraising registrations, and file an amendment to your articles of incorporation (see below for more information on submitting updates to government agencies).

Further, if your organization recently accepted donations that you have not spent in furthering your original mission, you must notify your donors that you will use their money for your new mission, and they have the right to a refund.

Review and Follow Procedures for Updates

Review your bylaws to determine the process for amendment, and confirm that your procedures comply with state law. Some of the rules you should check include:

- the number of director votes you need to pass the amendment (majority or unanimous)
- the number of member votes you need (for membership nonprofits)
- whether directors or members must receive notice of the amendment before the vote (which might be 30 days or longer)
- whether you must hold a director or member meeting to discuss the amendment, and
- Whether directors or members can email or mail in their vote, or if they must cast their votes in person.

If the bylaws are silent on any of the above, check your state's nonprofit statute, and follow the minimum requirements.

Submit Amendments to Government Agencies

Depending on the amendment and your state's laws, you might need to update state agencies and the IRS. In many states, you can report your changes in your annual filing, such as your annual report. In other states, you must file a certificate of change or an amendment to your formation documents (such as your articles of incorporation). Check with your Secretary of State to determine the requirements for your organization.

You must notify the IRS when you've made a structural or operational change, which includes amendments like increasing OR DECREASING the number of directors, adding required offices, or changing your mission statement. If you are making a non-structural change such as allowing for meeting notification by email, you likely do not need to notify

the IRS. To report a change, you include the updates in your annual tax return (990). The IRS does not require a separate filing.

Bylaws are often several pages long and densely packed with minutiae about elections, terms, and more. They're daunting to tackle, but going through an official process to review and revise them holds the key to the majority of real reform opportunities for your board. Let's cover the basics of bylaws and then look at the ways your nonprofit might consider changing them.

What are bylaws for?

Bylaws are the most basic rules of operation for your board and nonprofit. They should cover only the highest level of operation of the board. Think of the bylaws as equivalent to the U.S. Constitution—broad in the topics it covers and infrequently changed—while the policies you pass are more like the laws that fit within its framework. Every time Congress passes a law, it doesn't have to amend the constitution. Keep your bylaws focused on the big picture and use policy to enact other changes.

Here are the common things you'll see in a set of bylaws: the mission or goal of the organization; definition of membership (if applicable); the rules for notification of meetings where business is transacted; the basics of the board (size, terms, how to remove board members, size of quorum, etc.); designation of officers and their duties; elections of board members and officers; standing committees and their goals; term of the fiscal year; and process for amending the bylaws.

What follows are things to look for as you review your bylaws.

Look for easy changes first

A lot of what you read in your nonprofit bylaws is probably fine. Look for "housekeeping"-style changes, which just clean up the document to make it match current conditions: updating your address, adding that email (not just regular mail) is appropriate for notice of meetings, or changing the list of standing committees to reflect that your board development committee is now called a governance committee. These will be noncontroversial changes for the rest of the board.

Remove overly specific language

If you try to overly prescribe the business of your nonprofit in the bylaws, you will find yourself in bylaw paradoxes or otherwise needing to change your bylaws all the time.

Let me give you an example of an overly prescribed set of bylaws that went terribly wrong. A board I worked for proposed a change that said that the president of the board should be president-elect of the board for a year before assuming the duties. Makes sense, right? You can learn the job before you get to it, and it sets up a clear leadership succession plan.

Elsewhere in the bylaws, though, was a rule that any officer of the board had to have served on the board for a year. This also makes a certain amount of sense, as it would ensure that the board has leadership that understands the board culture and the organization.

But together these rules went badly wrong. First, when the president-elect stepped down partway through her term, there was a real succession problem: whoever would be president for the next year would, by default, not have served as president-elect *for a year*. Which meant that, technically, the board didn't have anyone eligible to be president anymore.

In addition, the board had added two or three really great people mid-year, but none of those people had served on the board for a full year, and so were ineligible to be an officer, such as president-elect. Other board members were term-limited off the board that year and couldn't stand for another

term. Between the various bylaws rules, on a board of thirteen there were fewer than three people who were even eligible to be president-elect, and that didn't solve the issue that no one was technically eligible to be president at the start of the fiscal year (except the current president).

The board did what many boards do in scenarios like this: it ignored the bylaws and did its best, referring the bylaws back to the governance committee for fixing the issue as part of the committee's annual review. But if the issue had been a contentious—let's say that someone didn't support the nominee for the next president—the bylaws would be unclear and confusing at the worst possible time.

The bylaws are most important when there is real disagreement, which is why removing language that might create one of these paradoxes is important.

So again, not everything has to be in the bylaws. It might be good to simply have the norm that presidents serve as president-elect first.

Also, remember that a board has another tool in its tool belt besides the bylaws: the ability to make policy (Standing Rules). Just because it's not in the bylaws doesn't mean it's not important. The bylaws should be the broadest set of rules that allow a board to make decisions. They shouldn't be a list of all the policies of the board.

Determine an ideal board size

What is the appropriate size of the board? It doesn't have to be in the bylaws, but whatever you think the ideal number is, the bylaws should provide a flexible range for you. If you want an ideal board of fifteen, for example, then allow your board a range of nine to seventeen. By allowing for a wide gap at the bottom between the ideal board and your bylaws-specified minimum, you are ensuring you aren't forced into taking someone on the board just to stay above the minimum. Having a maximum that is slightly bigger than your ideal board allows you to add that extra person you really want when they come along, and not be in violation of the bylaws because you're already full.

(Boards are often filled with an odd number of members, to prevent tie votes, although I've never seen a tie vote on a nonprofit board, or even a vote in which a single vote meant the difference. It's rare, but that's the reason you'll often see the ideal board size set at an odd number.)

Establish terms

Does your board have terms? If not, this should be an easy decision to make. As discussed before, terms help a nonprofit know how long it can expect to have a board member's expertise on the board. Terms also enable board members to step down gracefully if they choose, by not standing for another term.

If you don't already have terms, I'd recommend establishing a three-year term. Shorter than that, and a board member is practically done with their term as soon as they start. Longer terms might dissuade people from joining the board.

For three-year terms, the terms themselves should be staggered so that the terms of roughly one-third of the board are up every year. That way the entire board isn't or wouldn't be up for renewal in the same year. (This doesn't necessarily have to be in the bylaws, but it's useful to know.)

Adding terms just formalizes the relationship a bit. This change shouldn't be controversial...

Consider term limits

... But this one probably will be.

There are some really good reasons to consider term limits.

Term limits help a board stay current with changing times. What worked ten years ago might not work now, but it often takes new people with new ideas to realize that.

Term limits help prevent an individual board member from accumulating too much power over the rest of the board. As a new board member, it's hard to argue with someone who's been there for twenty years. Board members who have been there that long will just get their way because no one wants to argue with them.

Term limits allow a board to grow in experience, vision, and financial capacity—especially the board of a small nonprofit. What started out as a group of engaged volunteers with a dream could grow to become a community institution with stable resources and a big impact. But it's hard to get there with just the original group of volunteers.

Term limits help prevent board members from getting tired. Even on committees or boards I've loved, I've often been quietly relieved to term out and step down. What you personally get out of an organization as a volunteer board member can slowly start to decrease over time. Eventually board business might all start to feel like stuff you've been through before. Maybe you became a little cynical, maybe the excitement is gone, and you feel that you're just looking over budgets all the time. Term limits help prevent burnout.

Term limits remove board member guilt. Board members don't have to feel bad about being burned out or about wanting to move on. They can end their time gracefully.

Here is one example of how you add term limits to your bylaws. After spelling out the terms for board members, the bylaws could say:

These terms are renewable, but no person shall serve more than two (2) consecutive full terms.

And that's it! It's such a small change to the bylaws... and yet it's often a massive hurdle to implement. The problem is that the organizations that need term limits the most are the least likely to adopt them.

Sometimes people like to stay for years and years on a board. Maybe they founded the organization and believe they are irreplaceable (or believe that they are protecting the organization's roots from people who want to go in a new and scary direction). Maybe they have a profound sense of self-identity tied up with their position on the board. Maybe they are a major donor and believe that they are entitled to a position on the board. Maybe they simply love the organization and want to stay as close to it as possible.

Whatever the reason, even bringing it up can create bitter feelings in those who would be forced to term off the board. Here are some ideas that might make that transition a little easier.

Can board members come back?

Let's say a board member served two consecutive terms, took three years off, and now wants to come back onto a board. Should you bylaws restrict that?

As I said before, this is the kind of thing you may not need to codify into the bylaws. Your board might have the norm of not bringing back old members. But a future board might have a good reason to, and you don't need to unnecessarily restrict that board from doing so.

When shouldn't you have term limits?

Are there any examples of small (or very small) nonprofits that shouldn't have term limits?

Yes. Sometimes very small nonprofits are just a group of volunteers who are trying to make a difference. When they've filled the need, or when the group dissolves, the work of the nonprofit dissolves. There's nothing wrong with that. A lot of the recommendations of policy may not apply to them, including the decision to institute term limits.

But if that group of volunteers wants the nonprofit to last past the group's own direct volunteer work, then all of these are important, including term limits. It's through these policies that the nonprofit can endure, even after the founding volunteers are ready to move on to something else.

Here's another example of when term limits might not be worth the fight: when dealing with a very generous board member. Some nonprofits have a single donor whose capacity for giving dwarfs that of the other board members so much that, without this donor, the nonprofit might cease to function. Such donors *should* give without having to be on the board, and they *should* recognize that by operating this way they are holding back the organization over the long term. But they may not. And that's an awfully hard person to imagine approaching about this idea.

This nonprofit should have term limits, since it very much needs to diversify the funding streams and the number of people who care about it. But I wouldn't blame a board member who decided not to pick this battle at this time.

Nominations and elections

As we continue to look through the bylaws for possible changes, one thing to look at is the question of how board members are elected to the board.

Generally, the board appoints new members to fill the seat on the board for a particular term. It's a vote of the board members themselves. There's no reason to change this model if that's what you have in place.

Some nonprofits, though, are membership organizations that have a body of members outside the board who elect board members to represent them. Both of the nonprofits I led as the director had this structure and I watched both boards struggle with the same question: "Should we have *real* elections?"—real, meaning that someone would win, and someone would lose for each available seat on the board.

After seeing both nonprofits implement this for at least one round of nominations, I have to say I don't recommend it. First, it makes recruiting new members slightly more challenging, since someone has to stand for election, yet might not get on the board. Second, when a board member steps down from a board mid-term, the people who lost are frequently called upon to fill that vacant seat—so, what was the point of a competitive election? And third, I've twice seen sitting board members fail to be elected back to a board for a second term.

Of course, this might be the exact argument for why a board should have competitive elections. But from what I saw, it was a real blow to those—now former—board members. It's impossible to not take that personally. Giving is likely to suffer, and it's awkward to thank and recognize those departing board members for their service.

If you have three seats to fill on a board, I'd recommend the board put forward three candidates to the membership to fill it.

Finally, some nonprofits' bylaws allow for other means of getting onto a board. For example, the chair of a certain important committee might automatically become a board member. If your nonprofit has these backdoor ways to get onto a board, I'd look to close them. Let your norms handle this instead. All board members should enter through the same gate.

Voting to remove a board member

Your board may have the ability to remove a board member from a seat by a majority vote. It rarely happens, but a board member who just stops showing up and doesn't reply to email would need to be removed in this manner.

Here's one way to phrase it in your bylaws: *Any Director may be removed at any time from the Board for cause by a majority of the Board.*

Here's another: *A Director may be removed from office by a two-thirds majority vote at a regularly scheduled board meeting where the item was placed on the written agenda distributed at least one week ahead.*

I'm including both of these options because although they are superficially the same, I think one is better than the other, and I want to contrast them to make a larger point.

So which one is better?

The first that allows just a "majority?" Or the second in which a "two-thirds" majority is needed? Does that make a difference?

Here's a hint: it has nothing to do with how big the majority is.

The second one is better because it doesn't include the phrase "for cause." Removing the phrase "for cause" allows the board to decide whether it wants to act or not, without having to spend time deliberating on whether there is "cause."

Yes, *of course*, you don't want a board to willy-nilly remove board members from office without cause. But if it's even come up, then there *is* cause (at least some board members think so). Removing the phrase allows the board to focus on the specifics of the situation and not whether the current situation "counts." And I promise—if this is a matter of debate, at least one board member will ask if this qualifies as appropriate cause.

The larger point here is this: the bylaws should set the ground rules of allowable actions. They are like a big "Frequently Asked Questions." Someone asks the bylaws, "Can a board remove a board member from office?" And the bylaws answer: "Yes, with a two-thirds majority vote." They shouldn't wade too far past that level. Following bylaws in a difficult situation is hard enough without having to try to divine what the original authors meant when they wrote something like "for cause."

Recalls

If you have a membership-based organization, it *might* be possible that the members have the power to call a meeting and throw out board members (or the whole board). It's easy to look at this and think: "Eh. Probably won't happen." And it probably won't.

But don't even give them a chance. A board has a legal and fiscal responsibility to the organization that ordinary members don't have. A board that carefully and deliberately votes to cut a beloved program that is bleeding money should not be looking over its shoulder and wondering if there will be a recall by the members in two weeks to throw them out because of it.

For the most part, recalls are an issue only in organizations in which members can vote for the board. But the option to recall gives the general membership too much power. If the membership doesn't like a course of action, then it's at the next election when it should get to vote for a preferred candidate—*not* in between elections in the heat of the moment.

Voting by email and voting by proxy

With the advent of technology, it's often tempting to want to get more done by email or conference call.

In general, I would recommend that your bylaws allow for votes over email (at times when *everyone* is voting by email), or votes via a conference call.

In my home state there are laws about email voting for boards and how it works. Your state may have similar statutes. It's worth a check with a nonprofit attorney before you enact email voting.

Even if legal, email voting should be used sparingly, though. Discussion that would have happened in person often won't happen via conference call, and email threads can often get extremely difficult to follow. Your board should have the expectation and the norm that people attend.

Voting by proxy, on the other hand, should be done away with. Let's say a vote is coming up on authorizing a new program estimated to cost $25,000. A board member who will be absent writes, in advance, a "yes" vote and gives it to a board member who will attend the meeting (that person attending the meeting is considered to "be a proxy" or "have a proxy vote" for the person who couldn't attend). But then at the meeting, the executive director says that new information has come to light that indicates the program will actually cost $50,000. How should the proxy vote be treated? Is it a "yes vote" because the board member who gave the proxy vote wanted the program? Or a "no" because the program is too expensive? It's impossible to say without asking—but of course, you can't. Otherwise, there wouldn't be a need for the proxy.

Voting by proxy is fundamentally different from email or a conference call, when all board members are privy to the same information, because of the chance of new information arising after the vote has been made. Dump it.

Email notifications are fine

That said, boards often require a certain number of days of notice before an official meeting. That's fine, but make sure that notice can be delivered by email. Some bylaws still call for mail, and in this day and age with rising postage costs and the convenience of email, there's just no reason for that.

Number of meetings

If your bylaws call for a mandatory minimum number of board meetings per year, and that number is larger than ten, you may want to decrease it. Even six or eight might be safer. Again, you can meet monthly (and probably should) but what if your board often doesn't meet in December because it's too hard to schedule people, and then a freak snowstorm prevents a meeting in February and in August too many people are on vacation and you can't get a quorum. Suddenly you're in violation of your bylaws. It's better to establish a lower number of meetings.

Quorums

Your board likely has a minimum number of attendees to be able to conduct official business. This is a good thing. It protects the organization from the whims of a small minority who happened to attend. It can be a frustration, though, if a board continually has trouble making a quorum.

Half of your current board members make for a good quorum. Avoid having two-thirds needed, and make sure that it's phrased as a percentage of current board members, not a flat number that assumes you have a full board.

But if your board is having trouble making a quorum, then your board needs to deal with that attendance issue outside of the bylaws. Adjusting the quorum shouldn't be your solution.

Can an executive committee act on behalf of the board?

It might be a good idea to have an executive committee (usually composed of the officers of the board) who can act on behalf of the board in times of emergency or between board meetings. I would suggest you don't need to write into the bylaws that their actions need to be formally ratified by the board at the next meeting. Rather, if it's an unpopular decision, the full board can simply overturn it, or elect new leadership. (All of these scenarios are unlikely, but giving the board the duty to ratify makes it more likely they *won't*. Forcing the board to choose to overturn something is better than giving them the automatic option to do so.)

Creating a committee structure

Your bylaws can spell out the essential committees of the board, the length of time someone can be chair and a lot more. Sometimes that might be necessary based on your norms. But you can also allow real freedom by replacing it all with a simple sentence:

The Board may designate committees: standing, ad hoc, or otherwise as it deems necessary.

Maybe a marketing committee made sense in 2009. But if you don't need it now, your bylaws don't need to call for it. And, of course, the corollary to that is: Even if you *do* need it now, your bylaws don't need to call for it.

When in doubt, ask...

..."Is this necessary for the long-term governance of our nonprofit?" Everything in the bylaws constrains a future board, even just a little bit. There may be some weird quirk in your bylaws that isn't covered here. My advice is to look at that weird quirk and truly ask yourself, "Does this really need to be here?"

It's very likely that it doesn't.

ALWAYS PROTECT THE BOARD MEMBERS WITH D & O INSURANCE!