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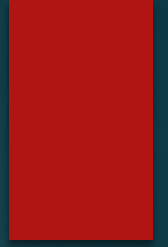
Best Practices in Governing Documents: Practical Tips

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AGENDA

- ▶ Scary Questions
- ▶ Governing Documents Funnel
- ▶ Bylaws
- ▶ Revising Bylaws
- ▶ Other Governance Documents
- ▶ Compliance

ARE THESE SCARY QUESTIONS FOR YOU?



- ▶ How often does your board look at your governing documents, e.g., articles of incorporation and bylaws?
- ▶ Is your board actually complying with them?
- ▶ Who is responsible for compliance?
- ▶ Are your governing documents consistent with best practices in governance?
- ▶ Do they advance your governance or impede?
- ▶ When were they last revised? Who was involved? Legal review?

GOVERNANCE DOCUMENTS FUNNEL

Articles of Incorporation



Bylaws



Head of School

Board of Trustees

Contract

Trustee and Officer Job
Descriptions

Job Description

Committee Charters

Board Resolutions and Policies

BYLAWS: TODAY'S FOCUS IS ON WHERE YOU HAVE DISCRETION

- ▶ State laws typically have minimum requirements that impact bylaws provisions (e.g., minimum board size; meetings; quorum; annual reports; indemnification; etc.)
 - ▶ Not focusing on that here (though you need to understand these laws)
 - ▶ *Please note: This presentation should not be construed as providing legal advice.*
- ▶ Here, the focus is on **where you have discretion** to make choices that fit your school and culture. And these laws expressly leave room for lots of discretion.
- ▶ And the focus is on **how you have flexibility** to reflect those choices in other board-approved documents rather than exclusively in your bylaws.

BYLAWS: WHY CARE ABOUT BYLAWS?

- ▶ Bylaws are required by State Law and your Articles of Incorporation
- ▶ Bylaws are a Roadmap to Good Governance:
 - ▶ The Board's Role (and the HOS's Role)
 - ▶ The Board's Structure
 - ▶ The Board's Decision-making
- ▶ Bylaws Help Trustees Uphold their Fiduciary Obligations

BYLAWS: STATEMENT OF PURPOSE

- ▶ Typically the first article of Bylaws. You have discretion.
- ▶ *Alignment* is critical:
 - ▶ Articles of Incorporation Statement of Purpose
 - ▶ Bylaws Statement of Purpose (can be same as Mission but must change bylaws if change mission)
 - ▶ Mission
- ▶ All are statements of *what your institution does and what your institution promises to its various constituencies*
- ▶ Contrast with Vision Statements
 - ▶ Statements of *what your institution aspires to become*

BYLAWS: BOARD AUTHORITY

- ▶ The Choice: General or Specific?
- ▶ General: e.g.: “The Board of Trustees is vested by law with all of the powers and authority to govern effectively and set policy for the school in accordance with the laws of _____.”
 - ▶ Note: State laws typically spell out authority of all non-profit boards. It is not necessary, therefore, to repeat in bylaws.
- ▶ Specific: To inform the board about its authority, bylaws may provide a non-exclusive list, e.g.:
 - ▶ Determine the mission and strategic direction
 - ▶ Oversee financial resources and other assets
 - ▶ Select and evaluate the head of school
 - ▶ Establish institutional policies and procedures.

BYLAWS: HEAD OF SCHOOL AUTHORITY

Authority/Responsibilities: For example:

- ▶ CEO and Executive Agent of Board
- ▶ Responsible for Day-to-Day Management/Operations
- ▶ Subject to Board Oversight/Supervision
- ▶ Member of the Board and its Committees (*ex officio* (means “as a result of one’s status”) (typical)? Voting (rarely)? Exceptions (Audit/Trusteeship)?
- ▶ Authority to Hire/Fire Employees
- ▶ Authority to Execute Documents (e.g., checks, contracts)
- ▶ Evaluations/Compensation (IRS intermediate sanctions)
- ▶ Removal (majority or 2/3rds vote?) (HOS contract)

Additional sources: HOS contract and Job Description; Compensation Committee Charter. **Alignment is Imperative**

BYLAWS: BOARD SIZE

Key Considerations

Large Boards (over 30)

- ▶ *Upsides:*
 - ▶ Helps with fund raising: Go large during capital campaigns
 - ▶ Greater diversity of skills, expertises and backgrounds
- ▶ *Downsides:*
 - ▶ Executive Committee can effectively become the Board (typical for large universities)
 - ▶ Trustee engagement diminished
 - ▶ Trustees don't know each other; trusting relationships not developed

BYLAWS: BOARD SIZE

Small Boards (under 12-15)

- ▶ *Upsides:*
 - ▶ Trustees have greater ability to give input
 - ▶ Trustees know each other, develop trust
- ▶ *Downsides:*
 - ▶ Less diverse skills, expertises and backgrounds
 - ▶ Greater potential for groupthink
 - ▶ Insufficient number to do Board work and staff committees

Importance of Alignment with Articles of Incorporation

What minimum and maximum size works for your Board?

BYLAWS: TRUSTEE TERMS

- ▶ Many variations out there, ranging from one to four (or more) year terms. **What works best for your Board?**
- ▶ IMHO, the Sweet Spot is 3 years:
 - ▶ 1-2 years are too short: Not enough time for trustees to get engaged and make a difference. That said, 2 years isn't a bad choice.
 - ▶ 4 years or more can be too long: Long initial time commitment deters some from being trustees. If trustee is not performing, forces a burdensome removal process to get rid of that trustee.
 - ▶ One option: 2-3-3. Initial term of 2 years, followed by two 3-year terms.

The bigger issue is term limits, next.

BYLAWS: TRUSTEE TERM LIMITS

- ▶ *The Pendulum Swings*
 - ▶ 40 plus years ago: No term limits. Trustees served for decades.
 - ▶ Then very short term limits. Trustees might be off after 4 years.
 - ▶ Search for Middle ground
- ▶ *Risk of No Term Limits:* Trustees become stale and coast; consolidate power; are resistant to change. Prevents new trustees from joining. Regular evaluation becomes imperative.
- ▶ *Risk of Short Term Limits:* Lose trustees just as they are getting productive. Lose institutional memory and expertise prematurely. Requires continuous recruitment of new trustees.

BYLAWS: TRUSTEE TERM LIMITS

- ▶ Approach: Figure out right number of years total: Typical is 6-9 Years Total
 - ▶ If terms are 3 years and want six total – 2 term limit
 - ▶ If terms are 2 years and want six total – 3 term limit
- ▶ Escape valves
 - ▶ Service as Board officer (very common)
 - ▶ Potential for abuse. Need firm term limits for Board officers.
 - ▶ One (or two) year hiatus (very common)
 - ▶ Limit to one additional term? Set lifetime maximum? 2/3rds vote?
 - ▶ Board Chair discretion with cap:
 - ▶ “In extraordinary circumstances and for good cause shown, the Board Chair, in consultation with the Trusteeship Committee, may nominate an existing Trustee to serve beyond three consecutive terms, with no more than 10% of the Board consisting of Trustees serving beyond three consecutive terms.”

BYLAWS: SELECTION OF TRUSTEES

You Have So Many Choices!

- ▶ Classes of Trustees?
 - ▶ Many states (e.g., PA) do not require classes, yet many bylaws have them.
- ▶ HOS as Member of Board and Committees?
 - ▶ *Ex officio?* Voting or non-voting? Exceptions?
- ▶ Representatives?
 - ▶ Faculty (not common)
 - ▶ Alumni (% of board; association president)
 - ▶ Parent (association president)
 - ▶ Voting? Bylaws should clearly state this.

BYLAWS: SELECTION OF TRUSTEES

- ▶ Emeriti (or Life) Trustees? (Avoid if you can)
 - ▶ Qualifications: Be judicious/selective, e.g.:
 - ▶ “Exceptional distinction” or “extraordinary service”
 - ▶ Minimum number of years (“not less than 12 years”)
 - ▶ Served as board chair (“for not less than three (3) years”)
 - ▶ Rights and Responsibilities
 - ▶ Right to Attend all Board/Committee Meetings?
 - ▶ Usually by invitation only
 - ▶ Voting or Non-Voting (generally non-voting)?
 - ▶ Term length (10 yrs)? Removal/resignation (same as for regular trustees)?
- ▶ Nomination Process (led by board committee; notice period or layover requirements)

BYLAWS: RESIGNATION AND REMOVAL OF TRUSTEES

▶ Resignation

- ▶ Manner (written notice to whom? Board chair and/or secretary)
- ▶ Effective Date (immediately or at future time)
- ▶ Deemed Resignation (abandonment, non-attendance)

▶ Removal

- ▶ Rarely done
- ▶ Conditions? “For Cause”? “Extraordinary circumstances”? Non-attendance?
- ▶ Majority or 2/3rd's vote? (If no conditions, make it 2/3rds vote)
- ▶ Notice and Opportunity to be Heard (typical but creates hoops)
- ▶ Separate Board Policy for Removals (detail process)?

BYLAWS: OFFICERS

- ▶ Typical Officers: Chair (also President); Vice Chair, Treasurer and Secretary. *Practical questions include*:
 - ▶ Is Vice Chair the Chair-Elect? (Advise against.) Co-Vice Chairs? (Be careful.) Co-Chairs? (Rare)
 - ▶ Treasurer also chairs Finance Committee? CFO as Treasurer?
 - ▶ Secretary also chairs Governing/Trusteeship Committee?
- ▶ Authority
 - ▶ General vs. Specific
 - ▶ Officer Job Descriptions (keep it general in bylaws)

BYLAWS: OFFICERS

- ▶ Terms:
 - ▶ 1 year too short; 4 is too long. 2-3 years common.
 - ▶ Staggered? Longer term for Board Chair?
- ▶ Term Limits
 - ▶ Officers must have term limits. As before, what is total # of years desired? Longevity of board chair is vital.
- ▶ Evaluation of Officers (in Officer Job Description document)
(simple board survey)
- ▶ Resignation/Removal (majority vs. 2/3rds; for cause?
consistency with resignation/removal of trustees)
- ▶ Succession Planning (esp. chair, treasurer)

BYLAWS: BOARD MEETINGS

▶ Types of Meetings

- ▶ Annual Meeting (required by many states (e.g., PA).
- ▶ Special Meetings (how many days' notice, who can call?)
- ▶ Retreats and other Potential “Non-meetings” (no action may be taken or decisions made)

▶ Frequency of Meetings

- ▶ At least four; not monthly
- ▶ Avoid too much specificity (e.g., particular months)

BYLAWS: BOARD MEETINGS

▶ Misc Issues

- ▶ Notice (electronic/email?)
- ▶ Remote participation (generally allowed; fully remote/hybrid meetings)
- ▶ Quorum (lose quorum if trustees leave meeting?; Proxy?)
- ▶ Unanimous consent (permissible by many states (PA); email consent)
- ▶ Robert's Rules (very onerous; consider only for extremely large or dysfunctional boards)
- ▶ Executive Sessions (make routine)

▶ Length of Meetings

- ▶ Not in bylaws but important governance consideration

BYLAWS: COMMITTEES

- ▶ Standing Committees -- The Fewer the Better
 - ▶ Executive, Finance (should include facilities), Advancement/Development, Trusteeship/Governance, Audit (990, ERM), Investment, Compensation. Be wary of Education Committee, Marketing Committee, e.g..
 - ▶ Remove certain authority from Executive Committee, e.g.: Amending articles of incorporation and bylaws; changes to school's mission/purpose; hire/fire HOS; purchase/sale of real estate; debt incurrence; approval of budget; removal of trustees or officers.
- ▶ Ad Hoc Committees and Task Forces
 - ▶ E.g.: Strategic Planning, HOS Search, Capital Campaign

BYLAWS: COMMITTEES

- ▶ Key Variables
 - ▶ Size of Committees (some small, some large)
 - ▶ Chairs (who chooses? Approved by Board?)
 - ▶ Chair Terms and Term Limits (many bylaws don't have them) (short terms/long term limits)
 - ▶ Membership
 - ▶ Non Trustee Members of Committees (voting?)
 - ▶ Audit Committee Chair not on Finance Committee
- ▶ Keep it Simple in the Bylaws. Use Separate Committee Charters

BYLAWS: CONFLICTS OF INTEREST

- ▶ Bylaws (not legally required) vs. Separate Policies
- ▶ Alignment with (1) Articles and (2) Conflicts Policies for Employees (best practice)
- ▶ Financial and Non-Financial Conflicts
 - ▶ Many policies focus too much (if not exclusively) on financial conflicts where the board is voting on a transaction. Too narrow a focus.
 - ▶ Example of a Non-financial conflict: Trustee having friendship or other non-financial relationship with a school vendor
- ▶ Annual Conflicts of Interest Disclosures for Trustees
- ▶ Processes
 - ▶ Which board committee oversees (executive, audit)
 - ▶ How conflicts are resolved

BYLAWS: INDEMNIFICATION

- ▶ Legal Review is Imperative to Comply with State Law
- ▶ Provide Maximum Permissible Indemnification under State Law, or Something Less?
- ▶ Exceptions to Indemnification (criminal acts, bad faith, breach of duty)?
- ▶ Coordination with School's Insurance
- ▶ Educate Trustees *Each Year* about Indemnification and Insurance

BYLAWS: REVISING BYLAWS

- ▶ Regularly Review and Evaluate Bylaws (every 2-3 years)
 - ▶ Keep a running tab of bylaws provisions that didn't work well (e.g., overly complicated or burdensome) or were impractical/infeasible
 - ▶ Do not leave it to when you have your full bylaws review process. You won't remember all the little (and even big) issues that arose.
- ▶ Overseen by Trusteeship/Governance/Nominating Committee
 - ▶ Or create separate committee or task force with relevant expertise (lawyer trustees are helpful)
- ▶ Regularly Seek Input From, and Provide Updates to, the Full Board
 - ▶ Transparency is key
 - ▶ Get board thoughts *early* on philosophical approaches

BYLAWS: REVISING BYLAWS

- ▶ Obtain outside advice from governance advisors and lawyers
 - ▶ They each provide different expertise and insights
 - ▶ Legal review imperative to ensure compliance with state laws
- ▶ There is no “perfect” bylaws provision. Not “one size fits all”
 - ▶ You have choices consistent with your school’s unique culture and history
- ▶ Give your Board Multiple Meetings and Chances to Consider Draft Revisions
 - ▶ Seek board approval only when they’ve had so many opportunities to weigh in that they “cry uncle”
- ▶ Don’t forget reporting obligations (e.g., on 990 or to state) for significant revisions

OTHER GOVERNANCE DOCUMENTS

- ▶ Board Governance Documents – All Board Approved
 - ▶ Trustee Job Description/Statement of Trustee Responsibilities (e.g., strategic focus; oversight responsibilities; hire/support/fire the HOS; fundraising (“give, get or get off the board”); engagement; collegiality; avoid operational issues; confidentiality/conflicts)
 - ▶ Officer Job Description/ Statement of Officer Responsibilities (e.g., detailed description of responsibilities; membership on committees; terms/term limits; evaluation; succession planning; alignment with articles/bylaws)
 - ▶ Committee Charters (e.g., purpose; min # of meetings; max/min # of members; authority and responsibilities; agendas, minutes and reports; staff liaison; approval date).

OTHER GOVERNANCE DOCUMENTS

- ▶ Board and School Governance Documents
 - ▶ Conflicts of Interest Policy (see above)
 - ▶ Confidentiality Policy (can be part of conflicts policy and/or trustee job description; simple document)
 - ▶ Whistleblower Policy (board role vis a vis the HOS; audit committee role; option for anonymous reporting; not substitute for other policies)

COMPLIANCE

- ▶ Education of All Trustees
 - ▶ New Trustee Orientation. Regular Reminders to Full Board.
 - ▶ Share Bylaws Regularly with Board and Stress the Importance of Compliance
 - ▶ When Board is Taking a Step Required by Bylaws, Be Sure to Tell the Board about the Bylaws Requirement
 - ▶ This promotes confidence in board processes and decision-making
- ▶ Enforcers
 - ▶ Chair of Trusteeship/Governance/Nominating Committee
 - ▶ Board Chair and Board Secretary
 - ▶ Every Trustee!



QUESTIONS?