

Updating Board Bylaws—and Beyond



BY ROBERT M. O'NEIL

TAKEAWAYS

- 1** A board without bylaws is like an invertebrate animal, lacking a backbone.
- 2** A college or university's bylaws should be reviewed as least annually, because legal and other mandates for institutions are multiplying continually.
- 3** It is wise to avoid any and all bylaws that are not imperative in favor of more flexible policies or procedures that might well suffice on legal and policy grounds.

DURING AN ESPECIALLY STRESSFUL MEETING some years back, one of my favorite board chairs turned in desperation to her fellow regents and, lamenting what seemed a flood of absurd technicalities, suggested that they direct the institution's general counsel to take whatever steps were possible to abolish the existing bylaws and replace them with a one-page précis. She was especially perturbed by constant interruptions

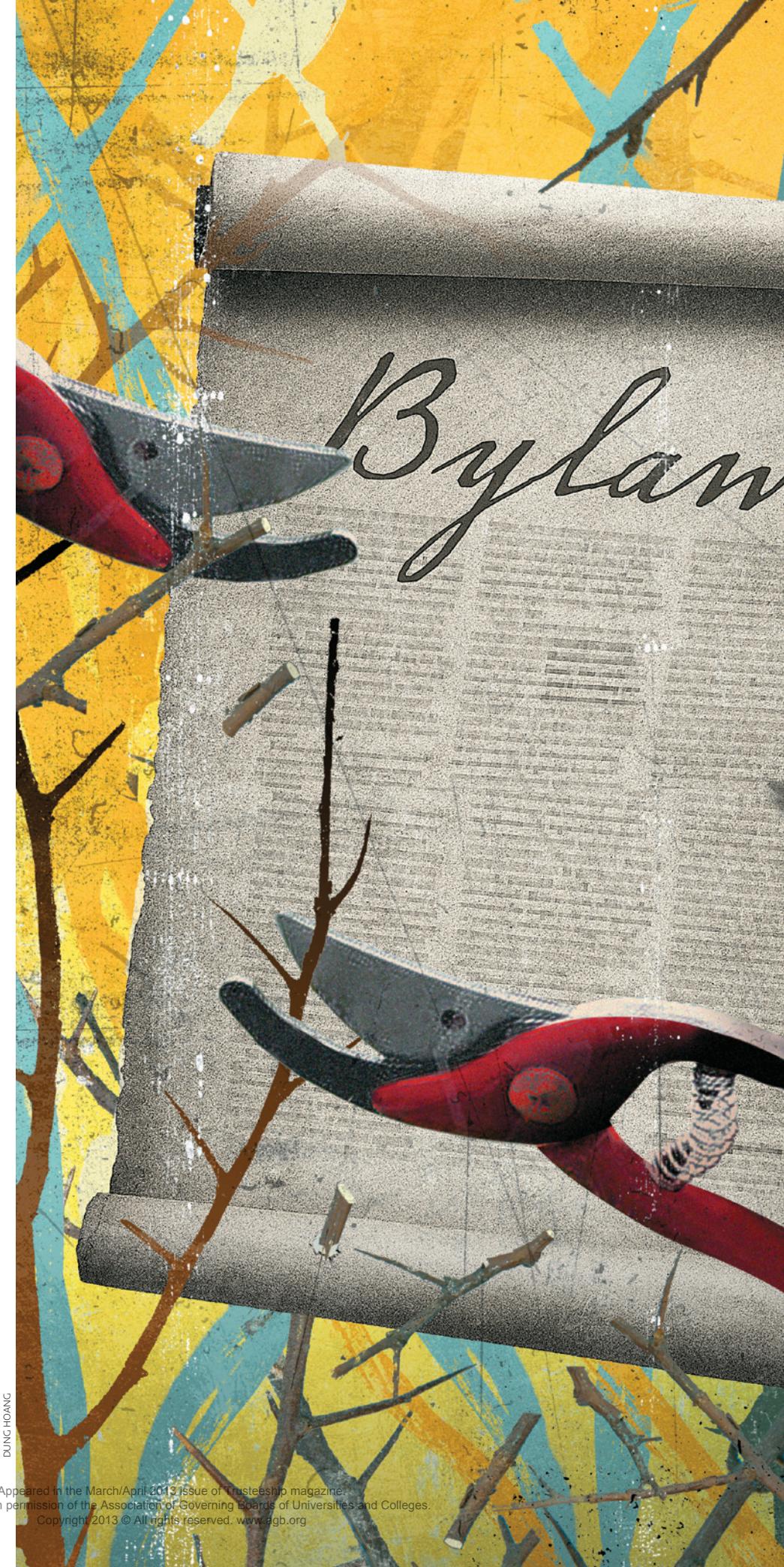
from one of the lawyer members of the board, who seemed intent on posing each and every possible obstacle to the actions under discussion that a rather complex set of bylaws offered this nitpicker.

Despite the chair's admirable goals of simplicity and clarity, her colleagues immediately objected. While few, if any, of the other regents were emotionally attached to the current bylaws—a subject that seldom engages boards with much passion or urgency—they urged the chair to be cautious. She ultimately relented and suggested instead that a judicious pruning of the too-elaborate set of bylaws might well suffice.

Later discussions affirmed the wisdom of the less-drastic strategy. For starters, even skeptics on the board agreed that some bylaws were essential, even though their content might be more artfully condensed and simplified. A board without bylaws would be analogous to an invertebrate animal, lacking a backbone.

As a practical matter, a bylaw-less institution simply could not function—and for legal purposes, many vital tasks could not be executed in such a lawless uncontrolled environment. How, for example, would members and officers be selected—and for what terms and under what conditions? How would vital information about meetings and actions be conveyed? What mission or purposes would the institution serve, and what core responsibilities would drive the board? The issue should never be whether boards need bylaws at all, but rather what elements the bylaws must provide to ensure a productive and functional institutional structure.

While relatively few people devote much time and thought to the institution's bylaws, such documents pose a constant and abiding concern for the board's secretary and college or university lawyer, and the bylaw's content should be no less visible to the board chair and other officers. Regular review should be on each board's agenda, at least annually. AGB published in early 2013 its first truly comprehensive template: *Updating Board Bylaws: A Guide for Colleges and Universities*.



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A key issue is just where in the hierarchy of governing documents the bylaws belong. At the top of the governance pyramid, of course, is the institution's charter or state constitution or other statutory imperative. Below the bylaws are a host of provisions, including board-approved resolutions, myriad policies that implement delegated authority, and an abundance of day-to-day operating procedures without which the institution could not possibly operate. So where on this grid of institutional structure do the bylaws fit?

The bylaws should be placed high enough to garner recognized authority and durability, yet also be able to be relatively easily amended and revised when needs and circumstances change. Thus, a prudent bylaw-crafter would be well advised to avoid any and all bylaws that are not imperative in favor of more-flexible policies or operating procedures that might well suffice on legal and policy grounds.

If, for example, a specific date or a dollar amount is required to complete even a required board action, but would regularly be changed or updated annually, the operating policy approach is vastly preferable to an essentially permanent bylaw revision. The soundest advice in cases of uncertainty may be the well-worn maxim, "When in doubt, leave it out!"

The question is never whether or not bylaws are vital, but rather which specific issues or board actions should be addressed through this medium. Along the way, those who create and enforce bylaws should consider several guidelines. The first involves communicating the current bylaws. Any recent and significant changes to the bylaws must not only be noted in the official board minutes, but also be widely disseminated in all available media, both print and electronic.

There is no worse frustration for anyone seeking the latest information on the bylaws from the institution's Web site than to see the notation "last updated in November, 2009." And in the case of multicampus public systems, there is an equally compelling need to ensure consistency and compatibility between statewide and local requirements. In fact, bylaws do occasionally apply differently among localities (cities or counties), while independent institu-

tions may often include in their bylaws distinctive, even unique, provisions reflecting their special needs.

Finally, although much more subtly, bylaws should reflect the spirit and ethos of the institution that adopts and issues them. There are vast differences between public and independent institutions, despite a surprising degree of commonality among basic bylaw provisions mandating (for example) a uniform standard of fiduciary responsible for all trustees. Religiously affiliated or ethnically distinct campuses merit special consideration here, as elsewhere. Illustratively, bylaws may specify the religious affiliation of the president or a percentage of board members, or mandate the inclusion of a senior religious officer (e.g., a bishop or elder). Above all, however useful sample language from other institutions or organizations may be, it should be clear that "one size does not fit all" with respect to bylaws. Examples and illustrations of bylaws may be helpful, but they offer no substitute for home-grown variations that are consistent with external imperatives and institutional traditions.

Essential Content for Bylaws

Turning now to the essential content of the bylaws, do a basic set of elements dominate and for the most part transcend differences in institutional types? In many ways, yes. Take, for example, the threshold matter of the board's power and responsibility. A surprising level of congruity exists between bylaws in the public and independent sectors, despite variations with regard to statements of institutional mission or a different focus on the means by which to enforce or apply ethical standards. Conversely, in regard to such core requirements as the prescribed number of board meetings and statements regarding the authority and responsibility of board officers and committees, for example, the differences in bylaws are surprisingly minor.

The relatively few obvious variants in bylaws between the two sectors, however, merit special attention. For example, state law or other state authority usually mandates specific board terms and the method of selection of board members in the pub-

lic sector, while independent institutions generally have broad discretion in such matters as board size, frequency of meetings, and the status of emeritus trustees.

Conversely, state laws that rigorously regulate such matters as the handling of public records or the conditions surrounding public or open meetings seldom, if at all, affect colleagues in the independent sector. Still, independent institutions and their boards are wise to observe a commitment to transparency and openness even though not mandated by state law. In other areas of difference, public institutions occasionally draw useful guidance in matters such as board composition from their independent colleagues—for example, in seeking to persuade governors to fill vacant seats with appointees who have particular types of experience or expertise or who otherwise make the board more diverse.

Term Limits and Institutional Types

Tucked away among the pages of the new *Updating Board Bylaws* are discussions of the relative handful of issues that are worth particular attention because they reflect important policy differences between and among types of institutions. Take the pesky issue of term limits. Two recent AGB surveys on this subject, “Policies, Practices, and Composition of Governing Boards of Independent Colleges and Universities” and “Policies, Practices, and Composition of Governing Boards of Public Colleges and Universities,” noted, for example, that the average term for board members of publics was six years, while the comparable figure for independents was four years. Where multiple terms were permissible, three terms were allowed for board members of independents, on average, while the typical limit for publics was two terms.

Perhaps of keenest interest was the variance the survey found between institutional types with regard to the very existence of term limits. A surprising number (41 percent) of publics did have such limits, while roughly two-thirds (64 percent) of independents reported having them. A closer analysis of such data opened up an intriguing policy issue. While AGB recognizes strong arguments on both sides of the issue, as we noted in the bylaws book, “term limits

are generally considered good governance practice.” Proponents argue, for example, that such limits energize the board “with fresh ideas and new energy, allow the board to adjust its composition to reflect changing institutional needs, make it easier to cultivate members when that commitment is not assumed to be ‘for life.’ They also provide a graceful way to rotate ineffective members off the board.”

The contrasting view is also quite appropriately presented in the book. Critics of term limits argue that they may “deprive the board of valuable institutional memory, risk the loss of engagement and financial support of veteran board members, and burden the board with the ongoing need for recruitment.” Indeed, in the absence of such limits, critics and supporters alike recognize the value of assessing regularly the performance of board members. Regardless of the board’s view of term limits, board members’ expectations of scheduled review (with carefully organized data gathering and sharing assessment of the board member’s performance by other members) confirm the commitment to board service of conscientious members. It can also allow the board to terminate a non-performing member’s service gracefully and with appreciation.

AGB research has recently addressed the corollary question of whether to permit a term-limited board member to serve again after a hiatus. A strikingly high 90 percent of independent institutions responding to a survey reported that their policies did indeed permit a board member to return after a hiatus of at least one year. If such a hiatus is allowed—whatever the permissible period—the bylaws should make clear whether or not the returning member may serve a single additional term. Alternatively, the bylaws might cap the total number of years of board service or, in special cases, might simply reset the term-limit clock. Thus the issue of term limits not only is of substantial interest to institutions of both types, but also poses a classic dilemma for bylaw crafters.

How to Treat Standing Committees

Several other “special” issues also merit attention for those updating institutional bylaws and invite pro and con arguments. Consider the question of specifying the number of standing committees and their explicit duties, for example. Many sets of bylaws routinely enumerate (often with detailed charges) a host of designated committees. Some of those committees—classically, a panel charged with celebrating a centennial or other major institutional milestone—may actually have ceased to function (or at least have served their useful lives) some years earlier. Yet perhaps simply by default or through inertia the committee designation may well survive in the bylaws. Given even a small number of seasoned and devoted former centennial committee members, the task of eliminating a seemingly obsolete group may prove harder than casual observers would expect, thus arguing for keeping such less-than-permanent bodies below the radar.

Tradition dies hard on the college campus. Even where the task assigned to a committee is seemingly timeless and durable (unlike the one-time centennial group), reliance upon ad hoc rather than permanent standing committees may better serve the interests of institutional flexibility and potential board creativity. If, to take a current

and sometimes contentious example, a board is uncertain about whether to merge its academic affairs and student affairs committees into a single body or keep the two as separate entities, the advantage of ad hoc committee status seems compelling. Avoiding the formality (and possible rigidity) of including these committees in the bylaws may be providential in such a case.

Survey data from the board composition surveys also offer practical guidance to those who draft and enforce bylaws. First, the number of standing committees should be severely limited. Many experts would argue, in fact, that beyond an

executive committee, there need be only a finance and/or budget committee and perhaps a governance or trusteeship committee mandated in bylaws.

Second, all other committees—even those charged with overseeing such durable tasks as buildings and grounds—should be formally recognized but not enshrined in the bylaws, in order to allow the board a greater degree of flexibility in nomenclature, precise charge, and other considerations. Despite their obvious importance and presumptive durability, all but the “big three” committees should have chairs and members regularly appointed and their recommendations entered in the board minutes, but they should not otherwise be permanently embedded in the governance structure.

Further practical experience reflected in responses to the composition surveys confirms the wisdom of this approach. The average number of board committees turned out to be quite comparable across institutional types—five for publics and eight for independents. When it came to the prevalence of budget/finance committees, little difference emerged (90 percent of publics had such committees and 95 percent of privates had them). The same was true for audit committees, which appeared on the roster of 55 percent of publics and 65 percent of independents. At institutions without audit committees, some of their duties may simply have been subsumed within larger finance/budget committees.

Yet when it came to the status of development and/or advancement committees, the contrast in the survey data was striking: Only 33 percent of publics reported having such committees, in sharp contrast to a nearly universal 89 percent of independents. Obviously, most public institutions have a major and sustained commitment to private fundraising, just as independents do. So the most likely explanation is that many public universities and colleges have created tax-exempt, institutionally related foundations, and thus they pursue clearly parallel goals through different structures and under different names.

Complying with New Mandates

A board should consider many other matters when it reviews and updates its bylaws. State corporation laws or occasionally state

constitutional provisions broadly mandate what might be termed “boiler plate” or uniform and pervasive basic requirements that affect virtually all institutions of higher learning, whether public or independent.

A few such mandates should be especially noted. One, a relatively recent entry into the lexicon, concerns board members’ need to avoid potential conflict-of-interest problems. In contrast to the legal landscape as recently as five or six years ago, the expectations today are substantially higher for the ethical conduct both of boards and of their individual members. The catalyst for change is complex and varied. In part the pressure is legally grounded, as well as induced by institutional efforts to avoid public embarrassment. No longer is the existence of a conflict sufficient to trigger a legal or policy concern in the board room; the mere appearance of such a conflict may well create a major issue.

Moreover, an annual form filed with the board secretary reporting each trustee’s financial and other relevant interests, which until recently seemed sufficient to ensure compliance with conflict-of-interest concerns, now requires instant updates or addenda as soon as a situation emerges that might possibly create a conflict. This is just one example of new conflict-of-interest requirements that boards must acknowledge.

A quite different and novel issue is that of indemnification. Indemnification protects board members in so far as possible against involvement in adversarial legal proceedings and the consequences of adverse judgments in connection with their board service. This issue is omitted or slighted in many bylaws simply because of its recent emergence as a significant issue for boards. The growing intensity of board concern directly reflects increased litigation and potential risk of liability.

While a few carefully crafted pages in the bylaws may suffice for this purpose, every board member should be briefed on the institution’s current indemnification policies and procedures; provided—wherever applicable and available—with directors and officers’ liability coverage; and otherwise

protected through policy that creates a vital distance, in this one respect, between the board and its individual members.

Finally, mention should be made of an anomalous matter that largely escapes the attention of even the most conscientious drafter of bylaws. Recent scans of institutional bylaws have found a startling gap with regard to nondiscrimination policies. For the most part, federal law imposes upon virtually all institutions, both public and private (save for a tiny handful of private colleges that eschew federal funding of any kind), enforceable obligations to forbid bias with respect to race, gender, nationality, religion, handicap, age, and several other characteristics. What often escapes official attention is one form of discrimination—on the basis of sexual orientation—that has not yet been comparably enjoined by federal law and remains largely within the purview of the states. To date, 21 states, the District of Columbia and 140 cities and counties forbid discrimination in employment on the basis of sexual orientation. Regrettably few institutions have, however, taken formal note of that gap in their bylaws, apparently believing that the preemptive role of federal law in regulating biased conduct and behavior should suffice. Until the state of the law changes, however, a substantial gap remains.

Closing Imperatives

Although quite clearly “one size does not fit all” in bylaws, institutions seeking to adapt or update their bylaws would be well advised to become familiar with sample or illustrative provisions, and then to adapt such language to meet their particular needs. Bylaws represent more than simply a formal embodiment of the institution’s governing or regulatory structure. They also reflect the college or university’s mission and its underlying institutional character. ■

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T’SHIP LINKS: Richard Chait, “The Gremlins of Governance.” July/August 2009.

OTHER RESOURCES: Robert M. O’Neil, *Updating Board Bylaws: A Guide for Colleges and Universities*. AGB Press, 2013.