

Sample Bylaw Provisions for Overriding the Default Provisions of the 2008 Model Nonprofit Corporation Act, Part I

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This is the first in a two-part series of articles containing some sample provisions that can be used to override default provisions of the American Bar Association's (ABA) Model Nonprofit Corporation Act (3d ed. 2008) (MNPCA) that vary from standard parliamentary procedure. The first part contains a general introduction to the purposes of the article, as well as proposed language to override statutory defaults involving (a) the rights of individual members, (b) meetings of the members, and (c) the members as a "designated body" exercising general management powers assigned by default by the MNPCA to the board. The second part, to be published in the Third Quarter 2009 *National Parliamentarian*, will contain a brief advisory on how to use the provisions proposed in the article in states where the MNPCA is adopted in whole or in part, as well as proposed language to override statutory defaults involving (a) powers assigned by the MNPCA to the board, (b) officers, and (c) fundamental changes to governance and governing documents.

The statutory defaults are not necessarily bad for most organizations. Often standard parliamentary procedure does not address an issue, which means that an organization may need to include an appropriate bylaw provision to address that issue adequately. In such cases, the statutory default often provides a rule that works well for many organizations.

For instance, parliamentary procedure provides no rule for holdover directors unless the bylaws specifically so provide. *Robert's Rules of Order Newly Revised*, 10th edition (*RONR*), however, suggests using either "and until their successors are elected" or "or until their successors are elected" when designating officers' terms to allow for the possibility of holdovers. The difference between the two allows an organization to choose the removal procedure the organization would like to utilize (*RONR*, p. 642, l. 34–p. 643, l. 14). If an organization, however, fails to include such

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language, holdover terms (even though suggested by the authors) are not permitted. MNPCA (§8.05) simply chooses one of *RONR*'s suggestions as a statutory default, that a director "continues to serve until the director's successor is elected . . . and . . . takes office" ("and takes office" is equivalent to the frequently used phrase in bylaws "and qualified," which typically means "continues to be eligible until taking office" when the time of taking office is delayed by the bylaws beyond the time of election).

RONR's holdover language serves a dual role—permitting holdovers and determining the removal procedure. The MNPCA holdover provision, on the other hand, simply allows holding over as the default option. There is another default provision that deals with removal that makes removal of directors even easier than the "or until" removal procedure under *RONR*, which requires cause for removal even by simple rescission of the election. *RONR*, p. 642, l. 29–32. Under the default procedure in MNPCA §§8.08, 8.43, the members may remove a member-elected director by a majority vote with notice but without cause and may remove a member-elected officer (in the latter case acting as a "designated body") by a majority vote without notice and without cause.

Often, the parliamentary default is not really optimum, but *RONR* felt constrained to restate general parliamentary law. For example, under the general parliamentary law, a majority of the membership constitutes a quorum, although *RONR* advises that organizations adopt a more realistic, lower quorum. *RONR*, p. 335, l. 7–21. In this case, MNPCA also adopts the general parliamentary law position as a default. MNPCA §7.24. There are situations where the statutory default provision improves on the general parliamentary law that *RONR* felt constrained to include. For example, under the general parliamentary law, a fixed term of office does not allow for holdovers, so *RONR* counsels to include a holdover provision. *RONR*, p. 556, l. 35–p. 557, l. 7. Yet often an organization will adopt a fixed term, not through a conscious choice, but because they were without guidance and simply did not consider the holdover issue. MNPCA provides a default holdover provision that, because it is statutory in nature, supersedes the general parliamentary law. MNPCA §8.05. This statutory default helps new organizations without the resources for professional assistance in drafting their bylaws, provided that the members know to look at the statute when a dispute involving holdovers comes up.

The language suggested below for overriding the defaults of the MNPCA seeks to restore the general parliamentary law only when the general parliamentary law also reflects common practice, such as the requirement that business can be transacted only when a quorum is actually present. Furthermore, the suggested language is just one of many possible approaches to an open-ended invitation to adapt bylaw language to a specific circum-

stance. The suggestions below are merely specific illustrations, and they are not meant to be adopted as a whole.

Sample Override Language Involving Members and Membership Meetings

Disciplinary procedures. *“Except as otherwise specifically provided in these bylaws, any member may be suspended or terminated pursuant to the procedure provided in the parliamentary authority adopted by the corporation.”*

Under MNPCA §6.21 “membership . . . may be terminated or suspended [only] for the reasons and in the manner provided in the articles of incorporation or bylaws.” This arguably implies that membership organizations cannot discipline their members unless they adopt a disciplinary procedure in their bylaws. At general parliamentary law, the default is that organizations have an inherent right to discipline their members (*RONR*, p. 630, l. 5–8). An organization that does not wish to adopt a parliamentary authority generally, but wants to override the no-discipline default of §6.21, could provide instead, *“Except as otherwise specifically provided in these bylaws, any member may be suspended or terminated pursuant to the disciplinary procedures included in the current edition of Robert’s Rules of Order Newly Revised.”*

Location of meetings. *“The members may choose a general location for meetings or a location for a specific meeting. If the members have not chosen a location for a meeting or for meetings generally, the Board may choose a general location for meetings or a location for a specific meeting. If neither the members nor the Board has chosen a location for a meeting or for meetings generally, the President in consultation with the Secretary may choose a general location for meetings or a location for a specific meeting.”*

Under MNPCA §§7.01, 7.02, the default is that meetings are held at corporate headquarters. At general parliamentary law, the default is that the members set the place of meetings (*RONR*, p. 559 l. 1–10: members have all the rights of governance except to the extent specifically granted to the board).

Action without a meeting. *“Action by the members may be taken only at a meeting of the members.”*

Under MNPCA §§7.04, 7.09, the default is that action by unanimous written consent and by mail ballot is allowed. At general parliamentary law, the default is that action can only take place at a meeting (*RONR*, p. 408, l. 31–p. 409, l. 2).

Number of days’ notice. *“Any required notice for a meeting shall be mailed at least ___ days before the meeting.”*

In this case, the blank should be filled by a reasonable number of days based on the circumstances of the organization. For a neighborhood organization, three days may be sufficient notice, while for a national organization, two months may be sufficient notice. Under MNPCA §7.05, the default is that notice must be given not fewer than 10 days and not more than 60

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days before the meeting date. At general parliamentary law, the default is that previous notice must be given a reasonable time in advance (RONR, p. 116, l. 15–18).

Selection of presiding officer. *Alternative 1:* “Meetings of the membership shall be chaired by the president or, in the absence of the president, by the vice-president, or, in the absence of the president and vice-president, by a temporary chair elected by the members.” *Alternative 2:* “Meetings of the membership shall be chaired by the president or, in the absence of the president, by the vice-president most highly ranked in numerical order in these Bylaws who is present, or, in the absence of the president and vice-presidents, by a temporary chair elected by the members.”

Under MNPCA §7.08 the default is that the chair of membership meetings is chosen by the Board. At general parliamentary law, if there is a president and vice-president, the president presides, and the vice-president presides in the absence of the president (RONR, p. 436, l. 21–26; p. 440, l. 19–25). If there are several vice-presidents, they should be ranked in numerical order (RONR, p. 442, l. 1–2).

Order of business and rules of order. “The rules contained in the current edition of Robert’s Rules of Order Newly Revised shall govern the corporation in all cases to which they are applicable. The order of business as contained in the adopted parliamentary authority, including any provisions regarding the alteration or suspension of such order of business, shall constitute the order of business for meetings of the members.”

Under MNPCA §7.08, the default is that the meeting chair determines the rules and sets the order of business. At general parliamentary law, an organization is governed by general parliamentary law unless it adopts specific rules to the contrary (such as by adopting a parliamentary authority), and agendas must be adopted by the members to be binding (RONR, p. 18, l. 18–23; p. 360, l. 10–13).

Quorum at adjourned meetings. “Even if a meeting is adjourned for lack of a quorum, no adjourned meeting may transact business without the presence of a quorum.”

Under MNPCA §7.24, the default is that when a meeting is adjourned for lack of a quorum, no quorum is necessary for the continuation of the meeting. At general parliamentary law, a quorum is necessary for all meetings, including adjourned meetings (RONR, p. 336, l. 25–28).

Proxies. “No proxies shall be permitted at meetings of the members.”

Under MNPCA §7.22, the default is that proxies are permitted. At general parliamentary law, the default is that proxies are prohibited (RONR, p. 414, l. 18–21).

Election by majority vote. “Directors shall be elected by majority vote.”

Under MNPCA §7.27, the default is that directors are elected by plurality. At general parliamentary law, directors are elected by a majority vote (RONR, p. 392, l. 2–6).

Powers of the membership and of the board. “The Board shall be subject to the orders of the members, and none of its acts shall be in conflict with action taken by the members. The members shall constitute a designated body to the extent that they exercise the powers assigned to the Board by statute. To the extent that the members are acting as a designated body, the procedural rules otherwise applicable to meetings of the members shall apply.”

Under MNPCA §§8.01, 8.12, the default is that “all corporate powers must be exercised by or under the authority of the board . . . , and the activities and affairs of the corporation must be managed by or under the direction, and subject to the oversight, of its board” unless some of the board’s powers are delegated to a “designated body.” The members may be a designated body. The default is that a designated body operates under the procedural rules applicable to boards. At general parliamentary law, the default is that all power is vested in the members and the board has only such powers as are delegated to it (RONR, p. 465, l. 26–p. 466, l. 14).

Inspection of records. “The members may from time to time adopt and amend a policy prescribing the terms and conditions upon which members may inspect the records of the corporation; [the following should be included only for non-religious corporations:] provided, however, that no such policy may limit the right of members to review the latest annual financial statements of the corporation.”

Under MNPCA §16.02, the default is that members have the right to inspect corporate records. MNPCA §16.20, however, mandates that the latest annual financial statements of non-religious nonprofit corporations shall be provided to members upon demand; for religious corporations, the provision of the latest annual financial statements to members upon demand is a default provision. RONR permits individual members the right to inspect corporate records, including minutes of members meetings (see p. 442, l. 32–33; p. 444, l. 8–10), but not board meetings (see p. 444, l. 10–13; p. 470, l. 4–10), upon request to the secretary. RONR indicates that the members collectively have all the rights of governance except to the extent specifically granted to the board (p. 465, l. 26–p. 466, l. 14), and thus could adopt a record review policy. ★

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