

Proxy, Proxy, Who Can Use the Proxy?

Michael Malamut, JD, PRP, CPP-T

Participants in most membership organizations would never think that members could choose to participate in meetings by proxy if they are unable to attend in person, even though proxies are the standard method of shareholder participation in business corporations. *Robert's Rules of Order Newly Revised* (“*RONR*”) recognizes that use of proxies is incompatible with the deliberative method of decision making used in most membership organizations, where all participants have an equal right to participate in debate, observe debate, and vote based on the information obtained through debate.¹ *RONR* therefore explicitly prohibits use of proxies unless the bylaws explicitly provide otherwise.²

On the other hand, the 1987 Revised Model Nonprofit Corporation Act (“*RMNPCA*”), published by the American Bar Association, chose proxy use as the default proposition, with an explicit prohibition of proxies required in the bylaws in order to prevent proxy use in the organization.³ The *RMNPCA* proxy provision has been adopted in numerous states. While the authors of the *RMNPCA* recognized that most nonprofit membership organizations did not utilize proxies, perhaps influenced by business corporation practice, they chose the proxy default anyway.⁴ Similar proxy default statutes may allow membership and leadership to be caught by surprise by a savvy gamesman knowledgeable about the statute who solicits proxies for his or her position on a controversial issue.

Attempting to clarify an awkward stand-off, the most recent editions of *RONR* added specific language to address the issue: “If the law under which an organization is incorporated allows proxy

voting to be prohibited by a provision of the bylaws, the adoption of this book as parliamentary authority by prescription in the bylaws should be treated as sufficient provision to accomplish that result.”⁵

Most parliamentarians would figure that was the end of the issue, as “the Book” is the final word. Unfortunately, courts tend not to be as respectful of *RONR* as most parliamentarians are. The legal question is whether explicit prohibition in the bylaws is required, or if incorporation of a parliamentary authority’s prohibition by reference is sufficient. Diligent research was unable to discover any reported cases discussing the current very explicit language in recent editions of *RONR*, quoted above.

Two older cases, both New York trial court cases (in New York, the principal trial court is called the “Supreme Court”), do discuss the issue in reference to older editions of *Robert’s Rules*. The two cases go in different directions about how to interpret a nonprofit corporation statutory provision indicating that proxies were allowed unless prohibited in the bylaws or articles of incorporation, when the bylaws adopted *Robert’s Rules* as the organization’s parliamentary authority. Both cases discuss the general rule against proxies contained in older editions of *Robert’s Rules*, which did not include the strong incorporation provision quoted above from the current edition.

In *Azzi v. Ryan*,⁶ the court stated that *RONR* was only advisory and could not overrule the statutory default provision permitting proxies.⁷ “On the subject of voting by proxy, *Robert’s Rules of Order* are merely advisory and cannot be used to deprive members of such an essential and fundamental right [as the right to vote by proxy provided for in NY N-CPL § 603].”⁸

On the other hand, in *Frankel v. Kissena Jewish Center*,⁹ the court held that, in combination with a number of other factors (history of non-use of proxies, a specific prohibition of proxies in a section dealing with another issue), the adoption of *RONR* with its prohibition of proxies was sufficient to prohibit proxies in that case. *Frankel* is not a ringing endorsement for incorporating *RONR*’s proxy prohibition by reference, and appears to rely

strongly on the equitable ground that it would be unfair to use proxies when proxies were never used before.

Respondent has made no claim that proxy voting has ever been utilized or permitted at any past congregational meeting. It is therefore assumed by the Court that this is the first instance in the congregation's history when an attempt was made to utilize proxy voting. Obviously, it would be unfair, ... to permit one party unilaterally to come to an important meeting of this nature and to present four proxy votes.¹⁰

Moreover, *Holler v. Goldberg*,¹¹ points out that NY N-PCL § 603 is inapplicable to religious corporations, such as those at issue in both *Frankel* and *Holler*, and was apparently unnecessary to the decision in *Frankel*.¹²

Because of this qualification of its precedential effect in *Holler*, *Frankel* may not be the strongest authority. Certainly both *Azzi* and *Frankel* are both trial level determinations, in different divisions of the same state's trial court, so neither is a very strong predictor of how a state supreme court would address the issue, and persuasive legal arguments could be made on each side.

A parliamentarian dealing with this thorny question is best off deferring to legal counsel and suggesting that the organization amend its bylaws as soon as possible to prohibit proxies explicitly. In the meanwhile, unless they are working with legal counsel familiar with the applicable proxy laws in the state, parliamentarians drafting bylaws are well advised to include an explicit prohibition on proxy voting and not rely on the *RONR* prohibition on pp. 414–15 alone.

Michael E. Malamut, JD, PRP, CPP-T, is an attorney and professional parliamentarian residing in Dedham, Massachusetts. He is a member of the AIP Opinions Committee and has authored a number of legal and parliamentary articles.

Notes

¹ See *RONR* pp. 414-15.

² *Ibid.*

³ RMNPCA § 7.24.

⁴ Elizabeth A. Moody, *The Who, What, and How of the Revised Model Nonprofit Corporation Act*, 16 N. Ky. L. Rev. 251, 258 (1989).

⁵ *RONR* pp. 414–15.

⁶ 120 Misc. 2d 121, 124, 465 N.Y.S.2d 414, 416 (Sup. Ct. 1983).

⁷ New York Not-for-Profit Law (NY N-PCL) § 603.

⁸ *Azzi*, 120 Misc. 2d at 124, 465 N.Y.S.2d at 416.

⁹ 144 Misc. 2d 548, 551-52, 544 N.Y.S.2d 955, 957-58 (Sup. Ct. 1989).

¹⁰ *Frankel v. Kissena Jewish Center*, 144 Misc. 2d at 552, 544 N.Y.S.2d at 958 (footnote omitted).

¹¹ 163 Misc. 2d 1075, 1079-80, 623 N.Y.S.2d 512, 515 (Sup. Ct. 1995).

¹² See New York Religious Corporations Law § 2-b (1) (c).