ABA Code Revision Raises Concerns for Democracy and Parliamentary Law in Nonprofits

by Michael E. Malamut, PRP, and Thomas J. Balch, PRP

Recent developments in the area of nonprofit law raise significant concerns for active members of nonprofit corporations and parliamentarians who assist such groups. The most recently released draft of a proposed major revision of the American Bar Association's (ABA) Revised Model Nonprofit Corporation Act, in particular, introduces a number of provisions that may interfere with the ability of incorporated nonprofit associations to continue to function democratically and in accordance with long-accepted norms of parliamentary procedure. (See the February 2006 Exposure Draft, available at *http://meetings.abanet.org/webupload/commupload/CL580000/sitesofinterest_files/MNCAexposuredraft.doc* or from the "materials" area of the Web page of the ABA Section of Business Law, Nonprofit Corporations Committee, at *http://www.abanet.org/dch/committee.cfm?com=CL580000*). Parliamentarians would be well advised to become informed about this threat to nonprofit corporate democracy and take action to counter it.

Background

A significant number of U.S. membership organizations, and the vast majority of large ones, are incorporated and therefore subject to the nonprofit corporation laws of their various states of incorporation. While nonprofit corporation statutes vary from jurisdiction to jurisdiction, in practice many state legislatures are significantly influenced by the ABA's model legislation for nonprofit corporations. Twelve states plus the District of Columbia currently use the original 1952 ABA Model Nonprofit Corporation Act with minor revisions. An additional twenty-five states currently base their nonprofit corporation law on the 1988 ABA Revised Model Nonprofit Corporation Act or close relatives grounded in the companion 1984 version of the ABA Revised Model Business Corporation Act.

These earlier versions of the ABA Model Nonprofit Corporation Act were both derived from companion editions of the

Model Business Corporation Act. The 1952 edition "almost slavishly" copied the 1950 Model Business Corporation Act, according to Lizabeth A. Moody, dean emeritus of Stetson University College of Law, who was a member of the 1988 revision team and is the chair of the current effort (Moody 2007, 1346). The 1952 edition, like later versions, provides a number of default provisions that are contrary to standard parliamentary procedures. These govern the corporation unless an astute drafter reviews the statute while drafting articles of incorporation and bylaws and carefully writes them so as to override the statutory default. More worrisome are mandatory provisions contrary to parliamentary procedure that cannot be overridden, even by a knowledgeable drafter.

For example, the 1952 Model Act requires annual meetings (disregarding the historical practice of many organizations, such as NAP, that employ longer intervals between delegates' meetings), stipulates that votes at membership meetings cannot pass unless a majority of those present (as opposed to those present and voting) vote in favor, and mandates that the board alone manage the affairs of the corporation. The 1988 version continued to require annual meetings, but changed the mandate for board management to a default provision. The 1988 version's new mandate was a confusing double-vote requirement to take action at a membership meeting—(1) an affirmative vote of the majority of those present and voting, provided that (2) the number of votes in the affirmative equals or exceeds the number of members equivalent to a majority of a quorum. The 1988 Model Act, following California law, introduced additional complexity by dividing all nonprofits into three categories with slightly different rules: public benefit, mutual benefit, and religious corporations.

The complexities and requirements imposed by the Model Acts on membership decision-making contributed to the growing movement towards "optionality" (corporation statutes making membership optional for nonprofits and allowing board-only nonprofit corporations). This movement is detailed in a recent article by Professor Dana Brakman Reiser (2003), *Dismembering Civil Society.*

An unfortunate recent example of this trend is the recent vote by the American Society of Association Executives (ASAE)

(continued on next page)

ABA Model Nonprofit Act

(continued from previous page)

making the organization essentially a board-only organization. The members no longer have regular meetings or any power to amend the bylaws. Their only power is to nominate directors by petition to run against a slate selected by a nominating committee consisting of individuals selected by current and recent leaders. Unless there is a petition in a particular year, there is no election at all; a petition candidate contesting the official nominees goes on to a mail ballot. ASAE is promoting its new governance structure as a model. The motivating idea seems to be that an active membership creates unnecessary complication.

The experience of most parliamentarians is to the contrary—that an involved membership participating actively through the deliberative process brings essential openness, accountability, and understanding of grassroots concerns to organizational leadership. Empirical research is starting to bear this out (O'Regan & Oster 2005, 216, 221: large, more representative nonprofit boards score well on a number of indicators; Ostrower 2007, 16–17: organizations with at least one governing body member directly elected by membership perform better on a number of governance indicators).

Recent efforts to model nonprofit organizations more closely on business corporate models by disenfranchising members raise particular concerns, because nonprofit organizations are not subject to market discipline for products and shareholder discipline over their capital.

ABA Task Force Work on Revision

Against this background, in February 2006 the ABA Task Force to Revise the Model Nonprofit Corporation Act published an "exposure draft" of its revision, which is subject to amendment before the revision is published as the official recommendation of the ABA. The exposure draft closely tracks the 2003 edition of the Revised Model Business Corporation Act (Jenkins 2007, 1138; Moody 2007, 1346).

Unfortunately, many features of what the task force is presently inclined to recommend would dramatically undercut the ability of members to deliberate on and decide the views and

Some examples of provisions of the ABA Task Force February 2006 Exposure Draft of the Revised Model Nonprofit Corporation Act that would supersede norms of parliamentary procedure:

• All corporate powers must be exercised under authority of the board of directors or others acting under strictures applicable to the board (§8.01)

• Officers must be elected by the board (not by the members) (§8.40(b))

• Presiding officer (rather than members) sets the order of business and the rules for membership meetings, unless the bylaws specifically provide otherwise; closing of the polls determined by announcement of the chair (§7.08)

• No regular membership meetings—only an annual meeting and special meetings of members allowed (§§7.05, 7.09)

• Annual membership meeting may be held electronically, at the choice of the board, with members' rights restricted to hearing or reading proceedings, asking questions, and voting; no debate or amendment rights (§7.01)

• In ballot voting, the official who is tallying votes may reject votes if he or she "has reasonable basis for doubt about the validity," and this rejection may be overturned only by a court, not by the assembly (§7.23)

• Once a quorum is established, it is deemed to exist for rest of meeting, *and for any adjournment of the meeting*, regardless of how many depart (§7.24)

• Board votes require a majority of those present (not present *and voting*), except as provided in the articles of incorporation or the bylaws (§8.24(c))

direction of their organizations. The most significant difference for parliamentarians between this proposed revision and the 1988 revision is that there are substantially more mandatory provisions varying from standard parliamentary procedure, while the 1988 revision had more default provisions that could be overridden by bylaw provisions.

For example, the principal

(continued on next page)

ABA Model Nonprofit Act

(continued from previous page)

governing authority would have to reside in the board of directors. The draft does provide for an awkward work-around procedure that would permit the articles or bylaws to give some of the board's authority to a "designated body." (While the exposure draft excludes the members or a convention of delegates from the definition of "designated body," there are indications that the task force intends to alter the language to permit their inclusion.) When the members do anything other than elect directors or amend bylaws under such a provision, however, they would be subject to all the additional statutory rules, limitations, and liabilities associated with board-level decision-making.

Moreover, the exposure draft, if adopted by state legislatures, would prevent nonprofit corporations from following a number of significant rules of parliamentary procedure (see sidebar on previous page).

The proposed revision is not all bad. For example, the vote for passage of a main motion (at a meeting of members) would now be the traditional majority of those present and voting, rather than the awkward mandates of the 1952 and 1988 editions of the Model Act. The new draft also eliminates the confusing distinctions among different types of nonprofits, retaining only a few special provisions for religious corporations.

Like the existing Model Nonprofit Corporation Act, the revision under contemplation is largely adapted from the ABA Model Business Corporations Act. It is evident that the drafters are thinking primarily of nonprofit boards that manage charitable foundations, hospitals, large educational institutions, and the like, rather than of the membership-dominated groups that parliamentarians typically advise (Jenkins 2007, 1136–39).

Response of the Parliamentary Community

After discussions begun at the September, 2006 National Training Conference, the executive committees of NAP, the American Institute of Parliamentarians (AIP), and the Robert's Rules Association all approved the creation of a joint special committee to address concerns raised by the ABA task force's proposal. On

March 8, 2007, that committee approved a "Comment on Exposure Draft of Proposed Model Nonprofit Corporation Act" which, with minor revisions, was ultimately approved by the boards or executive committees of the three groups.

The comment was submitted to the ABA task force before its meeting in Washington, DC, on March 17, 2007. The text of the comment is available in the News section on the NAP Web site at *http://parliamentarians.org/news.php*.

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The comment provides a unique perspective from the nonprofit community that has not, to date, been actively involved in the revision project. Professor Garry Jenkins, who decries the lack of involvement by nonprofits themselves in the model code revision process, has urged nonprofit organizations and their representatives to take a more active role in drafting and commenting on proposed changes to the model code: "[U]ntil nonprofits become more actively engaged in private law reform processes, vigorously participate in government lobbying concerning nonprofit state law, and/or exercise affirmative choice in the incorporation decision, they will have far less input than their corporate peers in the laws governing their activities" (Jenkins 2007, 1181).

Although the Model Act is presented to state legislatures as the "ABA Model," it is not in fact voted on by the ABA House of Delegates—or even by the full Nonprofit Corporations Committee of the Business Law Section of the ABA, of which the task force charged with revising the model is nominally a unit. Instead, the task force is authorized to issue the revision wholly on its own authority (Jenkins 2007, 1138). The full prestige of the ABA name thus rests on the decisions of the relatively small group of attorneys and academicians who make up the task force. We now await

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the publication of another "exposure draft" to see to what extent, if any, the task force has decided to accommodate the concerns raised by the joint committee's comment and similar points raised by others.

After the revision currently under consideration is adopted, its advocates will urge jurisdictions to update their nonprofit corporation codes by adopting the revision, with or without amendments. All of the thirty-seven states, plus the District of Columbia, that have adopted earlier versions of the Model Act will be prime targets for the update, as will four of the five states plus Puerto Rico that have combined general corporation statutes for businesses and nonprofits (generally with a few special provisions for non-stock or other nonprofit corporations). Delaware, with its general corporation law geared toward business, is an acknowledged leader in business corporate governance and is unlikely to adopt an ABA-sponsored nonprofit corporation law.

In addition, the statutes of at least two of the eight states with independent state-specific nonprofit corporations codes are considerably outdated and might well be targets for updating through adoption of the new revision to the ABA Model Act. If the new Model Act's impact is as broad as anticipated, it will have a profound impact on the use of parliamentary procedure in nonprofit membership organizations.

Perhaps because of these criticisms by Professor Jenkins, the joint committee, and other voices with similar positions, Dean Moody has raised the prospect of the creation of a new form of entity—what she calls a nonprofit limited liability company (LLC)—for what she terms "smaller" nonprofits (Moody 2007, 1354). A recent law review study of choice of entity for membership nonprofits included the limited liability nonprofit company as a strong contender, given the complexities of the widely adopted ABA Model Nonprofit Corporation Acts (Hastings 2007, 841–42).

To date, no state has adopted a statute specifically geared towards nonprofit LLCs and there is no model legislation in the offing. Perhaps, if the ABA's Revised Model Nonprofit Corporation Act is adopted without significant amendments taking into account the realities of today's nonprofit membership associations,

parliamentarians and parliamentary lawyers can be in the forefront of a movement to draft a more membership-friendly model nonprofit LLC statute and to try to see that it is widely adopted. In the meantime, the ABA's Revised Model Nonprofit Corporation Act is the only game in town.

For the present, parliamentarians should alert incorporated organizations that they serve, as well as organizations considering incorporating, of the potential danger to their mode of operation posed by the exposure draft. If these clients wish to preserve their legal freedom to operate as they customarily have, with liberty to have their members direct their operations and to choose to use the accepted norms of parliamentary procedure, they should be prepared to act.

The most effective immediate action they can take is to have their legal counsel, whether retained or volunteer, write to members of the ABA task force expressing concern. Parliamentarians who are concerned about the model code revision process may have good ties with attorneys who work alongside them for the same organizations and who believe that these organizations would be well served by legislation recognizing their traditional deliberative ways of doing business. Interested parliamentarians should regularly check the Web site of the American College of Parliamentary Lawyers (ACPL), *www.parliamentarylawyers.org*. Shortly after a new exposure draft is made public, ACPL will post an analysis and recommendation concerning the draft on the Web site. Parliamentarians should then contact attorneys for such organizations and refer them to the analysis as background information for legal comments they should be encouraged to submit to the task force concerning the draft.

Many members of NAP recall the changes to NAP's bylaws that were necessitated in the most recent revision to comply with the Missouri nonprofit corporation code, many of which—such as providing that bylaw amendments approved by the delegates must also be separately approved by the board of directors in order to be adopted—would likely not have been accepted if NAP had any legal choice in the matter.

Were the February 2006 exposure draft to be promulgated

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ABA Model Nonprofit Act
(continued from previous page)

unchanged by the ABA, and were Missouri to amend its statutes to conform, future NAP bylaws amendments would have to be reserved almost entirely to the board, largely cutting out delegates from what—for good or ill—has been their principal occupation at NAP conventions. Instead, delegates would be left to do little more than elect board members (even the election of officers would be done not by delegates, but by the board once it was elected).

For ourselves as well as for our many clients, it is vital that we closely monitor and seek to influence the American Bar Association Task Force to Revise the Model Nonprofit Corporation Act—and, perhaps, subsequently state legislatures—to prevent changes to nonprofit corporation codes that would substantially downgrade the rights of members and their ability to deliberate and decide using the rules of parliamentary procedure. ✯

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