

ABA Releases New Exposure Draft

This article follows up on the article in the First Quarter 2008 National Parliamentarian, ABA Code Revision Raises Concerns for Democracy and Parliamentary Law in Nonprofits. In January, 2008, the drafting task force for the American Bar Association's Revised Model Nonprofit Corporation Act adopted a new exposure draft. The Exposure Draft was posted on the ABA Business Law Section's Nonprofit Corporations Committee website in early April and is now available for public comment.

The Nonprofit Corporations website is:

<http://www.abanet.org/dch/committee.cfm?com=CL580000>

The first part of the exposure draft, Chapters 1 through 8, is available at:

http://meetings.abanet.org/webupload/commupload/CL580000/sitesofinterest_files/MNCAPart1.doc

The second part of the exposure draft, Chapters 9 through 17, is available at:

http://meetings.abanet.org/webupload/commupload/CL580000/sitesofinterest_files/MNCAPart2.doc

Comments will be accepted through the drafting task force's June meeting. Since the date of the task force's June meeting has not yet been set, all comments should be submitted before May 31, 2008. Comments from practicing attorneys who work with nonprofits will be particularly helpful. Parliamentarians who know lawyers who work with voluntary organizations and who are sympathetic to concerns about participatory democracy should contact them about the exposure draft and request them to comment. It might be helpful to supply them with a copy of this article. Comments should be forwarded directly to the Reporter for the Revised Model Nonprofit Corporation Act Task Force, William H. Clark, Esq., at clarkwh@dbr.com. Please request that any attorney's comments also be forwarded to the American College of Parliamentary Lawyers, info@parliamentarylawyers.org.

Letters from active parliamentarians may also be helpful if their experience and "war stories" can shed light on some of the concerns raised by the current exposure draft. For example, the current draft would do away with the "disappearing quorum" rule. Experiences describing the trouble caused by rump, quorum-less meetings could help persuade the drafters that it would be unfair to allow meetings to continue to do business after a quorum is no longer in attendance. ACPL has agreed to collect these comments and send them in aggregate to the Reporter of decisions, which should be the most effective way of communicating this type of information with the drafters. Please send any letters detailing your experiences in the areas of concern mentioned below to info@parliamentarylawyers.org.

Some examples of provisions of the ABA Task Force January 2008 Exposure Draft of the Revised Model Nonprofit Corporation Act that would supersede norms of parliamentary procedure and discussion of changes since the February 2006 Exposure Draft:

This list updates the pull-out box in the NP article on the Model Code Revision featuring provisions of the February 2006 Exposure Draft that raise concerns for fair and democratic meeting procedures.

- *Board powers* (§8.01). All corporate powers must be exercised under authority of the board of directors or others acting under strictures applicable to the board. While members (or delegates) can continue to supervise, oversee, and instruct the board and staff, the bylaws must specifically provide for that, and must also provide that the members, when acting on anything other than election of directors and amendment to the bylaws or other fundamental changes (amendments to articles of incorporation, mergers, etc.), will be subject to the procedural rules applicable to membership meetings. The draft continues to apply the corporate fiduciary obligations of directors to members when they do anything other than elect directors, amend the bylaws, or adopt other fundamental changes. (continued on page 12)

- *Officer elections* (§8.40(b)). This provision has been changed in the January 2008 Exposure Draft to allow others (including members), to elect officers if so provided in the bylaws.
- *Chair's control of meetings* (§7.08). The chair (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. This provision remains in the January 2008 Exposure Draft and it does not provide for a right to appeal the chair's determinations in these matters to the members. While case law might allow membership control through the appeal process under the requirement of this section that procedures be "fair," the rule should make it clear that the meeting is the members and the chair is their servant.
- *Annual and regular membership meetings* (§7.01). This provision has been changed in the January 2008 Exposure Draft to allow for regular membership meetings in addition to the annual meeting and special meetings. The provision still mandates annual membership meetings. The draft should permit membership corporations organized with a delegate body having some or all of the powers of the members to hold mandated meetings less frequently, for example, on a periodic basis and not less frequently than once every five years.
- *Electronic membership meetings* (§§7.01 (e), 702 (f)). The February 2006 Exposure Draft allowed membership meetings to 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. This derives from the model of the limited participation rights in business corporation shareholders meetings. The January 2008 Exposure Draft makes this procedure permissive. In other words, the bylaws must specifically permit such electronic meetings and may provide for additional rights in electronic meetings, such as the rights to speak and to make motions.
- *Tabulating votes* (§7.23). 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. Unchanged from February 2006 Exposure Draft.
- *Quorum* (§7.24). 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. Unchanged from February 2006 Exposure Draft.
- *Board quantum of vote* (§8.24(c)). Board votes require a majority of those present (not present and voting), except as provided in the articles of incorporation or the bylaws. Unchanged from February 2006 Exposure Draft.

Other concerns:

- *Volunteer board fiduciary duties* (§8.30). Volunteer directors and officers remain subject to same vigorous fiduciary obligations as business corporation directors. Perhaps the somewhat lower standard applicable to volunteers under the Federal Volunteer Protection Act, 42 U.S.C. §§ 14501 et seq., might make sense for volunteer directors and officers.
- *Fundamental transaction quantum of vote* (§§ 9.21, 9.31, 9.52, 10.03, 11.04, 12.02, 14.02). Fundamental transactions are subject to approval by simple majority of the members present and voting, unless otherwise provided in the bylaws or articles of incorporation (a few other technical ways of increasing the vote tally are possible). Most organizations make their bylaws much harder to amend than this in order to maintain fidelity to their mission. Drafters of bylaws are likely to think about and include a specific standard for bylaw amendments. They are unlikely to be aware that they need to mention adoption of fundamental changes as well, leaving an imbalance so that it is easier to amend the articles of incorporation than the bylaws. Savvy partisans might try to subvert the will of a significant number of members by amending the higher ranked articles of incorporation by a simple majority when they are unable to persuade two thirds of the members (the typical vote quantum to adopt bylaw amendments) to support their proposals.

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- *Parliamentary authority.* The draft makes no provision for adoption of a parliamentary authority. Most common parliamentary authorities include governance-related provisions in addition to procedural rules. Parliamentary authorities are written for the layperson and are more accessible (and readily obtainable) by the lay person than statutory provisions. Often, a default provision of the statute may conflict with longstanding expectations of parliamentary procedure and members may be completely unaware of the countervailing statutory rule. To provide clarity for lay leaders, the draft should provide that reference to a procedural manual in bylaws shall be deemed incorporation of the manual into the bylaws except to the extent that the bylaws specifically adopt or allow for the adoption of a contrary rule. The draft should also provide volunteer organizations with guidance on basic fairness in meetings by allowing them “safe harbor” protections for the fairness of their meetings under § 7.08 if they choose a recognized procedural manual.

- *Constituent units.* The draft makes no provisions for constituent units. § 8.08 (a) (2) mentions chapters in the context of removal of officers, but does not elaborate on the relationship between the constituent unit and the superior organization, an area of growing interest to the Internal Revenue Service in the new Form 990 annual filing for most tax-exempt organizations.

Michael E. Malamut, Chairman
Special Joint Committee with AIP and Robert's Rules Association

Parliamentary Law Month Celebrations



The Texas State Association of Parliamentarians President Ada Williams (2nd from left) and local unit members accept the Proclamation of April as Parliamentary Law Month in the City of Dallas.



At a recent meeting of the City Council, Mayor Dan Cort presented a Mayor's Proclamation declaring the month of April "Parliamentary Law Month" in the City of Pacific Grove.

The proclamation recognizes that parliamentary law is the cornerstone of democratic society and affirms a commitment to principles of justice, adherence to order and protection of the rights of all. It further acknowledges the California Pi Gamma Parliamentary Study unit in Pacific Grove, which fosters parliamentary procedure in order to educate the public, to promote a spirit of justice and fairness, and to provide an opportunity for developing leadership.

Five members of the California Pi Gamma Unit attended the ceremony at which the proclamation was presented. In accepting the proclamation, Unit President Jean Stallings thanked the mayor for recognizing the importance of *Robert's Rules of Order* in expediting meetings. She also reported that the CA Pi Gamma Unit had donated a copy of the current edition of *Robert's Rules of Order Newly Revised* to the reference department of the Pacific Grove library.