



Next, I'm going to talk about the boards of directors of charitable trusts. Under New Hampshire law, all charitable nonprofit corporations must be governed by a board of directors. Boards may refer to themselves as "boards of directors," or "boards of trustees," or some other name, but regardless of the name they use, the board is in charge of governing the organization and its members, directors, or trustees are fiduciaries. The board members' obligations as fiduciaries are prescribed in both New Hampshire statute and the common law.

BOARD OF DIRECTORS

- 5 independent directors not related by blood or marriage
- Presiding officer cannot be an employee
- Structured to ensure “diversity of discussion, connection with the public, and public confidence.”

New Hampshire Department of Justice

14

New Hampshire law sets several requirements for boards of directors. First, under RSA 292:6-a, boards of directors must have at least 5 independent directors who are unrelated by blood or marriage. It is possible to have related board members, but the related board members will not count toward the minimum 5 board members required by statute. For example, if two siblings are both on a board, there must be 4 other board members who are not related by blood or marriage to be compliant with the statute.

New Hampshire law also forbids the presiding officer of the board from being a paid employee of the organization. Boards may refer to their presiding officer as the board president, the chair, or some other name. But regardless of what name a board calls its presiding officer, that presiding officer may not be a paid employee. For example, if an organization has a paid executive director who serves on the board of directors, the executive director may not be the presiding officer of the board.

Finally, New Hampshire law recognizes the importance of a diverse board. A well-functioning board will have members with different backgrounds, skills, opinions, and experiences. There is not much benefit to having five board members if they agree about everything all of the time. When recruiting board members, look for people who will bring something new to your organization.



We are sometimes contacted by organizations regarding the role of the board versus the role of management. The exact roles of the board versus the role of management may vary from organization to organization and may vary with time within an organization. Some smaller organizations are entirely board-run with no management or staff. Some larger organizations have big management teams. There is no one-size-fits-all delineation of these roles, so it is important for the board and management to engage with each other to ensure that both know their roles.

In general, the role of the board is to govern the organization. This means that they establish the vision and strategic direction for the organization, approve major policies and creates systems, choose the CEO or Executive Director, and oversee the performance of the CEO or Executive Director. The board is not typically in charge of the day-to-day operations of the organization.

The role of management is to manage the organization. Management is in charge of carrying out the vision and strategic direction of the organization as established by the board, making operational decisions, establishing operational policies, hiring and supervising staff, keeping the board informed, and making recommendations to the board.

You can see from this slide that the two roles are intertwined and must work together. The

board needs to establish and communicate its vision to management so that management can implement it. Management needs to provide information and feedback to the board so the board can be well informed when it makes its decisions. The board supervises the CEO or executive director, who, in turn, supervises the organization's staff.

FIDUCIARY DUTIES OF BOARDS OF DIRECTORS



Loyalty



Care



Obedience

New Hampshire Department of Justice

16

As mentioned earlier, the members of a board of directors are fiduciaries under both New Hampshire statute and the common law. I am going to discuss three fiduciary duties: The duty of loyalty, the duty of care, and the duty of obedience.

DUTY OF LOYALTY

New Hampshire Department of Justice

17

First, the duty of loyalty. This is the duty to act with undivided loyalty in the best interests of the organization in light of its charitable purpose. In our lives, we wear many hats. We may be a parent, a spouse, an employee, a volunteer, a business owner, or any number of other things. The duty of loyalty requires that when you make a decision for an organization, you remove all of those other hats and only wear your board member hat.

DUTY OF LOYALTY

- ✓ Loyalty gets tested when a director has a conflict of interest or confronts a corporate opportunity
- ✓ Board members must act with undivided loyalty and in the best interests of the organization and not seek to derive personal gain from its programs or transactions
- ✓ The organization must come before any private interests of the directors
- ✓ NH RSA 7:19-a governs “pecuniary benefit transactions”

New Hampshire Department of Justice

18

The duty of loyalty can be tested when a director has a conflict of interest. A conflict of interest occurs when the interests of the organization differ from the director’s personal interest, or the interests of the director’s family member, business, employer, etc. Board members must act with undivided loyalty and in the best interests of the organization and not seek to derive personal gain from its programs or transactions. The organization must come before any private interests of the directors. If a director encounters a situation where the director’s personal interests could conflict with the organization’s best interests, the director’s fiduciary duty requires the director to be recused from the decision.

On the next slide, I am going to discuss pecuniary benefit transactions, which are a particular type of conflict-of-interest transaction for which there are special provisions in New Hampshire law under RSA 7:19-a.

PECUNIARY BENEFIT TRANSACTIONS

RSA 7:19-a

Definition

- A transaction in which a director, officer, trustee or an immediate family member of the same has a financial interest, direct or indirect, with a value of over \$500 in the aggregate for the year.

Exemptions

- Reasonable compensation of one executive director
- Benefits provided on same basis as the public (plus written eligibility criteria)
- Continuing transaction from before director's election

New Hampshire Department of Justice

19

Pecuniary benefit transactions under RSA 7:19-a are transactions in which a director, officer, trustee, or their immediate family member has a financial interest, direct or indirect, with a value of over \$500 in the fiscal year. A “direct” interest occurs when the director or their family member benefit from a transaction worth \$500 or more. An indirect financial interest occurs when the director’s business, employer, or other related person or entity benefits from a transaction worth \$500 or more. As we will see on the next slide, New Hampshire law does not prohibit these transactions, but it does prescribe certain requirements for them. These requirements only deal with assets flowing from the charity to a director, not the other way. In other words, directors’ donations to an organization are not pecuniary benefit transactions.

There are some types of transactions that are excluded from the definition of a pecuniary benefit transaction under the statute. Board members should still be diligent and avoid conflicts of interest with respect to these types of transactions, but they are not required to follow the statutory process outlined on the next slide. The statute exempts three types of transactions. First, reasonable compensation for one executive director is not a pecuniary benefit transaction. In many organizations, the executive director serves as an ex officio member of the board. The executive director’s salary is not a pecuniary benefit transaction. So, when setting the executive director’s salary, the board does not need to follow the process outlined on the next slide. Next, benefits provided on the same basis as the public

pursuant to written eligibility criteria are not pecuniary benefit transactions. What does this mean? Well, for example, many social service organizations have representation on their board from the communities that they serve. If those served members receive benefits from the organization, those benefits are not pecuniary benefit transactions, provided that they are awarded based on written eligibility criteria that are the same for any member of the public. Last, continuing transactions that were in place before a director's election are not pecuniary benefit transactions because the director with the financial interest was not involved in the decision to enter into the transaction. It is common for an organization to, for example, work with the same accounting firm for many years. As the accountant gets to know the organization and like its mission, the accountant may want to join the board, and the board, having worked with the accountant, may be happy to have the accountant join. If the organization is already under contract with the accounting firm from before the accountant joined the board, then that transaction is not a pecuniary benefit transaction. The accountant, prior to joining the board, was not part of the decision to hire the accounting firm. However, if the contract expires and the board votes on a new contract, this is a new transaction and is no longer subject to this exemption.

Again, New Hampshire law does not prohibit pecuniary benefit transactions, but it does place requirements on these transactions. We will go over those requirements on the next slide.

PECUNIARY BENEFIT TRANSACTIONS

REQUIREMENTS

- ✓ Best interest of the charity
- ✓ Goods/services in ordinary course for reasonable value (or less)
- ✓ 2/3 of disinterested Board members must vote in favor after full disclosure
- ✓ Interested members of board cannot participate in vote or be present during discussion (except to answer questions)
- ✓ The vote is recorded in the minutes of the meeting
- ✓ Must be reported to the Director of Charitable Trusts on Schedule C
- ✓ If transaction > \$5,000 in aggregate for year, must publish in newspaper and report to CTU before entering into the transaction

New Hampshire Department of Justice

20

In order to enter into a pecuniary benefit transaction, an organization must follow the process laid out in RSA 7:19-a. First, the board must determine that the transaction is in the best interests of the charity. The transaction must also be for goods or services in the ordinary course of the organization's business for reasonable value or less. So, for example, if an organization needs to purchase heating oil to heat its building and one of the board members owns a heating oil company, the board member may wish to provide heating oil to the organization at or below market rate. The transaction needs to be approved by a 2/3 majority of the disinterested board members after full disclosure of the details of the transaction. Under the statute, a "disinterested" board member is a board member who has had no pecuniary benefit transactions with the organization during the fiscal year. Sometimes boards get themselves into trouble by engaging in too many pecuniary benefit transactions in a fiscal year. Too many board members are conflicted, so there is not a 2/3 majority of disinterested board members to vote on the transaction. This is one reason why pecuniary benefit transactions are meant to be the exception, not the rule. In addition, the board must record the vote on the transaction in its meeting minutes and must report the transaction to the Director of Charitable Trusts on Schedule C of its annual report.

Remember that these are the requirements for transactions that exceed \$500 in a fiscal year. The statute has additional requirements for transactions that exceed \$5,000 in a fiscal year. For these larger transactions, the organization must publish notice of the transaction

in a local newspaper and must report the transaction to the Charitable Trusts Unit before entering into the transaction.

Note that if an organization fails to follow this process, the CTU can seek to invalidate the transaction. This means that the director who benefitted from the transaction would need to pay the organization back. It is important to follow these steps carefully to ensure compliance with New Hampshire law.

PECUNIARY BENEFIT TRANSACTIONS

REAL ESTATE TRANSACTIONS & LOANS

Real Estate

- ▶ A charity that seeks to sell, 5+ year lease, or purchase, real estate to or from an officer, director or trustee must get prior approval from probate court. RSA 7:19-a, VI.

Loans

- ▶ Charity cannot loan money or property to directors, and any director who supports such a loan is jointly and severally liable to the charity. RSA 7:19-a, V.

New Hampshire Department of Justice

21

Finally, there are some additional restrictions on certain types of pecuniary benefit transactions. First, charities may not sell, lease for a period of 5 or more years, or purchase real estate or an interest in real estate to or from a director without prior approval from the probate court. One way that charities may get into trouble here is with leases that renew automatically. A lease that renews automatically every year will not violate this statute for the first 4 years. But if the lease extends past 5 years, then the charity needs to get court approval.

Also, charities cannot loan money or property to a director. These types of loans are outright prohibited; there is no process to permit them. If a charity makes such a loan, then any director who supports it is jointly and severally liable for the full amount of the loan. Loans from a charity to a director are simply not allowed.



Next, I will discuss the duty of care, which is the duty to pay attention and be well informed.

DUTY OF CARE

ACTIVE & WELL-INFORMED

- Oversee finances & filings
- Regular meetings memorialized in meeting minutes
- Monitor management
- Ensure compliance with governing documents

New Hampshire Department of Justice

23

The duty of care requires that board members oversee the organization’s finances and filings. This includes the filings that were discussed earlier in this presentation: the organization’s filings with the IRS, the New Hampshire Secretary of State, and the Charitable Trusts Unit. The board is responsible for ensuring that the organization complies with these filing requirements on time and that its filings are accurate and correct.

The duty of care also requires that boards have regular meetings memorialized in meeting minutes. As discussed earlier, New Hampshire law recognizes that it is important for diverse boards to meet and discuss issues. This legal requirement is not met when board members only communicate over email, or when, for example, an executive director contacts board members individually. It is important that actual discussion takes place. For boards to fulfill their fiduciary duty of care, they really ought to meet at least quarterly, if not more frequently.

The board is also responsible for monitoring management. If a board leaves control of an organization up to the executive director and does not remain engaged, they are not fulfilling their duty of care.

Finally, organizations have governing documents and policies, such as articles of agreement, bylaws, and conflict of interest policies. The board’s duty of care requires it to

be familiar with these documents and to ensure that they are followed.

FINANCIAL CONTROLS

- ✓ Implement policies relating to finances, including handling of cash, reconciling bank statements, checks, bank cards, etc.
- ✓ Monitor policy compliance (audit management letter)
- ✓ Carefully consider which director should be the Treasurer
- ✓ Ask the CEO about the qualifications and supervision of accounting staff

New Hampshire Department of Justice

24

Finances are one of the areas where organizations run into trouble most frequently. Boards can set up organizations to avoid these problems by implementing policies related to finances, including how cash is handled, who reconciles bank statements and when, who has signing authority for checks, when do checks need two signers, who has control of debit and credit cards, etc. We have occasionally seen organizations that trusted one person to have unchecked control over the organization's finances and then had that trust violated. It is important that organizations establish financial checks and balances so that no one person has control.

It is also important to monitor compliance with these policies. If your organization is large enough to require an audit, then your audit management letter will identify areas where policies are inadequate or are not being followed.

Most boards have an officer who is the treasurer of the board. It is helpful to have a treasurer with some financial background, such as an accountant, a bookkeeper, a financial advisor or other similar profession.

If your organization is large enough to have accounting staff, the board should talk to the CEO about that staff, how they are selected, and how they are supervised.

FINANCIAL OVERSIGHT

Independent reviewer other than bookkeeper periodically reconciles bank statements with month's or quarter's receipt and disbursement records

Managers review monthly financial statements carefully with the bookkeeper, Finance Committee, and Board

Board organizes an annual audit by an independent qualified professional, such as a CPA, audit company, or controller

Finance Committee and Board review auditor's report, discuss findings with managers and staff, and take necessary action to address any issues

Organization observes all restrictions related to funds and donations

Equipment and other physical assets are secured against theft and organization periodically conducts inventories

Board ensures that organization has sufficient cash for near-term operations

Board ensures that organization has sufficient resources, practices, and strategies for long-term financial stability

New Hampshire Department of Justice

25

This slide is a short checklist that organizations can use to see how effective their financial oversight is, and where there could be room for improvement. These may not all be appropriate for every organization, but they are a good place to start. I'll read through them briefly.

Does the board have an independent reviewer, other than the bookkeeper, who periodically reconciles bank statements with monthly or quarterly receipts and disbursement records?

Do managers review monthly financial statements with the bookkeeper, finance committee and board?

Does the board organize an annual audit by an independent qualified professional? Because audits are expensive, this may not be feasible for small organizations.

Does the finance committee and board review the auditor's report, discuss findings, and take necessary action to address issues?

Does the organization keep track of and observe all restrictions related to funds and donations?

Does the organization secure equipment and other physical assets against theft and conduct periodic inventories/

Does the board ensure that the organization has enough cash for near-term operations?

Does the board ensure that the organization has sufficient resources, practices, and

strategies for long-term financial stability?

THE TREASURER CHOOSE CAREFULLY!

Must provide a report at each board meeting.

Must present an annual budget.

Must see that organization maintains a thorough and accurate set of books.

Must interact with financial staff to assure that accounts are up to date, and bills are timely paid.

Must see that State and Federal financial reports are timely filed.

May work with a finance committee.

New Hampshire Department of Justice

26

As we discussed before, it is important to choose your treasurer carefully. Ideally, the treasurer will have some experience or familiarity with a financial field, such as accounting, bookkeeping, etc. Regardless of the treasurer's experience, they should be comfortable with numbers and detail-oriented. The treasurer usually has a number of duties, such as presenting a financial report at each board meeting, presenting the annual budget, ensuring that the organization's books are thorough and accurate, ensuring that the accounts are up to date and bills are timely paid, and ensuring that state and federal financial reports are filed on time. The treasurer may work with a finance committee to assist in these duties.

TREASURER'S REPORT



New Hampshire Department of Justice

27

The content of a treasurer's report may vary depending on the organization, but typically will include comparative income statements, a balance sheet, and a cash flow statement. This lets the board know how the organization is doing financially. The treasurer may report on how fundraising is going on an event-by-event basis, and the board's review of the report will discuss the financial trends and how the organization is doing compared to its budget. A treasurer's year-end report will also include any audit and a report on internal controls.

ASSETS – THE BUCK STOPS WITH YOU!

- ✓ Board is responsible for safeguarding the charity's assets.
- ✓ This includes reporting theft and embezzlement to the police, no matter how sympathetic board members may be to the individual's situation.
- ✓ Failure to do so may be a breach of directors' fiduciary responsibilities

New Hampshire Department of Justice

28

Remember that as fiduciaries, the buck stops with you. Even though a board may have a treasurer, ultimately it is the fiduciary duty of each individual board member to safeguard the charity's assets. Each board member should review the financial information that has been prepared and ensure that they understand it. Ask questions if you don't.

It is the board's fiduciary obligation to report theft and embezzlement to law enforcement. This is true even if the board members may be sympathetic to the perpetrator's situation. From time to time, we have seen organizations where a trusted employee has stolen or embezzled from an organization. Remember the duty of loyalty—you must act in the best interests of the organization in light of its charitable purpose. Your duty is to the organization, not to the employee individually. Failure to report thefts to the police can be a breach of your fiduciary duties.

HOW CAN BOARDS MINIMIZE THEFT?

- ✓ Adopt appropriate internal financial controls and monitor compliance.
- ✓ Show up at meetings.
- ✓ Pay attention to the organization's finances.
- ✓ Ask questions.
- ✓ Do not "go along to get along."
- ✓ Do not accept excuses for financial information not being prepared, shared, or easily understood.
- ✓ Report suspected theft to law enforcement

New Hampshire Department of Justice

29

There are a number of things that boards can do to minimize theft. As already mentioned, they can adopt appropriate internal controls and monitor compliance. They should show up at meetings and pay attention to financial reports. If you are presented information that you do not understand, ask questions until you do understand. Don't go along to get along. Don't accept excuses for financial information that is not being prepared, not being shared, or not easily understood. And, again, if there is theft or embezzlement, report it to local law enforcement.

THE “BOBBLE-HEAD BOARD”

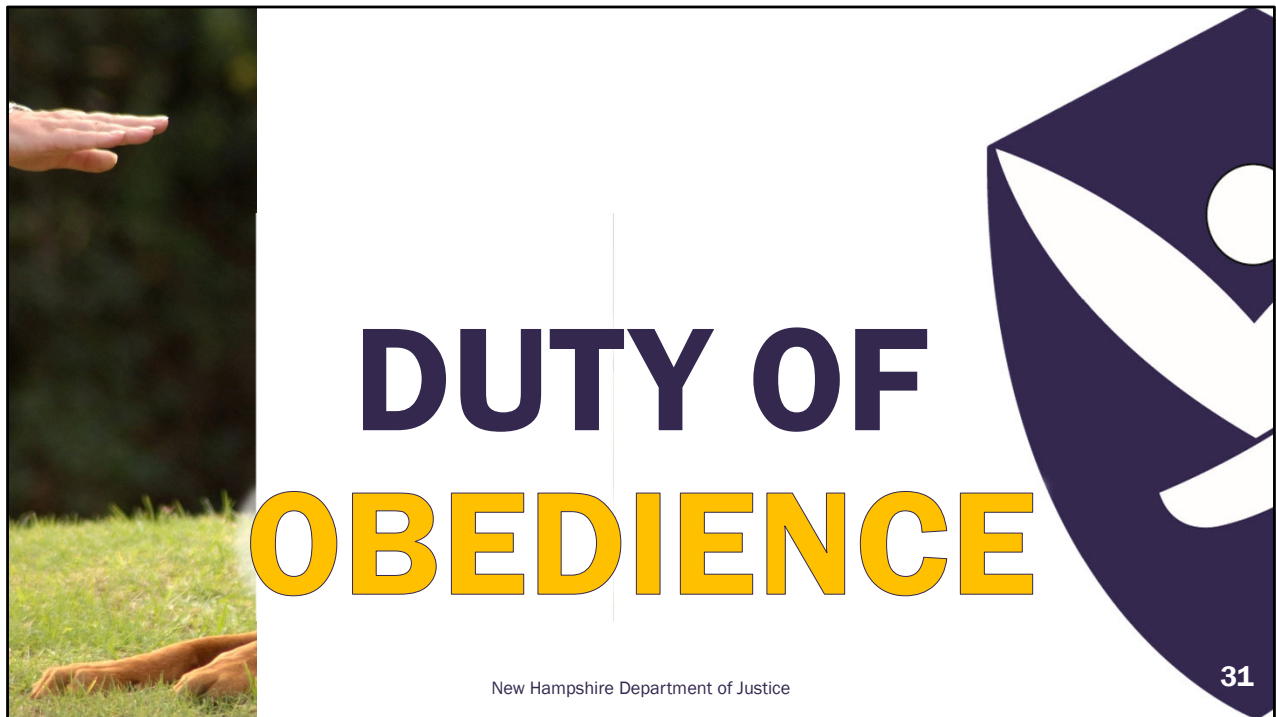
- Do members of your board nod their heads in approval, or fail to dissent, when any pressure is brought to bear during the meeting?
- Are questions and/or opposing opinions discouraged by officers or other directors?



New Hampshire Department of Justice

30

The “bobble-head board” can occur when there is one board member or an executive director who is very vocal or passionate and appears to call all of the shots. If the rest of the board just nods along without asking questions and without dissenting when there is an issue, they are not fulfilling their fiduciary duty of care. Board meetings should be fun and engaging with back-and-forth discussion. Questions should be encouraged. It’s OK if not everyone agrees.



Last, I will discuss the duty of obedience. This is sometimes considered to be a subset of the duty of care or the duty of loyalty. Here, we have broken it out as a separate duty. The duty of obedience is the duty to follow the law and adhere to any restrictions that may be placed on your organization's charitable assets.

DUTY OF OBEDIENCE

- ✓ Board members must ensure the organization devotes its assets to its mission as set forth in articles of Agreement
- ✓ Board members must ensure that the organization files all reports and complies with applicable state and federal laws
- ✓ Board Members must ensure that the organization honors any donor restrictions on use of funds

New Hampshire Department of Justice

32

As discussed earlier, all charitable nonprofit corporations are established by the filing of articles of agreement with the New Hampshire secretary of state. The articles of agreement set forth the organization's charitable purpose. The board of directors is obligated to use the organization's assets in furtherance of that charitable purpose. There are many worthy charitable causes in the world. Your organization's donors contributed to your organization believing that their contribution would be used in furtherance of your organization's purpose. The duty of obedience requires you to adhere to that purpose.

Under the duty of obedience, you are also obligated to follow the state and federal laws applicable to charitable organizations, which includes the obligation to file the annual reports discussed earlier and to comply with the pecuniary benefit transaction statute.

Board members also need to follow any donor restrictions on the use of funds, which I will discuss more on the next slide.

RESTRICTED FUNDS

- ✓ Donor intent is paramount
- ✓ Donor restricted includes time or purpose restricted funds
- ✓ Unrestricted funds may be used for any purpose related to mission. (Includes board restricted funds.)
- ✓ Donor restricted (endowment)—if permanent, annual spending of more than 7% of value is presumed imprudent (UPMIFA). Today 4.5% to 5% is the prudent norm.
- ✓ Borrowing from endowment is the same as spending

New Hampshire Department of Justice

33

Organizations are obligated to comply with donor-imposed restrictions on gifts. If, for example, a donor contributes money to an organization for the purpose of constructing a building, the organization can only use those funds to support the construction of the building and for no other purpose. Donors' gifts may be restricted with respect to purpose, or time, or both. A time restriction is a restriction on when money may be spent, such as a requirement that only the income from a fund may be spent, not the principal. Organizations must honor both types of restrictions and cannot change them on their own. A donor restriction can only be changed with consent of the donor, or through a court process involving the Charitable Trusts Unit where certain criteria are met. If you need to change a donor restriction on a fund, please contact our office.

An organization's unrestricted funds may be used for any purpose that is related to the organization's mission. This includes board-restricted funds. Unlike a donor restriction, a board restriction—such as a vote by the board to set money aside for a building fund—is imposed by the board, so the board can also release the restriction.

If you have an endowment fund, New Hampshire follows the Uniform Prudent Management of Institutional Funds Act, or UPMIFA. Spending of more than 7% from an endowment fund is presumptively imprudent. Today, the prudent norm is closer to 4.5% or 5%. Borrowing from an endowment should be treated the same as spending from the

endowment.

BYLAW BASICS

WHAT ARE BYLAWS?

- ✓ Bylaws are a legal document second in importance to the organization's Articles of Agreement
- ✓ Bylaws say how the organization is governed (voting, committees, etc.)
- ✓ Sets forth any member rights
- ✓ Failure to follow the bylaws can have severe consequences, even litigation
- ✓ Avoid Robert's Rules of Order

New Hampshire Department of Justice

34

Bylaws are another document that you are required to follow under the duty of obedience. Bylaws are a legal document second in importance the organization's articles of agreement. Where Articles of Agreement set out broad information about an organization, such as its purpose and dissolution provision, bylaws say how an organization is governed. The bylaws may state how votes occur, what board committees there are, who the officers of the organization are, etc.

Bylaws may set forth the rights of members if your organization has members. If your organization has members and the members have rights under the bylaws you need to be careful about keeping track of who your members are.

Be sure that you are following your bylaws because failure to do so can result in severe consequences, such as litigation, or could result in board actions being invalidated.

One thing we often see in bylaws is Robert's Rules of Order. We recommend against using Robert's Rule of Order, because these rules are much more detailed and complicated than most organizations need or appreciate. For example, Robert's Rules of Order require that your organization have a parliamentarian. Unless you are prepared to have a parliamentarian, Robert's Rules of Order are probably not appropriate for your organization.

KEEP BYLAWS CURRENT

- ✓ Establish a committee to review the bylaws every five years or less
- ✓ If changes need to be made, follow the proper procedure for amendment
- ✓ Conflict of interest policy in bylaws?
- ✓ Means of participating in meetings? (e.g., telephone, videoconference)
- ✓ Notice by email?
- ✓ Always include the date of the latest amendment at the end of the document

New Hampshire Department of Justice

35

Since bylaws are so important, it's important to keep them up to date. Establish a committee to review the bylaws every five years or less to be sure that your bylaws still work for your organization in its current form and still reflect how you operate. If changes need to be made, follow the proper procedure to amend them.

All New Hampshire nonprofit corporations are required to adopt conflict of interest policies, and many put those policies in the bylaws.

One thing that many organizations realized during the COVID-19 pandemic is that their bylaws did not allow them to meet remotely. If you want to meet via phone or videoconference, be sure that your bylaws allow it. Votes by email or text are not consistent with New Hampshire law because they do not fulfil the statutory requirement for discussion by the board.

Another area of bylaws that many organizations find needs updating is the provision about how board members are notified of meetings. Older bylaws may require notification by US Mail. But most organizations nowadays notify board members of meetings via email. If that is how your organization operates, be sure your bylaws allow it.

Finally, whenever you update your bylaws, be sure to include the date of the latest

amendment at the end of the document so you always know which version of your bylaws you are looking at.