

Association Governance & Antitrust Fundamentals

Regional Association Executives Conference 2023

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GOVERNANCE



Governing Documents

❑ Articles of Incorporation

- ✓ A public document that legally establishes the organization
- ✓ Agreement between state and organization

❑ Constitution and Bylaws

- ✓ Internal document(s) that governs organization's operations
- ✓ Agreement between organization and members

❑ Policies

- ✓ Standard operating procedures that are adopted and amended by the BOD
- ✓ Agreement between BOD and staff

What's What and How?

1

Constitution vs. Bylaws

- ❑ Both govern organization's internal affairs
- ❑ Courts consider these documents essentially the same
- ❑ Per Robert's Rules, constitution prevails if conflict

2

Bylaws vs. Policies

- ❑ Bylaws are appropriate for items that are less likely to change
- ❑ Policies are appropriate for items that may frequently change or requires discretion

3

NAR Bylaws Certification Process

- ❑ Streamlined process for verification of bylaws compliance
- ❑ Online certification form can be found NAR's [website](#).



Board of Directors

- ❑ Ultimate authority - over internal affairs of organization and management and use of its assets
- ❑ Provide strategic leadership
- ❑ Must act consistently and in accordance with Articles of Incorporation, bylaws and policies

BOD Fiduciary Duties

Duty of Care

Duty of
Obedience

Duty of
Accounting

Duty of
Loyalty

Duty of
Confidentiality



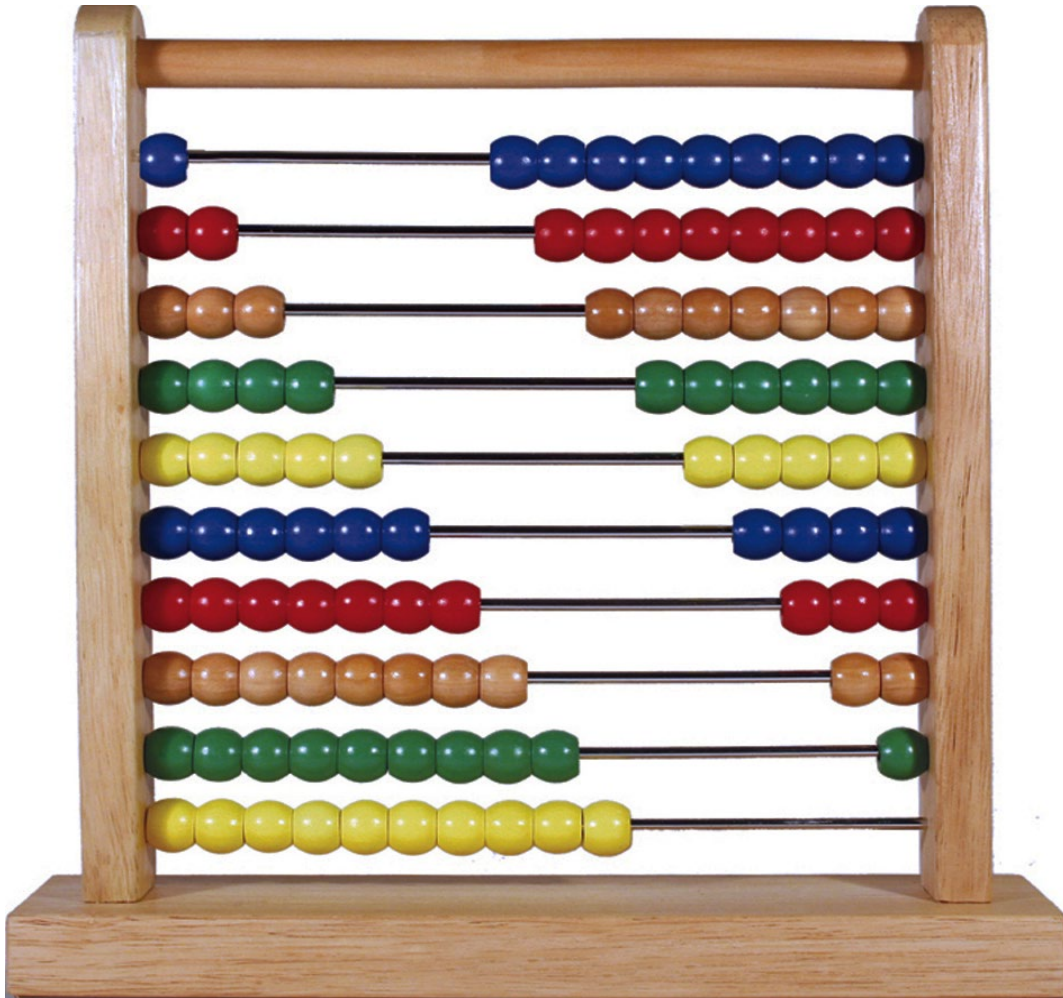
Duty of Care

- ❑ Exhibit honesty and act in good faith
- ❑ Exercise ordinary and reasonable care in delegation of duties
- ❑ Attend meetings and stay informed of all material information that's reasonably available



Duty of Obedience

Act in accordance with, and in furtherance of, the association's mission and governing documents, as well as applicable laws and regulations.



Duty of Accounting

Safeguard, protect, and preserve association assets by adopting, and following, proper accounting procedures and controls



Duty of Loyalty

Undivided allegiance and duty of faithfulness to the association.

- ❑ Directors must act in good faith for the benefit of the organization and not for the director's own personal interest.

Conflict of Interest



- Avoid**
- Disclose**
- Resolve**
- Recuse**

Review COI policy at the beginning of each BOD meeting

Examples:

- ✓ Transaction with a family member
- ✓ Corporate opportunities
- ✓ Competing organizations

**FAILURE TO FOLLOW FIDUCIARY DUTIES LEADS
TO HARM TO ASSOCIATION AND MEMBERSHIP
AND LEGAL EXPOSURE.**



BOD Composition and Removal

- ❑ The board composition and director eligibility requirements should be established in the bylaws
- ❑ If the organization's needs or interests of its board have changed, the bylaws should be amended accordingly
- ❑ The bylaws should contain a removal provision that describes the removal process and the events for removal

BOD Meeting

- ❑ **Fulfill minimum number of BOD meetings**
- ❑ **Give sufficient notice and send meeting agenda**
 - ✓ Establish start and end times
 - ✓ Identify action items, topics and speakers
 - ✓ Allows preparation

- ❑ **Quorum**
 - ✓ Must comply with state law and bylaws
 - ✓ Necessary to take valid action



Robert's Rules of Order - Parliamentary Procedure



**Promotes
Efficiency**



**Protects
minority's right
to be heard**

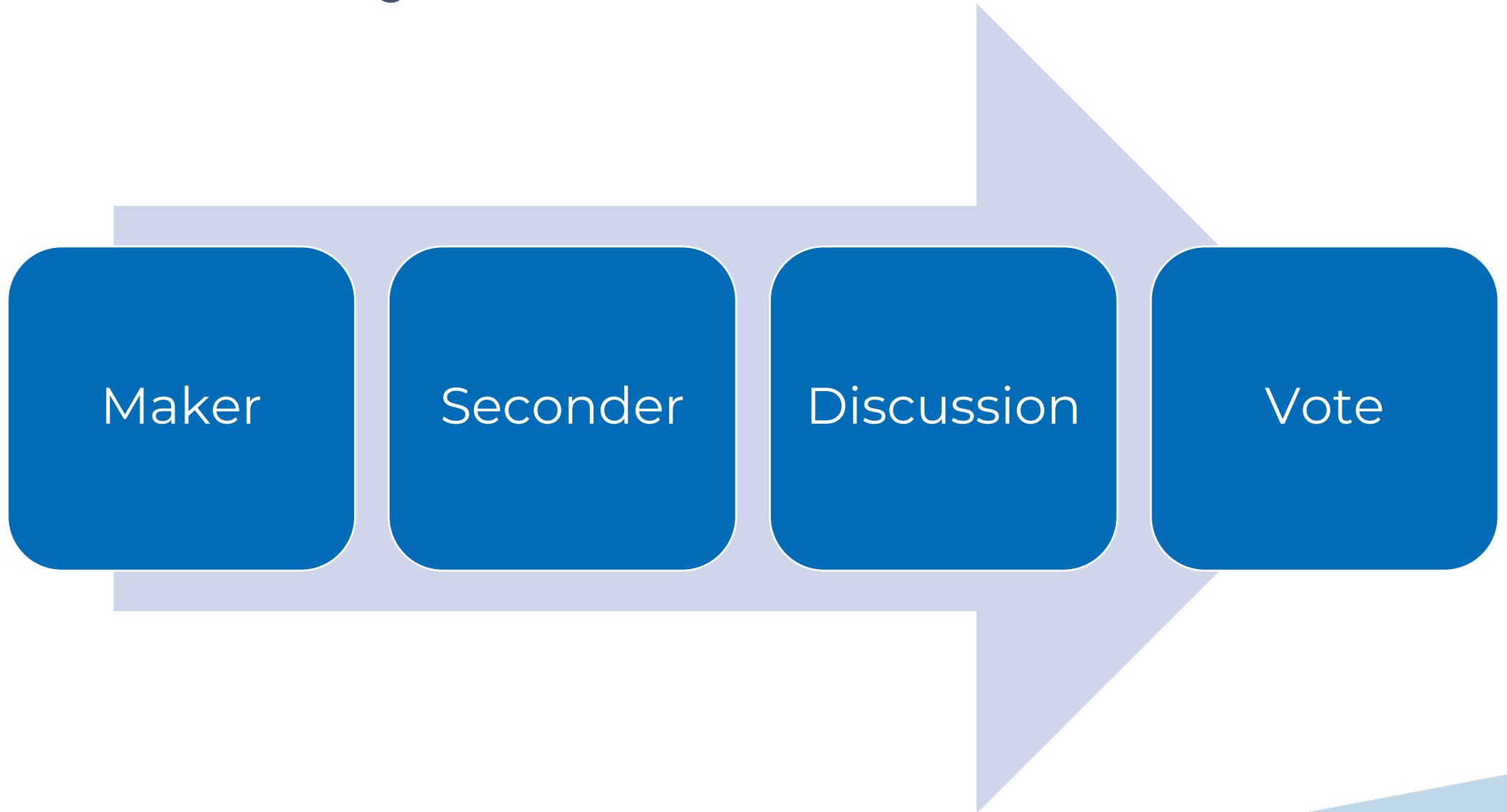


**Protects
majority's right
to decide**



**Maintains
order**

BOD Action by Motion



BOD Action by Amended Motion



**Needs a maker
and seconder**



**Vote on the
amendment**



**Discuss the
amendment**



**If amendment
passes, vote on
amended
motion**

Voting on BOD Action

- Chair calls to question
- Majority or supermajority
- Abstentions



Role of the Chair

- ❑ Facilitator
 - ✓ Assign floor
 - ✓ Ensure everyone is heard and informed
 - ✓ Comments directed to Chair
- ❑ Establish trust by being impartial
 - ✓ Be fair and try to avoid driving the debate
- ❑ Vote only when necessary
 - ✓ Only when it effects the result such as make or break a tie, or majority or supermajority



Consensus

- Informal
- Routine business
- No vote
- Announce belief of consensus
- If anyone objects, must have motion



Board Action Without a Meeting



Reserve for non-controversial matters or urgent matters



Abstentions not allowed



Unanimous written consent



Executive Session

- ❑ Motion
 - ✓ To enter into and to rise out of executive session
- ❑ Limited guests
 - ✓ Board members plus whoever BOD permits to stay
- ❑ Confidential
 - ✓ Anything discussed or share must not go beyond those present in the meeting
- ❑ Minutes
 - ✓ Keep separate minutes



Meeting Minutes

Minutes

- ❑ Legal documents
- ❑ Golden rule – Not a transcript, record of actions taken
- ❑ Consists of:
 - ✓ Date, time and place of meeting
 - ✓ People present and absent
 - ✓ Motions (maker and disposition)
 - ✓ Consensus items
 - ✓ Notation of subject matter of reports

Meeting Minutes 2008-03-18

10:03 - Meeting starts
10:05 - Check on presence of quorum:
* Quorum present
10:08 - Agenda:
* Added item "sales representative
bonus policies" to agenda
* Confirmed with 6 votes out of 7
10:14 - Sales report
* CEO: Numbers presented (attached)
....

Official Meeting Minutes

Meeting Minutes 2008-03-18

10:03 - Another bad start into the day
10:05 - Check on presence of quorum:
* Those who like to talk are here again
10:08 - Agenda:
* Looked out of the window
* Bird flew by, probably sparrow
10:14 - Sales report
* Counting "o"-s on the printed agenda
* Filling them with red pencil
....

What really happened ...

Wait ... What?!



GOVERNANCE RESOURCES

NAR Bylaws Certification: <https://www.nar.realtor/about-nar/policies/bylaws-certification-process-information-and-resources>

Fiduciary Duty: <https://www.nar.realtor/national-leadership/board-of-directors/meeting-policies-and-procedures/fiduciary-duty>

Good Sense Governance: <https://www.nar.realtor/about-nar/policies/good-sense-governance>

Risk Management Webinar on Good Governance: <https://www.nar.realtor/videos/risk-management-webinar-series/good-sense-governance-webinar>

ANTITRUST

Executive Order on Promoting Competition in the American Economy

- DOJ and the FTC called upon to vigorously enforce the antitrust laws.
- Focuses on labor, health care, transportation, technology and agricultural market.
- Real estate-related focus:
 - FTC encouraged to exercise its rule-making authority to address “persistent and recurrent practices that inhibit competition”, including “unfair tying practices or exclusionary practices in the brokerage or listing of real estate”.
 - Occupational Licensing: FTC encouraged to consider exercising its rule-making authority to address unfair (overly-restrictive) occupational licensing restrictions.

Antitrust Laws Matter

- Civil and criminal penalties
- Federal and State Enforcement
- Private Cause of Action
- Treble Damages and Attorneys Fees

Price Fixing

1

Per Se Violation

Presumed illegal; no opportunity to demonstrate reasonableness or pro-competitive justification.

2

Conspiracy to fix prices

Agreement, understanding or conspiracy among competitors that unreasonably restrains competition.

3

Usually unwritten, often implied

May be the result of a written agreement, but more often will be unwritten and can be implied through behavior and actions.

Group Boycotts

1

Per Se Violation

Presumed illegal; no opportunity to demonstrate reasonableness or pro-competitive justification.

2

Refusal to Deal

Agreement, understanding or conspiracy among competitors not to do business or only do business on certain terms.

3

Unilateral Decisions

Not required to work with a particular business, however, cannot encourage others to do the same; REALTORS® should always be mindful of ethical obligations.

Offer of Compensation



Communicated in writing



In advance of other broker submitting an offer on the property



Offer of compensation can be expressed as % of sales price or flat fee



Determined unilaterally and independently



Association Counsel Role

- Review agendas and meeting minutes
- Review proposed policies
- Adopt Antitrust Compliance Statement
- Attend association and MLS meetings
- Encourage and provide training and education

Insurance Coverage

- Coverage for Antitrust claims is available under the NAR Professional Liability Policy
- Coverage is “defense costs only” (attorney fees and costs); does not cover settlement payments
- Deductibles range from \$3,000 to \$15,000 based on membership count
- Exclusions may apply for malicious, or intentional acts, or any intentional or knowing violation of the law

Insurance Coverage

- Claim limit = \$1,000,000
- Excess coverage is available; must be purchased from January 1 to April 1
- Excess limits available:
 - \$250,000
 - \$500,00
 - \$1,000,000
- Premium is based on membership count



Business decisions must be made unilaterally and independently.

- KEY TAKEAWAY

Antitrust Resources

- [Competition.realtor](#)
- [Window to the Law: Antitrust for Real Estate Professionals](#)
- [Antitrust 101 for Real Estate Professionals Video](#)
- [Antitrust Pocket Guide for REALTORS®](#)
- [Real Estate Brokerage Essentials](#)
- [Antitrust Pocket Guide for Association and Board Leadership](#)
- [Executive Order on Promoting Competition in the American Economy and Fact Sheet](#)
- [MLS Antitrust Compliance Statement](#)
- [MLS Access Challenges](#)

THANK YOU.

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