

# The Cobbler's Children Have No Shoes: Do Our Own Corporate Instruments Clearly Reflect the Way We Intend to Do Business?

## Follow the Lead of the Detroit Bar Association Foundation

By James D. Robb

*As the author and I worked through the examples in this column, we noticed a few things that even the author agrees might have been changed. That is always the case: you can always go back and find additional edits, no matter who the drafter was or how much time and effort was invested. Let us instead applaud those who take on the challenge of a revisory project like this one, make such striking improvements, and move us forward.* —JK

Contributors to this column have long presented compelling reasons for lawyers to write in plain English. The virtues of precision, clarity, and common usage in legal writing can hardly be denied. Good litigators know that thoughtful, reasoned argument presented clearly and concisely is an effective way to persuade judges and opposing counsel of the merits of the case. Likewise, good business lawyers know that clear language contributes toward a more

certain understanding of the terms of the deal. Confusing, ambiguous, and stilted language has the opposite effect, resulting in needless time, frustration, expense, and even litigation.

That said, I wonder how many of us have ever reviewed our own organization's governing instruments with the goal of improving the language to facilitate our business affairs and relationships. Would we find that our own partnership agreements or corporate bylaws contain archaic, confusing, or ambiguous language that might cause problems for us down the road?

The Detroit Bar Association Foundation decided that it wants to be a leader within the organized bar in promoting clear language. I have been privileged to serve as a foundation trustee since 2008. One of my recent tasks was to redraft the foundation's corporate bylaws. Together with fellow trustee Alan Ackerman and an able staffer in his office, I sought to put the bylaws into plain English without changing their meaning.

My board, like the boards of many other charitable organizations, consists of volunteers who lead busy professional lives. It

seemed obvious to me that our governing document ought to be easy to understand and use. Why make our volunteer colleagues labor to figure out what the bylaws mean? Clear language saves time, reduces annoyance and frustration, contributes to certainty and predictability, and promotes organizational continuity and ease of transition to successors in office.

Even a quick review of the foundation's bylaws—first adopted in 1968, when the foundation was incorporated—revealed a tangle of unclear, prolix sentences that, quite simply, required too much effort to understand. The bylaws needed a serious overhaul. They were set in an archaic form that many of today's lawyers will recognize and unfortunately consider to be authoritative simply because “that's the way it's always been done.”

### Sentence-level changes

One big problem, again, was excessive sentence length. Another was overuse of the passive voice. The passive may be fine when the writer does not know who the actor is or wants to emphasize the action



“Plain Language,” edited by Joseph Kimble, has been a regular feature of the *Michigan Bar Journal* for 35 years. To contribute an article, contact Prof. Kimble at WMU-Cooley Law School, 300 S. Capitol Ave., Lansing, MI 48933, or at [kimblej@cooley.edu](mailto:kimblej@cooley.edu). For an index of past columns, Google “Plain Language column index.”

The Detroit Bar Association Foundation decided that it wants to be a leader within the organized bar in promoting clear language.

Most importantly, we met our chief goal of giving ourselves a governing instrument that is much easier for our trustees and staff to use.

instead of the actor. But its effects can diminish the readability of a document that is intended to specify facts or duties. Still another problem was the apparently mindless use of *shall*, a troublesome word of notorious ambiguity.

Several passages from the foundation's former bylaws illustrate these problems. For context, the Detroit Bar Association Foundation is a membership-based nonprofit corporation. Its only member is the Detroit Bar Association, which has the power to elect the foundation's trustees. But the very first provision in the bylaws made me stumble:

The membership of this corporation shall consist of one (1) class and the only member of the corporation shall be the Detroit Metropolitan Bar Association, a nonprofit corporation organized and existing under the laws of the State of Michigan.

We converted this stuffed sentence into two simple sentences:

The Detroit Bar Association Foundation is a membership corporation. The corporation's sole Member is the Detroit Bar Association, a Michigan nonprofit corporation.

Result: We stated affirmatively what the foundation is, identified its sole member, removed the confusing reference to membership class, and reduced the number of words by nearly half, from 39 to 22. For clarity and to conform to the association's style, we treated the term *Member* as a proper noun in the same way we treated terms such as *Board of Trustees*, *Board*, and *Executive Committee* elsewhere in the bylaws.

Because the members of a membership-based corporation have the power to elect

the trustees, the bylaw provisions on election and term of office are obviously significant. The foundation's bylaw on that topic used to read as follows:

### 3.2 ELECTION AND TERM OF OFFICE OF TRUSTEES:

The member shall determine the number of trustees who shall constitute the Board of Trustees to be elected and shall elect the number of trustees so determined. Trustees shall be elected for three (3) year terms and terms shall be staggered so that the term of approximately one-third (1/3) of the trustees expire each year. Successors to the trustees whose terms have expired shall be elected each year. Each trustee shall hold office until his or her successor shall have been duly elected and shall have qualified or until his or her death or resignation. Trustees are eligible for reelection to an unlimited number of terms.

Note that this mind-numbing provision, five sentences in length, contains nine instances of the word *shall*. We changed it to read:

### Section 3—Election and Term of Office of Trustees.

The Member will determine the number of Trustees to be seated on the Board and must elect that number of Trustees to office.

Trustees serve for 3 years after their election. Trustees' terms of office must be staggered so that approximately one-third of the terms expire each year. The Member will elect successors to Trustees whose terms have expired.

Each Trustee holds office until the Member has elected a successor or until that

Trustee's resignation or death. Trustees are eligible for reelection to an unlimited number of terms.

Result: We made the passage much simpler to read. We rewrote it in the active voice; reorganized the thoughts into separate short paragraphs that the reader can easily grasp and remember; and rid ourselves of the unnecessary double reference to the numbers (*three (3) year terms* and *one-third (1/3)*). We reduced the section from 107 to 89 words.

We also got rid of all nine instances of *shall*, which depending on its context either (1) had different meanings, only one of which we determined to be the imperative, or (2) was unnecessary. For example:

- We chose *will* to replace *shall* in “[t]he member *shall* determine the number of trustees” to give the phrase a future sense because the member has already determined the number of trustees, and it might, but need not, revise that number in the future. (We might also have said, “The Member is entitled to . . . .”)
- We chose *must* to replace *shall* in “[t]he member . . . *shall* elect the number of trustees so determined”) because the member is required to make that election.
- We deleted *shall* from “the . . . trustees who *shall* constitute the Board of Trustees” because the sense of the phrase is descriptive, not mandatory.
- We also deleted *shall* from “[e]ach trustee *shall* hold office until” because the proper verb of that phrase is simply the present tense of *to hold*.

## Structural improvements

We made structural changes to improve readability. For example, one former bylaw provision was labeled *Committees*, but it actually pertained to committees other than the executive committee, whose powers were expressed elsewhere in the bylaws. The passage thus placed undue weight on the exceptions to the rule it was trying to state.

## ARTICLE 5: COMMITTEES

**5.1 COMMITTEES:** The Board of Trustees may appoint, from time to time, such standing or special committees as the handling of the affairs and the attainment of the objects and purposes of this corporation may require, and may define their duties and prescribe their powers, except that committees other than the Executive Committee shall not exercise powers reserved exclusively to the Board of Trustees or the member by the laws of the State of Michigan, these bylaws or the Restated Articles of Incorporation. At least one (1) member of the Board of Trustees shall be appointed as a member of each such committee. Except in the case of the Executive Committee, the other members of each such committee may, but need not be, trustees.

We renamed this provision, divided it into its relevant components, and added headings to guide the reader.

### ARTICLE 5: COMMITTEES OTHER THAN THE EXECUTIVE COMMITTEE

#### Section 1—Appointment.

The Board of Trustees may appoint standing or special committees as corporate business requires. The Board may define the duties and prescribe the powers of any committee.

#### Section 2—Limitation on Committee Power.

Other than the Executive Committee, no standing or special committee appointed by the Board may exercise a power reserved exclusively to the Board of Trustees, Executive Committee, or the Member, by the laws of the state of Michigan, these bylaws, or the Restated Articles of Incorporation.

#### Section 3—Committee Membership.

Every standing or special committee must have at least 1 member who is also a member of the Board of Trustees, but other members of that committee need not be trustees.

Result: We converted a convoluted paragraph into a more sensible one and factored

out irrelevant provisions. We also eliminated from the former version the redundant use of the heading *Committees* at both the article and section levels. We could have improved section 2 further had we (1) changed *the laws of the state of Michigan* to the simpler *Michigan law* and (2) added *of Trustees* after the first use of *Board* and removed it after the second use.

Similarly, we changed the bylaw provision specifying how the Detroit Bar Association, as the sole corporate member, exercises its rights over the foundation. The former version read:

#### 2.2 ACTION BY CORPORATE MEM-

**BER:** The Detroit Metropolitan Bar Association shall exercise its rights as sole member of the corporation by a written consent resolution authorized by (i) resolutions duly approved by the board of the Detroit Metropolitan Bar Association at any annual, regular or special meeting; (ii) unanimous written consent resolutions of the directors of the Detroit Metropolitan Bar Association; (iii) resolutions duly adopted at any meeting of the Executive Committee of the Detroit Metropolitan Bar Association; and (iv) unanimous written consent resolutions of the members of the Executive Committee of the Detroit Metropolitan Bar Association. As long as the Detroit Metropolitan Bar Association is the sole member of this corporation, no meetings of the membership shall be required.

To improve readability, we used a vertical list for the four items, two of which we combined. And we moved the last sentence, which has nothing to do with the member's corporate action over the foundation, into its own new section:

#### Section 2—Action by Corporate Member.

The Member may exercise its rights in the corporation by a written consent resolution authorized in any of the following ways:

- a. a resolution approved by the Detroit Bar Association's board of directors at any annual, regular or special meeting;
- b. a unanimous written consent resolution of the Detroit Bar Association's

board of directors or executive committee; or

- c. a resolution adopted at any meeting of the Detroit Bar Association's executive committee.

#### Section 3—Meetings of the Corporate Member.

As long as the Detroit Bar Association is the sole Member of the corporation, the membership is not required to meet.

To their great credit, the Detroit Bar Association Foundation trustees not only encouraged our effort but wholeheartedly endorsed the ultimate amendments, which the Detroit Bar Association Board of Directors in turn adopted. We gave our bylaws a better organizational structure, used bullet points and shorter sentences to promote easy reading, rewrote in the active voice to clarify who does what, changed the document from an archaic format into a modern one, reduced its length from 2,253 words to 1,788 words, and rid ourselves of 52 instances of *shall*. We accomplished this without changing the meaning of a single clause.

Most importantly, we met our chief goal of giving ourselves a governing instrument that is much easier for our trustees and staff to use. Even if you usually write clearly for your clients, I encourage you to look at your organization's operating document to see whether you can improve its language. And I challenge the organized bar to follow the Detroit Bar Association Foundation's lead in embracing clear language in its bylaws. May the cobbler's children have fine shoes. ■



James D. Robb is general counsel and associate dean of external affairs of Western Michigan University Thomas M. Cooley Law School. A member of the State Bar of Michigan since 1983, he is a life fellow of the Michigan State Bar Foundation, a trustee of the Detroit Bar Association Foundation, a master of the Detroit Bar Inn of Court, and chair of the City of Birmingham Board of Ethics.