

Bare Bone Board Basics - for the Private Company

Episode #4 – How to Conduct an Effective Board Meeting

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Panelists

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James Mitchell • Kathleen Murray



About this Webinar

- What does a successful airplane ride have in common with a successful corporate board of directors meeting?
- Both should be anticlimactic. And both should be preceded with plenty of behind-the-scenes preparation.
- This fourth episode of *Bare Bone Board Basics* puts into play some best practices used by experienced corporate directors for planning, prepping for, participating in, and following up after a meeting of a company's board of directors.
- While this episode covers the basics mechanics (e.g., recognizing a quorum, calling the meeting to order, approval of the minutes of the prior meeting, etc.), its focus is more substantive.

Bare Bone Board Basics - for the Private Company

- #1 Series Overview / Preview – Welcome to the (Boardroom) Jungle
- #2 Public v. Private & Fiduciary v. Advisory: Different Boards for Different Situations
- #3 Where the Board's Duties Stop & the C-Suite's Duties Begin: An Overview of a Board's Functions & Fiduciary Duties
- #4 How to Conduct a Board Meeting
- #5 Committees of a Board & Work Between Board Meetings
- #6 Recruiting & Renumerating Directors & What Directors Should Do Before Saying Yes
- #7 Special Issues Require Special Attention: Retaining Experts & Conducting Investigations
- #8 Soft Skills Workshop: Leadership, Communication & Trust
- #9 Enterprise Risk Management
- #10 Going into Executive Session
- #11 The Workings of the Audit Committee
- #12 The Workings of the Compensation Committee

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- You should consult with an attorney or other appropriate professional to determine what may be best for your individual needs.
- While the webinar producers and speakers take reasonable steps to ensure that information presented is accurate, they make no guaranty in this (or any) regard.

Webinar Faculty

- Jonathan Friedland
- Allan Grafman
- Bob Lerner
- James Mitchell
- Kathleen Murray

Types of Board Meetings

- Regular
- Annual
 - Usually elections of directors & officers, report of financial situation, accomplishments
- Special/Emergency
 - Something comes up requiring special or urgent attention

Pre-Meeting Preparation

- Agenda
- Draft/collect materials to support agenda
 - Draft minutes for review
 - Financial report
 - Committee/officers reports
 - Other pertinent documents
- Disseminate Board Packages

Role of the Board Chair

- Facilitate discussion among board members/enforces parliamentary procedure / Robert's Rules
- May refrain from offering substantive opinions
- Commonly votes only if by ballot or if vote would change outcome or break a tie

Typical Order of Board Meeting

1. Call to order
2. Recognize a quorum
3. Approval of agenda
4. Approval of minutes
5. CEO report
6. Financial report
7. Committee reports
8. Old business
9. New business
10. Other business
11. Confirm next meeting date
12. Executive sessions
13. Adjournment
14. Post-meeting

What's with all the Business?

- **Old business** - items the Board has previously discussed that are ready for formal vote
- **New business** - after discussion, a matter may be voted on, amended, tabled, moved to a committee for consideration, or postponed
- **Other business** - other matters that don't require discussion, such as announcements

Who's in the Room?

- Chair
- CEO/CFO
- Directors - inside v. outside v. independent v. disinterested
- Observers
- Advisors

What Happens Between Meetings?

- Pre-meeting calls between Chair & each Member, to:
 - Solicit feedback
 - Follow up on promises made
 - Ask for input for next meeting
- Distribute meeting prep materials (a/k/a the “Board Package”)

Hypo #1: Jerry, Kramer, Elaine & George (New Board)

- Jerry and Kramer founded Cosmo Corp
- They recently took VC money from Dreyfus Partners
- As part of its investment, Dreyfus nominated Elaine to the Board
- Cosmo Corp. only had a paper board in the past. But not anymore
- Its board now consists of Jerry, Kramer, and Elaine
- The first board meeting with Elaine as a member is on Tuesday
- George is Cosmo's CEO
- None of them have ever been part of a "real" board meeting
- Jerry comes to you and wants some advice about how to run the meeting

Hypo #2: Rachel, Monica, Chandler, Ross & Joey (All is Not Well)

- Rachel, Monica, Chandler, Joey & Ross constitute the Board of Bing Industries
- Bing is a 100+-year-old company with several thousand shareholders, most of whom are company employees or descendants of the company employees and founders
- Ross and Monica are siblings and together they control >30% of company stock
- Ross is married to Rachel, who is also a large shareholder, as is Joey
- Chandler, also a shareholder, is Chairman and CEO. Chandler's judgment has been called into question the last few years & more recently he has come under fire for Bing's poor performance & outsized comp package
- Rachel, Monica, Joey & Ross are also employed by Bing & are friends
- Another shareholder (Phoebe) has accused Board of misconduct, has retained a law firm, and is actively working to elect a new slate of directors at next shareholder's meeting (which is set for 10 months from now)

Disinterestedness v. Independence

- Disinterestedness = Having no material financial or other benefit derived from the matter under consideration, except as a stockholder
- Independence = Having no relationship with an interested party that reasonably could influence the director's decision-making

The Significance of Disinterestedness & Independence

- IF Board decision approved by majority of independent & disinterested directors, THEN Courts will defer to such a decision by second-guessing only if it cannot be attributed to any rational business purpose
 - This is the Business Judgment Rule
- Directors enjoy a rebuttable presumption that they have acted in conformity with their fiduciary duties

Revlon

- *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986)
- Arose out of a hostile takeover
- When directors may have both means and motive to participate in self-dealing, BJR no longer applies
- Rather, “enhanced scrutiny” standard shifts the burden from the plaintiff to the board
- Enhanced scrutiny requires an independent director to establish two things regarding the action(s) of the board:
 - Process through which a decision was reached was executed with proper care; and
 - Action itself was reasonable with then-existing circumstances

Hypo #3: Will, Carlton, Philip, Vivian, Hilary & Ashley Banks (The Offer)

- Carlton, Vivian, Hilary, and Ashley are 4 members of Bel Air & Sea (“Bel Air”), a private fast-growing logistics company
- 3 of them were appointed by the private equity firm that owns about 85% of Bel Air’s equity
- One of them, Vivian, is Bel Air’s founder, who sold the company to PE fund 5 years ago
- Will is Bel Air’s CEO and chairman
- Bel Air received an unsolicited offer in the form of an LOI to purchase the company from a competitor five days ago
- Vivian owns about 5%; other current and former employees collectively own the remaining 10%
- Bill, three days ago, called a special board meeting for today
- Will already discussed the offer with the PE fund, which wants to accept the offer right away. It asked Will to get the Board to approve it ASAP
- Phillip is company counsel

Caremark

- *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996)
- Caremark established the conditions for director oversight liability under Delaware law
- The *Caremark* test imposes liability under either of two bases:
 - Directors utterly failed to implement any reporting or information system or controls; or
 - Having implemented such a system or controls, directors consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention

Hypo #4: Stan, Kyle, Lola, Bebe & Kenny (The Incident)

- Stan is the chairman & CEO of a private company, Park Holdings (“Park”)
- Park owns close to 100 B2C websites and holds confidential customer information for close to 10 million customers
- Park’s other Board members are Kyle, Lola, Bebe, and Kenny
- Park’s IT systems were the victim of a cyber-attack about 90 minutes ago
- Eric, the company’s CTO, just called Stan to let him know of the issue

About the Faculty

Jonathan Friedland

- Jonathan Friedland is a partner with the Sugar Felsenthal law firm.
- He regularly advises boards of directors and owners of companies in financial distress.
- Friedland has been representing companies in out-of-court workouts, chapter 11 bankruptcy, and controlled liquidations for more than 25 years. He also has broad and substantial experience in acting as outside general counsel to clients and in running both a wide variety of corporate transactions, and a wide array of commercial litigation.
- He is widely recognized as a leading corporate restructuring and insolvency attorney. He has been rated for many years as AV® Preeminent™ by Martindale-Hubbell, 10/10 by AVVO, and 10/10 by Justia. Jonathan is the principal author of two leading legal treatises, and his scholarship is widely cited by legal scholars. He formerly served stints as an Adjunct Professor of Strategic Management at the University of Chicago's Graduate School of Business and as a Clayton Center for Entrepreneurial Law Visiting Professor of Business Law at the University of Tennessee College of Law. More information [here](#).

Allan Grafman

- Allan Grafman has served on 12 boards, including 4 public, 4 private equity-owned and 4 venture-sponsored. He is currently Chair of the Audit Committee of a public company (IDW) and also Audit Committee member for a REIT, and has served on Compensation and Governance Committees as well.
- Specific past experience includes serving as the Chairman of the Board of a Nasdaq listed video game company and other entertainment, media and consumer focused entities. He is currently a licensed investment banker raising capital for companies.
- Allan comes to board service building on executive roles at All Media Ventures, Archie Comics, Hallmark, Tribune, ABC and Disney. He received his BA from Indiana University (PBK), Masters (Fellow) and MBA from Columbia (BGS). More information [here](#).

Bob Lerner

- Robert L. Lerner has 35 years' experience in the investment management industry.
- Bob has co-founded and invested in several successful startups and has been a director to private and public companies. He has been a trusted advisor to early-stage hedge funds, investment research firms, and growth equity investment funds.
- Bob's focus is on business development, product design, strategy, business operations, and compliance. He currently is chairman of InfraSight Software Corporation. Bob is a graduate of Cornell University and Boston University Law School.

James Mitchell

- James has a 30+ year career as a leader in business, financial services, and government including 25-years with GE.
- His expertise in the legislative process and regulatory provide a unique perspective to regulated companies. James has over two decades of governance and board leadership roles with several national non-profit organizations.
- James is Chairman of the Board of Directors and chairs two board Committees of Fora Financial. James is the Founder of JMJ Advisors, a consulting firm which advises senior business leaders and their organizations.
- James is a Qualified Financial Expert, has expertise in M&A and as CIO (\$5.0B AUM). He has also managed domestic equity portfolios (financial services). James graduated with a B.S. from Purdue and holds an MBA from The Wharton School. More information [here](#).

Kathleen Murray

- Kathy Murray is an approachable and creative business growth executive, board member, angel investor and advisor. Kathy is Co-Founder of Tech Up for Women and Principal of McMorran Strategists.
- Earlier, Kathy held key C-Suite roles at publicly-traded firms and partnerships - Aetna, PwC and FARO. Currently, she is Fiduciary Board Member & Diversification Committee Chair of Daily Gazette (Winner of 2021 Private Directors Magazine Board Award), Founder of Executive Forum Angels, Board Chair of Harvard Business School Women's Association, Life Trustee for University of Rochester, and Fellow at the Foreign Policy Association.
- Kathy received a BA in Math/General Science from the University of Rochester and the Advanced Management Program Degree from Harvard Business School. More information [here](#).

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This is the fourth episode in a series of webinars produced by:

- Certain chapters of the [Private Directors Association®](#)
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- [Executive Forum™](#)
- [Vistage®](#)
- [Private Director Symposium™](#)
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- Our close to 3,000 members include current and qualified future board members, private company owners, and C-level executives of family-owned businesses, ESOPs, private equity owned, early stage, and start-up organizations.
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 - Enhance private company value through high-performing boards
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- Bare Bone Board Basics - for the Private Company is a co-production of Financial Poise, Executive Forum, Vistage, Private Director Symposium, ChamberWise, and the following chapters of the Private Directors Association:
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