

Bare Bones Board Basics - for the Private Company
Episode #3 - Where the Board's Duties Stop & the C-Suite's Duties
Begin: an Overview of a Board's Functions & Fiduciary Duties
February 23, 2022

Panelists

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James Mitchell • Allen Grafman



Where the Board's Duties Stop & the C-Suite's Duties Begin: An Overview of a Board's Functions & Fiduciary Duties

- This 3rd episode of *Bare Bone Board Basics* does 2 things: **First**, it dives into the relationship between directors and officers and provides useful guidance on how they can best work together. **Second**, it provides a 100-foot (as opposed to 500 or 10-foot) overview of fiduciary duties and a practical-what to do / what-not-to-do to minimize the chance of violating them.
- This is the second in a series of webinars produced by certain chapters of the [Private Directors Association](#) in association with [Financial Poise™](#), [Executive Forum™](#), [Vistage®](#), [Private Director Symposium™](#) & [ChamberWise™](#) to make you a more effective board member.

Bare Bones Board Basics- for the Private Company

- #1 Series Overview / Preview- Aired *November 11th*
- #2 Public v. Private & Fiduciary v. Advisory: Different Boards for Different Situations- *January 26th*
- #3 Where the Board's Duties Stop & the C-Suite's Duties Begin: An Overview of a Board's Functions & Fiduciary Duties- *February 23rd*
- #4 How to Conduct a Board Meeting- *March 30th*
- #5 Committees of a Board & Work Between Board Meetings- *April 27th*
- #6 Recruiting & Renummerating Directors & What Directors Should Do Before Saying Yes – *June 8th*

Bare Bones Board Basics- for the Private Company (cont'd)

- #7 Special Issues Require Special Attention: Retaining Experts & Conducting Investigations- *July 13th*
- #8 Soft Skills Workshop: Leadership, Communication & Trust- *August 8th*
- #9 Enterprise Risk Management- *September 14th*
- #10 Going into Executive Session- *October 12th*
- #11 The Workings of the Audit Committee- *November 9th*
- #12 The Workings of the Compensation Committee- *December 14th*

Session #3 Panel

- Will Clarke - Clarke Growth and Sustainment Strategies
- Jonathan Friedland - Sugar Felsenthal Grais & Helsinger LLP
- Allan Grafman - Chair of the Audit Committee, IDW
- James Mitchell - Fora Financial

Directors and Officers: Who's Who?

- Directors - appointed by shareholders to oversee the management of the corporation
- Officers – appointed by directors to manage day-to-day activities of the company

Who's on the Board?

- Chairman of the board/Lead director - the leader of the board whose job is to effectively oversee board process
- Inside directors - Directors who are employees of the company
- Outside directors - Directors who are not employees of the company
- Independent directors - Outside directors with no “material relationship” to the company

Material Relationship (NYSE)

- Board affirmatively determines director has "no material relationship" with the listed company, either directly or as a partner, shareholder, or officer of an organization that has a relationship with the company.
- Can include commercial, industrial, banking, consulting, legal, accounting, charitable, and familial relationships.
- **But**, ownership of even a significant amount of stock, by itself, should not be a bar to a finding of independence.

* *Additional info:* [FindLaw](#)

Board's Duties

- Legal responsibilities – contractual + fiduciary duties
 - Fiduciary duty of loyalty
 - Fiduciary duty of care
 - Overseeing the overall business direction of the company
 - Obtaining information from sources other than just management
 - Applying critical thinking including asking probing questions about information obtained from management

Board's Duties (cont'd)

- Fiduciary duty of care (cont'd)
 - Setting up reporting systems and internal controls that are designed to bring issues and problems to the board's attention
 - Paying attention to and taking steps to address issues that come to the board's attention
 - Conducting appropriate inquiries and investigations, as needed

**Additional info: [Priya Cherian Huskins, Esq.](#)*

Board's Role

- Recruit, supervise, retain, evaluate and compensate the manager
- Provide direction for the organization
- Establish a policy-based governance system
- Govern the organization and the relationship with the CEO
- Protect the organization's assets and member's investment
- Monitor and control function

**Additional info: [Iowa State University](#)*

7 Key Areas of Director Responsibility

- Succession
- Compensation
- Mergers and acquisitions
- Business direction and focus
- Company performance
- Financial statement integrity
- Capital structure

7 Key Areas of Director Responsibility (cont'd)

- These 7 key areas can be organized around the 2 main roles of a board of directors:
Strategy & Monitoring
- Directors can take on these 7 areas without fear of improperly encroaching on the company's officers.

**Additional info (taken verbatim from): [Priya Cherian Huskins, Esq.](#)*

Who are the corporate officers?

- CEO - presides at meetings, carries out board's directives
- Secretary
- Treasurer/CFO
- Other common positions: chief operating officer, chief compliance officer, chief information officer, chief technology officer, chief legal officer (GC), chief marketing officer, chief sustainability officer

Officers' Duties

- Same *fiduciary* duties as directors

Officers' Roles

- Officers of a corporation are the agents through which the board of directors acts
- Duties of each officer are set forth in the bylaws or prescribed by the board of directors (but consistent with the bylaws)

Potential for Friction – Where Does the Board’s Job Stop & the C-Suite’s Job Start?

- Directors should not micromanage officers, yet directors have significant oversight obligations

Hypo #1- Jerry, George, Elaine & Cosmo

- Jerry, George & Elaine constitute the board of a large private company with hundreds of shareholders
- Cosmo is the company's CEO
- Jerry, George & Elaine become increasingly concerned about Cosmo's erratic behavior over a three-month-long period
- The Board eventually determined that Cosmo was preventing key information from getting to the board

Hypo #2- Rachel & Monica

- Rachel is the CEO of a chain of soup restaurants.
- She decides to hire her sorority sister, Monica, as CMO. She does not ask the board in advance, nor does she even run the decision by the board in advance.

Hypo #3- Larry Tate & Darrin Stevens

- Larry Tate is co-founder and, until recently, CEO of McMann & Tate, an advertising firm.
- He sold majority control to a PE firm and is now board chair of a three-member board of directors, of which the other two seats are controlled by the PE firm, Montgomery Capital Partners.
- The board voted to hire Darrin Stevens as the company's new CEO.
- Larry welcomed Darrin at first, offering him advice and introductions to key customers.
- However, in recent months, Larry has been trying to micromanage Darrin and, just last week, Larry approved a discount for a large customer. Darrin, who the board has a great deal of confidence in, pointed out to Larry his “resignation for good cause” provision. The board is meeting in a few days.

About Faculty of Session #3

- Will Clarke - Clarke Growth and Sustainment Strategies
- Jonathan Friedland - Sugar Felsenthal Grais & Helsinger LLP
- Allan Grafman - Chair of the Audit Committee, IDW
- James Mitchell - Fora Financial

Will Clarke

- Founder and President of Clarke Growth and Sustainment Strategies, an advisory firm specializing in guiding early-stage companies' business expansion.
- He serves as an Independent Director for Ascent Solar Technologies (OTC: ASTI), an Advisor for Glass Inc, and on two nonprofit Boards. Previously, he led the Global Supply Chain business unit for Atlas Airlines (NASDAQ: AAWW) and directed turnaround initiatives for Best Buy (NYSE: BBY).
- Will served 25 years as a Naval Officer, where he completed 10 deployments on a ship, submarine, and two aircraft carriers in support of war and peacetime operations.
- Will earned a BSc in Mathematics from U.S. Naval Academy, an MSc in Management from Naval Postgraduate School, and completed the Corporate Governance Program at Columbia University.

Jonathan Friedland

- Jonathan Friedland is a partner with the Sugar Felsenthal law firm.
- He regularly counsels boards of directors and owners of companies in financial distress.
- Friedland's wide range of experience includes representing companies in out-of-court workouts, chapter 11 bankruptcy, and controlled liquidations. He also has substantial experience 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 by a number of legal publications. 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](#).

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](#).

About Private Directors Association®

- The Private Directors Association® (PDA) is an independent 501(c)(6) founded in 2014 and headquartered in Chicago, IL. PDA is the only national association dedicated to improving private companies' growth and sustainability through governance that adds value.
- 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.
- The PDA's mission is to:
 - Advocate for and teach board formation and governance
 - Enhance private company value through high-performing boards
 - Advocate for the value of diverse and inclusive boards
 - Create a national alliance of directors, executives, and private company owners interested in board service to learn, network, and identify and attract exceptional board members

The Co-Producing Chapters

- Bare Bones 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:
 - Alabama
 - Dallas
 - DC Metro
 - Nashville
 - New England
 - New York Metro
 - Tampa Bay
 - Wisconsin
- Go to <https://www.privatedirectorsassociation.org/chapters> for contact information for any of these, or other, chapters.

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- The Executive Forum is a highly engaged community of executives from leading corporations who share a passion for “what’s next” to drive business growth.
- Its mission is to empower senior executives to reach their fullest career and business potential.
- Since its formation in 1995, the Executive Forum has grown to over 400 members who are the top-most leaders at market moving companies, run portfolios for the most innovative Private Equity Firms and serve as directors on boards --- public, private and non-profit.
- More information can be found at www.executiveforum.org

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