

Bare Bone Board Basics - for the Private Company

Episode #5 – Committees of a Board & Work Between Board Meetings

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Panelists

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About the Episode - Divide & Conquer the Corporate Way

- Much of the work of a corporate board of directors happens not at board meetings but, rather, in between them - at committee meetings. Among other things, they perform much of the oversight and advising tasks that boards are responsible for.
- As pointed out by Kevin D. Chen of the University of Pennsylvania and Andy Wu of Harvard Business School in their 2016 Working Paper, titled, *The Structure of Board Committees*, board committees provide three basic benefits: (a) through the process of decentralization, committees allow for knowledge specialization; (b) such specialization allows for a more efficient task allocation to directors; and (c) they tend to increase accountability of individual directors. Best corporate governance practices, therefore, usually include the critical work done by committees in between full board meetings.
- Episode #5 of *Bare Bone Board Basics*, “Committees of a Board & Work Between Board Meetings,” sketches out the basic committees of a board; discusses best practices regarding how committees should be structured, operate, and interface with the Board as a whole; and suggests how committees should be comprised.

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 an Effective 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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Webinar Faculty

- Jonathan Friedland
- Allan Grafman
- Elaine Eisenman
- Lori Marcus

Part I: The Basics of Board Committees

Recap: Board Responsibilities

- Board's work falls under three major buckets:
 - Governance
 - Management
 - Operations
- ❖ *You can learn more about the Board's responsibilities and duties in Episode #3 of this series, located [HERE](#)*

How do Boards get work done?

- Full Board meetings
- By committees, in between full Board meetings
- In between full Board meetings but not by committees

Need for Board Committees

- Legal obligations v. best practices
 - Private company - no legal obligations to form committees
 - Public company - SEC rules and exchange listing standards impose certain requirements
 - Examples: Audit, Compensation & Nominating/Corporate Governance committees
 - Each must have a charter that includes the responsibilities and authority prescribed by applicable SEC rules/listing standards
 - Charters generally provide that the committees have the power to engage outside advisors and counsel
 - You can learn more about requirements for public company boards [HERE](#)

Need for Board Committees (cont'd)

- Committees often serve several different functions, including:
 - Governance
 - Coordination
 - Research and recommendations

Advantages & Disadvantages of Board Committees

- Advantages
 - Knowledge specialization
 - Task division efficiency
 - Accountability
- Disadvantages
 - Increase in specialization → information segregation

The Limits of Delegation

- State law generally permits most of the functions of the board of directors to be delegated to committees
 - Even in the absence of a statute, the board “may delegate the management of its affairs to a committee, or even to an individual, in furtherance of the convenient dispatch of the business as a whole.” See Ford v. Magee, 160 F.2d 457, 460 (2d Cir.), cert. denied, 332 U.S. 759 (1947); see also Jones v. Williams, 39 S.W. 486, 490 (Mo. 1897)
 - **Exception** - Fundamental corporate changes

The Limits of Delegation (cont'd)

- Delegations must be expressed either through the certificate of incorporation (charter), by-laws, or board resolution
- Committee authority is advisory unless Board decision-making powers are delegated by the board at large
- Board may delegate corporate *authority*, but generally not its *accountability*
 - See In re Ultimate Escapes Holdings, LLC, 551 B.R. 749, 761 (D. Del. 2016)

Should the Board Delegate?

- Consider -
 - General business of the Board
 - Inconvenience involved in convening special meetings of the entire Board
 - Comfort among members of the Board
- Case law indicating that formation of a “special committee” will support fulfillment of board’s fiduciary duty
 - See In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013)

Must the Board Delegate?

- Special committees to deal with conflict issues
 - See Weinberger v. UOP Inc., 457 A.2d 701 (Del. 1983); see also Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014)

Board Committee Structures

- Committee structures should be unique to each corporation
- Structure of a committee should be reviewed and re-evaluated each year - these questions should be asked:
 - Is special knowledge or effort still required for this issue/activity?
 - Can the work of any committees be combined?
 - Should the work of the committee be expanded?
- Standing v. special committees

Standing Committees

- Established on a permanent basis
- Typically established in corporation's bylaws
- Common standing committees:
 - Executive committee
 - Audit committee
 - Compensation committee
 - Nominating/governance committee
- ❖ *Corporations are increasingly creating cybersecurity, risk and ESG standing committees to address the increasingly complex risk and regulations landscape in these areas*

Special & Other Committees

- Committees created (from time to time) for the specific purpose of undertaking a specific project or responsibility - created through Board resolutions
- Disbands when it fulfills its specific purpose
- Examples of scenarios where special committees are frequently used:
 - Conflict of interest transactions (special negotiation committee)
 - Shareholder derivative lawsuits (special litigation committees)
 - Other sensitive matters (internal investigations)
 - CEO succession
 - Specialized scientific-or-industry-related committees

Appointing a Committee

- Board may appoint a committee chairman, or the committee members can choose/elect the chairman - chairman is the key to an effective committee
- Committee members may be appointed by the board or committee chairman
- Committee members must be selected using criteria appropriate to the committee's purpose and in compliance with any applicable laws and listing standards of any applicable national securities exchange (if a public company)

Appointing a Committee (cont'd)

- Committee membership criteria may include:
 - Experience relevant to committee responsibilities
 - Subject matter expertise that will assist the committee in its work
 - Ability to meet required time commitments
 - Disinterest in the committee's subject matter
 - Refreshment and diversity
 - Independence from management

Committee Interface with Board

- Reporting to the Board
 - Standing committees should provide reports at regularly scheduled board meetings and make available to all directors committee agendas, minutes, and written reports
- Periodic review by the Board
- Committee self-assessment

Committee Charter

- A committee charter is a written founding document that helps committees deliver and uphold effective governance
 - Submitted to the Board for approval (similar to mission statement - acts as blueprint for committee's work)
 - Should be revised by Board as appropriate
- Committee charter should clearly articulate the roles and responsibilities, as well as the mission, composition, responsibilities, and standard protocols of a committee

How Committees Function

- Minutes / agenda
 - Establish committee agenda + agenda for every committee meeting
 - Minutes
 - Minutes need to reflect the process to get to those decisions and not the decisions themselves
 - Minutes should at minimum cover:
 - The date and location of the meeting
 - Who is in attendance and what their titles are (while also reflecting when people leave or join)
 - If the meeting or any participants were in-person or on the phone
 - The presentations made
 - Summary of areas of questions that were asked and answered and notes that a discussion and deliberations occurred
 - A clear indication of actions taken and opposing or abstaining members (if relevant)

Frequency of Meetings/Committee Annual Calendars

- Meet more regularly than full Board
 - Board might meet once a month (if that)

Sample Calendar

REGULARLY SCHEDULED MEETINGS

	Full Board	Audit Committee	Compensation Committee	Nominating and Corporate Governance Committee
January (two days)	X	X	X	X
February	X	X	X	
March				
April		X (telephonic)		
May	X			
June				
July	X	X	X	X
August				
September (retreat)	X			X
October		X (telephonic)		
November	X		X	
December				
TOTAL	6	5	4	3

Source: <https://www.sidley.com/~media/uploads/best-practices-calendar.pdf>

Another example of a Compensation Committee Annual Calendar is available [HERE](#)

Interaction with Management & Legal Counsel

- *e.g.*, CFO speaking with the Audit or Finance Committee Chair about an upcoming financing
 - Certain officers may act as liaison between committee chair and management
 - Committee meetings may have legal support
- Calling of an executive session
 - Some committees like to have their own "executive sessions" with a particular company executives (i.e. audit committee)

Best Practices

- An annual committee calendar should be prepared and finalized for all the major activities during the year
 - The committee calendar should be in line with the overall annual Board calendar so that efforts are unified and coordinated for maximum benefit
 - In addition to this, scheduling regular meetings of the committee in advance also helps members plan far enough in advance to assure good attendance
- Each committee should have either a specific charter or a specific list of duties and responsibilities with a timetable to complete each duty/responsibility
- Staffing assistance to committees

Part II: Summary Information about Specific Committees

Executive Committee

- Can be a flexible resource to monitor a wide range of developments on a continuous basis
- Functions as a standby resource to act in emergency situations (i.e. can expedite the authorization of important matters)
- Typical composition:
 - Chair
 - CEO and/or President
 - VP, Secretary, and Treasurer
 - Outside directors
 - Other officers who might serve as directors

Executive Committee (cont'd)

- Activities/functions
 - Meets more frequently than full Board
 - Carries on work of Board in between meetings
- Risks of relying on executive committee
 - Control of corporation is in a select group of people's hands - could easily withhold information and usurp authority from other board members
 - Place specific restrictions on EC's powers and include them in the bylaws or charter

Audit Committee

- Activities/functions:
 - Reviews periodic financial statements and financial reports of operations, assets and liabilities
 - Examines the corporation's internal control over financial reporting (usually with help of external, independent auditors)
 - Reviews work of the auditors, especially reports to management about internal controls, alternate reporting options, disagreements with management, and difficulties encountered in performing the audit
 - Reviews the annual budget

Audit Committee (cont'd)

- Composition
 - Members should have certain financial expertise, at a minimum being “financially literate” (particularly if company is public)
 - Members of management shouldn't serve on audit committee (CEO + CFO are typical key advisors to this committee)
- ❖ *We will dig into audit committees and how they work in Episode 11 of this series, premiering on November 9, 2022. You can learn more and register [here](#).*

Compensation Committee

- Implements and monitors the Company's overall compensation structure, including, among other things:
 - base salaries, fringe benefits and employee plans, particularly the compensation of the corporation's executive officers
- ❖ *We tell you everything you need to know about compensation board committees in the final episode (Episode 12) of this series, premiering on December 14, 2022. You can learn more and register [here](#)*

Governance/Nominating Committee

- Identifies individuals qualified to become members of the Board and its committees
- Establish and implement core governance policies and principles
- Oversee the evaluation of the Board

About the Faculty

Elaine Eisenman

- Elaine has served on public, private, PE, non-profit, start-up, family and advisory boards for over 20 years. She is an independent director of DBI (NYSE), a vertically integrated shoe manufacturer and retailer, chairs the Compensation Committee and is a member of the Audit Committee.
- She is Managing Director of Saeje Advisors, providing strategic advisory services to private companies, and a faculty member at Entrepreneurship Policy Advisors, developing entrepreneurial ecosystems through growing and scaling companies. She was a senior executive for several global public companies, and a Professor and Dean of Executive and Enterprise Education at Babson College.
- She is the coauthor of *Betrayed: A Survival Guide To Lying, Cheating, And Double-dealing*, and of *I Didn't See It Coming: The Only Book You'll Ever Need to Avoid Being Blindsided in Business*. More information [here](#).

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](#).

Lori Marcus

- Ms. Marcus serves as an independent board director on public and private company boards -- Fresh Del Monte Produce, Inc. (NYSE: FDP) and 24 Hour Fitness.
- Until recently she also served on the boards of Golub Corporation (d.b.a Price Chopper/Market 32 grocery stores), Phunware (NASDAQ: PHUN), DDC (DNA Diagnostics Center), and Talalay Global.
- She is also a board member for SHARE Cancer Support and Vice Chair of the Board for the MMRF (Multiple Myeloma Research Foundation).
- She comes to board work after a long career as a c-suite operating executive in leading consumer companies -- PepsiCo, The Children's Place Retail Stores, Keurig Green Mountain, and Peloton Interactive.
- Ms. Marcus earned her BS degree in Marketing from the Wharton School of Business, University of Pennsylvania. More information [here](#).

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- This is the fifth episode in a series of webinars produced by:
 - Certain chapters of the [Private Directors Association®](#)
 - [Financial Poise™](#)
 - [Executive Forum™](#)
 - [Vistage®](#)
 - [Private Director Symposium™](#)
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 - Enhance private company value through high-performing boards
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