NACD
NATIONAL ASSOCIATION OF CORPORATE DIRECTORS

DIRECTOR'S HANDBOOK SERIES

A GUIDE FOR DIRECTORS OF PRIVATELY HELD COMPANIES

2011 Edition

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This handbook is dedicated to the everlasting memory
of my lifetime partner, my wife Marilyn,
who departed this earth on June 22, 1999.
She breathed life into this project
through her constant love and
encouragement.

And to the memory of my dear friend
and governance mentor,
Robert K. Mueller.

– RIZ

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ISBN# 978-0-943176-57-4

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Introduction

The number of privately held companies in the United States far exceeds the number of publicly traded companies, yet private company directors receive comparatively little attention.[1] Indeed, private companies outnumber public companies by a ratio of 1,000 to one, and some are quite large in terms of total assets and annual sales. Also, although many have a very few shareholders, some have a large number of shareholders. Finally, although numerous private corporations are controlled literally by "Mom and Pop," a substantial number are owned entirely by families, some of which cover several branches and more than one generation—clearly a significant force.

Yet, today we are reading and hearing more and more about the changing relationship between the owners (shareholders) of public companies and their director representatives, but we hear very little, if anything, about this same relationship as it exists in the privately held company.

How do these relationships compare? What about the basic job of private company directors, including their basic duties and responsibilities? What about private company board structure, and the process for educating and informing directors? How do these aspects of board life differ in private versus public companies?

This handbook, the third edition of this tried-and-true resource from the National Association of Corporate Directors, will deal with the foregoing issues as well as others that face the director in the privately held company today. The need for such a handbook has grown in recent years as more private companies seek independent directors for their boards, and more and more individuals seek to serve private companies as directors, and, therefore, as representatives of the private owners. This handbook is intended to serve as a guide to those who either have assumed or are about to assume this significant responsibility.

For purposes of this handbook, a privately held company can be defined as a company that is not publicly traded. The term "director" in these pages includes anyone who serves as a member of a private company board—whether called a director or, in the case of limited liability companies, manager. (Under most state laws, limited liability companies may provide for the use of boards of directors, which are usually designated as boards of managers. When in place, these boards are operated in the same manner as privately held corporation boards, with some differences under state laws.)

In preparing this handbook, I aspired to write a prescription for the efficient and successful governance of all privately held corporations—including yours. Yet, as with practically all prescriptions written today, mine comes with warnings as to possible side effects, as well as to limitations of use.

Some companies are in a post-start-up phase, and some are enterprises that have peaked and may be declining in earnings growth or have reached their plateau. These maturity and "going-concern" attributes will suggest what portions of the handbook are of current value to directors of corporations and managers.

Given the diversity of private companies today, what I have prescribed in this book may have to be taken in small doses and even spread out over extended periods of time. In adopting some of the suggestions and procedures described in these pages, you and your fellow board members should consult with company counsel or other qualified business advisors who can help you implement the policies as and when needed—all dictated by the size, ownership, and maturity of your company and the nature of your targeted goals.

Bear in mind that although there may be considerable honor connected with the position, a directorship is not an honorary position. Rather, it is a very serious business undertaking clothed with fiduciary responsibilities and related exposure to liability. Therefore, when entering any important business transaction and relationship, the director must begin by recognizing his or her duties and responsibilities, and then, with professionalism, pursuing a course of action that meets the demands of the job.

There is no more fulfilling experience than to serve on a board of directors of a company that grows, becomes profitable, and gains favorable visibility in the business community. By the same token, there are few events in life worse than being highlighted in the media as a director who has failed or who was associated with a failure. Although it is difficult to measure the cost of a damaged reputation, we know that it is great. To quote William Shakespeare, "Who steals my purse steals trash; 'tis something, nothing… But he that filches from me my good name… makes me poor indeed." In building your résumé as a director, remember: One blemish can destroy pages of triumphs.

So we undertake to fulfill our duties as directors in a manner that will bring credit to the company that we serve, to its owners, to the community in which we function, and to our own reputations. If you abide by these directions cautiously, you should be able to progress and prosper as a privately held company director. The goal of this handbook is to help lead you as a director into the boardroom and, once there, to sharpen your performance as an exalted member of this august body—a true knight of the Round Table!

So join with me now as we traverse the oft-traveled trail from the initial "ground floor" interview to the panoramic vistas seen from the heights of the boardroom. This is the great adventure of directorship.

SECTION 1

The Director’s Job

As is usually the case when someone seeks employment or when an employer seeks someone to employ, we begin the journey with the interview.

The Interview Process

This exchange of views and information is usually conducted between the prospective director and some representative of the private company—either a management representative (such as the CEO), a board representative (such as a current director), a combination of both, or by the members of a nominating/governance committee, if one exists. The alternative introductory process may be conducted by an employment agency or “head hunter,” but it culminates with the interview process now described.

Traditionally, the procedure is composed of a series of questions originating from both sides of the interview table. Readers are invited to consult the sample questions in the back of this handbook. Many of the questions posed are meant as ideas for doing “homework” before the interview. If answers can be found through research, it is best to find them before the interview, so that the interview can include a good deal of informal talk.

Shareholder and Stakeholder Relations

In preparing for an interview to be considered as a director, perhaps the most important questions to bear in mind are: “Why does the board need me?” and “What purpose will I serve?” It is generally recognized that the prime duties of the public company director are:

- To represent the interests of the company and the shareholders
- To make certain that effective management is in place
- To monitor management’s performance
- To select the CEO and evaluate the effectiveness of the CEO and the CEO’s potential successors

Also, it is important to note the importance in the business world today of three key topics upon which the success of the company may ultimately depend, namely:

- Good business ethics (doing what is right)
- Social responsibility
- Sustainability

Do these differ from the duties and responsibilities of the private company director? Basically, no, except in one respect: In many private companies, the shareholders and management are one and the same. In the private company, as the duty to "represent" fuses with the duty to "monitor," the director becomes more of an advisor than a monitor. The only exception to this general rule is when the management team is run by an outsider (non-shareholder) who has been brought in by ownership to manage the company. When working with such a "hired gun," the private company director has basically the same duties as the public company director.

The shareholders are the owners of the corporation, and the directors are their elected representatives. Whether a corporation is privately or publicly held, directors should ensure that the corporation seeks profitability and shareholder value. In the words of the American Law Institute (ALI): "A corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain." Section 2.01(a), *Principles of Corporate Governance,* ALI, 1994.

In reality, how does this work? Obviously, the smaller the number of shareholders, the smaller the number of problems, particularly with respect to board-shareholder communications. As an example, in the family-controlled corporation we often find the majority of the board is composed of family members who are not only involved in the active management of the company, but who also own shares. In such a situation there is little, if any, distinction between the "board" and the "shareholders."

When privately held companies move away from family control of management and/or ownership, however, they become more like public companies, which tend to have a majority of "outside" directors or "independent, outside" directors. An independent director is one who does not accept any direct or indirect fee from the company other than director fees, and is not otherwise affiliated with the company.[2]

As Adolph Berle and Gardiner Means noted in their classic study, *The Modern Corporation* (1933), the separation of ownership and management raises special issues and challenges. Therefore, as shareholders move from active participation in either or both management and the board, directors must pay more attention to the board-shareholder communication process. As a director in a private corporation, you represent the company's shareholders. Thus, it is essential that you direct your attention to four primary areas:

1. Who Are the Shareholders?

They all may be family members. They may be employees, past and present. They may be venture capitalists. They may be a mixture of each of these groups. Obviously, if you represent a group or groups, you must be aware of just who you represent. However, as a director, you must represent the interests of, and act for the benefit of, the company and all of its shareholders, not just a select shareholder or group of shareholders.

2. What Are Their Goals?

Are they seeking short-term or long-term gains? Are they desirous of building the corporation so that it can be sold and they can reap large profits? Do they desire to perpetuate the corporation for the employees or for future generations of the family? Are they interested in some growth through acquisitions and mergers? Do they want to expand into new businesses or shrink by shedding old ones? Do they want to go public? Answers to these questions can help point you as a director in the right direction and focus your advice and counsel. Since privately held companies have less shareholders than public companies, the opportunity presents itself for better, more frequent, and more direct contact with the shareholders.

3. How Are Shareholders Informed?

For the public or private company, good communications are essential to good corporate governance. In public corporations, the information process is subject to regulatory scrutiny, and, as a result, the procedures for informing shareholders are controlled. In the private company, where ownership is very close to its director representatives as well as to management, the information process requires special attention. Procedures should be established, not only to keep the shareholders informed on a regular basis, but also so directors can stay abreast of what the shareholders want.

4. Who Are the Stakeholders?

Generally the stakeholders consist of the following groups:

- The company's employees
- The company's customers

- The community in which the company does business
- The general public, represented by local, state, and federal regulators
- The company's creditors, which, of course, include its suppliers

Some states have adopted laws that require a consideration of stakeholders' interests by corporations and their directors (e.g., Pennsylvania) or provide that corporations and their directors "may" consider the stakeholders' interests (e.g., New York). Today, good business practices dictate that some attention should be paid to the stakeholders, but the bottom line is the true test: When a company's value increases, everyone wins—stakeholders and shareholders alike.

Basic Duties

When you serve as a company director, you have undertaken a job with attendant duties, responsibilities, and accountabilities, as well as liabilities. As a director, you must be prepared to do each of the following when required:

- Attend meetings—both the full board and committee meetings, for this is where the business of a director is conducted. The boardroom is the director's office.
- Learn all you can about what a good director and a good board should do, and then practice these duties and requirements.
- Pay attention.
- Learn all you can about the business of the company itself.
- Come prepared by reviewing all materials in advance, and supplementing this review with research as needed.
- Prepare adequately for meetings so that you are informed.
- Serve as a goodwill ambassador for the company, both in a business and a social sense.
- Participate effectively in board deliberation.

In order to fulfill the requirements of this job, as any job, you must be prepared to make a commitment of time that is not just adequate, but is sufficient to perform the director functions in accordance with the highest standards.

Time and Dedication

Obviously, someone will have to estimate the time required to accomplish the above requirements. No two boards are alike, so time commitments will vary. A typical private company director might spend 50 hours in board meetings, 50 hours preparing, and another 50 hours in traveling, receiving director education, and attending events on behalf of the company.[3] It is important to estimate the amount of time prior to joining a board. Then you must either make a total commitment to the time requirements or decline service as a director.

The golden rule of directorship is this: If you don't have the time, don't assume the responsibility. Otherwise, you may be creating liability for yourself, as well as for the company and your fellow directors. (The same rule applies to your fellow directors, so keep an eye on their industriousness, too—for your own sake, as well as the company's.)

If you have the time, then you can make the commitment. Once you make the commitment, however, treat it as if you made it under oath, and that it was secured by a pledge of your personal assets.

If you are serving on other boards, whether public, private, or in the nonprofit arena, your time commitment becomes even more of a challenge to fulfill. Each board seat carries time commitments, and you must not put yourself in the position of having to determine which of your board seats is the most important. They are all important. With each seat, you have assumed a special responsibility to different groups, people, and organizations. Each of these groups is entitled to the same full measure of your participation and performance. So beware of slicing yourself too thin by serving on too many boards at the same time.

We are always tempted by our egos to expand our personal résumés, more importantly to live out those résumés, but it is even more important to live out those résumés with a sincere feeling of accomplishment and without fear of personal liability.

Board and Committee Meetings

Board meetings are usually run under the direction of a chairman who is designated "chairman of the board." This person can be the CEO acting in a dual capacity or it can be another member of the board.

Board meetings require leadership, direction, and management, and it is the chairman who provides this, whether good or bad. Efficient board meetings are usually run by individuals who are skilled not only in parliamentary procedures, but also in meeting dynamics—getting the most out of the directors in the least amount of time. The effective board chairman refrains from using board meetings to advance a personal agenda or to dominate discussions. By the same token, committee meetings are run by the chairman of each committee, who may be selected by the entire board, by the CEO, or by the committee itself.

Here are some tips on how to run a good meeting:

- Schedule meetings far enough in advance so that the directors can "calendar" them at convenient times and dates. Calendars should be set one year in advance, constantly "rolling forward" through updating. Once you as a director have scheduled a meeting date, then you have made a personal commitment to attend.
- If there is no business for the board, do not hold a meeting. However, by the same token, if there is some business that can be discussed—for example, if management needs the board's advice and counsel on an important matter—then hold the meeting.
- Meet regularly. If there is "not enough" business to do, then management is not using its board! Do not space the meetings so far apart that directors can barely remember the discussions from the previous meeting.
- Send an agenda for the meeting far enough in advance to permit directors to prepare adequately. (It is also a good idea to send out an agenda "draft" well ahead of the formal agenda, in case some directors want to suggest significant revisions or additions.)
- Consider holding the meetings at a time of day when the attention spans of the directors are at their apex—usually morning or early afternoon.
- Schedule the most important items early in the meeting and while the greater number of directors are present. Sometimes directors have to leave meetings early due to travel plans, other commitments, or emergencies.

Compensation

Directors perform a job, and they should be fairly compensated for it. There are no established formulas for the level of director pay, but there is empirical evidence on what current pay practices are, on average, for a fairly representative survey population. (See Box on page 13.)

More important, there are guidelines for the process used to determine pay and the form in which pay should be awarded. One such set of guidelines may be found in the *Report of the NACD Blue Ribbon Commission on Director Compensation: Purpose, Principles, and Best Practices* (Washington, DC: NACD, 1995/2001). Also see the 2*010-2011 NACD Director Compensation Report* (Washington, DC: NACD, 2011).

The Blue Ribbon Commission Report recommends that boards:

- Establish a process by which directors can determine the compensation program for directors in a deliberative and objective way.

- Set a substantial target for stock ownership by each director and a time period during which this target is to be met. (This "best practice" will not apply to all privately held companies, but it should be considered. If existing shareholders are unwilling to dilute their ownership by issuing new shares of stock, then the company can offer "phantom stock," or stock units, which are in effect promissory notes tied to the value of a company's stock.)
- Define the desirable total value of all forms of director compensation.
- Pay directors solely in the form of equity and cash, with equity representing a substantial portion of the total up to 100 percent (if equity is available in the privately held company); dismantle existing benefit programs and avoid creating new ones.
- Adopt a policy stating that the company should not hire a director or a director's firm to provide professional or financial services to the corporation.
- Fully disclose the philosophy and process used in determining director compensation and the value of all elements of compensation. (In the private company, such disclosure will come in other ways—for example, in letters to all shareholders signed by the CEO and chairman of the board, or in or in written company guidelines, possibly through the use of a website.)

Private Company Board Pay Averages in 2010

Cash retainer: $26,903

Board meeting fees (per meeting): $2,408

Committee fees (per meeting): $1,425

Committee chair fee: $4,273

Note: The *2010 NACD Private Company Governance Survey* had nearly 400 respondents serving companies ranging from small (27 percent had revenues under $25 million) to large (13 percent had revenues over $1 billion).[4]

With the exception of most family-owned and controlled companies, the directors will set their own compensation. In family-owned or controlled companies, the family members in control will make this determination. In either case, the compensation should be fair and measurable, based on the amount of time required of a director, as well as on the attendant duties, responsibilities, and exposure to personal liability.

Who Should Be Compensated

Generally, employee or "inside" directors are not compensated for board service. Their basic salary and bonus plan, if available, usually includes any board service. If the employee director happens to be a member of the ownership family, however, then compensation for board service is often paid. This provides a legal method of putting some reasonable compensation in the hands of the owners without subjecting them to dividend treatment (double taxation). The outside directors of a for-profit company, whether serving on its board of directors or its advisory board (discussed in the next section), should always be compensated.

How Compensation Shall Be Awarded

The three primary ways to award outside director compensation are: an annual retainer; a per-meeting fee, whether board or committee, which is payable only if the director attends the meeting; or a combination that includes both an annual retainer and a per-meeting fee. Directors should be reimbursed for all out-of-pocket expenses incurred in attending any board or committee meeting. Perquisites such as charitable contributions, first class travel, discounts on company products/services, and life/health insurance are waning, but they are still offered by some companies; by contrast, the present trend is to eliminate retirement plans for directors.[5]

Some companies also pay additional compensation for service either as chairman of the board, lead director, or as chairman of a board committee.

Cash vs. Stock

Private companies typically award director pay in the form of cash rather than stock. In many privately held companies, there is either an absolute prohibition or just a tendency not to distribute or make available any stock for distribution to outside directors, or even employees. Occasionally, under the foregoing circumstances, phantom stock plans are established to give the directors all of the benefits of stock, such as dividends and value appreciation, but without voting rights or outright ownership.

As mentioned earlier, if your prime consideration for service as a director is the amount of compensation that you will receive, then you should not serve, and the company would be ill advised to offer a board position to you. One does not get rich for service as a board member, particularly in the private company domain. Rather, directorships provide a unique opportunity to serve, learn from, and participate in the life of a company—and to glory in the satisfaction of one's contributions to its success. Compensation is surely a way of recognizing one's contributions as a director, but it should never be one's sole reward.

The amount and method of director compensation should be disclosed to the outside director up front, and it should always be paid when due. It should be fair to the company and to the director, but it should never be excessive or unfair to the shareholders.

SECTION 2

Duties and Responsibilities

Essentially, there are five basic duties and responsibilities of a director in a privately held company:

1. Represent and protect the interests of the company and all of its shareholders
2. Monitor the performance of management in order to make certain that management does what it says it will do, and that in doing so follows the policy established by the board

Example: *The board establishes a policy that an internal audit function shall be outsourced. Management then proceeds to establish a written description of the internal audit function and interview those companies that provide such services on a contractual basis before either contracting for or recommending to the board a contract for such services. During the process, the board, by asking questions of management, will inquire as to management's progress in carrying out the board's policy.*

3. Perform any duties as required by law
4. Render advice
5. Appoint the CEO, evaluate the CEO's effectiveness, and replace the CEO, if necessary.

Protecting the Interests of All Shareholders

As the representative of private-company shareholders, a director must serve the interests of all shareholders, not only controlling shareholders. Minority shareholders have rights under state and federal laws. They also constitute an important block of power when joined together.

Monitoring

The responsibility of the director to the company and to all of the shareholders dictates the necessity for the constant monitoring of management's performance. The entire monitoring process is accomplished by an efficient use of three methods, namely:

1. Asking questions
2. Seeking and reading written information such as studies, opinions, appraisals, or any other documentation on the subject being monitored
3. Listening to and understanding verbal presentations from individuals who are qualified to present the information

Once a director has an understanding of the methodology of the monitoring process, what then does the director monitor? The following is a suggested checklist covering the most popular and useful topics:

- Management's performance
- Compliance with laws
- The company's performance
- The board's performance
- The directors' performance
- Compliance with the company's policies and procedures
- The marketplace in which the company does business
- Conformity to previous board actions
- Communications with shareholders
- Compensation programs, including perquisites and benefit plans, especially those formed under the Employee Retirement Income Security Act of 1974
- The independence of, the relationship with, and the services performed by the company's external auditors
- The company's code of ethics or code of conduct
- The company's products and/or services
- The competition
- The company's strategic or long-range plans
- The company's financial results (which may be accomplished through an active audit committee)
- Employee relations
- Customer and supplier relations
- The community's view of the company as a citizen and participant
- The directors' performance of their legal duties (i.e., those imposed by law such as corporation codes)
- The company's mission and/or vision statement (whether it reflects what the company is all about)

Following Mandated Legal Duties

The laws of the various states, as well as the laws of the United States, impose duties and responsibilities upon directors of U.S. firms. These laws are discussed further in **Section 5**, "Corporate Governance: Legal Aspects." Nonetheless, it is important to mention at this point some director duties created by the common law or law decided by the courts, as contrasted to statutory law which is law prescribed by legislative bodies.

The main duties are "care," and "loyalty," which must be grounded in "good faith." These duties and others can be described as follows:

Duty of Care

The duty of care says that a director shall perform his or her duties as a director:

- In good faith
- In a manner he or she reasonably believes to be in the best interests of the corporation
- With such care as an ordinary prudent person in a like position would use under similar circumstances

This particular duty, which covers all board work, including committee work, is now a part of the statutory law of many states; in other states, including Delaware, it is still a duty imposed upon directors under the common law.

Four Commandments for the Duty of Loyalty

Based on my past experiences as a director, this duty can be expressed as four commandments:

Commandment One: Thou shalt not use your position as a director to make a personal profit or gain.

Commandment Two: Thou shalt not enter into any transaction with the company you serve without first disclosing the transaction to the other board members and obtaining board approval by a majority of fully informed and disinterested directors.

Commandment Three: Thou shalt not usurp opportunities that are presented to you as a board member. If the company could use them, then they must be offered first to the company. Only after the company rejects them (after full disclosure), may you use them yourself.

Commandment Four: Thou shalt not disclose any nonpublic information presented to you as a director or available to you as a director unless first authorized by the company.

Duty of Loyalty

As a director, it is essential to remember that the company you serve comes first. You cannot put your own interests ahead of the company's; this would be disloyal to the company. In the eyes of the law, the duty of loyalty is even more crucial to board service than the duty of care. Whereas a company can indemnify its directors in legal actions alleging violations of duty of care, no such indemnification is possible in a duty of loyalty case.

Duty of Good Faith

Several Delaware cases have referenced a duty of good faith. The Delaware Supreme Court has said that this may be described as part of a "triad" of fiduciary duties that includes the duties of care and loyalty, but clarified that "the obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty." The court also stated that "the fiduciary duty of loyalty… encompasses cases where the fiduciary fails to act in good faith."[6] Clearly, courts will be more likely to find a failure of the duty of loyalty if there is an absence of good faith. This is significant because, as mentioned, directors cannot be exculpated under a limitation on liability provision adopted under Section 102(b)(7) of Title 8 of the Delaware Code for breaches of the duty of loyalty.

Other Duties

Some commentators add other duties—for example, the "duty of attention, or obedience," which includes, among other things:

- Noting disapprovals in minutes
- Keeping fully informed
- Attending meetings
- Preparing for meetings

Duty of Full and Fair Disclosure

This newest of the common law duties was developed in Delaware. It requires directors to fully and fairly disclose all material information, when required to do so or when authorized by the company, to its owners and regulators.[7]

Included under the classification of "Performing Legal Duties" is compliance with the state corporation or business codes (i.e., declaring dividends, paying dividends only from surplus or profits, etc.).

All of these duties—representing shareholders, monitoring, performing mandated legal duties, and rendering advice—require that the director remain informed. (See discussion of the business judgment rule in **Section 6**, "Liability Risk Management.") In an increasing number of companies, directors are becoming involved in the planning process itself, particularly with respect to long-term strategic plans.

The Delaware Court of Chancery, in 2005, stated in the case of *In Re Walt Disney Company Derivative Litigation* that:

- "Corporate fiduciaries are held by the common law to a high standard in fulfilling their stewardship over the assets of others, a standard that (depending on the circumstances) may not be the same as that contemplated by ideal corporate governance."
- All good corporate governance practices include compliance with statutory law and case law establishing fiduciary duties. But the law of corporate fiduciary duties and remedies for violation of those duties are distinct from the aspirational goals of ideal corporate governance practices. Aspirational ideals of good corporate governance practices for boards of directors that go beyond the minimal requirements of the corporation law are highly desirable, often tend to benefit stockholders, sometimes reduce litigation and can usually help directors avoid liability. But they are not required by the corporation law and do not define standards of liability."

In 2009, the state of Delaware made some key changes to their corporate laws that are viewed as shareholder friendly, namely:

- Allowing a company to amend its bylaws to require that a company's proxy voting materials include shareholders' nominees for director positions along with nominees favored by the board of directors.[8]
- Requiring companies to reimburse a stockholder's expenses for proxy materials related to getting a stockholder-nominated director elected to the board.

These changes, although generally applying to publicly traded companies, have application to privately held companies with a large number of shareholders and who use the proxy system for election of directors, amending bylaws or articles of incorporation. It is suggested again that a director become acquainted with the applicable corporate code in the state in which the company is incorporated.

Rendering Advice

As mentioned earlier, the advice-giving function is particularly important in the privately held company. When management controls ownership, or when owners control management via board membership, then the roles of shareholder representation and management monitoring, which are so important in the public company, become a secondary role for the director. The director's primary role then is to render advice and counsel while fulfilling legally required duties.

In performing this function, the director must be mindful of obligations that the company might have to its stakeholders. Recall from **Section 1** that the stakeholders include the following:

- The company's employees
- The company's customers
- The community in which the company does business
- The general public, represented by local, state, and federal regulators
- The company's creditors, which, of course, include its suppliers

In fact, each of these groups of stakeholders represents potentially formidable liability problems for directors. A 1999 survey by Aon Corporation indicated that 44 percent of all claims against directors were made by shareholders, 28 percent came from employees, 14 percent came from customers and clients, and 14 percent came from competitors, the government, and "other third parties" combined.

One who renders advice must do so carefully and considerately based on knowledge obtained from research and/or experience. Like all aspects of directorship, this one creates a fiduciary relationship and responsibility that exacts not only honesty and integrity, but also a high degree of loyalty and care, as the following passages from two classic Delaware Court decisions show:

> The rules require an undivided and unselfish *loyalty* to the corporation and demands that there shall be no conflict between duty and self-interest. The occasions for the determination of honesty, good faith, and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.
>
> *– Loft, Inc., v. Guth, 2 A.2d 225 (Delaware Chancery Court, 1938) affirmed, 5 A.2d 503 (Delaware, 1939) (emphasis added).*
>
> The duty of care includes a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. The duty also includes a requirement that they reasonably inform themselves of alternatives. The more significant the subject matter of the decision, the greater is the requirement to probe and consider alternatives… Having become so informed, they must then act with requisite care in the discharge of their duties.
>
> Considerations of good faith are irrelevant in determining the threshold issue of whether directors as a board exercised an informed business judgment. Directors are entitled to rely on the honesty and integrity of their subordinates until something occurs to put them on suspicion that something is wrong. If such an event does occur and goes unheeded by the directors, liability may follow.

> Absent cause for suspicion, there is no duty on the directors to install and operate an espionage system to ferret out wrongdoing that they have no reason to suspect exists. It has also been held that the degree of care taken in a specific case in the selection and supervision of employees must depend on the surrounding facts and circumstances, giving regard to the nature of the business, its size, the extent, method, and reasonableness of delegation of executive authority, and the existence or non-existence of zeal and honesty of purpose in the directors' performance of their duties.
>
> – *Smith v. Van Gorkom, 488 A. 2d 858 (Delaware, 1985) (emphasis added).*

Remember always that there are both pros and cons relating to any issue. Therefore, it is very important that directors, as a part of keeping fully informed, make certain that they hear or read about both sides of every issue before making a decision.

Statutory Boards vs. Advisory Boards

This handbook is focused on statutory boards—which have the duties, responsibilities, and liability described herein. But it would not be complete without a discussion of the advisory board.

Advisory boards (also referred to as advisory counsels) offer privately held companies a way of including outsiders in company decisions without burdening them with the responsibilities and liabilities of full-fledged official board service. This type of board does not vote or act as a legally constituted board would act, but merely offers advice that can be accepted or rejected and is not binding upon the company.

Advisory boards also can be used as a "farm system" for future board members by giving management the opportunity to work with—and, in effect, get used to—outsiders before granting them a seat on the company's statutory board. Many times, the managers and/or owners will elevate a member of the advisory board to full board status based upon his or her performance on the "farm team."

Advisory boards, however, are not a magical cure for the inherent ills of directorship. Properly constituted, an advisory board should have very little of each. If a board does receive high levels of compensation and/or exercises sustained and significant power, it may be considered a *de facto* board, bringing consequent liability to all members.

Furthermore, unless the advisory board is expressly covered in the company's indemnification provisions and D&O insurance, it will not be protected against such liability. Finally, unless advisory boards are given meaningful work, members can become dissatisfied.

The choice as to which vehicle a company uses to benefit from outside advice—a formal board, an advisory board, or a combination of the two—depends upon the desires of all parties involved, including management, shareholders, and the directors themselves. Remember, though, the choice is not whether to bring outsiders into company decisions, but how to do so. Obviously, if the board consists only of insiders, who are advised by insiders, then the company is not benefiting from new and independent ideas. In order to open these windows to the world, the company must either open its board membership to the outsiders or establish a strong and working advisory group. Also, if a company intends to go public in the future, then its board plan must include a design that eventually will bring a significant presence of independent outsiders into the boardroom.

SECTION 3

Board Education and Information

We all like to be good at what we do. Being a director is no different. What does it take to be a good director? It is impossible to identify the "typical" good director so that we can fashion ourselves in his or her image, but we can at least learn the ingredients that can contribute to successful board service. This handbook has described time and commitment as two very important ingredients. To this we must add continuing education.

Education Processes

Since being a director is a job, then we can have people serving who are either experienced or inexperienced. Frankly, the best education for a director is having the benefit of prior experience as a director—learning by doing. Yet, for every director, there is a "first time" for service. As companies seek first-time directors with great ability and promise, but no hands-on experience, they must adopt programs to provide some basic education in directorship. The job of monitoring a company, advising its management, and dealing with millions or billions of dollars of assets requires some amount of training. Professionals such as doctors and lawyers are required to pass certain examinations for entrance into their field, and are encouraged or required to participate in annual workshops and seminars aimed at teaching them to do their jobs better, thus benefiting the citizenry that they serve. In some states, failure to meet annual training requirements can mean losing the right to pursue one's profession.

Although directors have no such entrance or continuing education requirement, some believe they should—and eventually will—be so "certified." Following the Sarbanes-Oxley Act of 2002, the New York Stock Exchange required all listed companies to make disclosures about director education. Although directors have no such entrance or continuing education requirement, some believe they should—and eventually will—be so "certified." One in three public company directors responding to the *2010 NACD Public Company Governance Survey* (35 percent) said their boards require them to receive continuing education, and almost all (92 percent) said they believe continuing education enhances director effectiveness. In any event, the myriad duties and responsibilities imposed upon corporate directors by both law and custom strongly suggest the need for director training. Directors need continuing education in two distinct areas: the essentials of directorship and corporate governance (regulations, statutes, and norms), and the basic facts about the business the director serves, including the changes it is going through at any given time.

The essentials of being a director can be learned through attendance at the seminars offered by various organizations, both public and private (e.g., NACD's Director Professionalism® programs, the business schools of Harvard and Stanford, and the Wharton School of Business at the University of Pennsylvania). This education can also be supplemented by periodicals, articles, books, and other publications that are available in the field (e.g., *NACD Directorship*, and other NACD publications available at www.NACDonline.org, and publications such as *Directors & Boards*).

Understanding the business of any given corporation can be attained through:

- In-house educational programs run by the corporation itself for the express purpose of educating its directors about its business,
- Subscriptions to trade publications (i.e., *Bankers Journal* for bank directors, etc.), and
- Enrollment and attendance at public seminars, conventions, or meetings dealing with the industry or business in which the corporation functions.

Information Requirements

To remain informed as board members, directors should ask themselves three fundamental questions early on:

1. What information do we need as directors to properly perform our jobs?
2. In what form do we want the information presented to us (e.g., executive summaries for detailed reports, graphs in financial presentations, etc.)?
3. When do we need the information (how many working days before the meeting)?

When directors have both asked and answered the three preceding questions, then the answers should be made known to management. In some instances, management will take the initial step by posing the questions of the directors. In either event, the answers to the questions should be adopted and become standard policy until changed by the board. Directors might also find it worthwhile to specify how the information is delivered (e.g., personal delivery, overnight courier, bonded messenger, mail, etc.).

As a director, you will need certain basic types of information in order to perform your duties and responsibilities:

Financial Information

Directors should receive and review both forward-looking and current financial information. Forward-looking information can be conveyed through profit and loss/income projections, and cash flow projections. Current information will be conveyed in balance sheets, profit and loss (e.g., income) statements, cash flow statements, and other basic financial documents.

Financial Plans

Financial plans may range from a simple budget predicting income and expenditures to a broad strategic plan charting the future course of the company. Directors should review information and approve and monitor plans, which should remain "evergreen" with frequent updating.

Presentations by Management or Outside Experts

Many companies supplement the "black and white" of their financial statements with the "living color" of live presentations from members of management or outside professionals such as attorneys, accountants, underwriters, or other specialists/experts. Such presentations typically advance a case "for" or "against" a particular action that is up for a board vote. In observing this type of presentation, it is important to remember that there are both positives and negatives on every issue. As a director, you should insist that the presenter address both the upsides and the downsides and be prepared to answer questions concerning both.

Minutes

Each board should have a special policy covering who takes minutes during board meetings, who reviews them, who receives them when they are distributed, and how they are distributed. The policy should also recommend the level of detail expected in minutes. Since minutes are usually the first documents requested during the discovery process in any adversarial action or in the event of a tax audit, all of these considerations are important.

Typically, the corporate secretary takes the minutes, counsel (inside or outside) reviews and corrects them, and all board members receive and approve them. Seasoned attorneys recommend detailed minutes that disclose all board decisions and the reasons for the decisions, but it is important that each company adopt its own policy pertaining to the preparation and dissemination of minutes. These procedures apply both to board and committee minutes. Minutes should be kept of all committee meetings, then approved by the members of the particular committees and made available to each director.

Press Releases

Directors should have advance copies of all press releases issued by the company, and should ensure that the company has rules for preparation and distribution of press releases. The company should also have a policy stating under what circumstances directors are or are not allowed to speak to the press about the company. Always keep in mind the common law duty of "full and fair disclosure" as well as the company's rules relating to "confidentiality."

Press Coverage

Any and all articles about the company appearing in newspapers, trade magazines, or other print sources should be distributed to the directors. This will supplement (and may balance) information supplied by the company. Press coverage can also indicate how well the company is doing with its stakeholders in the local community and/or the public at large.

Special Information

If the company has requested any studies, summaries, opinions, reports, or appraisals in support of any matter before the board, copies of the same should be made available to the directors in a timely manner. Directors should have enough time to familiarize themselves with the contents of the documents.

All special or unusual events require such special reports to the board. Examples of special events would include change of control through mergers or acquisitions, bankruptcy, major litigation, refinancing, sale of assets not in the usual course of business, director or executive resignations, and relocations. Management should provide, or directors should request, more specialized and detailed information tailored to the event.

Ignoring any of these sources of information can be perilous. Taken together, they can become the very arteries that sustain the company's heart—the board of directors. We are all aware that blockages or abnormalities in the artery system that nourishes the human heart can result in death. So it is with the entity, be it a corporation or a limited liability company. After all, the company is an "artificial person" created by state law, and companies have been known to die from lack of communication.

Communication

Finally, there is no means of communication more valuable than candid, informal, personal communication between:

- Managers and directors
- Directors and directors
- CEO and directors
- Outside advisors and directors (subject to certain rules of cost containment, which must be established up front)

The personal communication network can be implemented through meals or other social hours conducted prior to or during a break in meetings, and through social events such as holiday parties, sports outings, and retreats.

One company's code of business conduct and ethics for directors states "We act with integrity and communicate honestly and openly… We work together as a team… We respect each other and celebrate our diversity."[9] Remember, "communication" is the big word here, and the more attention directors give to its fulfillment and improvement, the healthier their companies will be.

SECTION 4

Board and Committee Structure

To function well, boards should be structured well. This means basically that they should have an effective chairman who can run meetings well, and a board size that is small enough to encourage discussion yet large enough to foster diversity of expertise and experience.[10] At a minimum, a board should have committees—committees for oversight of internal control (audit committee), for determining executive pay (compensation committee) and for board membership (nominating/governance committee). A company's board leadership, committee structure, and terms of service will vary, depending on the needs of the company.

Leadership

To begin with, the company's CEO may serve as chairman of the board (the typical practice in most large U.S. companies) or directors may elect to have a separate chairman. When boards do have separate chairmen (as many private and small public companies do), they may be former CEOs, or they may be independent outside directors. Either way, the chairman's duties should be separate and distinct from those of the CEO. The independent chairman also serves as the representative of the board, particularly the independent directors, in communicating with management and the shareholders. He or she is, basically, the leader of the independent directors.

An alternative to the separate chairmanship is the "lead director." The lead director is an outside director who takes on added leadership responsibilities on behalf of the full board.

Committees

Another important aspect of board structure is committee formation. The use of committees by private companies seems to expand with the amount of business that comes before their boards of directors. As directors, we should be striving to do the maximum amount of business effectively and efficiently in the minimum amount of time. Most boards find that they can accomplish much more by forming committees that can study issues at length and then make recommendations to the full board, as opposed to reserving each and every issue for full board consideration.

Most state corporation or business codes provide that the board of directors may create committees and appoint one or more members to serve on them. Some states permit the appointment of non-directors to these committees. (For particulars, check the provisions of the state code in which your company is incorporated.)

The majority of statutes dealing with committees provide that to the extent specified in the corporation's bylaws or by the board of directors, each committee shall exercise the authority of the board of directors (i.e., may take action in the name of the board and which is binding upon the board), except that a committee shall not:

- Authorize distributions
- Approve or propose to shareholders action that the corporation or business code requires to be approved by shareholders
- Fill vacancies on the board of directors or on any of its committees
- Amend articles of incorporation
- Adopt, amend, or repeal bylaws
- Approve a plan of merger not requiring shareholder approval
- Authorize or approve reacquisition of shares (except according to a formula or method prescribed by the board of directors)
- Authorize or approve the issuance or sale of shares, or a contract for the sale of shares, or determine the designation and relative rights, preferences, and limitations of a class or series of shares (except under authority granted by and limits prescribed by the board of directors)

The board can create any committee that it desires, depending on the need for the committee and its designated duties. Whenever a committee is established, it should be given a written mandate or charter as a part of the birthing process. This document describes in clear detail the duties and responsibilities of the committee and other matters pertaining to its structure and operations. By adopting the mandate or charter, the board triggers the ability to invoke the legal defense of "statutory reliance," discussed in **Section 6**, "Liability Risk Management."

Types of Committees

There are two primary types of committees—standing committees and special committees. Standing committees are those that remain in existence until eradicated by action of the board, usually through amendment of the bylaws.

The most common standing committees today include:

- The audit committee (in today's business world, a *de facto* requirement)
- The compensation committee
- The nominating/governance committee
- The executive committee
- The finance committee

In addition, we also see standing committees focused on additional areas such as investment, strategic planning, employee benefits/retirement plan, risk oversight/crisis management, ethics/compliance, HR/labor relations, mergers and acquisitions, technology, social responsibility, and environmental policy.[11]

The committees of privately held company boards tend to be composed of a balance of outsiders and insiders, with the weight shifting toward outside majorities. The audit committee is typically made up of all outside (independent) members, while at the other extreme the executive committee is usually composed of a majority of inside (management) members.

These committees can be established through bylaw provisions or through resolutions. In public companies, their make-up is usually determined by the full board, and occasionally by the nominating/governance committee. In private companies, particularly family-controlled companies, committees are most often established by the CEO.

Boards that use committees tend to rotate committee members on some regular basis, so long as at least one committee member remains on each committee for continuity purposes.

Terms of Service

The terms for which directors are elected are usually specified in the company's bylaws, but sometimes they are provided for in the articles of incorporation.

Many companies elect each of their directors annually, following the company's fiscal year. However, a number of companies also have provisions that call for staggered terms. For example, a nine-member board may have three directors elected each year to three-year terms. The staggered term has been used in some public companies as an anti-takeover device. In the private company, it has been used primarily to limit terms of directors. The term established for service by directors can be an invaluable tool in keeping the board productive. In the private company, and particularly in the family-dominated company, a premier problem is the development of an acceptable procedure for removing directors who do not contribute.

In many family-controlled companies, it literally requires the death of the family member director in order to secure a replacement. Boards should ensure their own vitality by putting rules in place to prevent any director from serving for life, particularly when that term of service extends beyond a certain age. About half of all public companies have provisions requiring directors to retire at a fixed age, such as 70 years old, whereas only one in five private companies have such requirements.[12]

Another provision that is being adopted by a number of public companies requires the automatic resignation of a director if the director's primary position of employment (for example, CEO of ABC Company) has changed for any reason (for example, retirement or termination). This provides a graceful mechanism for companies to part ways with directors who no longer bring to the table the same status and current experience they did when they were first nominated. Boards can always decline to accept the resignation of a director whose value surpasses his or her incoming résumé.

SECTION 5

Corporate Governance: Legal Aspects

The boardroom is an important place. It is, as mentioned, the director's "office"—the place he or she conducts business on behalf of the company. But the boardroom is only a part of the director's world. That larger world is what has come to be known in recent years as "corporate governance." Actually, the term "corporate governance" has not been a part of our every day vocabulary for a great length of time, and its dynamics and definitions are continually evolving and changing. Nonetheless, there are certain basics to learn, beginning with state corporation or state limited liability company laws.

State Law

In the United States, each new corporation or limited liability company comes into existence through the issuance of a charter by one of the 50 states acknowledging that the corporation formed has been duly "formed" under the laws of that issuing state. By qualifying in a particular state, the corporation formed becomes immediately subject to the corporation or business code in effect in that state, including any amendments to the code.

Most state corporation or business codes are hybrid forms of the Uniform Commercial Code, with which all directors should have (or develop) some familiarity. However, each state seems to take pride of authorship by providing its particular nuances to the code, so each director should also have some basic knowledge of the code under which the company the director serves was qualified. This basic knowledge can usually be obtained through a personal review of the applicable statute, through consultation with the company's counsel or one's personal counsel, or through a company-sponsored educational program.

Most state codes have a section specifically entitled "Directors and Officers" or "Boards of Directors," and this is a must for review. It typically begins by describing how corporate powers are exercised. Most codes provide that:

"All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed *under the direction of* the board of directors, or such other persons as the articles of incorporation provide shall have the authority and perform the duties of a board of directors." *Colorado Revised Statutes,* §7-8-101 (2). (Emphasis added.)

If the company that you serve as a director happens to be a limited liability company, you should review the applicable state statute relating to the formation and operation of a limited liability company. These statutes are usually found within or as an adjunct to state business or corporation codes.

As this typical code language suggests, *boards do not manage.*[13] Rather, they *direct* management. Furthermore, they may delegate the direction of management responsibilities to others (i.e., professional managers). In layman's terms, to quote an anonymous pundit, "NIFO: *Nose in—fingers out."* Directors provide oversight and monitor management's performance, while the managers provide management in accordance with the policies prescribed by the board.

Other sections of state corporation laws typically discuss the following:

- Qualification of directors (by age, etc.)
- Number and election (the minimum number of directors to serve and how long they serve)
- Election of directors by certain classes of shareholders
- Terms of directors generally
- Staggered terms for directors
- Removal of directors by the shareholders
- Removal of directors by judicial proceedings
- Filling vacancies on the board
- Meetings of the board
- Actions of the board taken without a formal meeting
- Notice of meetings
- Waiver of notice of meetings
- Quorum and voting requirements
- Committees of the board
- Officers
- Duties of officers
- Resignation and removal of officers
- General standards of conduct for directors and officers
- Limitation of certain liabilities of directors and officers
- Liability of directors and officers for unlawful distributions
- Conflicting interest transactions

- Indemnification of directors and officers
- Insurance of directors and officers

The limited liability company statutes usually deal with the following topics:

- How to form a limited liability company
- Management of the company
- Indemnification of members, managers (directors), employees, or agents
- Contributions for ownership of the company
- Sharing of profits, losses, and distributions
- Distribution and resignations
- Members (who are the equivalent of shareholders), their admission, rights, and liability
- Meetings of members and notices
- Information and accounting
- Dissolution
- Provisions relating to foreign limited liability companies
- Mergers and conversion to other entities
- Powers and authority

Directors need not be fully acquainted with state code provisions, but they should have some elementary understanding of these aspects of laws governing corporation or limited liability companies. Those who do have this awareness report that it is invaluable in making informed decisions.

As a further part of good governance practice, each company should have some process to monitor changes in the corporate or business code that could have an impact on the directors, their decisions, and/or their advice.

Corporate Governance Documents

As a director of a corporation, you should familiarize yourself early on with some key governance documents:

- The company's articles of incorporation, including any and all amendments thereto (This is the document that is required to be filed in the state of incorporation in order to officially create the corporation.)
- Bylaws, including any and all amendments thereto

- Rules of the board, sometimes known as *governance guidelines* (These are the active, everyday rules under which the board operates. They include such items as how matters can be placed upon the board meeting agenda, how directors are selected, when directors become ineligible for reelection, etc.)
- The corporation's strategic plan, including any and all amendments
- The corporation's code of conduct or ethics
- The directors' job description (written), if any
- The company's mission and vision statements
- The company's budget for the current fiscal year
- A description of the company's compliance program, and
- Written standards, if any, for performance review of the CEO, the board, and/or the individual directors (The secretary of the corporation or legal counsel should be able to supply information on many of the topics listed above.)

If you are a director of a limited liability company, in addition to all of the items listed above (except for the articles of incorporation), you should familiarize yourself with:

- The articles of organization
- The operating agreement

The foregoing should be included in what is commonly known as a "Director's Manual." It consists of a loose-leaf binder with the company's name and logo, if any, on the cover. This manual permits the information to be kept fresh since changes can be made and outdated entries removed easily.

D&O Liability Risk

The liability of a director flows generally from two sources, namely, statutory laws and common laws.

- *Statutory laws* are created by legislative bodies such as Congress, state legislatures, local councils, and regulatory agencies that create laws through rule making powers.
- *Common laws* are the laws pronounced by appellate and trial courts through the official publication of opinions.

It is impossible for any director (or even an attorney) to know all of these laws, but the prudent director should have some basic knowledge of all laws that are likely to impact the company upon whose board the director is serving. For example, it is foolhardy for a director to remain ignorant of the statutory law contained in the corporation or business code of the state in which the company was incorporated.

With respect to statutory laws, companies should sponsor a regular, in-house program, usually conducted by company counsel, to brief directors on all laws that directly affect the company. The program should pay special attention to laws containing penalties that can be imposed upon directors if a violation occurs.

If your company is in an industry that is sensitive to environmental matters, for example, then the directors should be briefed on environmental laws in general, with special attention to those that apply in your industry.

The educational process is much more difficult when it involves common law violations. This points out the necessity for access to experienced counsel. See **Section 2** for an extensive description of the principal common law duties of care, loyalty, attention or obedience, and full and fair disclosure.

We live with the liability issue every day, no matter what business we are engaged in. With its relatively low cost to plaintiffs (especially those suing on a "contingency fee" basis), litigation has become a way of life in the United States, despite recent litigation reform. For defendants, however, and for many plaintiffs, the costs rise after filing, as if they were launched on a rocket into space.

Every day we hear directors ask themselves why they should serve in the face of the liability threat. Yet, the liability threat is no more dramatic in the case of directors than it is to the typical business owner operating his or her own company. Particularly in the private company, the risk is diminished when the director can apply the rules of risk management to board service.

Let us then move to this "ounce of prevention" and review the protective devices that are readily available.

SECTION 6
Liability Risk Management

Babe Ruth struck out 1,330 times in his illustrious career, yet he was never sued for poor performance. Unfortunately, this is not the case for directors, who must maintain an extremely high "batting average" in their decisions (even better than Babe's .342!) to avoid legal actions against them. Every director should be aware of the risk management devices that can reduce exposure to legal liability.

Directors are not expected to anticipate every legal problem, but they do need to maintain awareness of legal risk. Professor Stephen L. Pepper of the Sturm College of Law at the University of Denver gives advice for what to do when you know there may be a problem:

> First, think through the problem carefully and analytically. [Ask] why do I think this may be a problem? Will innocent or undeserving people be harmed? Will someone be cheated? Will the market be deceived? Who will gain from the conduct, and will that gain be earned or deserved? What values are at issue: Honesty? Fair value? Shareholder value? Transparency? Generosity? Equity? From what perspective can the conduct be criticized? From what perspective can it be justified? Which is the more truthful, accurate, or generous perspective?… This is ethics in a nutshell: rational deliberation about right and wrong.[14]
>
> – *Steven L. Pepper, Good Business: Exercising Effective and Ethical Leadership*

Pepper cites a classic psychology experiment to demonstrate the phenomenon. "Participants were placed in a room and asked to fill out a form. Smoke was then sent into the room through a wall vent. If the subjects were alone, 75 percent reported the smoke to the experimenters. If two other seemingly unconcerned subjects were also in the room, only 10 percent reported. Thus, almost all subjects would follow the passive lead of the others, continuing to fill out the form and ignore the smoke (and the danger possibly indicated by that smoke). This now well known—but usually ignored—fact about human nature can have severe consequences."[15]

Statutory Reliance

To some degree, directors can rely on some measure of protection from state law. Most of the state corporation or business codes have statutes that read, in essence, as follows: In performing his or her duties, a director may rely upon information, opinions, reports, and statements, including financial data prepared by:

- Company officers or employees whom the director reasonably believes to be reliable and competent in the matters presented;
- Attorneys, public accountants, or other professionals whom the director reasonably believes to be qualified in the matters presented within such person's professional or expert competence; and/or
- A committee of the board upon which he or she does not serve, and which has duly designated—and, in the director's reasonable belief, merited—authority in the matters presented.

(The authority of the committee should be conferred by a provision of the company's articles of incorporation or bylaws.)

Warning: It is incumbent upon a director to not blindly rely upon the above. One should always make inquiry and be fully informed as to his or her basis for reliance before assuming that these provisions will provide full protection.

Abstentions from Voting

Some states have adopted statutes that eliminate abstentions from voting except where a conflict of interest exists, and these state laws usually read substantially as follows:

A director who is present at a meeting of the board or a committee of the board when corporate action is taken is deemed to have assented to the action taken, unless:

- The director objects at the beginning of the meeting to holding the meeting or to voting on the action
- The director requests at the time the action is voted on that his or her dissent from the proposed action be entered in the minutes of such meeting
- The director gives written notice of dissent to the presiding officer of such meeting before its adjournment or to the secretary of the corporation immediately after adjournment of such meeting

The right of dissent as to a specific action taken in a meeting of a board or a committee is not available to a director who votes in favor of such action.

Amendment of Articles of Incorporation

Most state laws provide that a company may amend its articles of incorporation in order to limit or eliminate the liability of a director to the corporation or to its shareholders for certain actions. Given an affirmative vote by shareholders (required in all amendments to articles of incorporation), a company can protect its directors from all liability to the shareholders due to the breach of a fiduciary duty of care. Such protection does not apply to breach of a duty of loyalty, any acts or omissions not in good faith, or any acts that involve intentional misconduct or knowing violation of law.[16]

For directors serving companies incorporated in Delaware, two changes were made to its corporate law in 2009 which are user friendly to shareholders and which affect risk management, namely:

A director's right to indemnification or advancement of expenses under a company's bylaws or certificate (articles) of incorporation vests at the time of the act or omission in question, and these rights may not be eliminated or weakened by amendments to the bylaws or certificate (articles) of incorporation after the act or omission occurs, unless the provision in effect at the time of the omission authorizes the elimination or limitation of rights; and the Chancery Court may remove a director who has committed a felony or violated his or her duty of loyalty. The burden of proof would be on the stockholders (or the corporation in a derivative action).

Tort Liability

Many states have adopted statutes that read more or less as follows:

No officer or director shall be personally liable for any injury to person or property arising out of a tort (an act of negligence) committed by an employee unless such officer or director was personally involved in the situation giving rise to the litigation or unless such officer or director committed a criminal offense.

Note: In practice, this statutory protection offers only minimal protection because many courts create director and/or officer liability based upon the fact that they reasonably should have known.

The Business Judgment Rule

The famed "business judgment rule" is a part of our common law and has been used successfully in defense of directors from the late 1800s to the present. As pronounced by the courts the rule essentially says: In the absence of fraud, conflict of interest, or other breaches of loyalty, a director will not be held liable to his or her corporation if he or she acted in good faith and with a reasonable basis for believing that the action he or she authorized was lawful and in furtherance of the company's purposes.

In recent years, the common law has added a further requirement: that the action authorized must be based upon *"informed"* judgment. The courts have looked at the board's decision-making processes in determining whether or not directors satisfied this condition. The business judgment rule puts the burden of proof on the plaintiff. It presumes that directors did exercise business judgment—a presumption that can be rebutted only if plaintiffs can prove the board failed to satisfy one of the rule's elements. If plaintiffs can prove such a failure, directors can then defend their actions on the basis of the "fairness" of the action; that is, that they satisfied the duty of care; their actions were lawful and in furtherance of the corporation's purpose; and their actions were fair, which is defined in the fifth edition of *Black's Law Dictionary* as: "Having qualities of impartiality and honesty; free from prejudice, favoritism and self-interest. Just; equitable; even-handed; equal, as between conflicting interests."

In other words, the courts have been extremely reluctant to apply hindsight in judging prior actions by directors that may have led to loss or damage and to substitute their judgment for that of the board. No one is perfect. We all have made some wrong decisions in our lives, and the courts will not second-guess us so long as the actions we took did not involve fraud, conflicts of interest, or breaches of the duty of loyalty, and we made them in good faith with a reasonable basis for believing that the action taken by the director was lawful, informed, and in furtherance of the company's purposes.

The word "informed," as applied to directors, has been interpreted to mean that we have asked questions, sought and obtained necessary documentary information, and have sought and obtained professional opinions when necessary.

On the reverse side of the business judgment coin can be found those activities or inactivities that furnish a breeding ground for liability, such as failure to:

- Ask questions
- Listen
- Prepare properly
- Attend meetings
- Understand what the job of being a director entails
- Understand the business of the corporation one serves

Directors and Officers (D&O) Liability Insurance

"Operational" Safety Devices

Finally, in addition to the protections afforded to a director by amendments to the articles of incorporation, statutory law, and the business judgment rule, companies can institute their own "operational" safety devices. These include:

- Creating a written position or job description for directors
- Adopting written governance rules and guidelines for the board
- Using regular peer performance evaluations of the board and of each director
- Educating directors about the business of the company and about the business of being a good director
- Acquainting directors with any statutes in the company's state corporation or business code that give a director some measure of protection, adopting them as bylaws (if required), and following them to the letter
- Adopting compliance programs aimed at preventing violations of law, and then diligently monitoring and enforcing such programs
- Making certain that directors have been indemnified by the company to the full extent permitted by the indemnification law in the company's state of incorporation, which is usually a part of the corporation or business code
- Identifying potential sources of legal action against the board

This last point deserves separate discussion. Who is likely to sue you in your role as a director? As discussed earlier, public company directors are sued most often by stockholders, employees, and customers or clients. In the private company, there are not a great number of shareholder suits. As mentioned earlier, shareholders usually are close to the boardroom scene of action through representation on the board or through close communication. Thus, if they do not believe that a director is performing, they will remove, rather than sue, the offending director or directors.

They can do so quickly, given the typically small number of shareholders in the private company as opposed to the large number of shareholders in the public company.

By contrast, employees who wish to remove directors have little recourse outside the courts. Not surprisingly, the D&O insurers tell us that the growing body of lawsuits against directors of private companies now come from the employees.

Before you accept any assignment to join a board of directors, make sure that you are covered by D&O liability insurance issued by a reputable company. Ask for a copy of the policy or, an insurer-approved description of it to learn:

- The amount of coverage
- The scope of coverage
- What acts or activities are included and which are excluded
- The amount of the deductible
- The requirements for filing claims

It is currently recommended that the D&O policies contain Side A coverage that protects directors and officers in the event the company becomes insolvent.

Indemnification

Most, if not all, of the state corporation or business codes, including those pertaining to limited liability companies, contain provisions permitting companies to indemnify their directors against judgments entered against them while acting in the capacity of a director, and also indemnifying them against attorneys' fees and costs incurred in defending any such actions. Often a corporation will fund the indemnity through its acquisition of D&O insurance.

As a director, you should make the following inquiries and requests of the company:

- Do you indemnify your directors?
- What does your indemnity cover?
- May I have a copy of the indemnity as contained in your corporate records?

Remember that indemnities of this nature are only as good as the companies that give them. When it comes time to make a claim on the indemnity, the company may not have the funds to honor the indemnity. Yet, notwithstanding this possibility, you should never serve on a board without obtaining the company's indemnity. Indemnify to the full extent permitted by the indemnity statute in the state in which the company is incorporated. If the company is not willing to indemnify, then the red warning light should shine bright and clear.

SECTION 7
Ethics

Every language has words that are regularly used and generally misunderstood. In the English language, one such word is "ethics." To paraphrase the well-known statement on "pornography" by former U.S. Supreme Court Justice Potter Stewart, we can't define ethics, but we know it when we see it (and more importantly, we know it's missing when we *don't* see it!).

We can look to the dictionary definitions, but when we attempt to practice ethics in the real world, we find that it means different things to different people under different circumstances.

Each of us has a code of ethics whether we recognize it or not. It is the way we do business. It is the way in which we deal with other people and entities. It reflects what is right, what is wrong, and what is acceptable and unacceptable. Our professional codes of ethics, when studied, have multiple origins. We learn from our family experiences, our formal schooling, our places of worship, our relationships, and our work life. We learn some things from friends and others from enemies. We learn from kind mentors and from the "cold, cruel" world. Therefore, although the human condition suggests certain universal principles for ethical behavior, as individuals our codes of ethics vary. No two are alike.

Given the wide range of ethics at work in any group of individuals, it is extremely important for the board to set a tone at the top. The ethical patterns established in the boardroom and at the management level can and will permeate an entire company, determining the manner in which it deals with and represents itself to others—including individuals, entities, and the community as a whole. Given the importance of these factors in today's business world, the corporate or business entity derives much of its success or failure from its ethics.

Within recent years, Johnson & Johnson conducted a study of 30 companies presumed to have above-average ethical standards and found that they significantly out-performed the stock market. For example, $30,000 invested in the Dow Jones Industrial Average 30 years ago would be worth about $150,000 at the time of the study—a five-fold increase. Yet

$1,000 invested in each of the 30 “ethical” companies over the same period would be worth about $700,000—a 23-fold increase.

Directors should work with management to determine the company’s ethical standards, and to express them in a written document. Once these ethical standards are set, they should be proudly displayed to the public as a portrait of the company. They must then be monitored by the directors on a regular basis to make certain that they remain operative and that they are not just words printed on a piece of paper.

Written codes can be helpful in teaching and reinforcing ethical behavior.[17] But ethics must be reflected not only in the written code adopted by a company, but in the actions of its managers and directors. Codes must be living, working, meaningful testimonies to the fact that the company and its leadership knows right from wrong and pursues what is right with vigor and determination. Managers are people who do things right and leaders are people who do the right thing.

One hundred years ago, in 1912, future U.S. Supreme Court Justice Louis D. Brandeis, addressing the graduating class of Brown University, stated that business was a profession, and, among other things, added:

“A profession is an occupation for which the necessary preliminary training is intellectual in character, involving knowledge and to some extent learning, as distinguished from mere skill. It is an occupation which is pursued largely for others and not for one’s self. It is an occupation in which the amount of financial return is not the accepted measure of success.”

During his years as NACD CEO, Dr. Roger W. Raber often asserted that directors needed to have “courage, candor, and conscience.” Professor Stephen L. Pepper, having heard this phrase at an NACD event, followed up on Dr. Raber’s premise by writing: “Courage, candor, and conscience are the essential ingredients of moral vision. They need not be lofty abstractions, but can be close at hand and familiar: (1) everyday moral intuition, (2) honesty with oneself about intuition, and (3) self-confidence about one’s moral vision.”[18]

The former chancellor of West Germany, Konrad Adenauer, once said: “We all live under the same sky, but we don’t all have the same horizon.” In recognizing the importance of ethics, we might observe the converse of these wise words: “We do not all share the same horizon, but we all live under the same sky.”

Summary

The privately held corporation and the limited liability company today needs you! If you are willing to assume the important responsibility of directorship, and have the qualifications and integrity necessary to do so, you can serve one or more of the thousands of companies actively seeking to add outsiders to their board. If you accept such an offer, I hope that this handbook will serve as a travel guide over the potholes, pitfalls, and occasional black ice that can cover the roadway toward successful directorship.

Before you commit to the responsibilities and commitments of a directorship, it is important to do your due diligence and show a willingness to learn about the company you will be serving. This means conducting a peer-group analysis, looking into the background of the company and considering all the factors that will come into play once you agree to a position on the board. Once you have a basic understanding of what your duties and responsibilities will be, and commit to a strong sense of personal ethics, this journey can be both rewarding and stimulating.

Being a director is both hazardous and thrilling. Your journey on boards will bring moments of despair as well as moments of elation, but one thing is sure: it will never be boring or unchallenging. As a director, you will be a necessary and leading player in the life—and, in some cases, survival—of the companies you serve.

Financial scandals and problems over the past several years have brought about some very stringent federal legislation, particularly the Sarbanes-Oxley Act of 2002 and the Dodd-Frank Act of 2010. Although these laws deal with public companies, it is quite likely that a court, while judging the conduct of a privately held company or a limited liability company, will consider and even apply some of the standards prescribed by these laws. Therefore, directors should become familiar with them, particularly those provisions that deal with audit committees, financial statements, and ethics. Directors should also look at the company's liability exposure and coverage.

This handbook has met its mark if it can, in some manner, contribute to your success in this important calling.

Sample Questions for Prospective Directors to Ask

The following list represents a sampling of core questions that a prospective director candidate can ask during this process of mutual assessment. The purpose of the list is to stimulate ideas prior to a live conversation.

This list does not claim to be complete. Other questions may occur to you. By all means consider asking them (and send them to us for the next edition).[19] This list is meant to help you prepare; it is not a script for an interrogation. Such an approach would give the impression that the candidate has a low "EQ" (emotional quotient), and reduce the chances for a board invitation.

Above all, prospective directors should not be afraid to ask for any information that can help them decide whether or not to accept a directorship. In many cases, they may find that companies have anticipated these questions, making the interview flow more smoothly.

Sample Questions

1. What are the basic duties and responsibilities of a director in this company? Are they expressed in any written document? If so, may I have a copy of the document?
2. Is there a written job description for the company's directors? If so, may I have a copy?
3. Does the company have any written rules or guidelines for operation of the board? If so, may I have a copy?
4. What active committees, if any, does the board have?
5. Do the committees have written charters describing the scope of their activities? If so, what do these charters provide?
6. How often does the board of directors meet?
7. How often do the committees meet?

8. How long do the meetings usually last?
9. Where are the meetings usually held?
10. In asking me to join your board, are you relying upon any special expertise or experience that I may have acquired? If so, what?
11. Are the directors elected annually or for staggered terms? If there are staggered terms, what are the terms?
12. What are the names of the members of the present board of directors?
13. What are their backgrounds (i.e., lawyer, marketing expert, etc.)?
14. What special expertise do they have?
15. How long has each member of the present board served?
16. Does the company have any rules pertaining to the length of time that a director may serve, in terms of years and age?
17. What is the core business of the company? What are its other business areas?
18. How can I learn more about the business?
19. What will the company do to educate me about its business?
20. Who are the principle executives of the corporation?
    - How long have they been with the corporation?
    - What are their goals (long term/short term) for the company?
    - How effective are they as leaders?
21. Who are the shareholders?
    - How active are they, either individually or as a group, in the affairs of the company and the board?
    - What goals (long term/short term) do they seek for the company?
22. How was I selected as a possible candidate for a directorship?
23. How were the other directors selected?
24. Is there a formal nominating or governance committee of the board or does the CEO select the directors?

25. Generally, what laws affect the company's operations which, if violated, could impose personal liability upon me as a director?
26. Has the board adopted a written indemnification policy for directors and/or officers? If so, when was it adopted and what does it provide? May I have a copy?
27. Does the company carry directors and officers (D&O) liability insurance?
28. If the corporation has D&O liability insurance:
    - What is the amount of coverage available?
    - Who is covered?
    - What circumstances are expressly exempted from coverage?
    - What is the procedure for filing a claim?
    - Is there a plain language summary of the policy prepared by (or on behalf of) the insurer? If so, may I have a copy?
    - Is there a deductible or retainage? If so, what is the amount?
    - Is the company itself insured under the policy?
    - Is a director's spouse also insured?
29. Does the company have a policy or program for keeping its directors informed on issues that could create legal liability?
30. Does the company have a strategic plan? Who prepares it? Is it evergreen?
31. Is the strategic plan in writing? If so, may I have a copy?
32. How often is the strategic plan monitored by the board of directors?
33. What part, if any, does the board play in creating the strategic plan?
34. Does the company have a mission or vision statement? If so, may I obtain a copy of the statement?
35. Does the company have a code of ethics or a code of conduct? Does this code include a policy for disclosing conflicts of interest?
36. How is the code of ethics or conduct disseminated throughout the company?
37. Are there different or separate codes of ethics of conduct for employees and directors? If so, may I obtain copies of both codes?
39. Does the board review the performance of the CEO or any of his or her senior staff? If so, how is this review accomplished and how often is it done?

39. Does the corporation have a formal succession plan for its CEO and key executives?
40. Is the succession plan in writing? If so, will I receive a copy of the plan?
41. Is the performance of the board reviewed? If so, how, by whom, and how often?
42. Is the performance of each individual director reviewed? If so, how, by whom, and how often?
43. Does the company have any active liability risk management protection programs for the benefit of its employees, including the directors?
44. If so, how is the program (or programs) administered?
45. What communication systems are in place to ensure an easy flow of information among management, the board, and shareholders?
46. Does the board have any input into the company's information flow system? If so, what? How?
47. How much preparation time does a director have for each board and committee meeting? How many days in advance of any board or committee meeting are information materials delivered to a director?
48. How am I to be compensated as a member of the board? (Note: If this is the only reason or the most compelling reason for your service on the board, then you should not serve, and the company would be wise to look elsewhere for a new director.)
49. Is the company audited annually?
50. Who are the outside auditors?
51. Aside from conducting the annual audit, do the outside auditors perform any other services for the company? If so, what services?
52. For what period of time has the current audit firm provided audit services for the company?
53. How often is the audit partner changed?
54. If it is a family-owned company, do the directors meet with the shareholders informally? If so, how often?

55. *When a CEO is present during the interview.* If I am selected to the board, I will do everything within my power to serve the best interests of the corporation. However, if problems arise, and I believe that you as the CEO are the cause of the problems, how should my fellow directors and I handle this situation, in your view?

The foregoing sample questions are merely suggested as a starting point. The prospective director can use this list to formulate questions tailored to his or her own needs and to the company itself.

The answers generated by the sample questions should enable you as a prospective director to determine whether or not you are willing to serve on the board that is recruiting you. In addition, your personal evaluation of the person or persons conducting the interview, in terms of candor, knowledge, and responsiveness, is also a critical part of your interview and ultimate decision.

Sample Questions for Companies to Ask

During the two-way interview process, prospective directors will naturally be expected to answer questions about themselves. Here are some questions the prospective director should be prepared to answer. As with the list of sample questions to ask companies, this partial list is meant to stimulate dialogue, not an interrogation. The interviewer needs to create a climate for discussion, much like an effective board meeting.

Sample Questions

1. What other boards have you served on? When?
2. What boards are you presently serving on?
3. If you have served on any board and are no longer serving on such board, why are you no longer serving?
4. With respect to your present board service, how many hours per year do you expend in the service of this company?
5. Do you have adequate time to commit to expending at least ___ hours per year as a director of this company?
6. Are you aware of any conflicts of interest that would affect your service on this board?
7. Here is a list containing the names and business affiliations of our current directors:
   - Do you know any of them?
   - Do you know of any reason why you could not serve with any of them as a fellow director on this board?
8. One of the reasons you have been considered for nomination as a director is because of your perceived experience in ___________. Are you willing to provide this company such expertise while serving as a director and in consideration of your director's compensation only?

9. Are you the subject of any present regulatory, criminal, or civil investigation or proceedings, or are you aware of any threatened investigation or proceedings? If so, please describe in detail.
10. Are you willing to participate in any continuing education sessions dealing with both the business of this company and the business of being a director?
11. Aside from your previous service as a director of other companies, or if you have never been a company director, what educational programs developed for directors have you attended?
12. Can you read and understand financial statements, including profit and loss statements, balance sheets, and cash flow statements?
13. Have you ever served as a member of an audit committee? If so, please describe such service.
14. Do you have any accounting experience or background? If so, what experience?
15. Why do you want to serve as a director of this company?
16. Are you familiar with the duties and responsibilities of a director as imposed by both statutory and common law?
17. Are you willing to attend both board and committee meetings as scheduled?
18. Do you have any objections to being evaluated at least annually by your fellow directors as well as doing a self evaluation?
19. How do you feel about evaluating your fellow directors and the board as an entity? Are you willing to do so honestly and candidly? Can you accept being evaluated, if the process is candid and transparent?

Note: The following five questions may be best suited for a confidential written questionnaire administered by corporate counsel.

20. Are you aware of any conflicts of interest that would be created by virtue of your service as a director in this company? If so, please describe them.
21. If a conflict of interest should arise during your service as a director of this board, would you immediately describe the conflict to the board, and then refrain from further participation in the matter which creates the conflict?

22. Do you have any health problems that would or could affect your service as a director of this company?
23. Are you now, or have you ever been a defendant in a legal action or are you currently under threat of any such action?
24. Have you ever been terminated as a director by any company by reason of incompatibility, failure to attend meetings, criminal activity, or by a negative vote of the shareholders? If so, explain the circumstances. (**Note:** this might be better to include in a written questionnaire prior to the interview.) If so, please explain.

About the Author

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Mr. Zall has been associated with NACD since 1979 in many capacities, namely as lecturer, fellow, member of the board of directors, and as director of education. During his career, he has served on the boards of directors of many public, private, and nonprofit corporations. He is a member of the NACD editorial advisory board.

Acknowledgments

In connection with the preparation and publication of this 2011 edition of *A Guide for Directors of Privately Held Companies*, part of the NACD Director's Handbook Series, the author expresses his appreciation for the assistance of the following individuals: Alexandra "Alex" Lajoux, NACD's chief knowledge officer, who graciously edited the original handbook published in 1996, the revised edition in 2003, and this new edition; Suzanne L. Meyer, who did the final editing; and Peter Gleason, NACD's managing director, who encouraged me to provide this 2011 edition.

Endnotes

1 For the purpose of this book, a private company is defined as a company that has no obligation to register with regulatory authorities as a public company. In the United States, a company is required to register if it sells shares to the public—having 500 shareholders or more—although this ceiling may be lowered, given the phenomenal success and impact of private companies like Facebook and Twitter. See Steven M. Davidoff, "Facebook and the 500-Person Threshold," *New York Times*, January 3, 2011. Also see the AICPA, FAF, and NASBA blue ribbon panel report addressing standards for private companies at www.aicpa.org/press.

2 This definition, set forth under Section 301 of the Sarbanes-Oxley Act, is the most restrictive definition possible. It covers family and vendor ties because the restricted payments include payments to family members and payments to companies employing or controlled by the director. See "Standards Related to Listed Company Audit Committees." http://www.sec.gov/rules/final/33-8220.htm.

3 The average annual time commitment reported by private company directors today is as follows: meeting attendance- 48.2 hours; reviewing reports and other materials-42.4 hours; director education-15.1 hours; representing the company at public events-14.3 hours; other time commitments, including attending social or other events pertaining to the company-14.4 hours. Source: *2010 Private Company Governance Survey* (Washington, DC, 2010).

4 These averages are based on the 75 percent of respondents that pay in cash. Other modes of pay include equity-like vehicles (27 percent) and perquisites (seven percent). Respondents could check all that apply, so in some cases companies offered all three or two of the three types of pay. Fifteen percent indicated that they do not compensate their directors. Source: *2010 NACD Private Company Governance Survey*, op. cit., note 4.

5 According to the *2010 NACD Private Company Governance Survey*, only seven percent of private companies pay perquisites. When asked what kind of perquisites they provide (allowing multiple choices), these respondents indicated that they provide charitable gifts/ matching charitable contributions, company aircraft/first class travel, discounts on company products/ services, and life/health insurance. Each of these options was checked by one in five respondents. Source: *2010 NACD Private Company Governance Survey*, op. cit., note 4.

6 "Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith." *Stone v. Ritter*, C.A. No. 1570-N, 2006 WL 3169168 (Del. Nov. 6, 2006).

7 See *Stroud v. Grace,* 606 A.2d 75 (Delaware, 1992). See also *Lonergan v. EPE Holdings LLC*, C.A. 5856-VCL (October 11, 2010).

8 If the SEC's rules on proxy access survive the legal challenge raised in the fall of 2010, then there will be specific conditions mandated for proxy access—namely automatic qualification of any shareholder with three percent held for three years or more.

9 PG&E Corporation, *Code of Business Conduct and Ethics for Directors*. http://www.pgecorp.com/aboutus/corp_gov/cocd.shtml. Accessed January 3, 2011.

10 Diversity of experience includes personal experience pertaining to gender or race. Based on responses to the *2010 NACD Private Company Governance Survey*, two in three boards have at least one female member and one in three private company boards have at least one member who is a racial or ethnic minority. In public companies, the level of a female presence is comparable, but the level of a minority presence is higher: Nearly half of all public company boards have at least one minority member. Source: *2010 NACD Public Company Governance Survey*.

11 Source: *2010 NACD Private Company Governance Survey*, op. cit., note 4, listed in order of prevalence.

12 Source: *NACD 2010 Public Company Governance Survey* and *NACD 2010 Private Company Governance Survey*. The downside of age limits is that they remove directors who reach a certain age without regard to whether or not they are still serving usefully. Robert K. Mueller, whose board service began in his retirement years and who served on boards with energy and competence well into his eighties, referred to such a rule as “statutory senility.”

13 Note: There is one circumstance in which a board may in fact wind up managing the company: in the event of an emergency when a succession plan is not in place or cannot be implemented immediately because the chosen successor is dead or seriously injured as a result of the emergency situation.

14 Steven L. Pepper, *Good Business: Exercising Effective and Ethical Leadership*. Denver Colorado: The Institute for Enterprise Ethics, Daniels College of Business, 2010.

15 Pepper, op. cit., note 15.

16 Note: Please review your state’s law for any variances from this description.

17 “A recent review of 174 academic articles about ethical decision-making in top business journals during the period 1996-2003 revealed the following about organizational influences on ethical decisions and behavior: “…The majority of studies support the idea that the existence of a code of ethics is positively related to ethical decision-making. All things being equal, having clear written statements about the fundamental values of an organization, along with clear behavioral expectations, produce more ethical organizations and more ethical employees.” Pepper, op. cite, note 15.

18 Pepper, op. cit. note 15.

19 Send suggestions to Resources@NACDonline.org.