



406 The Board Meeting from Hell

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Faculty Biographies

Ellen R. Dunkin

Ellen R. Dunkin is general counsel of the Risk and Insurance Management Society, Inc. (RIMS) in New York, a not-for-profit organization dedicated to advancing the practice of risk management, a professional discipline that protects physical, financial, and human resources. Her responsibilities at RIMS include providing advice and counsel to the organization, its staff, and volunteer leadership on a wide range of legal issues relating to its annual conference, volunteer governance structure, intellectual property, and human resources, among others.

Prior to joining RIMS, Ms. Dunkin had served as senior attorney to Marsh & McLennan Companies, Inc. in New York. While at Marsh, she provided counsel in the areas of securities regulation, mergers and acquisitions, executive compensation, and employee benefits. Ms. Dunkin began her practice of law as a corporate associate at Willkie Farr & Gallagher in New York.

She currently serves as chair of the programming subcommittee of ACCA's Nonprofit and Association Committee. She is also a member of the Nonprofit Committee of the Association of the Bar of the City of New York. For the past five years, Ms. Dunkin has served as officer and director, and most recently as president of the Mamaroneck Schools Foundation in Mamaroneck, NY.

Ms. Dunkin received her BA from Albany State University and her JD from St. John's University School of Law, where she was an editor of the *Law Review*.

Sheffield Hale

F. Sheffield Hale is associate chief counsel with the American Cancer Society and counsel to the firm of Kilpatrick Stockton LLP, where he was a corporate partner until earlier this year.

Mr. Hale is active in various community affairs and was a recipient in 2001 of the Chief Justice Robert Benham Award for Community Service given by the State Bar of Georgia in recognition for outstanding commitment to public service. He is currently chair of the State of Georgia's Judicial Nominating Commission and immediate past chairman of the board of the Georgia Trust for Historic Preservation, the largest statewide preservation organization in the United States. He is also a member of the Executive Committees of Camp Sunshine, a camp which sponsors year-round programs for children with cancer, and the Margaret Mitchell House, Inc., one of Atlanta's largest visitor attractions. Mr. Hale is on the Board of Trustees of Trinity School in Atlanta, The Atlanta Historical Society, the Advisory Board of the University of Georgia Honors Program, and the Alumni Council of the University of Virginia School of Law. He is also active in the field of substance abuse prevention, having been chairman of St. Judes Recovery Center and having served on The Joint Legislative Study Committee for the prevention and treatment of substance abuse. Mr. Hale is member of the 1996 Class of Leadership Atlanta and the 1999 Class of Leadership Georgia.

Mr. Hale received his BA summa cum laude from the University of Georgia, where he was a member of Phi Beta Kappa, and received his JD from the University of Virginia School of Law.

Bruce S. Mendelsohn

Bruce S. Mendelsohn heads the corporate and securities practice group in the Washington office of Akin, Gump, Strauss, Hauer & Feld, L.L.P. In addition, he is cochair of the firm's corporate finance practice group and a member of the firmwide management committee. He focuses on securities matters and mergers and acquisitions. He is also a member of the technology practice group.

Mr. Mendelsohn has extensive experience in public and private offerings of debt and equity securities, representing both issuers and underwriters. His practice also involves mergers and acquisitions of both public and private companies, as well as related regulatory issues. Mr. Mendelsohn also represents clients before Congress and the executive branch on public policy issues concerning mergers and acquisitions and securities law.

Prior to joining Akin Gump, Mr. Mendelsohn held various positions at the Securities and Exchange Commission, including chief of the Office of Regulatory Policy in the Division of Investment Management, counsel to Commissioner John R. Evans and attorney-advisor and special counsel in the Division of Corporation Finance. He has spoken on securities law issues at various professional conferences and is on the Board of Contributing Editors and Advisors of the *Securities Regulation Law Journal*.

Mr. Mendelsohn received his BA and JD with honors from the University of Maryland, and is a member of Beta Gamma Sigma, the national business honor society. He serves on the board of visitors of the University of Maryland School of Law.

Philip B. Rosen

Philip B. Rosen is managing partner of the New York office of Jackson Lewis LLP, one of the nation's largest law firms representing management exclusively in workplace law.

Mr. Rosen lectures extensively and advises clients with respect to reductions in force, compliance with the EEOC's Guidelines on Sexual Harassment, the development of AIDS and substance abuse programs, compliance with the Americans With Disabilities Act, wrongful discharge litigation, collective bargaining, arbitration, and National Labor Relations Board proceedings. He received the *American Jurisprudence Award for Labor Law* in 1978.

Mr. Rosen received his BA cum laude from The University of Rochester and his JD from New York University School of Law.

James A. Woehlke

James A. Woehlke is in-house counsel for the New York State Society of Certified Public Accountants (NYSSCPA).

Prior to becoming counsel, Mr. Woehlke served four years as the NYSSCPA Tax Policy Director. Before joining the NYSSCPA, Mr. Woehlke had been a technical manager in the AICPA's Tax Division for four years. He practiced accounting for five years with KMG/Main Hurdman,

including one year with that firm's Washington National Tax Office, and law for four years with the Wichita, KS law firm of Fleeson, Gooing, Coulson & Kitch.

Mr. Woehlke received his BA from Grove City College, where he graduated cum laude, his JD and MBA from Drake University, and his master of law-taxation with distinction from Georgetown University Law Center.

The Board Meeting From Hell: Bad Corporate Governance and How to Cope With It

This session is a re-enactment of a board meeting handicapped by a number of miscreant directors. The panel will demonstrate the various misbehaviors and use the demonstration to lead a discussion of neutralizing or coping with the disruptive behaviors.

The Setting is the board meeting of a local private school. The agenda is as follows:

**Agenda of
October 1, 2002 Meeting of
The Board of Trustees of
Mainville School**

1. Formal Approval of Agenda
2. Approval of Minutes of September 1, 2002 Meeting
3. Year-to-date Financial Statements (previously distributed)
4. Appointment of Architect for New Wing
5. The Pledge of Allegiance
6. Personnel Matters
 - A. Headmaster St. John-Ashmole's Evaluation
 - B. Report on Mr. Smythe
7. Adjournment

People join nonprofit boards for many reasons, ranging from community or professional service to bald-faced self-promotion. Each has his or her own view of how to run the nonprofit, some focusing on mission to the exclusion of business realities, others emphasizing the business side. Some appreciate legal niceties, others do not. Every board member has different listening skills and different abilities to articulate their positions. Finally, board members vary greatly in their ability and willingness to make decisions.

Given this plethora of personalities, abilities, and motivations, it is commendable when boards are able to govern effectively. Many boards can't and, in the end, abdicate their responsibilities to staff.

The challenge to govern effectively is complicated by member behavior that is disruptive or otherwise causes a board to deviate from its governance role. This presentation explores director misbehavior and suggests coping mechanisms.

Good Director . . .

Before discussing what makes a bad director, however, we should focus on what makes a good one. The starting point is, of course, meeting the board member's legal responsibilities, which, generally speaking, include the following:

- Duty of care/due diligence
- Duty of loyalty
- Duty of obedience

Duty of Care/Due Diligence. To meet the duty of care, a Board member should

- Be reasonably informed and exercise independent judgment,
- Participate in the Board's decisions, and
- Fulfill these obligations honestly, in good faith, and with the care of an ordinarily prudent person in similar circumstances.

In the ordinary course of business, a director may rely on information received from sources that the director reasonably regards as trustworthy. Generally, board members may rely on information from the staff, but if a Board member thinks such information is in any way inadequate, he or she should request additional information. A director should inquire as to how the information was gathered or as to the basis of the conclusions presented if the basis is not apparent.

The board does not manage the organization's affairs on a day-to-day basis and must, therefore, delegate managerial functions to the chief staff officer. This does not relieve the board from their responsibility to monitor the organization, but directors of nonprofit organizations have no personal responsibility for errors and omissions of management, employees, or agents of the corporation as long as those persons were prudently selected and the directors' reliance on them is reasonable. In other words an organization's board is expected to properly delegate its authority to the officers and staff; but it may not abdicate its responsibilities to monitor and evaluate the officers and staff.

Duty of Loyalty. The duty of loyalty requires that directors exercise their powers in the interest of the organization and not in their own interest or the interest of another entity or person. This duty primarily relates to

- Conflicts of Interest,
- Corporate Opportunity, and
- Confidentiality.

A major responsibility of association directors is the obligation to avoid conflicts of interest. A director must provide undivided allegiance to the association and its mission. The existence of occasional conflicts of interest is not a problem, but they need to be properly handled.

- Directors should be sensitive to any interest they have in any decision to be made by the board.
- When a director has an interest in a transaction, he or she should disclose it in advance of any board action.
- At that time the board should review the matter.
- Disclosure of material conflicts of interest should be in writing and recorded in the minutes.

Occasionally, a conflict of interest will be such that the director cannot disclose the details to the board. In those instances, the director should disclose that a conflict exists and then, depending on the circumstances, either leave the meeting or abstain from discussion and voting. If even this lower level of disclosure is impossible under the circumstances, the director may need to resign.

A director's fiduciary duty also subjects him or her to the "corporate opportunities" doctrine. This precludes a director who learns of a business opportunity through the director's service to the corporation from pursuing the opportunity outside the corporation.

Another important responsibility of directors relates to confidential information. A director must maintain in confidence whatever information the corporation desires to keep confidential and that it treats as confidential. A board member should not disclose information about the organization's legitimate activities unless the information is already known to the public or is part of the public record. Similarly, from time-to-time board members receive information that is protectable under the attorney-client privilege. The protections available to these confidential communications may be waived when a board member discloses them outside a proper venue.

Duty of Obedience. Directors cannot ignore potentially illegal activities. If a board member believes some activity of the organization may not be legal, he or she should bring the matter to the attention of the chief volunteer officer and the chief staff officer with a demand for an investigation. If ignored, the matter should be brought to the full board. If not satisfied with the handling of the matter, the board member should consult his or her attorney to determine if disclosure outside the organization is required or if resignation is in order

Rights of Board Members. To fulfill their responsibilities as board members, directors have certain rights, including

- Reasonable access to management,
- Access to the corporation's books and records at reasonable intervals and during business hours,
- Notice of meetings, and
- Minutes of meetings.

Liability of Directors. Nonprofit association directors, even though they serve voluntarily and without pay, may be exposed to personal liability for acts they perform on behalf of the association. In general, as long as a director exercises ordinary diligence and care, no personal liability will arise, even when actions and decisions are made in poor judgment, or cause damage or injury. Good faith is the principal test of ordinary diligence and care.

The Business Judgment Rule. Even where a corporate action has proven to be unwise or unsuccessful, a director will not be liable if he or she acted in good faith, in a manner reasonably believed to be in the corporation's best interest, and with independent and informed judgment. In general, directors may be held liable if they

- Perform or approve association activities that are beyond the corporate power and authority of the association (*ultra vires*).
- Intentionally cause injury or damage to others.
- Commit or facilitate acts while representing the association that violate anti-trust or tax or other laws.

Bad Director . . .

We have included in the following table descriptions of the following archetypal "difficult directors." The list, needless to say, is not exclusive. Indeed, a search of Amazon.com performed for this outline yielded 77 entries when asked for books

on “difficult people”. Variations on the theme of “difficult people” are endless. The archetypes we wished to bring to your attention are the following:

- The Know-it All
- The Nonparticipatory Carper
- The Abdicator
- The Monopolist
- The Loose Cannon
- The Self-righteous Moralist
- The Nay-sayer
- The Nitpicker
- The Chatterers
- The Telegraph
- The Robert's Rules Abuser – two types

	Type	Possible Characteristics	Coping Techniques
1.	The Know-it All	<ul style="list-style-type: none"> Reaches conclusions without the facts being laid out. Doesn't prepare for meetings while still managing to pontificate. Insists on his or her view of reality. 	<ul style="list-style-type: none"> Limit speaking time of individual at meeting (good time to use Robert's Rules to chair's advantage). Assign staff member to provide individual with facts and answer questions.
2.	The Nonparticipatory Carper	<ul style="list-style-type: none"> Unwilling to air complaints at board meetings. Overly free to air complaints outside board meetings. 	<ul style="list-style-type: none"> Chair should approach one-on-one to allow individual to vent. Ask individual to come up with list of solutions to complaints. Chair could appoint subcommittee including carper to address complaints.
3.	The Abdicator	<ul style="list-style-type: none"> Over-relies on staff. Attends meetings sporadically or comes to meetings unprepared or both. <p>May not pay sufficient attention during board meetings to ask probing questions during board meetings.</p>	<ul style="list-style-type: none"> Approach individually and ask person to "shape up." If shape-up talk is not an option (e.g., individual is major contributor) involve individual in specific discreet tasks. Emphasize the potential liability from abdication at board orientation.

	Type	Possible Characteristics	Coping Techniques
4.	The Monopolist ¹	<ul style="list-style-type: none"> • Fills every silence. • Jumps to respond to all others' concerns without giving sufficient consideration of other's opinions. • Offers unwanted opinions and endless bits of information. • May be giving a "lazy" board the opportunity to be silent. • Behavior may be caused by anxiety or concerns about organization coupled with fear that "nobody's listening." • One undesirable side effect is shielding the board from making decisions. 	<ul style="list-style-type: none"> • Talk to the director to convince him or her you do care about the issues being raised. • Privately, develop a signal to tell the director it's time to listen to other board members. Don't let the awkward silence that results let the board off the hook. • Set time limits on agenda items and remind board to abide by them. • Limit speaking time of individuals on particular agenda items (another good time to use Robert's Rules to chair's advantage). • Acknowledge his or her opinions and then open floor to others. • Ask for comments from other members.
5.	The Loose Cannon ¹	<ul style="list-style-type: none"> • Not a team player; counters committee decisions. • Spearheads negative whisper campaigns. 	<ul style="list-style-type: none"> • Improve board recruitment program to identify problematic board members in advance. • Include a probationary period for board members.

¹ Archetype discussed in Bailey, Mark, *The Troublesome Board Member*, National Center for Nonprofit Boards, 1996.

	Type	Possible Characteristics	Coping Techniques
		<ul style="list-style-type: none"> • Undercuts chair. • Abuses board status to gain confidential information. • Tries to form a business relationship with staff. • Participates in lawsuit against staff. 	<ul style="list-style-type: none"> • Term limits • Develop code of ethics for board members
6.	The Self-righteous Moralists ¹	<ul style="list-style-type: none"> • Imposes personal (perhaps religious) views on board. 	<ul style="list-style-type: none"> • Chief staff officer or chief elected officer should privately meet with the director and explain how moralizing can demean others. • Improve recruitment procedures to identify problems in advance of board appointment. • Present clear board orientation. • Trial period for membership; service on committees. • Code of Ethics. • Improve consensus-building and conflict-resolution activities. • Remind Board of fiduciary obligations – namely duty of loyalty.

	Type	Possible Characteristics	Coping Techniques
7.	The Nay-sayer ¹	<ul style="list-style-type: none"> • Freely complains. • Rejects proposed solutions out of hand or from claim of experience, "Been there; done that." Or, "tried that in '89". • Explodes at meetings and impairs the ability of the board to make decisions. 	<ul style="list-style-type: none"> • Privately meet with board member to try and identify what is the source of his or her anger and concern. • Explain the impact of outbursts at board meetings. • Suggest a leave of absence from the board; but stay in touch. Nay-sayer may in time be ready to return to the board.
8.	The Nitpicker	<ul style="list-style-type: none"> • Cannot focus on big picture; distracts board from real issues. • Unable to delegate implementation to staff. 	<ul style="list-style-type: none"> • Privately meet with board member and explain impact of nitpicking. • Explain organization's volunteer/staff partnership. • Include discussion of respective volunteer/staff responsibilities in board orientation with explanation of how observing correct roles enables the organization to better achieve its goals. • Focus staff on eliminating pretexts for nitpicking, i.e. ensure accuracy of reports and professional presentations.

	Type	Possible Characteristics	Coping Techniques
9.	The Chatterers	<ul style="list-style-type: none"> • Conduct mini-meetings, side conversations during meetings. • Don't pay attention. • View meetings as social gatherings. 	<ul style="list-style-type: none"> • Become silent while the chat continues. • Interrupt the meeting to ask if the chatterers have something for the full board to share. • Have board chair privately explain how the chatterers are being perceived as rude. • Assign seats to keep chatterers apart. • Volunteer individuals to specific task to get them engaged.
10.	The Telegraph	<ul style="list-style-type: none"> • Reports out to constituents everything that happened in the board meeting (particularly problematic in a private school situation where you have concerned parents and applicants). 	<ul style="list-style-type: none"> • Privately explain duty of confidentiality and how to differentiate between what is confidential and what is open for public consumption. • Cover in board orientation.
11.	The Robert's Rules Abuser - type A	<ul style="list-style-type: none"> • Refuses to use rules of order with chaotic result. 	<ul style="list-style-type: none"> • Explain to director that some rules of order are necessary to focus board discussions. • Make simplified or customized rules-of-order resources available to the board. • Include rules of order discussion in board orientation.

	Type	Possible Characteristics	Coping Techniques
12.	The Robert's Rules Abuser - type B	<ul style="list-style-type: none">• Overuses rules of order to forestall majority action.	<ul style="list-style-type: none">• Rules of order are intended to facilitate and focus group discussion. When used to obstruct action the speaker often can be ruled out of order.• Improve board's general knowledge of rules of order, so that the chair and other directors are better equipped to move to a conclusion.

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