

# Establishing Norms for Director Behavior to Enhance Board Culture and Effectiveness

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*In her regular column on corporate governance issues, Holly Gregory discusses how shared expectations about standards of behavior for **directors** strengthen the internal culture of the **board** of **directors**.*

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**Board** culture — the shared values, beliefs, assumptions, and expectations that influence behavior in the boardroom — plays a considerable role in the **board's** ability to govern in an effective and efficient manner. It affects how **directors** engage with one another and with management, the candor with which differing viewpoints are raised and deliberated, and the ease with which **directors** determine priorities and reach consensus. A positive **board** culture marked by trust, respect, and candor provides the foundation for collaborative and constructive discussions as the **board** assesses corporate opportunities and risks, manages transitions, and navigates crisis. Attentiveness to issues of **board** culture in normal times helps **boards** withstand stress in times of volatility and crisis.

This article discusses:

- The value of positive behavioral norms for **directors**.
- The legal framework in which behavioral norms are developed.

- The importance of developing and articulating behavioral norms.
- Appropriate dissenting behavior.
- How to identify and address problematic behavior.
- Considerations in setting behavioral norms.
- Practical guidance for establishing behavioral norms.

## The Value of Positive Behavioral Norms

Effective governance depends on how **directors** weigh in with their perspectives, stimulating discussion that challenges assumptions and biases in constructive ways. Moving from identification and deliberation of options and alternatives to formation of consensus (or at least a majority agreement) in an efficient manner requires a positive **board** culture built on norms for how **directors** will conduct themselves in undertaking their service as fiduciaries and in interacting with one another and management.

Whether established implicitly through pattern and practice or explicitly through **board** policies, behavioral norms:

- Help set the tone for the **board's** deliberations, resolution of disagreement, and ability to reach consensus.
- Assist in defining and establishing the **board's** relationship with management and how the **board** and management engage, including through expectations about when the **board** becomes informed of and involved in a matter.
- Serve as the foundation for the trust that supports the **board's** ability to act in times of stress.
- Reduce the likelihood of interpersonal discord and the potential for related misconduct.

Given that the **board** is often constrained in its ability to take meaningful action against a **director** who strays from agreed policies and norms, attending to the health of the **board's** culture by underscoring what is expected is an important preventive measure.

For more information on the importance of an effective **board** culture, see [Article, Corporate Crisis: Board Preparation and Response](#).

## The Legal Framework

The **board's** authority to act is as a collective body. Individual **directors** are fiduciaries who have duties to act with care, loyalty, and good faith in participating in **board** activities and decisions. Individual **directors** do not have authority, unless delegated by the **board**, to authorize action by the company, bind the company to agreements, issue directives to members of management or other employees, or speak on behalf of the **board** or company.

In monitoring performance and determining how to vote on a matter, **directors** are expected to review all relevant information reasonably available. In addition to considering information provided by management, experts, and advisors, **directors** should consider the views of other **directors** that are explored and developed in **board** and committee deliberations, including as the **board** works toward building a consensus about potential courses of action. Well-functioning **boards** are normally able to achieve a consensus that all **directors** can support, only rarely resorting to a majority position that a minority of **directors** oppose. However, reasonable **directors** may disagree on important matters from time to time.

For more information on **directors'** obligations, see [Practice Note, Fiduciary Duties of the Board of Directors](#).

## Expectations for **Director** Behavior

For a **board** to be effective as a decision-making body in which a variety of views are raised, explored, and debated, **directors** must respect, trust, and rely on one another and at times defer to one another's judgment. From a **board** culture perspective, the goal is to achieve a supportive atmosphere where dissent and disagreement can be both expressed and resolved. A well-functioning **board** culture encourages **directors** to ask questions and engage in healthy skepticism. Ideally, **directors** develop an understanding of one another's styles and strengths and adapt to, and accommodate, one another's weaknesses.

Abiding by agreed behavioral norms helps develop trust and a cooperative and collegial atmosphere among **directors** that supports the candor and rigorous discussion that is **fundamental** to the deliberative process. This helps the **board** resolve disagreements, reach a consensus, and make timely decisions.

Generally, **directors** are expected to:

- Show respect for one another and for executives and employees, including respect for expertise and viewpoints.
- Listen actively, with an open mind.
- Be constructive in questions directed to management or other **directors**.
- Promote discussion and debate, including through the exercise of self-control in the use of discussion time, respecting the interests of other **directors** to also participate.
- Commit to working towards a consensus after an informed and deliberative process.
- Support, and not undermine, decisions reached by the **board**.
- Protect **board** confidentiality.
- Avoid acting or speaking on behalf of the company or **board** without authorization.
- Raise any concerns in as open and transparent a manner as possible.

- Identify and disclose conflicts of interest, and recuse themselves from discussion of and voting on these matters.

## Dissenting Behavior

**Directors** should freely share their viewpoints in **board** and committee meetings and seek to persuade other **directors** through deliberations. After thorough discussion, it is uncommon for a **director** to continue to disagree with what is apparent as the emerging position of the **board** majority, and the **director** often votes in favor of the emerging majority position out of respect for and reliance on the informed judgment of the other **directors**.

A **director** who disagrees with a **board** position should consider their own assumptions and biases to identify the source of the disagreement, and should be particularly wary of an internal rationale that the matter is complex and the other **directors** "just do not understand." If the **director's** view has been articulated clearly, concisely, and without animus or emotion, yet has failed to persuade fellow **directors**, it is likely that the other **directors** understand the matter but simply have drawn a different conclusion about the best course of action. The **director** also should consider whether the **board's** decision-making process is appropriately robust, including whether any conflicts have been disclosed and handled appropriately, and whether **directors** have the relevant information to be able to assess strategic options and come to an informed decision.

If the disagreement remains unresolved, the **director** has a range of possible responses, depending on the level of and reasons for the disagreement. The **director** may take one or more of the following actions:

- Persist in trying to convince the majority to agree with their point of view before the vote.
- Seek to have the decision-making process reformed to remedy possible procedural flaws by, for example, removing the influence of conflicted **directors** or tabling the discussion until additional information or advice that the **director** believes would be helpful can be obtained and reviewed.
- Vote against the proposal and either:
  - respect the will of the majority; or
  - request that the dissent be recorded in the meeting minutes to express significant disapproval of the decision (this also protects the **director** from fiduciary liability for the particular decision at issue).
- Seek to have the **board** reconsider or modify the decision.
- Consider resigning, in a case of serious and continuing disagreement, where the **director** believes that their point of view is disregarded on a regular basis and therefore the **director** feels they cannot be effective in influencing **board** decisions.
- Seek legal advice about options if the **director** believes that significant issues of compliance or risk are not being addressed after raising the issues with the **board**. There are circumstances in which the courts look with disfavor on **directors** who resign rather than seek to address significant issues (for more information, see [Legal Update, In](#)

re Puda Coal: Delaware Court of Chancery Describes Efforts Required of **Directors** of Foreign-Based Delaware Corporations).

For a public company, a disagreement concerning the company's operations, policies, or practices that results in a **director's** resignation or refusal to stand for re-election, if known about by an executive officer of the company, triggers a Form 8-K disclosure obligation (Item 5.02(a), Form 8-K). In this Form 8-K, the company must disclose a description of the disagreement that it believes caused the **director** to resign or refuse to stand for re-election, and any correspondence the **director** has sent to the company regarding their resignation or refusal to stand for re-election must be filed as an exhibit. The company must provide the **director** with a copy of the disclosure on or before the day the Form 8-K is filed, and offer the **director** the opportunity to state in writing whether they agree with the company's description and, if not, indicate how they disagree. The company must amend the Form 8-K to include any written statement provided by the **director** within two days after receipt.

For more information on filing and amending Form 8-K to publicly disclose **director** departures and other material information, see [Practice Note, Form 8-K](#).

## Problematic Behavior

Problematic **director** behaviors come in a variety of forms, including:

- Acting in an abrasive, abusive, or disrespectful manner.
- Monopolizing discussions.
- Unduly interfering in management operations.
- Overstepping one's authority.
- Failing to respect and abide by company protocols and policies.
- Leaking confidential information.
- Failing to disclose a conflict, acting on a conflicted basis, or both.
- Taking any action that breaches a fiduciary duty or violates a law or regulation.

**Boards** have limited options to curb problematic **director** behaviors. Possible **board** responses include:

- **Informing, educating, and coaching a director.** In many cases, simply pointing out the errant behavior to the **director** may be sufficient. If the behavior reflects a lack of understanding of policies or obligations, education may be appropriate and helpful. Coaching may assist a **director** in modifying a problematic personal style. Individual **director** evaluations can help focus feedback about more generalized problematic behaviors (for more information, search [Article, Board Evaluation Processes and Related Disclosures](#)).

- **Reprimanding a director.** A **board** may threaten to or actually issue a formal reprimand. For a public company, if the **director's** actions constituted a breach of the company's code of conduct and ethics, a reprimand for their actions avoids the need for public disclosure that the **board** waived the code.
- **Choosing not to re-nominate a director or requesting their resignation.** The **board** may decide (absent a specific contractual arrangement) not to re-nominate the **director**. If change is needed mid-term, the **board** may request that the **director** resign.
- **Forming a board committee and removing a director from committees.** If a **director** refuses to resign, the **board** may take action to protect the integrity of **board** decisions from conflicts of interest, confidentiality breaches, and other harm. Forming a **board** committee and delegating certain decisions to it may prevent these decisions from being influenced by the **director's** behavior. The **board** should seek the advice of counsel if considering this approach. The **board** may also remove the **director** from committees on which the **director** serves.
- **Removing a director.** A **board's** ability to "remove" a **director** is usually limited to a decision not to re-nominate the **director** for re-election by the shareholders at the end of the **director's** term. Many states allow **director** removal only by a vote of shareholders. In some jurisdictions, a court may be petitioned to remove a **director** for fraudulent or dishonest acts, gross abuse of authority, or a breach of duty. Judicial removal of **directors** is a public process, which could cause reputational harm to the company.

For more information on responding to **director** misconduct, see [Article, The Challenge of Director Misconduct](#).

## Considerations in Setting Behavioral Norms

While diversity in **director** viewpoints should be highly valued and encouraged, and a range of **director** styles is to be expected, the **board** should establish behavioral norms for **directors**. These norms should set expectations about the behaviors that are valued and acceptable in **board** and committee discussions and in company-related interactions outside the boardroom. The governance committee and the **board** should periodically revisit these expectations, which can be reflected in the code of conduct for **directors**, corporate governance guidelines, or both.

Behavioral norms should be premised on a clear understanding of the roles of the **board** and management. **Directors** offer outside perspectives that can provide a stable foundation in times of tension and crisis, which is valuable in supporting effective governance. However, **directors** need to respect the limits of the **board's** role, which is focused on policy-setting and oversight, and avoid operating in the zone of management. To that end:

- The **board** and management should agree on behavioral norms that support a clear delineation of **board** and management authority, while recognizing that this line is difficult to draw and shifts based on the context.
- The CEO and independent **board** chair (or lead independent **director**) should agree on their respective roles and responsibilities, given the importance of mutual trust, respect, and candor between them. The **board** leader plays a key role in ensuring the **board** has policies and practices that facilitate a healthy **board** culture. Practices that may strengthen **board** culture include:
  - scheduling frequent executive sessions;

- ensuring the **board** has sufficient in-person interactions;
  - encouraging all **directors** to participate and express differing views in meetings; and
  - developing norms around **director** communications outside the boardroom (between **directors** and between **directors** and management).
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- The **board** should agree on behavioral norms that respect the limits of individual **director** authority (see above).

## Practical Guidance

As noted above, trust and candor improve the **board's** ability to navigate challenging situations. Behavioral norms related to the flow of information and communications can help foster a culture where management is candid and shares negative news promptly, and **directors** are constructive and deliberative. For example, management and the **board** should develop a shared expectation about the circumstances that call for prompt and substantive **board** notification and engagement. **Directors** should be alerted about significant matters in a timely manner, including matters that implicate **board** responsibilities or may receive negative publicity. To that end:

- **Directors** should respect the impact that their requests may have on other work priorities, and the interest that all **directors** have in access to the same base of information. The **board** should establish procedures for **directors** to suggest **board** meeting agenda items and identify information to be provided by management that would be helpful to both their understanding of the business generally and their consideration of specific matters.
- The **board** may wish to develop clear policies in consultation with management on how to coordinate meetings and other contacts with key employees to ensure that priorities are established and that **directors** have equal access to information.
- Given the highly confidential nature of information provided to **directors** and of the proceedings and deliberations of the **board** and its committees, **directors** should periodically be reminded not to share information outside the boardroom unless specifically authorized by the **board** (for example, by a **director** who represents a significant shareholder).
- Behavioral norms should reflect the limited time available for **board** and committee meetings and the interest that all **directors** have in actively participating. Care should be taken to promote interaction and equal opportunity for participation.
- In communicating with one another outside **board** and committee meetings, **directors** should be mindful that the work of the **board** and its committees be undertaken through discussions in duly convened meetings. Email and text messaging among **directors** about substantive matters raise confidentiality and litigation risks, given their susceptibility to a security breach and their quick, informal tone, and because they form an incomplete record. Substantive communication should take place in the security of a duly convened meeting in which all **directors** share the same base of information. For more information, see [Article, Managing Litigation Risks: Board Minutes and Electronic Communications](#).

The following additional actions help to create a positive **board** culture and support appropriate **director** behaviors:

- Discussing **board** culture and expectations about **director** conduct and reviewing related **board** policies periodically.
- Addressing behavioral norms in corporate governance guidelines or other appropriate **board** policies.
- Reminding **directors** of confidentiality requirements and other key policies periodically.
- Assessing **board** culture in the annual **board** evaluation.
- Underscoring expectations about **director** conduct in individual **director** evaluations.
- Considering a **director's** behavior in making re-nomination decisions, including:
  - how they have handled **board** disagreements in the past;
  - whether they abide by company and **board** policies;
  - whether they uphold their fiduciary duties; and
  - their commitment to confidentiality.
- Discussing periodically in governance committee meetings and with counsel the avenues for addressing problematic behaviors.
- Addressing problematic behaviors when they arise.

The **board** is responsible for developing an internal culture of trust, respect, and openness, and that culture is in large measure a product of accepted behaviors among **directors**. Periodic consideration of the behaviors expected of **directors**, the behaviors that are unacceptable, and the mechanisms for handling disagreements helps shape a positive **board** culture.

For more information on **board**-management relationships and **board** culture, see [Article, Board Oversight: Key Focus Areas for 2022](#).

*The views stated above are solely attributable to Ms. Gregory and do not necessarily reflect the views of Sidley Austin LLP or its clients.*