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PRESENT AT THE CREATION: REFLECTIONS ON THE EARLY YEARS OF THE NATIONAL ASSOCIATION OF CORPORATE DIRECTORS

Lawrence J. Trautman

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[Pre-Publication Draft]

Lawrence J. Trautman*
Professional Corporate Director

* BA, The American University; MBA, The George Washington University; JD, Oklahoma City Univ. School of Law. Mr. Trautman is a past president of the New York and Metropolitan Washington/Baltimore Chapters of the National Association of Corporate Directors and is currently located in Dallas, Texas. He may be contacted at Lawrence.J.Trautman@gmail.com.

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ABSTRACT

Effective corporate governance is critical to the productive operation of the global economy and preservation of our way of life. Excellent governance execution is also required to achieve economic growth and robust job creation in any country. In the United States, the premier director membership organization is the National Association of Corporate Directors (NACD). Now over 36 years old, NACD plays a major role in fostering excellence in corporate governance in the United States and beyond.

Over the past thirty-six years NACD has grown from a mere realization of the importance of corporate governance to become the only national membership organization created by and for corporate directors. With a membership in excess of 13,000, today's NACD is a reliable source of essential resources that assist board directors in strengthening board leadership. Now a member of the Global Network of Director Institutions (GNDI.org), NACD has worldwide impact. Even during the early years, NACD was a significant source of quality education and qualified directors to companies striving to achieve excellence in corporate governance.

My interest in corporate governance covers more than thirty years. During my career, I have found the job of the corporate director both fulfilling and intellectually challenging. My involvement with the NACD dates back to 1978. At that time the Washington, DC-based organization was in its infancy; just a few months old. During NACD's early months, I was a 28 year-old entrepreneur, serving as chairman and CEO of a Washington, DC-based financial services start-up. I needed to learn about corporate governance and recruit a board of directors capable of governing a national financial services entity, while communicating to the investor community that we were deserving of their support as we contemplated our initial public offering.

NACD's focus has changed over the years to reflect those issues receiving the most attention in corporate boardrooms at any given time. The Foreign Corrupt Practices Act, signed into law December 19, 1977, was a major development confronting directors as NACD was founded. Next, the SEC's Advisory Committee on Corporate Disclosure, chaired by A.A. Sommer, held hearings focusing attention on the broad topic of corporate governance and served to highlight the need for increased professionalism by corporate directors. The 1985 decision in *Smith v. Van Gorkom* held that directors who make an uninformed decision are unprotected by the business judgment rule and, accordingly, face substantial personal liability exposure. *Van Gorkom* triggered a huge demand for director education. Focus on the need for effective audit committees resulted from the National Commission on Fraudulent Financial Reporting of 1987 (the "Treadway Commission").

NACD has also proven to be a great source of directors over the years for my involvement with early-stage companies. Experienced senior executive talent, often in the form of independent outside board members, can prove to be a profoundly valuable intangible asset of any start-up enterprise. A lifetime of experience teaches that entrepreneurs may enhance the likelihood of ultimate enterprise success by recruiting the assistance of experienced executive talent. Corporate directors provide a useful mechanism in which to tap this asset and leverage many years of experience and personal relationships.

This article discusses the growth of the New York and Baltimore/Washington, DC chapters during these early days, especially at the local level. NACD's primary strength is found in its local chapter system; these are the "grass roots" that make governance a viable field.

Keywords: audit committee, board of directors, business judgment rule, community of practice, corporate governance, corporate law, entrepreneurship, FCPA, National Association of Corporate Directors, mentoring, NACD, professional associations, securities, SEC, Van Gorkom, strategy, Treadway Commission,

JEL Classifications: G20, G30, J40, K22, L10, L20, L50, M13, M14, M21

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I. OVERVIEW

Over the past thirty-six years the National Association of Corporate Directors (NACD) has grown from a mere realization of the importance of corporate governance to become the only national membership organization created by and for corporate directors. With a membership in excess of 13,000, today's NACD is a reliable source of essential resources that assist board directors in strengthening board leadership.[1]

Present at the Creation

My interest in corporate governance dates back more than thirty years. During my career, I have found the job of the corporate director both fulfilling and intellectually challenging. The multitude of skills required to be a competent and effective director requires a commitment to life-long learning and the recognition that every day brings something new to learn. The corporate governance community has also been attractive to me over the years. I've found that it consists of a group of unusually talented and interesting people. My involvement with the National Association of Corporate Directors dates back to 1978. At that time the Washington, DC-based organization was in its infancy; just a few months old. The founders, including entrepreneur Steven Cummings and early president John Nash, had a primary goal of raising the standards of corporate governance practice in the United States. This vision was joined very early on by practitioners Richard S. Mauer (Delta Airlines), Jerry Hildebrand, Robert K. Mueller (A.D. Little), Jean Head Sisco, Al Sommer, and Pete Scotese (Springs Mills), who I believe constituted NACD's first board.

Many individuals influenced and shaped the organization during that period. Others who I recall from very early-on include Don Betts, Joe Chalfont, Seth Dabney (Caterpillar), Ralph C. Ferrara, Barbara Hackman Franklin, Frank Hubbard, Roberta Karmel (Mallinckrodt), Ira Korn (Korn/Ferry), Juanita Kreps, Tom McMahon (Chase

[1] National Association of Corporate Directors, *About NACD*, *available at* http://www.nacdonline.org/AboutUs/?navItemNumber=556 http://www.nacdonline.org/AboutUs/ (last viewed July 6, 2013).

Manhattan), Jack O'Callaghan (Xerox), Harvey Pitt, Charles Ramsey (Pioneer Natural Resources), and many others, too numerous to be included here. I owe much to the many members of the NACD who have mentored me in the craft of working as a corporate director.

Recruiting My First Board

Over the years, I have probably been responsible for the recruitment of approximately fifty various corporate director board positions. As an entrepreneur, giving birth to about a dozen start-ups, I have learned that directors are a major asset, often as important to ultimate success as initial capital. During NACD's early months, I was a 28 year-old entrepreneur, serving as chairman and CEO of a Washington, DC-based financial services start-up company with initial operations based in Minneapolis. My immediate task was to learn about corporate governance, the duties and responsibilities of corporate directors and, in particular, the role of chairman. In addition, I needed to recruit a board of directors capable of governing a national financial services entity, while communicating to the investor community that we were deserving of their support as we contemplated our initial public offering. In addition to programs offered by The Practising Law Institute, NACD was my primary resource for corporate governance education and community.

Although very modest and elementary in 1978, I recall that NACD's "Director's Register" program (now called Directors Registry) was very helpful to me as I recruited for my first board.[2] My business partner and I had set about to consolidate the

[2] National Association of Corporate Directors, *NACD Director Recruitment Services, available at* http://www.nacdonline.org/Resources/content.cfm?ItemNumber=740&navItemNumber=4531 (last viewed July 7, 2013).

fragmented mortgage banking business. At the time Chase Manhattan Bank was perhaps the largest real estate lender in the United States. Tom McMahon was a senior officer at Chase and chaired the audit committee of publicly traded Arlen Realty and Development, maybe the largest real estate developer in the country at the time and was an important, yet likely a difficult client for Chase. I met Tom through our activities at NACD and he became our audit committee chair. Others who I was able to recruit to my first board included: Farris Bryant (former Governor of Florida); Bill Guth (professor of business strategy at NYU); Newton I. Steers (former U.S. Congressman and Insurance Commissioner of Maryland); Herbert Stein (former Chair of President Nixon's Council of Economic Advisors), and others. NACD was just beginning to attract a community with an avid interest in increasing the effectiveness of corporate governance. Having the ability to draw on the skills and many years of experience of others proved to be a tremendous asset and personal learning experience. This start-up was where I learned the value of every board member having a wealth of diverse functional experiences and years of relationships where they count.

To make a very long and complicated story short, the Federal Reserve tightened monetary policy on October 6, 1979, causing interest (mortgage) rates for the next few years to rise. I knew in an instant that my hopes for a successful mortgage-related IPO were toast; so, I headed off to New York for a career as an investment banker. Like so many things in life, what appeared to me at first to be a great personal disaster, resulted in great experience from an early business failure, thus providing a great lesson in corporate governance navigating a crisis.

SEC Disclosure Hearings

As I look back, it becomes apparent that NACD's focus has changed over the years to reflect those issues receiving the most attention in corporate boardrooms at any given time. Early on, my thoughts immediately focus on the influence of corporate and securities lawyer A.A. Sommer, Jr. His friends called him Al (and perhaps more than anyone else I've met in life, everyone seemed to be his "friend)." Al served as a commissioner of the SEC from 1973 to 1976, and gained high marks for his role as chairman of the SEC's Advisory Committee on Corporate Disclosure.[3]

The SEC disclosure Hearings, which I actually remember attending, focused attention on the broad topic of corporate governance and served to highlight the need for increased professionalism by corporate directors. According to Al Sommer, the disclosure project was "an extensive empirical research project designed to test various hypotheses and commonly held theories about investors and markets, as well as secure a fund of reliable data for the Committee to use in reaching conclusions."[4] The Commission's charge to the Committee was

1. .... To identify the characteristics and functions of the present system of corporate disclosure and the role of the Securities and Exchange Commission within that system;
2. To assess the costs of the present system of corporate disclosure and to weigh those costs against the benefits it produces;
3. To articulate the objectives of a system of corporate disclosure and to measure the Commission's present disclosure policies against those objectives; and

[3] *See* A.A. Sommer Jr., *The U.S. Securities & Exchange Commission Disclosure Study*, 1 Journal of Comparative Corporate Law & Securities Reg. 145 (1978), *available at* *https://www.law.upenn.edu/journals/jil/articles/volume1/issue2/Sommer1J.Comp.Corp.L.&Sec.Reg.145(1978).pdf*.
[4] A.A. Sommer, Letter to Hon. Roderick M. Hills, Chairman, Securities and Exchange Commission, dated Aug. 23, 1976, available at http://3197d6d14b5f19f2f440-5e13d29c4c016cf96cbbfd197c579b45.r81.cf1.rackcdn.com/collection/papers/1970/1976_0823_SommerHills.pdf.

4. If necessary, to formulate recommendations to the Commission for adjustments to Commission policies to better effectuate those objectives.[5]

Results from the Advisory Committee report, completed in November 1977, provided an early roadmap for NACD research and education, so that members might better understand corporate governance best practices.

Foreign Corrupt Practices Act (FCPA)

The Foreign Corrupt Practices Act, signed into law December 19, 1977, was also a major new development confronting directors as NACD was founded. The statute prohibits (1) payments of anything of value to foreign officials 'in order to assist [the payor] in obtaining or retaining business for or with, or directing business to, any person;' and (2) failing to keep records and books "which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer. When the FCPA is read as a whole, its core of criminality is seen to be bribery of a foreign official to induce him to perform an official duty in a corrupt manner."[6] The FCPA movement resulted from "the testimony during the Watergate Hearings which had disclosed that an offshore subsidiary of an American corporation was providing cash to its parent in New York City…. [and that] cash from the slush fund had been given directly to President Nixon's reelection campaign."[7]

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[5] *See* Sommer, *supra* note 3.

[6] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 et. seq., *See also* Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VIRGINIA LAW & BUSINESS REVIEW 145 (2011), a*vailable at* http://www.ssrn.com/abstract=1930190; U.S. Department of Justice, Criminal Division, Legislative History, *Foreign Corrupt Practices Act of 1977, available at* http://www.justice.gov/criminal/fraud/fcpa/history/, (last viewed July 7, 2013).

[7] Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, SECURITIES REGULATION LAW JOURNAL (Fall 2013), available at http://ssrn.com/abstract=2293382. (Providing recollections by Judge Stanley

As global commerce continued to expand at a fast pace, the FCPA emerged in 1978 as a new and complex challenge for directors of companies engaged in international sales or product or raw materials sourcing.

John Nash as NACD Founding Force

There would be no NACD without the dedicated hard work and entrepreneurial vision of John Nash. John brought a considerable understanding of financial markets and journalism experience to his role as president of NACD in the founding days.[8] His writing and organizational skills were instrumental in breathing life into an organization that had great promise but little else during the early years. John recognized the great need for corporate director education and the value to be gained by bringing together the promising community that had not yet become cohesive in any meaningful way.

John Nash proved to be an absolute dynamo in identifying and soliciting the active support of corporate governance opinion leaders in Washington, New York and throughout the country. John was particularly successful in recruiting the help of SEC Commissioners and former staff as resources during the developing securities law and regulatory expansion of the 1980s and 1990s. For example, John quickly developed strong relationships with present and past SEC Chairs and Commissioners such as: James J. Needham, Ray Garrett Jr., A.A. Sommer, Irving M. Pollack, Roderick M. Hills, Harold M. Williams, Roberta Karmel, Stephen J. Friedman, Barbara S. Thomas, John Shad, Bevis Longstreth, James C. Treadway, Aulana L. Peters, Joseph A. Grundfest, David S.

Sporkin, who was serving at the time the FCPA was passed as Director of the SEC's Division of Enforcement, in conversations of July 10 and 11, 2013 with Lawrence J. Trautman).

[8] National Association of Corporate Directors, *A Leader Ahead of His Time: NACD Founder John Nash,* NACD Directorship (June 28, 2013), *available at* http://www.nacdonline.org/Resources/Article.cfm?ItemNumber=7172. (last viewed July 7, 2013).

Ruder, Mary Shapiro, Richard C. Breeden, Arthur Levitt, Laura S. Unger, Harvey L. Pitt and Harvey J. Goldschmid.[9] The above list includes my best recollections of those making significant contributions before 1990. I'm sure there were other former SEC Chairmen or Commissioners who were instrumental to NACD's early and continued success. Because I have unfortunately, inadvertently, omitted some of them; for that I am truly sorry. Space limitations prohibit mention of the many active and former SEC staffers who were helpful.

John Nash's familiarity with the securities bar was augmented by his understanding of the importance of the accounting profession to effective corporate governance. Prominent early members of the accounting profession to play an influential role in the foundation of NACD's growth include J. Michael Cook and Wade Williams (Deloitte & Touche), along with Richard Hickok, John Thompson and Jules Zimmerman (now KPMG). I know that Dennis Beresford spoke before NACD audiences many years ago when he was chairman of the Financial Accounting Standards Board (FASB). Louis Braiotta, an accounting professor who coauthored an early book on audit committees with Al Sommer, wrote for the NACD's flagship publication, *Director's Monthly*, which had a regular accounting feature provided by Deloitte & Touche. The increased boardroom role for those having an accounting and auditing background correlates with the rise in recognition of the importance of the corporate audit function and eventually resulted in a mandated formalized audit committee.

[9] *See* U.S. Securities and Exchange Commission, *SEC Historical Summary of Chairmen and Commissioners, available at* *http://www.sec.gov/about/sechistoricalsummary.htm*, (last viewed July 6, 2013).

Trans-Union Decision

The 1985 decision in *Smith v. Van Gorkom*,[10] also known as the Trans Union case, has been described as "arguably … the most important corporate law decision of the 20th century…. [holding] that directors who make an uninformed decision are unprotected by the business judgment rule and, accordingly, face substantial personal liability exposure."[11] The Delaware Supreme Court held

> To summarize: we hold that the directors of Trans Union breached their fiduciary duty to their stockholders (1) by their failure to inform themselves of all information reasonably available to them and relevant to their decision to recommend the Pritzker merger; and (2) by their failure to disclose all material information such as a reasonable stockholder would consider important in deciding whether to approve the Prizker offer. We hold, therefore, that the Trial Court committed reversible error in applying the business judgment rule in favor of the director defendants in this case.[12]

Professor Stephen M. Bainbridge observes that "In so holding, the court breathed new life into corporation law's fiduciary duties…. Indeed, a *Van Gorkom*-based inquiry into whether the board was fully informed remains a key component of the Unocal [corporate takeover inquiry] methodology."[13] My best recollection is that widespread publication about the Van Gorkom decision, where directors were held liable for failures in their decision process, triggered a huge demand for director education.

[10] 488 A.2d 858 (Del. 1985).
[11] *See* Stephen M. Bainbridge, *Smith v. Van Gorkom*, UCLA School of Law, Law-Econ Research Paper No. 08-13(May 2008), *available at* http://ssrn.com/abstract=1130972, *citing* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).
[12] *Van Gorkom*, 488 A.2d at 893.
[13] *See* Bainbridge, *supra* note 11, *citing Paramount Communications Inc. v. QVC Network Inc.*,637 A.2d 34, 45 (Del. 1994) (noting that *Unocal* requires, *inter alia*, "a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision").

Focus on the Audit Committee

It now seems difficult to believe that the presence and stature of the formalized board audit committee has evolved so much over a relatively few years. It was only in 1977 that the New York Stock Exchange first required an independent audit committee, and in that era, the standard was a majority of members, not all members. As recently as thirty-something years ago, congruent with NACD's founding, the board audit committee was in its infancy.[14] Professor James D. Cox states, "Through most of the 1960s few companies had outside directors; the prevalence of outside directors spread with the corporate governance movement of the 1970s so that having a majority of a public corporation's board be independent became something of a norm by the 1990s."[15] During the 1980s, crisis brought regulation and a call for reforms. The PCAOB reports that "As a result of congressional hearings leading up to, and recommendations from, the National Commission on Fraudulent Financial Reporting ("Treadway Commission"), a new paragraph, now commonly referred to as the 'scope paragraph' was added to the auditor's report in the 1980s."[16]

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[14] Lawrence J. Trautman & James H. Hammond, *Role of the Audit Committee: Update and Implementation,* National Assn. of Corporate Directors, Monograph No. 13 (1980).

[15] James D. Cox, *Managing and Monitoring Conflicts of Interest: Empowering the Outside Directors With Independent Counsel,* 48 Vill. L. Rev. 1077 (2003).

[16] Concept Release On Possible Revisions to PCAOB Standards Related to Reports on Audited Financial Statements and Related Amendments to PCAOB Standards, Notice of Roundtable, PCAOB Release No. 2011-003 at Appendix A (June 21, 2011), *observing* 'The Treadway Commission was established in response to the congressional and public scrutiny of the accounting profession after significant business failures such as Drysdale Government Securities, Washington Public Power Supply System, Baldwin-United Corp, and E.S.M. Government Securities [SEC, 'The Treadway Commission Report: Two Years Later," News Release (January 26, 1989)]. From October 1985 to September 1987, the Treadway Commission studied the financial reporting system in the United States. The Treadway Commission's mission 'was to identify causal factors that can lead to fraudulent financial reporting and steps to reduce its incidence.' *Report of the National Commission on Fraudulent Financial Reporting* (Oct. 1987), p.1 ("Treadway Commission Report"); *See also* Joseph A. Grundfest, Remarks before the Sixteenth Annual Securities Regulation Institute, The University of California, San Diego, The

The importance of an independent audit committee cannot be overstated. Dennis Beresford, now a member of the NACD board, says "I believe [the external audit] is an integral part of the system that shareholders and our overall capital markets heavily rely on."[17] Moreover, "Much of our democratic system is built on checks and balances or 'trust but verify,' and the role of the external audit brings an independent point of view to financial reporting that helps make our public markets continue to be arguably the most credible in the world."[18]

> I think it is also important to note that independence, objectivity, and skepticism are qualities that audit committee members insist upon in Chief Financial Officers, Controllers, Chief Accounting Officers, Chief Audit Executives, and other senior finance leaders with whom they work directly. Obviously, these terms would not be applied in exactly the same way as for external auditors. A CFO, for example, receives compensation from the company and wouldn't meet an external auditor's definition of independence. However, the audit committee expects that the CFO's communications to them are independent of his/her personal interests in the company or responsibilities to the CEO, for example. Providing incomplete or incorrect information to the audit committee, or worse yet, withholding information, would be grounds for dismissal for a CFO.[19]

By 1980 there was a widespread realization that while accounting and financial statement presentation may constitute the language of business, it is the board's audit committee that serves as the front-line integrity gatekeeper to the company's financial

Treadway Commission Report: Two Years Later (Jan. 26, 1989), *available at* *http://www.sec.gov/news/speech/1989/012689grundfest.pdf*.

[17] Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?*, 11 DEPAUL BUSINESS & COMMERCIAL LAW JOURNAL 205, 209 n7(2013), *available at* http://www.ssrn.com/abstract=2137747, *citing* Letter from Dennis R. Beresford, the Ernst & Young executive professor of accounting at the J.M. Tull School of Accounting at the University of Georgia's Terry College of Business, to PCAOB Regarding Docket No. 37, Concept Release on "Auditor Independence and Audit Firm Rotation," 12 (Oct. 11, 2011), available at http://pcaobus.org/Rules/Rulemaking/Docket037/029_Dennis_R_Beresford.pdf., *See also Ronald C.* Anderson, Sattar Mansi, & David M. Reeb, *Board Characteristics, Accounting Report Integrity, and the Cost of Debt* (November 15, 2003). Journal of Accounting & Economics (JAE), Vol. 37, No. 3, 2004. *Available at* http://ssrn.com/abstract=491883.

[18] *See* Beresford, at *Id.*

[19] *Id.*

statements. Accordingly, NACD took up the challenge to educate corporate boards about audit committee dynamics and best practices.

Director Education

Even during the early years, NACD was a significant source of quality education and qualified directors to companies striving to achieve excellence in corporate governance. Like other *professional associations*, NACD "increasingly provides an essential forum for 'the formulation and reproduction of shared meanings and understandings.'"[20] The academic literature describes the role, such as NACD's, in fostering a *community of practice* as "groups of people who share a concern, set of problems or a passion about a topic, and who deepen their knowledge and expertise in this area by interacting on an ongoing basis."[21]

It's difficult now to recall how different life was during the pre-Internet age. Communication was achieved primarily thru print channels and face-to-face educational sessions proved uniquely important, as they remain today. Because of my prior experience writing for industry publications such as *Mortgage Banking,* and *the American Banker*, newspapers such as *The Baltimore Sun, Washington Post, Los Angeles Times*, and others, I was asked by John Nash to contribute to NACD's early publications efforts.[22] It was during this period of time that I gained an appreciation and profound

[20] James Faulconbridge, *Exploring the Role of Professional Associations in Collective Learning in London and New York's Advertising and Law Professional Service Firm Clusters* 6 (July 3, 2008), available at http://ssrn.com/abstract=1155047, *citing* R. Greenwood, R. Suddaby & CR Hinings, *Theorizing Change: The Role of Professional Associations in the Transformation of Institutional Fields,* 45 ACADEMY OF MANAGEMENT JOURNAL 55, 61 (2002).
[21] Faulconbridge, *Id.*, *citing* E. Wenger, R. McDermott & Wm Snyder, *Cultivating Communities of Practice,* Harvard Business School Press 4 (2002).
[22] *See* Lawrence J. Trautman, *Financing Alternatives For Small And Medium-sized Companies,* National Association of Corporate Directors, Washington, DC, Monograph #15, Dec. 1981;

respect for the keen intellect of Alexandra Lajoux, then serving as the editor of *Director's Monthly*, whose exceptional language and editing skills could make even my writing look good.

Early NACD educational efforts also included a series of one-day seminars held around the country to teach the fledging emerging discipline of corporate governance. I remember flying to many cities with John Nash and Ronald Zall, cofounder of NACD'S educational programs, as part of their traveling educational roadshow to speak about various topics of interest. Above all else, the profession of corporate governance is legally intensive. Accordingly, many of the early publication materials created by the NACD utilized the skills of gifted prominent corporate counsel such as: Alan Berkeley, John Coffee, Ralph Farrara, Victor Futter, Bayless Manning, Ira Milstein, Bob Pozen, A.A. Sommer, Bryan Smith, Ronald Zall, and many others.

Because I was also living in Washington, D.C., and had taught finance and accounting at several nearby universities, John and I had many discussions over lunch debating how NACD could grow to better fill the need for increased corporate governance education. It is easy to underestimate how difficult a task it was to gain sufficient critical mass necessary for NACD to even survive, let alone thrive. John Nash is an entrepreneur of the first order and found the energy and resources necessary to make it happen. I continue to have many fond memories of those days and have great respect for John's successful struggle to keep NACD afloat. He has given us all something of great lasting value.

Lawrence J. Trautman & James Hammond, *Role Of The Audit Committee: Update and Implementation*, National Association of Corporate Directors, Washington, DC, Monograph #13, Sept. 1980; Lawrence J. Trautman, *Focus On The Future: The Strategic Planning Committee*, National Association of Corporate Directors, Washington, 4 *Director's Monthly*, Sept. 1980.

Mentoring

Mentoring has been referred to as assistance by "an experienced, wise, and trusted guide or counselor who nurtured the protégé to grow in some substantial way."[23] As I have set these recollections to paper, it becomes increasingly apparent that one of the major benefits provided by my long-standing NACD involvement has been the informal role of mentoring that takes place, both in the boardroom and in the "on-boarding" process of bringing the new director up-to-speed with respect to company governance issues and potential focus points. Scholars Hamilton and Brabbit observe that "mentors and protégés live out a critical social compact among the generations. The more experienced seek to help the generations who follow to build on what the earlier generations have done; the mentor seeks to help the next generation to do better than the mentor's own generation has done."[24] Mentoring is also a highly valuable strategy in efforts to increase boardroom diversity.[25]

[23] Neil W. Hamilton & Lisa M. Brabbit, *Fostering Professionalism Through Mentoring. Journal of Legal Education*, 4 (2007); U of St. Thomas Legal Studies Research Paper No. 06-17, available at http://ssrn.com/abstract=899405.

[24] *Id.* (teaching that "Recent scholarship on mentoring observes that mentor relationships also offer substantial intrinsic and extrinsic benefits to mentors. The mentor receives intrinsic benefits in terms of the personal satisfaction of sharing one's experience to help another person. The mentor receives extrinsic benefits in terms of an increase in the mentor's base of loyal support and power, social recognition for skills as a good teacher and adviser, gratitude and confirmation from the protégé, and an increase in mentor learning. Raymond A. Noe, David B. Greenberger, and Sheng Wang, Mentoring: What We Know and Where We Might Go, *in* 21 Research in Personnel and Human Resources Management, 129, 151 (2002); Connie R. Wanberg, Elizabeth T. Welch, and Sarah A. Hezlett, Mentoring Research: A Review and Dynamic Process Model, 22 Research in Pers. & Human Res. Mgmt. 39, 52-53 (2003); Sharon K. Gibson, Being Mentored: The Experience of Women Faculty, 30 J. Career Dev. 173 (2004); Sarah A. Hezlett and Sharon K. Gibson, Mentoring and Human Resources Development: Where We Are and Where We Need to Go, 7 Advances in Developing Hum. Resources 446, 453, 457-58 (2005))."

[25] Lawrence J. Trautman, *Boardroom Diversity: Why it Matters* (2012), available at http://ssrn.com/abstract=2047750; Michael McDonald & James Westphal, *Not Let in on the Secret to Success: How Low Levels of Mentoring from Incumbent Directors Negatively Affect Women and Racial Minority First-time Directors' Appointments to Additional Corporate Boards*, Academy of Management Journal (forthcoming 2013).

I have seen this mentoring taking place by NACD members in chapters accross the country as more experienced corporate directors share their experiences and insight with younger and often less experienced directors. Vivid recent examples of this *servant-leadership mentoring* includes Jack Lowe, the 2012 recipient of NACD's *Lifetime Achievement Award* who leads a life of servant leadership on a daily basis, and prominent director Bud Sorenson (Whole Foods and others).

II. CHAPTER DEVELOPMENT

It seems to me that the NACD's primary strength is found in its local chapter system.[26] These regional chapters started to organize during the early 1980s. It was the many hours of volunteered effort and strong leadership provided by chapter boards of directors that resulted in those early chapters becoming viable.

I remain honored to have been selected by my peers to serve as founding-president of the New York City chapter and what was then called the Metropolitan Washington, DC / Baltimore Chapter, now known as the Capital Area chapter. Many years later, these chapters have grown to be among the nation's largest. Other chapter presidents during the early years included: Jerry Hildebrandt (Philadelphia), Dann Angeloff (Southern California), and John Stout (Minneapolis). Jerry passed away untimely at age 60 in 1989; Dann and John remain dynamically involved with NACD to this day.

[26] National Association of Corporate Directors, *NACD Chapters- Enhancing Corporate Governance in Your Region, available at* *http://www.nacdonline.org/Connections/NACDchapters.cfm?ItemNumber=702&navItemNumber=579*. (last viewed July 7, 2013).

Chapters Matter

In a phrase, chapters matter. Directors confronted with corporate governance challenges often face complex and difficult tasks, requiring skilled judgment. Monthly NACD chapter meetings provide a convenient, informal opportunity for directors to develop and strengthen relationships while gaining the perspectives of other directors. Developing and nurturing these peer relationships becomes particularly important during times of crisis. For example, when the FCPA came into being during the late 1970s, NACD gatherings provided a forum for informal discussions by directors who might not otherwise have an opportunity to learn best practices from each other's experiences.

Over the years, I've often been asked for an example to illustrate the value of the NACD peer-to-peer community. One example is that of the "audit committee in crisis." The universe of people who have actually lived through serving as audit committee chair and faced the kind of governance nightmare in which you may find yourself is, thankfully, very small. However, NACD relationships, for me, have provided an ability on several occasions to quickly access this reservoir of real life experience.

My hypothetical goes like this: imagine that you serve as audit committee chair. You get an emergency phone call at 10:00 p.m. Saturday evening informing you of the discovery of a significant fraud within your company. Let's say the fraud is of the magnitude that threatens thousands of jobs and the very survival of your major domestic enterprise. Is management complicit? What do we know, what is not known, and what is the best flow chart to navigate this mess? When such a crisis develops, you, your audit committee members, and the entire board of directors, will be calling on the skillful advice of experts for legal and other relevant advice. Having the ability to gain the perspective of another audit committee chair you know, and with whom you have developed an informal relationship through NACD may provide you with insight about what was learned by virtue of their crisis--and what, upon reflection, they might have done differently when crisis hit. Sometimes, this helpful advice comes in the form of guidance as to what professionals should be considered or avoided.

While I'm glad to say that I haven't yet had to experience that scenario, I'm no stranger to crisis. Many years ago I was elected as chair of the committee of independent directors of a public company during a buyout attempt from its chairman and CEO. This is the kind of situation that causes such committee members to spend weeks and months entertaining offers, weighing their attractiveness, obtaining valuation advice from investment banker(s), and building a legal record reflecting the committee's diligence in representing the shareholder's best interest during the process. In this instance, it translated into many meetings that lasted until midnight at the Wall Street offices of the law firm of Winthrop Stimpson Putnam & Roberts. My ability to access and talk with other, more experienced, directors I met through NACD activities was of great value to me as I worked my way through this process.

A recent example of the value of peer-to-peer NACD relationships can be found in the impressive efforts of Dallas chapter director Rich Howell (trustee of Luther King Capital Management and director of Red Robin Gourmet Burgers) as he organized and presided over a monthly Dallas peer-to-peer director-only breakfast. With no preliminary agenda, this informal setting gives directors the ability to discuss whatever topic emerges over breakfast. Regardless of discussion topic, the take-away is that each participant leaves having learned from others and having a stronger relationship with each other participant.

So in light of the importance of chapters and the peer-to-peer education they enable, here, for history buffs and others who may be interested, are a few recollections on the formation of the metropolitan Washington/Baltimore and New York NACD chapters.

Washington

During the early years, it took time and considerable effort on the part of many for local NACD chapters to gain traction. Such was the case for the Capital Area chapter. I can remember chapter meetings being held at various locations (Northern Virginia, Maryland, and the District) as we sought to "find a home" conductive to meeting the needs of our membership. It seems that a club or hotel located next to the Pullman Mansion at 1125 16th Street, NW was the site for some of our first meetings as well as the Hotel Washington, adjacent to The White House and now known as the Hotel W.

As mentioned, corporate governance is legally intensive. During the early years in particular, we benefited from close proximity to the SEC, DOJ, Congress, and various other agencies and representatives of policy making and influencing bodies. At the risk of overlooking many who gave generously of their time and knowledge, I can remember the particular contributions of: Alan Berkeley (now K&LGates), John H.Dalton, economist Michael K. Evans, Ralph C. Ferrara (now Proskauer), Phil Grub, James H. Hammond, Thomas R. Harter, Ken Knott, Gary Lynch (Chief of SEC's Enforcement Division from 1985 to 1989; now at Bank of America), John McCabe, Thomas McKeon, Robert C. Pozen (now Harvard), Stanley Foster Reed, John Sanders, Ernest L. Solar, Bonnie Wachtel and Wendy Wachtel. In particular, during my presidency the Washington chapter benefited from the guidance of George Michaely, former chief counsel, division of corporation finance, U.S. Securities and Exchange Commission, for his support and guidance over many years. Several members of the NACD staff were particularly helpful to the success of the Capital Area chapter, in particular, Kenneth Knott. It's appropriate to express a special thanks to Ken Knott for his hard work during the early NACD experience. Several years later Ellen Cardwell (mid-1980s) made significant staff contributions.

New York

Meetings in New York City began at Tavern on the Green in Central Park. As I recall, former SEC Commissioner Bevis Longstreth (then at Debevoise & Plimpton) was one of our first program speakers. We also met at the World Trade Center to see if a downtown, Wall Street venue would prove attractive to our membership. Soon thereafter and for several years, NACD's monthly chapter meetings were held in New York at the beautiful University Club located at One West 54th Street and the corner of 5th Avenue. It was a great personal honor to be elected as founding president during the mid-1980s of NACD's New York Chapter and to serve in that capacity for several years and later as Chairman Emeritus. Serving as a chapter president is much more work than anyone wants to believe they've gotten themselves into. At the time, in addition to serving as a corporate director, my principal activity was working as an investment banker at the Wall Street firm of Donaldson Lufkin & Jenrette (DLJ). The New York chapter also benefited from the hard work and resourcefulness of several on my DLJ staff, including in particular, Debra Hazel (the beginning) and Dianne Seibert (later years). This is probably an appropriate place for me to express my thanks to Richard Jenrette, John Chalsty and John Castle, collectively, the leadership of the investment banking firm of Donaldson, Lufkin & Jenrette for their confidence shown by allowing me, at an early age, to put the firm's capital at risk by serving as a director of a number of public companies. This unusual graciousness was seldom allowed at a major investment banking firm then, as now, due to the perception of legal risk resulting from such a firm being perceived as "deep pockets." For their confidence and kind permission, I remain grateful for being exposed to many unusual corporate governance situations and experiences.

The New York NACD chapter was blessed with an abundance of talent. Following me as chapter president were, Harold R. Logan, Sr. (Vice Chairman at the time of industrial giant W.R. Grace and board member of numerous entities, including IC Industries); Richard Hickok (retired Chairman of what is now KPMG and corporate director of numerous entities) followed; and I believe Jules Zimmerman (former Avon CFO and seasoned director of many issuers) was next. If I remember correctly, prominent attorney Victor Futter, professor of law and previously general counsel & corporate secretary at Allied Corporation (now Honeywell) followed next. Victor, an excellent writer, contributed a significant amount of valuable knowledge to the body of corporate governance literature.

Our current NACD community owes a particular thanks to those in New York who donated so freely of their time and energies during NACD's infancy to build better corporate governance practices and foster greater knowledge. Monthly chapter programming benefited from having national corporate governance thought leaders in close proximity. It seems that some of our early programs included discussions on the following topics: (1) audit--- Richard Hickok and Jules Zimmerman; (2) compensation--- Pearl Meyer; (3) corporate governance--- John Coffee, Victor Futter, Harvey Goldschmid, Robert W. Lear, Bevis Longstreth, Martin Lowy, Siri Marshall; and (4) special topics--- Art Cashin, Rosina Dixon, Thomas J. McKeon, Bob Peloquin, and Pete Scotese. With my sincere apologies for those many contributors who I am overlooking, the following other individuals remain very memorable in our early New York chapter growth: Burt Alimansky, Archie Allbright, James Alterbaum, Robert Alvine, Tom Armstrong, Gene Beard, Steven Becker, Timothy W. Bell, Lillian Berkman, Gene Brown, David Browning, Bill Chisholm, D. David Cohen, Frank D'Elia, Bob Detmer, Helen Galland, Jack Granger, Andy Heine, Mickey Hidayatallah, John Jurgensen, James Kelly, Brewster Kopp, Herbert W. Marache Jr., Steve Maslow, Pearl Meyer, Shane O'Neil, Chip Parks, Merz Peters, Bill Smart, Steven H. Rice, E.W. Richard Templeton, John Thompson, Terry P. Thompson, Jim Tomai, John Tomlinson, Edie Weiner, and Rolland Weiser. At about 1990 or so, my family and board activities took me to Dallas, Texas, and I lost track of New York NACD particulars.

III. SKILLED DIRECTORS NEEDED

Effective corporate governance is critical to the productive operation of the global economy and preservation of our way of life. Excellent governance execution is also required to achieve economic growth and robust job creation in any country. In the United States, the premier director membership organization is the National Association of Corporate Directors (NACD). Now over 36 years old, NACD plays a major role in fostering excellence in corporate governance in the United States and beyond.

Desired Skills and Personal Qualities

What human qualities are desired for every board member? Each director candidate should possess core personal attributes including: high standards of ethical behavior; availability; outstanding achievement in the individual's personal and professional life; possession of strong interpersonal and communication skills; independence; and soundness of judgment. Under current U.S. standards, corporate boards usually consist of the following minimal independent standing committees: (1) Audit; (2) Compensation; (3) Governance and Nominating. Some boards also opt to have an executive committee, but this practice is declining, with fewer than one in four boards having such committees. NACD, since inception, has endeavored to provide useful research and knowledge regarding developments and best practices for these and other committees of the board.[27]

My Start-Ups

While my board experience includes serving as a director of several public companies, NACD has also proven to be a great source of directors over the years for my involvement with early-stage companies. Experienced senior executive talent, often in the form of independent outside board members, can prove to be a profoundly valuable intangible asset of any start-up enterprise. A lifetime of experience teaches that entrepreneurs may enhance the likelihood of ultimate enterprise success by recruiting the assistance of experienced executive talent. Corporate directors provide a useful

[27] *See generally* Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLORIDA STATE UNIVERSITY BUSINESS REVIEW 75 (2012), *available at* http://www.ssrn.com/abstract=1998489.

mechanism in which to tap this asset and leverage many years of experience and personal relationships.

What follows is just one of several of my "start-up" stories where NACD proved very helpful. I've told the following story in a publication elsewhere;[28] it involves several individuals already mentioned who happened also to have served as president of the NACD New York chapter.

My first involvement in the oil and gas industry came in the mid-1980s when all financing had dried up for exploration and production. At the time, I was working primarily as an investment banker in New York City, and had served as a corporate director on a number of boards. On an otherwise normal morning, I remember a colleague and good friend walked into my office and said something like "between birth, death, and divorce there is an unmet need for liquidity in the oil patch;" he wanted me to help him start a Texas-based oil and gas exploration company from scratch, and asked if I would join him as a co-founder, serve as a director, and recruit an experienced board.[29] It seemed to me that this was likely to be a tremendous challenge and wonderful fun, so we immediately got started.

Along with Harold R. Logan, Sr. (former Vice Chairman of natural resources company W.R. Grace and retired CEO of Grace Energy) and Dick Hickok (former Chairman of Main Hurdman, now KPMG), with whom I had served on other boards, we became founding directors of a start-up oil and gas company, now traded on the NYSE. Prominent securities attorney George Michaely (former Chief Counsel at the Division of Corporation Finance at the SEC) was handling our securities work; and these reputations

[28] Lawrence J. Trautman, *Start-Up Venture Considerations: A Perspective on Structuring and Financing the Entrepreneur* (forthcoming).
[29] Author's conversation with Timothy W. Bell, approximately January 15, 1987.

and combination of many years experience in the business community gave us a competitive advantage over less experienced rivals when competing for acquisitions. Accordingly, beginning in 1985 with no petroleum assets and a negative net worth (of -$32,000) , we proceeded to acquire producing petroleum properties by exchanging common stock in our fledgling micro-cap company, along with cash from banks located outside the oil patch, to build our oil and gas company from scratch. In retrospect, it seems this financing schematic was only possible because of the perceived corporate governance strength of our board and substantial reputations and relationships developed during many years by Messrs. Logan, Michaely and Hickok. With considerable hard work, success followed and twenty-something years later the start-up has created many jobs and grown to a peak market value during recent years approximating $2 billion.

Independent Directors: Valuable Strategic Asset

The skills represented by directors with years of management and corporate governance experience can provide real economic value to any start-up or early stage enterprise. This is the functional equivalent to governance and relationship leverage provided by institutional venture investors who sit on the boards of their portfolio companies. Many entrepreneurs overlook the value of these added relationships brought by venture capitalists, seasoned directors or advisory board members. None of us live long enough or have broad enough span of career experience and industry contacts that we cannot benefit from the additional insight and relationships brought by others who have excelled in their chosen fields. Thus, the intelligent leveraging of an entrepreneur's mission-critical enterprise relationships may become the difference between ultimate success and failure. Another way to look at every seed-stage enterprise is that it's a "race against the clock." If the core business proposition you offer is truly compelling, then, it's only a matter of time before someone else devotes the resources to take your market share or creates a technologically superior product. Therefore, time-to-market is critical and the help from others to get you successfully to market is paramount.

IV. CONCLUSION

Effective corporate governance is critical to the productive operation of the global economy and preservation of our way of life. Excellent governance execution is also required to achieve U.S. economic growth and robust job creation. Now over 36 years old, the NACD plays a major role in fostering excellence in corporate governance.

V. ABOUT THE AUTHOR

LAWRENCE J. TRAUTMAN

LARRY TRAUTMAN has more than thirty years experience as a professional corporate director, and is an executive with one of the world's largest financial institutions. Mr. Trautman held numerous corporate directorships in publicly traded and privately-owned corporations engaged in such diverse industries as dairy processing, financial services, franchising and fast food (Custom Creamery, Orange Julius and Crescott, Inc.-- all NASDAQ), mortgage banking, publishing, software and information technology, oil & gas (Comstock Resources, Inc., NYSE), and others. He served as chairman of the committee of independent directors in the sale of Orange Julius, Inc. to International Dairy Queen. As Senior Vice President of the New York-based investment banking firm Donaldson, Lufkin & Jenrette, he had a diverse corporate finance practice, having sole client responsibility for the origination, negotiation and processing of $Hundreds of Millions of merger and acquisition transactions and public equity offerings for both traded and going-public situations. His other transaction experience includes: venture capital, real estate, public finance, and private debt and equity placement.

Mr. Trautman provided testimony (economic analysis and policy strategy as an investment banker) before hearings of the United States Congress. He taught accounting and finance at several colleges and universities. He is author of many articles on corporate governance, investment banking and corporate finance-related topics for numerous industry trade publications, and newspapers such as The American Banker, The Baltimore Sun and The Washington Post. He is author of *Trautman's Guide to Mortgage Banking and Loan Servicing Portfolio Acquisitions*, and has frequently been quoted in the financial press. Some of his recent scholarly writing may be viewed at http://ssrn.com/author=1603406. Mr. Trautman previously served as Chairman and President of the Dallas Internet Society. For the Mortgage Bankers Association of America, he served as Chairman of the Industry Corporate Planning Subcommittee, member of the President's Economic Task Force; and has been a frequent speaker at many conferences.

At the National Association of Corporate Directors ("NACD"), he served as: President of the New York Chapter (several years) and subsequently as Chairman of the Executive Committee; Past-president of the Metropolitan Washington/Baltimore chapter; director and program chair for the Dallas chapter (several years); and has contributed numerous articles and monographs published by the NACD; and has appeared as a frequent speaker.

Mr. Trautman earned a BA from The American University (international relations); MBA (finance & investments) from The George Washington University; and JD from the Oklahoma City University School of Law. He may be contacted at Lawrence.J.Trautman@gmail.com.

