

Strengthening & Protecting Your Board

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Founding Partner of
Nonprofit Practice

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- Nonprofit Resource Hub
- Board Development Conference, November 15, 2022
- **Certilman Balin Adler & Hyman, LLP**
- Nonprofit/Tax Exempt/Religious Organizations Practice Group
- **David Goldstein, Esq.**
- (516) 296-7811; dgoldstein@certilmanbalin.com

NONPROFIT GOVERNANCE: IT'S NOT ROCKET SCIENCE!

Not-for-Profit Corporation Law:

- **Best efforts under difficult circumstances is not the compliance standard**
- **Law**
- **Mandatory requirements & procedures**
- **Bright lines**
- **Rigid**
- **Inflexible (cemetery pandemic example)**
- **Unforgiving**

Some Governance Touchstones:

- **Certificate of Incorporation**
- **Bylaws**
- **Conflict of Interest Policy** (related party transactions)
- **Annual Meeting**
- **Committees** (Audit Committee)
- **File Cabinet Syndrome**
- **Overkill**
- **IRS Form 990**

UNDERSTANDING FIDUCIARY DUTIES OF BOARD MEMBERS

FIDUCIARY DUTIES OF NONPROFIT DIRECTORS

Fundamental Precepts:

1-Directors of Nonprofits have Legal Duties (Fiduciary Duties).

2-There can be Personal Liability to Directors for Breaching these Legal Duties.

3 Fundamental Legal Duties of a Nonprofit Director Under New York Law:

- **Duty of Care**
- **Duty of Loyalty**
- **Duty of Obedience**

Duty of Care:

❖ A director must discharge the duties of his/her position in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

- NPCL § 717(a)

- Oversight function.

- Requires familiarity with the organization's finances and activities and regular participation in its governance.

- ✓ **Healing Arts Initiative lawsuit (April 2016)**

Duty of Care: A Roadmap:

- ✓ **Right From The Start: Responsibilities of Directors of Not-for-Profit Corporations (Charities Bureau, 2015)**
- ✓ **The Committee to Save Adelphi, et al. v. Diamandopoulos, et al. (Board of Regents, 1997)**
- ✓ **Unsecured Creditor Trustee of Dowling College v. 13 individuals being sued in their capacity as board members (trustees) of Dowling College (and also as CFO)**
- ✓ **Internal Controls**
 - ❑ **Internal Controls And Financial Accountability For Not-For-Profit Boards (Charities Bureau, 2015)**
- ✓ **Policies & Procedures**
- ✓ **Critical Role of Audit Oversight (Independence Requirement)**
 - ❑ **Audit Committee Requirements And Responsibilities Under New York's Not-For-Profit Corporation Law As Amended Through 2017 (Charities Bureau, 2018)**

Duty of Loyalty:

- ❖ A director must act in the interest of the organization.
 - Requires undivided allegiance to the organization's mission when using the power of his/her position, or information concerning the organization or its property.
 - Conflicts of interest; related party transactions.

Duty of Obedience:

- ❖ Least understood and most often neglected of the 3 primary legal duties
- ❖ Why? The other 2 primary legal duties exist in the for-profit world, but the Duty of Obedience is strictly a not-for-profit law concept

What is the Duty of Obedience?

- ❖ to ensure that the organization complies with applicable laws and regulations and its internal governance documents and policies
 - Compliance with applicable laws and regulations is even more difficult than it sounds
 - Multiple layers of laws and regulations

Duty of Obedience - Compliance with

Laws and Regulations :

- **Not-for-Profit Corporation Law**
- **Laws & Regulations – additional layers**

Duty of Obedience - Compliance with Internal Governance Documents and Policies:

- Certificate of Incorporation
- Bylaws
- Conflict of Interest Policy
- Investment Policy & more . . .

Traps for the Unwary

Duty of Obedience

- Compliance with Certificate of Incorporation
- Compliance with Bylaws
- Compliance with Not-for-Profit Corporation Law

GOVERNANCE: IT'S NOT ROCKET SCIENCE!

- ✓ Process, Process, Process
- ✓ Procedures
- ✓ Mandatory Requirements
- ✓ Board Education
- ✓ Awareness – Even Under Extraordinary Circumstances
- ✓ Discipline & Commitment to Compliance



asymonette1@gmail.com

(917) 991-7923

www.linkedin.com/in/asymonette

ALVAREZ SYMONETTE

BOARD EXPERIENCE:

- [North Star Fund - Foundation](#) - Finance Committee (2012)
- [South Bronx Community Charter HS](#) - Board Chair (2015)
- [Long Island City Partnership - Econ. Dev.](#) - Treasurer (2018)
- [Mission Society of NY City - Anti-Poverty](#) - HR Comm (2020)
- [Notre Dame HS-West Haven - Education](#) - Mission Effectiveness Comm (2020)

HONORS AND RECOGNITION:

- [2022 Selected to EBONY Magazine POWER 100](#)
- [2021 Fellowship from Nasdaq-funded Herndon Directors Institute](#) in Corporate Governance / Board Leadership
- [2019 Official Appointment from NY Governor & NYC Mayor](#)
 - AMAZON HQ2 Community Advisory Committee
- [2018 Notre Dame High School Knights of Honor Award](#)
 - Highest honor bestowed on distinguished alumni
- [2017 Lauded as Emerging Leader: US Small Business Association](#)

EDUCATION:

- University of Pennsylvania
- Harvard Graduate School of Education
- The London School of Economics and Political Science (LSE)

1. Establish The Environmental Context For Nonprofits To Be Sustain (GUIDING FRAMEWORK)

- **Resource Dependency Theory** highlights organizational constraints based on interdependencies to external organizations (government, funders) and the role **uncertainty** can play on that effect behavior (1970s-80s); organization with resources exert influence and power over those without ¹
- **Resource-Based View Strategies** help organizations gain a competitive advantage to support sustainability by looking at a company's internal resource pool (tangible /intangible assets) ²
 - **VRIN Framework** resources must be "Valuable, Rare, Inimitable and Non-Substitutable" to sustain competitive advantage (1991) ²
 - **VRIO Framework** improved VRIN Framework by adding the following question: "Is a company organized to exploit these resources?" (1995) ^{3, 4}

Agency Theory

Principals, or owners, delegate control to executive managers who act as their agents. Managers are expected to act in ways that further the interests of the owners or shareholders.

EXAMPLES: Policy formation, strategic planning, program monitoring, financial planning and control, resource procurement, board development, and dispute resolution.

Institutional Theory

To be deemed legitimate, organizations embrace norms, values, beliefs, and expectations that conform to societal mores (coercive, professional, and normative pressures).

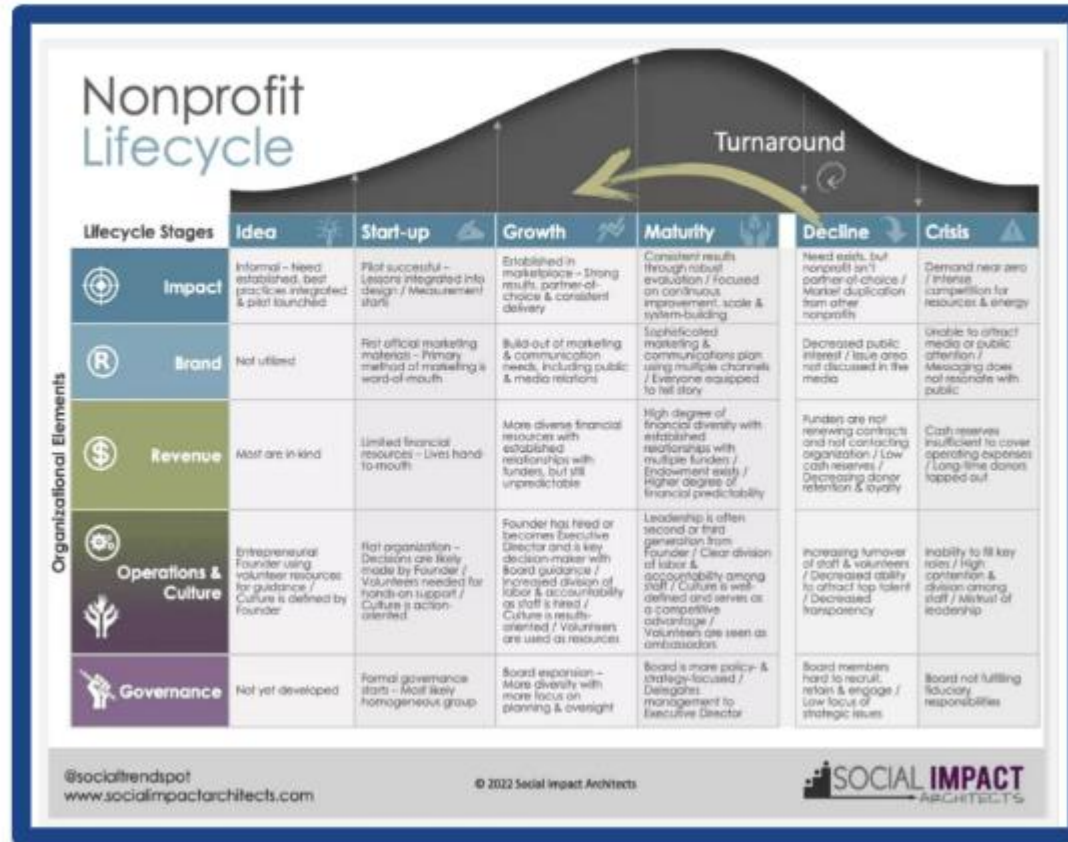
EXAMPLES: Attend meetings; adhere to laws; create committees, file required documents; ensure OSHA compliance adhere to bylaws; sound financial management

1. Pfeffer, J. and G. R. Salancik (1978). The External Control of Organizations: A Resource Dependence Perspective
 2. Barney, J. B. (1991). Firm Resources and Sustained Competitive Advantage. Journal of Management, Vol. 17, pp.99-120.
 3. Barney, J. B. (1995). Looking Inside for Competitive Advantage. Academy of Management Executive, Vol. 9, Issue 4, pp. 49-61
 4. Rothaermel, F. T. (2012). Strat.Mgmt.: Concepts and Cases. McGraw-Hill/Irwin, p. 5

2. Leverage Your Board's Expertise, Knowledge Base and Resources as You Consider Other Theories



3. Understand The Lifecycle of Your Organization and Board – Not Necessarily In Sync



4. Ensure Board Members Understand The Organization's Core Building Blocks and Next Steps

- Revisit the Organization's **Vision** During Annual Retreats
- Write the **Mission** on Your Board Meeting Agenda
- Have Board Members Participate in the Annual **Goal** Setting and Review Process
 - Ensure goals can be achieved with available resources
 - Analyze and observe program structure to ensure capacity
- Ensure organization has an impact measurement strategy to test accuracy of its **Theory of Change**
- *Take **Every Opportunity** To Teach, Learn, Reinforce and Affirm These Core Organizational Building Blocks*

Each step builds on the last

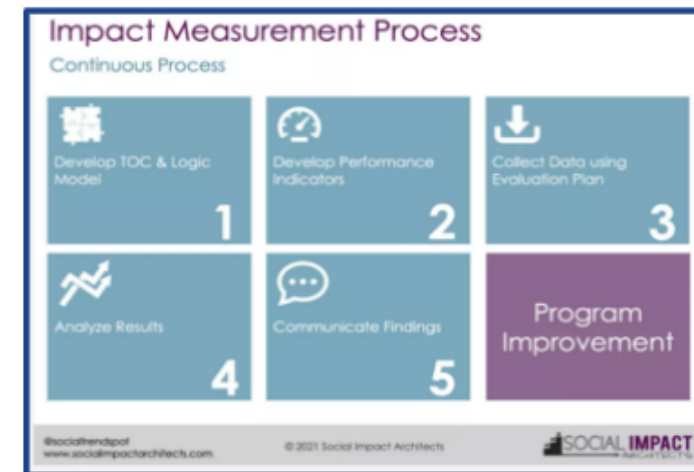
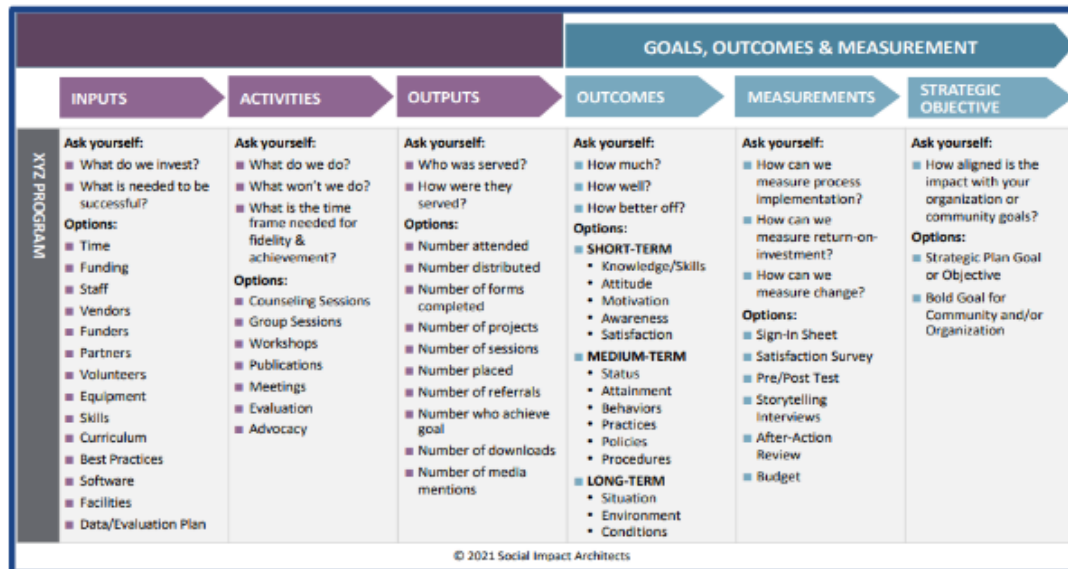
You might have noticed, but each step is designed to inform the next. Skipping steps might lead to inconsistencies in the impact measurement strategy you are designing.



5. Ensure Mission, Goals, and Desired Impact Are Understood. Share Org's Plans and Results.

THEORY OF CHANGE	LOGIC MODEL
Hypothesis defining the <u>expected impact</u> for the org, available resources and specific efforts to <u>achieve desired change</u>	Steps required to organize all the appropriate resources and activities to produce intended outputs and outcomes

EVALUATION PLAN
To understand the impact take into account factors like data validity, reliability, practicality, authenticity, transparency, fairness and equity.



Revisit Organizational Design and Inquiry Processes As Needed.

6. Find The Right People For Your Board. Embrace Diversity. Focus on Technology.



First Who, Then What—get the right people on the bus—is a concept developed in the book *Good to Great*. Those who build great organizations make sure they have the right people on the bus and the right people in the key seats before they figure out where to drive the bus. They always think first about who and then about what. When facing chaos and uncertainty, and you cannot possibly predict what's coming around the corner, your best "strategy" is to have a busload of people who can adapt to and perform brilliantly no matter what comes next. Great vision without great people is irrelevant.

Retrofit your board to reflect the environmental dependencies and needs

- Size and Composition
- Age
- Gender
- Technology
- Prior Experience in Area of Need
- Resource Connectivity
- **BANDWIDTH* AND INTEREST**

Qualifications and Attributes	David	Ernie	Alex	Khan	Paul	Jerro	Jamie	Laur	David	Herb
Accounting/Auditing			•	•			•		•	
Business Operations & Strategy	•	•	•	•	•	•	•	•	•	•
Capital Management & Investment Markets										
Corporate Finance	•	•	•	•	•	•	•	•	•	•
Corporate Governance Leadership	•		•	•	•	•	•	•	•	•
Financial Expertise/Acumen	•		•	•	•	•	•	•	•	•
Independence		•	•	•	•	•	•	•	•	•
Industry Experience	•	•		•	•		•		•	•
International	•	•	•						•	•
Other Recent Public Board Experience			•					•	•	•
Public Company Executive Experience	•	•	•	•		•			•	•
Real Estate	•							•	•	•
Regulatory/Risk Management	•	•	•		•			•	•	
Board Diversity										
Director Since	1992	2016	2008	2021	2020	1997	2020	2012	2009	2011
Age (Years)	75	55	66	58	59	83	62	84	70	87
Gender (Male/Female)	M	F	M	F	M	M	F	M	M	M
White	•	•	•		•	•	•	•	•	•
Asian				•						

*ISS policy is that a CEO should not serve on more than three boards (including his or her own board), while other directors (including non-CEO executives) can sit on up to five boards

7. Respect Board Time: Be Realistic About When “Real Work” Takes Place. Avoid Common Pitfalls.

Serving on a board requires significant time and attention on the part of its directors. Certain roles (committee chair, board chair, or lead director) may carry additional time commitment, such as:

- **Meeting Presentation** → Establishing Protocols To Avoid Boardroom Bias or Focus The Discussion
- Agenda Building / Review
- Committee Meetings
- Executive sessions
- Meeting Minutes Review
- Confidential Discussions
- **Site Visits**
- Accessing management
- Accessing information
- Use of technology

Common boardroom biases

We have identified four dynamics that commonly affect the boardroom: deference to authority, groupthink, a preference for the status quo, and confirmation bias. We offer warning signs to spot these issues and tools to address them.



Authority bias



Groupthink



Status quo bias



Confirmation bias

Answer Key: Avoiding Boardroom Biases

Tips to minimize groupthink

- Leverage the board's assessment process. Seek input during individual interviews or questionnaires, when directors may feel more open, on whether dissent is discouraged. If particular directors are a problem, board leadership should have the difficult conversation about how to change the dynamic.
- Bring in outside advisors to share a new or dissenting view on issues, and shake up discussions.
- Discourage side conversations between directors outside of meetings, as they relate to the business. When business matters are discussed, bring that conversation back to the boardroom to seek input from the whole board.
- On controversial issues, solicit views from each director.
- Recruit directors who bring a true diversity of viewpoints to the boardroom.
- Push management for the materials directors need, when they need them. Ensure the materials are highlighting key issues and discussion points.
- When possible, conduct meetings in person or over video conference, not telephone, to maximize director focus on the issue at hand.
- Consider whether the current board size is optimal. With too many members, directors may be more likely to give in to groupthink.

Tips to minimize status quo bias

- Incorporate "If you were a competitor..." activity into strategy development sessions, which includes answering the following three questions: What would they hope you do? What would they fear that you do? How would they respond if you did what they feared?
- Make structural changes to board deliberations. Bring in outside experts, revamp the agenda of a strategic offsite meeting, take a board trip to Silicon Valley or other center of innovation.
- Take a fresh look at board materials. Ask advisors and other contributors to suggest revisions and recommend best practices.
- Use the board assessment process to identify ways the board might benefit from refreshment. Having a static group of directors for a long period of time may contribute to groupthink.
- Ask management to conduct a pre-mortem exercise, where the team imagines that it is in the future and the strategy did not work—and must come up with all of the reasons why it did not work.

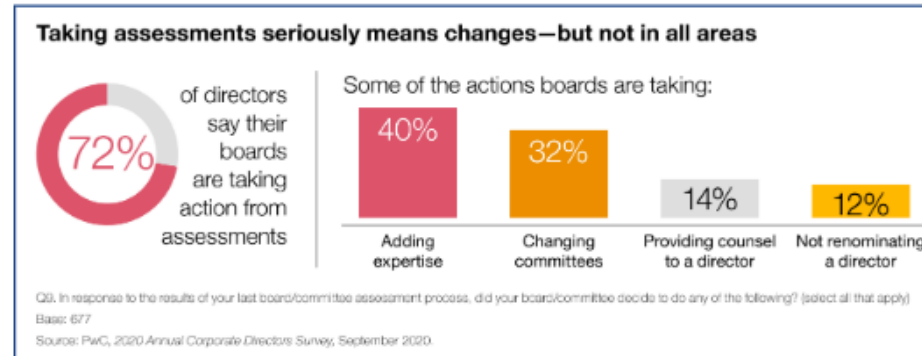
Tips to minimize a confirmation bias problem

- Have management present strategies that they considered but dismissed. There could be useful elements within those strategies.
- Recruit a director who will challenge the board's preconceived notions. Sometimes a director from a completely different industry can offer a fresh look at old problems, and ask big questions that may not have occurred to those with long experience in the area.
- When confronting a major strategic move, hire one outside advisor to present arguments in favor of the idea, and another to present arguments against it.
- Ask directors to rotate presenting hypothetical dissenting views. Even if the director does not hold that view, it can change the shape of the discussion.
- Ask internal audit and other support functions to provide strong, data-based challenges to the prevailing view.
- Highlight diversity in the room, including diversity of industries and varied past roles. When new directors are added to the board, ensure that they are fully brought into the fold.

Tips to minimize authority bias

- Board leadership can solicit views from each director in turn. This ensures that all directors have a voice on an issue—and also that the "expert" speaks up in other areas as well.
- Offer deep board education opportunities in specialized areas to prevent the board from relying too much on one director's experience.
- Have board leadership purposely withhold opinions until the end of the discussion. Alternatively, if the same person always has the last word, ask them to contribute first so their idea can be discussed.
- Ask each director to offer thoughts or ideas at the beginning of the meeting on what they would like to cover, or, at the end, about items that were not captured during the meeting.

8. Accountability Across The Board - For Yourself, The Board and The Organization.

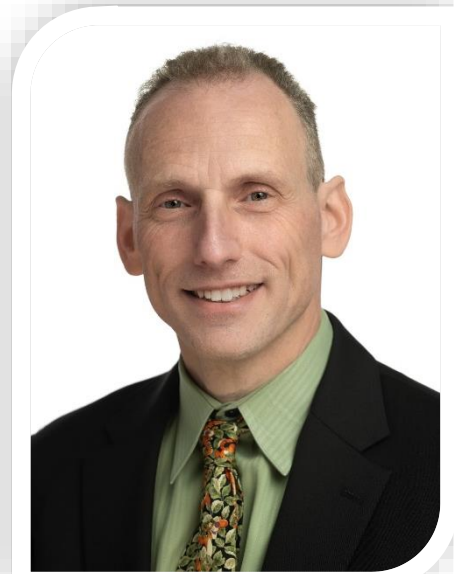


How well do you think your board understands the organization's...

- Strategy
- Competitive landscape
- Company culture
- Talent development and pipeline (DEI)
- Crisis management plan
- External vulnerabilities
- Cybersecurity vulnerability

5 Things Every Board Member Should Know...

- Board Service is a job
- Your voice is as valuable at your first meeting as it is at your last
- Personal agendas serve non one
- Admit when you are wrong and take corrective action
- Don't lose sight of the organization's goals



- ▶ Ken Cerini, CPA, CFP, FABFA
- ▶ Managing Partner of Cerini & Associates, LLP
- ▶ kcerini@cerinicpa.com

Risks and Financial Competency

- The Board Sets policy ... Management implements procedures ... the Board monitors that those procedures are effective
- Key Elements of Board Responsibility:
 - Oversee effectiveness of ED/consider succession plan
 - Monitor board member effectiveness (including your own)
 - Ensure organization is effectively running and provide, in conjunction with the executive team, the vision for the organization
 - In conjunction with the ED ... be a compass (Tone, vision, direction)
 - Ensure organization is fiscally strong
 - Understand the operations of the organization
 - Understand the organizational risks (both internal and external)

Risks and Financial Competency

- The Board is responsible for evaluating risks, both internal and external
 - Insurance – appropriate and adequate
 - Grant/contract compliance (how are you ensuring government takebacks won't occur?)
 - Donor intent
 - Conflicts of Interest
 - Proper controls (mitigate error and fraud)
 - IT concerns (cybersecurity)
 - Changing regulations
 - Economic and other external factors

Risks and Financial Competency

- What communication channels exist for the Board to get information?
 - Internal & External auditors
 - Internal staff
 - Other Board members
 - External experts/trainings
 - Trade associations
- How is the Board monitoring effectiveness?
 - Budgets and financial analysis
 - Established rubrics and operational indicators
 - Vibrant committee structure

Risks and Financial Competency

- How is the Board implementing course corrections?
 - Strategic Planning/thinking
 - Establishing policies
 - Communication ... collaborative not micro manage
- How do you stay on top of industry trends and changing regulations?
 - Internal staff
 - Outside professionals
 - Trade associations
 - Trade publications/internet