



PRIVATE EQUITY DIRECTOR ISSUES

8:30 AM

Paul Broude, Foley & Lardner LLP

John Byrnes, Mason Wells

Peter Hunter, Axia Capital Partners, L.P.

David Payne, Aon Financial Services Group

Anne Ross, Foley & Lardner LLP

Sona Wang, Ceres Venture Fund L.P.

Paul Winters, Denham Capital Management L.P.



PAUL BROUDE
PARTNER
Foley & Lardner LLP

Paul Broude is a partner in Foley's Transactional & Securities and Private Equity & Venture Capital Practices, vice-chair of the firm's Emerging Technologies Industries Team, and a member of the Life Sciences Industry Team.

Prior to joining Foley, Mr. Broude was a member of the firm Epstein Becker & Green, P.C.

He represents a wide range of publicly and privately held companies, entrepreneurs and private equity funds in technology and other business ventures.

Mr. Broude's experience includes:

- Representing issuers, investment banking firms and private equity investors in equity and debt financings, including public offerings, private placements, venture capital and other financings
- Representing a wide variety of buyers and sellers in merger and acquisition transactions, including acquisitions of publicly held companies
- Representing management groups and boards of directors in "going private" transactions
- Representing private equity firms in fund formation, investing, compliance issues and day-to-day matters
- Structuring and negotiating licensing arrangements and strategic partnerships
- Counseling entrepreneurs and established businesses on a wide range of day-to-day legal and business issues, including securities laws compliance, corporate governance issues and compensation planning for key executives

Mr. Broude is a frequent speaker on issues related to emerging businesses, including financing alternatives, securities issues, mergers and acquisitions, and domestic and international licensing and joint venture arrangements.



JOHN BYRNES
EXECUTIVE MANAGING
DIRECTOR
Mason Wells

Mr. Byrnes is Executive Managing Director of the Mason Wells Funds where he is responsible for the overall management and strategic direction of the firm. Mr. Byrnes is also involved in initiating investment opportunities, structuring and negotiating transactions, working with portfolio company management teams and arranging the disposition of investments. In his capacity he serves as the Managing Member of the General Partner for every Fund under management at Mason Wells.

Mr. Byrnes has over 25 years of private equity investing experience. Mr. Byrnes organized the private equity arm of the Marshall & Ilsley Corporation in 1983 where for 15 years he managed four successful investment funds, making private equity and venture capital investments throughout the Midwest. In 1998 Mr. Byrnes managed the spin-out of M&I's private equity team into Mason Wells, leading the fundraising for its first, \$175 million buyout fund. In 2005 the firm raised \$300 million Mason Wells Buyout Fund II, which is currently being invested. Next year Mason Wells is planning to launch its third fund, a \$500 million buyout fund to continue its investment focus on Midwest, middle market transactions.

Mr. Byrnes is active in numerous public and civic organizations in Wisconsin and currently serves on the Board of Trustees of the Medical College of Wisconsin and the Milwaukee Institute. Mr. Byrnes has previously served on the Wisconsin Governor's Economic Growth Council and on the Wisconsin Technology Council.

Mr. Byrnes is a member of the Board of Directors of the following public and private corporations: The Gehl Corporation, Premix, Inc., GAMFG Precision, L.L.C., and The Oilgear Company.

Mr. Byrnes received his JD Degree from the University of Wisconsin Law School and his Bachelor's Degree from the University of Notre Dame.



PETER A. HUNTER
CO-FOUNDER
Axia Capital Partners,
L.P.

Mr. Hunter is a co-founder of Axia Capital Partners, L.P. and has been actively involved in private equity investments for over seven years. Prior to founding Axia, Mr. Hunter was a well respected operating executive with over 20 years of experience. Most recently Peter was the CEO and director of Innovative Microplate, Inc, where he grew revenues by 100% and, led the sale of the company. Previously, Peter was CEO and director of Inspectron Corporation, a machine vision hardware and software company focused on the factory automation market. Under his leadership, the company grew over 400% in less than three years and was ultimately sold to a strategic buyer in 2002. Prior to Inspectron, Peter was EVP, COO & CFO for Data Instruments, Inc., a manufacturer of industrial sensors and factory automation equipment. During his twelve years at Data Instruments, he initiated and completed seven acquisitions globally that provided significant growth to the company (revenues of \$70 million) and ultimately led to the sale of the company to Honeywell International in 1998. Prior to joining Data Instruments, Peter was a consultant/CPA for Deloitte & Touche. Peter currently serves on five for-profit and two non-profit boards. An attorney and CPA, he received his JD in corporate law and BS in Accounting at Suffolk University where he is currently on the board of Trustees. Peter lives in Concord, Massachusetts with his wife, Elizabeth, and daughters, Libby and Sally.



DAVID PAYNE
SENIOR VICE PRESIDENT
Aon Financial Services
Group

Responsible for managing a National Executive Liability team focused on D&O, EPL, Fiduciary, Fidelity, E&O business origination, structuring and execution

Experience in a variety of industry segments, including numerous engagements in the general FI/PE sector (e.g., New Century, Zions Bank, Triad Guaranty, Patriarch Partners, American Capital, Arco Capital, Luminent Capital, Thornburg Mortgage)

Manages Aon's Distressed director and officer liability group, providing strategic advice on appropriate D&O program structures as well as assisting clients in resolving complex legal and economic conflicts with D&O carriers. Sample engagements have included, New Century, Spiegel, Eddie Bauer, Exodus, Vitesse, Daystar

12 years of commercial and investment banking experience with Credit Lyonnais (at one time the largest bank in the world), providing clients invaluable insight into D&O risk

International experience managing a Latin American private equity group in New York and an investment banking operation in Argentina

Directed a corporate development practice for a leading internet security company, creating a client warranty program utilizing insurance products

Bachelor of Science – Finance, University of Missouri, 1986

Masters of Business Administration – International Finance, American Graduate School of International Management (“Thunderbird”), 1988



ANNE E. ROSS
PARTNER
Foley & Lardner LLP

Anne E. Ross, managing partner of Foley's Madison office, has worked in the field of business law for more than 25 years. A partner in the Private Equity & Venture Capital and Commercial Transactions & Business Counseling Practices, and the Life Sciences and Insurance Industry Teams, her practice reflects the growing intellectual asset-based economy of the Upper Midwest, including extensive work with technology-driven companies and their investors, insurance companies, and tax-exempt organizations. Ms. Ross strives to work as her clients' partner in making the most of business opportunities, solving problems, and avoiding potential disputes through active listening, creative negotiation, and precise drafting of transactional documents. She acts as "outside general counsel" to many of her clients, serving as the focal point to bring the full resources of Foley & Lardner to bear on the project at hand in an effective and efficient manner.

Ms. Ross serves as counsel to public and private companies in a variety of technology-driven industries. She has had extensive experience handling mergers and acquisitions, distribution and licensing arrangements, private debt and equity financings, and strategic partnerships for ag-biotech and pharmaceutical companies, software developers, medical instrument manufacturers, communications technology companies, and a number of "pure play" e-commerce survivors. Ms. Ross regularly works with university faculty members, research scientists, and engineers on company formation and commercialization of emerging technology. She also represents venture capital, "angel," and institutional investors in fund formation and portfolio investment and divestment transactions.

Ms. Ross graduated with her J.D. from Stanford University Law School in 1981, where she was associate editor of the *Stanford Law Review*. She earned a B.A. in physical anthropology, with distinction, from the University of Wisconsin - Madison in 1977.



SONA WANG
MANAGING PARTNER
Ceres Venture Fund
L.P.

Sona Wang, chairperson, possesses over 20 years of institutional venture investment experience. Since 1987, she has raised three Chicago-based venture capital funds totaling over \$100 million under management: Batterson, Johnson & Wang, INROADS Capital Partners, and CERES Venture Fund LP. Previously, she was an investment manager with Allstate Venture Capital, one of the oldest institutional venture funds with over \$400 million invested. Her investment focus has been in information technology, business services, and healthcare. She has served on numerous corporate boards including Blue Cross Blue Shield of Illinois, Evanston Northwestern Healthcare, VIPdesk Inc., High Tower Software, TrafficCast International, SuccessLab Inc., Ultimo Enterprises, and IKOS Systems.

Prior to her career in venture capital, Ms. Wang was employed with Intel Corporation in key management positions in engineering, manufacturing and marketing.

Ms. Wang graduated from Stanford University with a B.S. in Industrial Engineering (1980) and received an M.B.A., magna cum laude, from Northwestern University's Kellogg Graduate School of Management. She currently serves on Northwestern University's Board of Trustees. Sona also supports Boardroom Bound, a non-profit organization that is preparing and promoting the next generation of corporate board directors.



PAUL WINTERS
GENERAL COUNSEL
Denham Capital
Management LP

Mr. Winters is General Counsel of Denham Capital Management LP. Denham is a private equity firm focused on the global energy and commodities sectors. Denham manages approximately \$2.3 billion of invested and committed capital in four dedicated funds. Denham's investments include upstream and midstream oil and gas assets, coal production, power generation, district heating and cooling, timber processing, and metals and minerals mining and processing, and span the globe from North America to Europe, Russia, South America and Asia. Denham's investment approach is unconstrained: it invests across all segments of the capital structure and across all stages of the corporate lifecycle, from greenfield development to mature, operating assets. Through a staff of over 50 located in Boston, Houston, London and Short Hills, New Jersey, Denham offers its partners unparalleled commercial and operational experience in the energy and commodities sectors. Prior to joining Denham, Mr. Winters practiced at Latham & Watkins LLP. Mr. Winters received a Bachelor of Science from Georgetown University in 1990 and a Juris Doctor from Georgetown University in 1996.

Private Equity Director Issues

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Overview

- Board Responsibilities
- Pitfalls for Private Equity Portfolio Boards
- Protective Measures
- Sarbanes-Oxley

Board Responsibilities

Board Responsibilities

- Board of Directors is Responsible for Managing the Business and Affairs of Its Company
 - Approving Leases, Contracts or Other Material Agreements
 - Approving Fundamental Operating Financial and Corporate Plans, Strategies and Objectives
 - Authorizing Sale of Company Assets and Other Strategic Transactions

Board Responsibilities

- Managing the Business and Affairs of Its Company *(continued)*
 - Evaluating Performance of the Company and its Management
 - Selecting, Evaluating and Fixing Compensation of Corporate Officers
 - Reviewing and Approving Management Plans
 - Adopting Polices of Corporate Conduct

Board Responsibilities

- Evaluating the Overall Effectiveness of the Board Itself
 - How Well the Board Carries Out Its Functions
 - How Well Prepared the Directors Are to Fulfill Their Obligations

Board Responsibilities

- The Directors Owe Certain Fiduciary Duties to Their Company
 - Duty of Care
 - Duty of Loyalty

Board Responsibilities

- Duty of Care:
 - Requires Directors to Keep Themselves Informed About the Affairs of the Company and be Assured that They Have All Reasonably Available Information When Making Decisions
 - Directors are Expected to Act on an Informed Basis, in Good Faith, with the Care an Ordinary Prudent Person in a Like Position Would Exercise and in a Manner the Directors Believe to be in the Best Interests of the Company

Board Responsibilities

- Duty of Loyalty
 - Requires Directors to Uphold Their Fiduciary Duties to the Company and its Stockholders by Placing the Company's Interests Ahead of Their Own
 - Directors Should Not Use Their Corporate Position to Make a Personal Profit or Gain or for Other Personal Advantage
 - Two Specific Considerations:
 - Conflict of Interests
 - Corporate Opportunity

Board Responsibilities

- Business Judgment Rule
 - Qualifies the Duty of Care
 - Protects Disinterested Directors from Personal Liability to the Company and Its Shareholders, Even if a Corporate Decision the Director Approved Turns Out to be Unwise or Unsuccessful

Board Responsibilities

- Business Judgment Rule *(continued)*
 - A Court Will Not Substitute Its Judgment for that of a Director, if the Director:
 - Acted in Good Faith
 - Was Reasonably Well Informed; and
 - Rationally Believed the Action Taken Was in the Best Interests of the Company

Pitfalls For Private Equity
Portfolio Board

**Pitfalls For Private Equity
Portfolio Board**

- Being Too Involved vs. Not Being Involved Enough
 - Avoid Managing Portfolio Company's Day-to-Day Operations
 - Remain Actively Involved in Decision Making

**Pitfalls For Private Equity
Portfolio Board**

- Conflicts of Interests
 - Between Private Equity Firm's Interests and Portfolio Company's Interests
 - Acquisition Decisions
 - Executive Compensation
 - Management Fees and Other Arrangements
 - Valuation and Terms of Additional Financing Provided By Private Equity Firm
 - Between the Various Discrete Funds Managed in Parallel by The Private Fund Manager

**Pitfalls For Private Equity Portfolio
Board**

- Conflicts of Interests *(continued)*
 - Between Various Portfolio Company's Interests
 - Acquisition Decisions
 - Commercial Transactions Between Different Companies Represented by a Director

**Pitfalls For Private Equity
Portfolio Board**

- Blurring the Line Between Private Equity Firm and Portfolio Board – Piercing the Corporate Veil
 - Using Portfolio Company as a Façade for the Operation of the Corporate Parent or Related Company
 - Failure to Keep Separate Corporate Records for Portfolio Company and Private Equity Firm

**Pitfalls For Private Equity
Portfolio Board**

- Blurring the Line Between Private Equity Firm and Portfolio Board – Piercing the Corporate Veil *(continued)*
 - Failure to Adhere to Corporate Formalities
 - Board Meetings
 - Authorizing Resolutions
 - Electing Directors

Issues During IPO and Beyond

- Inappropriate Disclosure of Material, Non-public Information – Violation of Regulation FD
- Inappropriate Use of Material, Non-public Information – Insider Trading
- Efficacy of Board Membership on Status of Company Stock as Restricted Securities

**Pitfalls For Private Equity
Portfolio Board**

- Changing Fiduciary Duties in the “Zone of Insolvency”
 - Duties Change When Portfolio Company Nears Insolvency
 - Duties Run to Company's Creditors
 - Ordinary, Routine Corporate Decisions Become Subject to Additional Scrutiny

Protective Measures

Protective Measures

- Document Decision Making and Corporate Approval Process Carefully
 - Board Minutes
 - Must be More than Mark-up of Last Year's Minutes
 - Balance Between No Record of Deliberations and Keeping Transcripts
 - Reflect Substance and Process of Meeting

Protective Measures

- Use Independent Directors
 - Conflicts of Interests
 - Executive Compensation
- Use Outside Experts
 - Mergers/Acquisitions
 - Executive Compensation
 - Other Substantial Transactions

Protective Measures

- Know Where Your Duties Lie
 - When Acting as Partner/Manager of Private Equity Firm
 - When Acting as Director of Portfolio Company
 - When Serving on Multiple Boards Simultaneously
 - When Portfolio Company is in "Zone of Insolvency"

Protective Measures

- Avoid "Deputization" Issues
 - Look Out for Interests of All Shareholders, Rather than Serving on the Board as a Representative or "Deputy" of the Private Equity Firm
 - Carefully Consider the Kinds of Communication You Have with Colleagues at the Private Equity Firm – Avoid the Appearance of Deputization

Protective Measures

- Time and Effort
 - Ensure You Have Adequate Time to Fulfill Your Obligations
 - Attending Meetings
 - Communication Between Meetings
 - Reviewing Materials
 - Carefully Considering Decisions
 - Put Forth the Time and Effort Required
 - Experts Estimate between 150-200 hours annually

Protective Measures

- Process
 - The Legal System Will Judge You Based on the Soundness of the Process You Undertook
 - Whether Independent Directors Approved Related-Party Transactions
 - How Many Meetings the Board Held to Discuss an Issue
 - How Much Time the Board Spent Discussing Certain Issues

Protective Measures

- Process
 - The Legal System Will Judge You Based on the Soundness of the Process You Undertook *(continued)*
 - What Materials Were Reviewed
 - Whether the Board Received Required Materials Sufficiently in Advance of Board Meetings
 - How Many Questions the Directors Asked

Protective Measures

- Specific Concerns
 - Piercing the Corporate Veil
 - Maintain Corporate Records Appropriately
 - Follow Corporate Formalities
 - Ensure Directors and Officers Act on Behalf of the Company They are Serving
 - Management's Failure to Raise Issues
 - Create a Whistle-Blower System for Employees

Protective Measures

- Specific Concerns *(continued)*
 - Regulation FD
 - Create and Follow Certain Procedures for Disclosing to Others Within the Private Equity, Information You May Learn as Director of a Portfolio Company
 - Adhere to Such Procedures in Every Instance

Protective Measures

- Specific Concerns *(continued)*
 - Insider Trading
 - Create and Follow Certain Procedures to Ensure that Partners and Employees of Private Equity Firm Do Not Intentionally or Accidentally Decide to Buy or Sell Shares of Public Portfolio Company's Stock While Possessing Material, Non-Public Information
 - Adhere to Such Procedures in Every Instance

Sarbanes-Oxley

Sarbanes-Oxley

- Why Adhere to Sarbanes-Oxley ("SOX")?
 - Risk Management
 - May be Required in Future
 - By Public Companies Doing Business with Private Companies
 - By Law

Sarbanes-Oxley

- Why Adhere to SOX? *(continued)*
 - Importance to Exit Strategy
 - Going Public
 - Sales to Third Parties

Questions?

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