

# Directors & Boards

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FIRST QUARTER 2010

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## The 'great divide' makes for a great debate

*A panel of experts tackles whether to separate the chairman and CEO roles*

# The Great Divide

*To separate the chairman and CEO roles, or not? To make such a separation mandatory, or not? A panel of experts tackles the thorny theoretical issues and practical concerns involved in splitting the two top leadership positions of the corporation.*

**I** DON'T KNOW HOW to be a chairman and not a CEO." That is what the AP reported Ed Whitacre Jr. telling top General Motors executives upon being named chairman of the automaker last year. Well, in January of this year he resolved that dilemma by adding the CEO title. But he may be on the wrong side of history on that maneuver. The trendline of one person holding down both the chairman and CEO titles may be moving against senior executives who, in a Whitacre-type boardroom, "don't know how" to lead without serving as the head of the company and head of the board of directors.

That is one of the consensus sentiments voiced by a group of business leaders and governance thought leaders brought together to hash out the pros and cons of separating the top roles. The panel (see bio notes on page 27) convened in November 2009 at the Weinberg Center for Corporate Governance at the University of Delaware. The 90-minute session in front of an audience of 100 business school students, faculty,

and guests was ably moderated by the center's director, Charles Elson. The spirited debate resulted in some clear conclusions by the panel: there will be diminishing opportunities for the two top positions at American corporations to be held by the same person; the positions should not be split while someone holds both titles but should be factored into the succession planning process; separation of the roles will likely become the default board governance policy in the future; and that the federal government and courts should stay away from mandating a separation of the roles.

This is the fourth in a series of Weinberg Governance Center roundtables on pressing board leadership issues that DIRECTORS & BOARDS has published. Previous panels addressed "Whose Company Is It Anyway?" in 2000, a roundtable that launched the center 10 years ago; "Handling Dissent in the Boardroom" in 2004; and "Director Term Limits Under Review" in 2008. Excerpts from the debate on chairman-CEO role separation follow. — James Kristie

**Charles Elson:** The issue of whether the CEO position should be separate from the chairman position is being passionately debated in boardrooms, in the broad business community, and within the institutional investor community. Historically, the chairman was the senior member of the board — a board that hired and fired management. With the separation of company ownership and control in the 1920s and 1930s, management took over board composition and control unified, in the sense that the CEO assumed the role of board chairman, and the board became less of a monitoring body and more of an advisory group to management.

Several years ago, a movement picked up steam to separate the roles, so as to revert to the historical approach in which the chairman of the board was independent of management. When you think about it, why should the chairman of the organization that is overseeing management



**'Separation is a great idea only if you choose the right people for the two posts.'**

— Charles Elson

be the person being overseen — i.e., the CEO? That doesn't make much sense.

Legislation that would separate the roles has been introduced in Congress by Sen. Schumer. This is an issue that the courts ultimately may deal with as well. During these times many questions are being asked about separating the roles and how it would impact the organization of the company and the way that the company operates. Ira, you have been an early proponent of separating the roles. Lead us off as each of you states your initial positions on the matter.

**Ira Millstein:** The trend toward splitting the roles is inexorable. At least a quarter of major U.S. companies have adopted separation. Even more important is that directors *want* it. In the latest report from the National Association of Corporate Directors more than 70% of directors voted for separation.

As Charles noted, the whole structure of the board has changed. Years ago, management handpicked board members; they essentially acted as an advisory board, not a monitoring board. The independent director movement really started in the 1970s with enactment of the Foreign Corrupt Practices Act and the requirement by the SEC that public companies establish audit committees composed of independent directors. With the rise in hostile takeover activity in the 1980s, Delaware courts demanded board independence, and then the GM Board Guidelines in the early 1990s brought the independence issue into the mainstream for all companies. The accounting scandals that led to enactment of Sarbanes-Oxley eventually prompted the SEC to require not only audit committees to be composed entirely of independent directors but also compensation and nominating committees. So, over time, independent directors increasingly comprised the majority of the board. I consider the independent chairman to be the final piece in the creation of an independent board that truly monitors management.

I've lived in boardrooms over the past 25 years. I have been called into many miserable situations involving a troubled board. I know that one thing is certain: He who sits at the head of the table runs the board meeting. If the CEO sitting at the head of the table also happens to be the chairman who is running the board meeting, that meeting will be very different than a board meeting being run by an independent chair, because an independent chairman *can* raise important questions, notwithstanding management's take on those issues.

I'm not urging a mandate. I'm not saying that every company must separate the positions. And I don't think the chairman role should be stripped from a CEO who now holds the combined position. Rather, that separation should occur upon succession.

In summary, I don't see how separation could fail to happen. Directors want it. Activists want it. Companies in many countries in the civilized world already have split the roles. It's going to happen, and it's the right thing to do. The CEO should not be chairing the independent board which is supposed to be monitoring his or her activities. Period. Splitting the roles is the preferred model, and I think that most U.S. companies will voluntarily adopt it in the not-too-distant future.

**James Robinson:** I have been an independent director. I have been a nonindependent director. I've been a chairman and CEO. I've been a nonexecutive chairman. There are times when the best course of action is to split the roles. There are times when it's best to combine them. My conclusion is a simple one: Do no harm. Beware the simplicity of saying that two heads are better than one. What about the 12 heads of the full board? You have to be careful that you don't create a passive attitude

among directors who think they can just sit back and watch while the chairman and the CEO run the show. You want all board members to be actively engaged. Once you start separating the duties and acknowledge that two heads are running the shop, you risk disenfranchising the other board members and not getting the active contribution you want from each and every director.

An unintended consequence of the debate on separation is word choice. We say that we need a separate chairman to "monitor" the CEO, as in "Watch them — they are going to do something that could put them in jail." This gets into the delicate issue of defining risk. In my view, avoiding risk is more than simply avoiding financial exposure. The biggest risk a board should be concerned about is management getting so traumatized that it doesn't take legitimate business risks.

I would certainly disagree with any efforts to make the role separation mandatory. This should not be a politically populist initiative. The systemic risk in this country, I fear, is no longer the financial system — it's the U.S. Congress.



**'Splitting the roles can give more of a window into the boardroom.'**

— Bess Joffe

**Bob Monks:** I'll come at this issue with a story about the tragedy of Tyco and Dennis Kozlowski. Kozlowski would not be in jail today and the shareholders of Tyco would have been spared expensive notoriety if Tyco had been required to have a chairman of the board be someone other than the CEO.

I served on Tyco's board for nine years under Kozlowski. During my tenure, I wrote numerous letters to him saying that the combined chairman-CEO role wasn't working, that the board was dysfunctional and that there was disorder within the compensation committee, and that we needed an independent chairman. Ultimately, I was asked to leave the board. In hindsight, I don't blame my colleagues for wanting to see me go. I *do* blame them, however, for allowing, even enabling, the company culture that resulted in Dennis' conviction and the company's near demise.

It requires great talent to be a CEO of a company. It is a lonely job that is best done by individuals with a good sense of their worth, but this personality trait usually comes with a need for power and control. The individuals comprising Tyco's board while I was there were probably typical of most boards. The members had no particular sense of governance, no sense of the dangers of absolute authority, and they took great pleasure in the company's seemingly limitless expansion potential and rising stock price. They were not bad people. Kozlowski isn't a bad person. He could have functioned well under a suitable chairman. The money he was convicted of stealing would not have been denied him by a properly functioning board and compensation committee. The board was fully aware of the value that Dennis brought to the company, and that level of compensation was part of the culture of the times. In the

words of President Nixon, “Mistakes were made,” and a tragic result for all ensued.

Not all independent chairpersons are helpful, but institutionalizing accountability creates a constructive energy in the governance of corporations. The tragedy for both Dennis Kozlowski and Tyco was huge, and it was unnecessary. In order to protect against problems resulting from the abuse of power, separation of roles of authority at the top of the corporation is essential.

**Harry Kraemer:** As a former chairman and CEO of Baxter International, and a current director on several boards, I view this debate as more one of form over substance. Many times, chairmen-CEOs are accused of wanting all the power. I actually told my board members that if they wanted to separate the chairman and CEO roles, I would be very comfortable with that because I didn’t think it was that big an issue.

I am concerned that we’re talking about the wrong issue. What I believe the main focus of board governance should be is ensuring that a board truly operates independently. What does that mean? It means a board should be able to counsel and challenge the CEO — and to replace the CEO, if needed. The board must be able to meet independently without the CEO being present, and to be able to operate in executive sessions as often as needed. One of the independent board members should be appointed as a spokesperson for the board, and that person does not necessarily need to be the chairman.

If these board members are really doing their job and are operating as independent directors, their ability to have the proper influence on their CEO has no limits. I have been a member of four boards that had to replace the person who was the chairman and CEO. In each case, we were doing our job — we were operating independently. So it is not clear to me why this whole debate is necessary as to what the actual benefit is of separating the roles.

**Reuben Mark:** I spent 25 years as the combined chairman-CEO of Colgate-Palmolive. Now, having stepped down from both positions, I have become convinced that separation is required. During the last three or four years of my tenure as chairman-CEO, I was devoting an increasing amount of my time to board management — eliciting director’s opinions, bringing them together on issues, and so on — and less time perforce on the CEO job. The president ended up absorbing more of my CEO duties. It became clearer and clearer that being chairman was virtually a full-time job.

Also, let me acknowledge this. People who serve as CEOs, and I certainly include myself among them, tend to have a touch of megalomania or a leaning toward tyrannical action. After all, a corporation is a kind of benevolent dictatorship. If there is a separation, and assuming good faith and assuming

the right people are in place, the board has an additional conduit of information and oversight that they would not have had. So even though my personal experience is contrary to this conclusion, I believe that separation of the roles not only should happen but inevitably will happen.

**Jon Hanson:** I have been the nonexecutive chairman of HealthSouth Corp. for four years. I support the separation of the two positions. A little history: Prior to 2003, it can be said that HealthSouth had no corporate governance. We had one person who served as the executive chairman, CEO, and president. Then the FBI showed up. As part of the company’s restructuring in the wake of its accounting scandal, a separate position of an independent nonexecutive chairman was established. By independent I mean that this person could not be the former chairman or the former CEO, nor ever employed by the company. Those were the terms under which our new CEO, Jay Grinney, joined the company in 2004.

The key to a good working relationship between the chairman and the CEO is mutual trust. The CEO should be comfortable that the chairman doesn’t want his job. As chairman, I serve as a sounding board for the CEO on both board and management issues. Notwithstanding, all board members have direct access to the CEO at any time; they don’t have to go through me. Management develops the board agenda and I have the final say in signing off on the agenda. On all business matters, Jay is the spokesman for the company. On matters of corporate governance, I am the spokesman. I chair the board meetings. My role requires me to engage directors in discussion on policy matters and to try to build a consensus that leads to timely decision making. After each board meeting, I provide feedback from the executive session to the CEO.

I chair the annual meetings, and am available, as chairman, to all the shareholders. Periodically I do get calls from investors. Last year I went with Jay to visit 10 of our largest shareholders. My experience leads me to be very supportive of separating the two positions.

**Bess Joffe:** I’m pleasantly surprised to hear how many of the panelists support the separation of the roles. Hermes is based in London, which is where I live, but I am a Canadian lawyer by background. In both U.K. and Canadian companies, the chairman and CEO positions are split, but the systems operate very differently. In most cases, U.K. boards have what we would call an executive chairman. The individual is independent upon appointment but works two to three days per week with a staff in an office at the company. We would not view that person as being independent from that point on. The U.K. model also has a senior independent director on the board who tends to fill that gap. In the Canadian model, the inde-



**‘Beware the simplicity of saying that two heads are better than one.’**

— James Robinson

pendent chairman, in most cases, tends to be a more robust version of a lead director, with the title and the privilege to sit at the head of the table and chair the board meetings.

In the U.S., there needs to be a shift toward best practice. In agreeing with Ira and others on the panel, I think the shift increasingly will entail separation of the roles. From an investor's viewpoint, the separation is necessary in the U.S. because there is very little added insight that we, as owners of companies, can garner from the annual proxy documents. Most of the language in them is legal boilerplate because there's so much potential liability attached with filing the information with the SEC.

In looking at and engaging with companies, I try to get a sense of what's going on inside the boardroom. Since I'm not in the boardroom, I cannot vouch to my clients that I have faith in a board because the proxy statement says this or that about the level of debate that is going on or about the level of accountability to which management is being held. This is one outcome that the separation of roles points to — it is a proxy for good governance. Separation of roles also gives shareholders an ability to speak to chairs as the independent leaders of boards to get a better idea of what's going on at the board level.

My colleagues in the U.K. would say that the power and the ultimate role of the chairman is to fire the CEO when he or she is underperforming. It's very hard to understand how that would happen when the same person holds both roles. I wouldn't advocate a one-size-fits-all solution, nor would I propose stripping persons with combined titles of one of their roles. That can be addressed upon succession planning.

A lot needs to be done to improve disclosure about the structure of companies' leadership, as the SEC has proposed to do. In 2009 we have filed approximately 12 shareholder proposals on this issue at U.S. companies. We do this as a way to engage with them — to start a dialogue or continue a dialogue. What I would be willing to settle for in agreeing to withdraw the proposals, so that they don't appear on companies' proxy statements, varies from company to company. In some troubled companies with very difficult, underperforming, and risky chair-CEOs, we would want to separate the roles immediately. At other companies, we would want a commitment that the roles be separated upon succession. And at certain companies we might want there to be a default rule — that the roles would be separated upon succession, but actually leave the decision to the discretion to the board, provided that there is some value-added disclosure about why the board made the decision at a particular time to keep the roles separate or to recombine them, and a compelling assertion as to why we, as owners of the company, should support the decision.

**Stuart Grant:** I'm a Delaware lawyer, so I believe in the Dela-

ware way of self-ordering. I oppose the Schumer bill because it would allow the federal government to make the rules. This is a matter of state corporate law. I would agree that the default rule ought to be to separate the two positions, but I would not be in favor of mandating it. Shareholders should have a choice. If shareholders decide they want one person to assume both roles, even if for a limited time, they should have that right to decide.

While Jim Robinson talked about the fear of risk taking as a danger for corporate management, I have not seen many companies get into trouble from the lack of risk taking. What I have seen is what Bob Monks talked about — the imperial CEO demanding all the power and crushing anyone who might oppose him.

One of the biggest challenges that's not being tackled in Corporate America is CEO succession. It's a huge problem. First, it leads to the incredible pay packages that result when you have to go outside of your organization to find a CEO. Look at DuPont Co., for example. It generally hires from within, so its CEO salaries are far lower than anyone else's. Succession planning is one way of reining in these enormous pay packages. It is also a way of controlling the culture and the way a company operates by looking ahead at who is going to take over. Hank Greenberg at AIG, before it blew up, never would disclose who his successor was going to be. And we've seen other companies in which the CEO has been there for a very long time and would not raise the issue of who is going to follow him. It is far

easier to discuss CEO succession when the chairperson — who is not the CEO — pushes that critical issue.

However, as interesting as this debate is, separating the roles is not going to cure the major ills that affect boards. There are a lot of other issues to tackle. One of the structural issues is that even if a board has an independent chair, I don't believe that the board can truly run independently because the CEO, by and large, is going to control the flow of information. Unless you have a situation as in the U.K., where you have directors working two or three days a week at the company instead of one or two days a month, it's very hard to have the access to information to allow you to be truly independent. The person who controls the flow of information can also control how people perceive and deal with that information. Separating the CEO and chairman functions would not cure that problem.

**William Chandler:** Let me open my remarks with the obligatory disclaimer that I'm not speaking on behalf of the Delaware Court of Chancery or my colleagues, and no one can cite anything that I say as authoritative for any proposition. That being said, I can tell you that I take a somewhat agnostic position on this issue. I don't think there should be a mandatory solution for all companies. The Delaware way, by history and



**'Separation of the roles not only should happen but inevitably will happen.'**

— Reuben Mark

tradition, is to emphasize, with very few exceptions, a non-prescriptive, non-mandatory approach. That is, we take a voluntary, contextual, case-by-case approach. This issue would be no exception. We take no position on it as a matter of law, and that's the way I hope it remains.

In more than 20 years with the Chancery Court, I can't recall a single instance in which this issue was the focus of or surfaced in litigation as somehow being a determinant factor. That said, let me add a footnote. I have had settlements of class actions on one or two occasions in which the settlement consideration for releasing the claims by the plaintiffs stipulated certain corporate governance reforms, among which was the separation of the chairman and the CEO role. And there have been a few cases in which the existence of a combined chairman-CEO at a company may have contributed to a somewhat unwholesome board culture. I'll even suggest that may have been the situation at Disney. Today, the company has a separate chairman and CEO, but prior to and during the period it was embroiled in litigation in the Chancery Court several years ago, the positions were not separate. My view then and now is that perhaps having a separate chairman and CEO might have resulted in a different culture of the board and a different outcome for the company.

The proposition that the chairman of the board is going to be busy enough to not also be the CEO of the company does

resonate in a commonsense way with me. But let me be clear that Delaware General Corporation Law is silent on this issue, as is our common law of fiduciary duties. I am heartened by the fact that Ira and others refer to the trend toward separation as an "inexorable" process. That is music to my ears, in the sense that I won't have to grapple with the issue in court. I also hope that Congress and the Obama Administration allow states to continue to predominate in the area of state corporate law.

### No mandate for a mandate

**Elson:** Now that we have everyone's initial thinking on the issue of separation, let's expand on some of the complexities of it. I was on the NACD Blue Ribbon Commission on Director Professionalism with Ira years ago when I was first became aware of the separation issue. At the time, the topic failed to spark great interest. As long as the board is composed of a substantial majority of independent directors and the committees are chaired by independent directors, it really didn't seem to matter one way or the other.

I eventually ended up serving on a board that received a shareholder resolution on splitting the two roles, so then I was forced to confront the issue and really give it some thought. I still believed that the idea of a split model made sense theoretically, since why should the person being overseen by the board be chairing the body that was overseeing him? But I also still

## A separation at the right place, right time

By Tama Copeman

**As the debate rages** over separating the chairperson and CEO roles, it is useful to review examples under fire from real-life situations. Here is a case I was involved in with a stressed early-stage company that illustrates how the separation of roles played out.

Two successful entrepreneurs had taken companies through successful IPOs in the past. They came together from different industries and founded a new company with a compelling vision. The company easily attracted investment based on their reputations and potential to build a highly successful company. The governance structure involved split chairman and CEO roles. The chairman, in his 70s, invested heavily in the company. The remaining board members were chosen from the major external investors.

After two years, industry dynamics began to change and the company started to struggle. Despite several creative adaptations to the business model, the situation worsened. Under continual stress, the CEO resigned. As

a major investor in the company, he remained on the board. The chairman led the choice for a replacement, picking a retired industry leader and former co-worker as the replacement CEO. After some time, many members of the executive team felt the new CEO was not strong and not involved deeply enough in the management of the company. The executive team, looking for leadership, began to consult with the former CEO, now a non-executive director. They had built a good relationship from working together through many crises. This naturally began to undermine the current CEO.

The issue reached the breaking point a few days before a board meeting. Within an hour from the start of the meeting, the conflict turned into a shouting match, with personal attacks firing back and forth. After listening for about 15 minutes, the chairman took control of the meeting. He first reiterated the definition of roles within the company's

operating agreement. Then he demanded that the former CEO agree to back away from directly managing the executive team — or resign before the end of the meeting. The director agreed. The chairman also dealt with the CEO's performance in the meeting, laying out specific performance goals. However, it became clear over the next few months that the CEO was unable to energize and lead the company. After about six months, a turnaround specialist replaced the CEO.

Could this issue have been resolved as easily with a different structure? Perhaps. But in this case, the separation of chairman and CEO enabled a pathway for resolution of the conflict.

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saw the practical problems with separation, such as how having dual sources of authority in a company could undermine a CEO's ability to run an organization, or that separation might cause the other directors to become a little lazy and deferential to the nonexecutive chair and not be as diligent.

That was how I felt until I joined the HealthSouth board. As Jon mentioned, as part of the company's restructuring, separate positions of an independent nonexecutive chairman and a CEO were established. Watching Jon in the role of nonexecutive chair, I observed how separating the roles worked in practice. As it turned out, my concerns never came to pass. So I have gone from being agnostic to being slightly against the concept to now being in favor of it. But my "in favor of" stance comes with an important caveat. Separation is a great idea only if you choose the right people for the two posts. You don't want to end up having two strong egos running your organization. I have seen that at other companies that split the roles and ended up eventually recombining the two.

**Robinson:** Think about British Airways with John King serving as chairman and Colin Marshall as CEO. The two were constantly contradicting each other. When you have a chairman who has a staff and has an ego, you are going to have potential problems.

Let me be clear that I am not saying that we should under no circumstances split the chairman and CEO roles. Sometimes the two positions *should* be separate. Keep in mind whether you are sending a negative message when you bring in someone to the organization who doesn't hold the full title that the previous chairman-CEO did. Does that mean the board lacks confidence in the new person, particularly when he or she is an insider? It *does* send a message. You need to be careful when you start mandating issues of corporate governance.

**Mark:** Doesn't this fall on the normal bell curve like everything else? At the "bad" end are the Tycos and the Enrons. Then the curve goes up — in the middle, everybody's OK, then at the other end there are the wonderful "it ain't broke so don't fix it" kind of companies. Without some enabling mechanism to allow the shareholders or the other directors to gain greater board authority, this "bad" end perpetuates itself until there's some stunning tragedy that causes it to fall apart.

Speaking from personal experience, I have always found that the trouble with being an individual director is that no matter how much of an activist you are on an issue or how strong you are, essentially you are powerless unless you gain the support of your fellow board members. If yours is a lone voice speaking up about something, you will get branded as a pain in the neck. Unless you can get a few other influential members to support you, you will go down in defeat every time. Then the only tool you have is resignation, which is an ineffective tool

because it gets reported that you are "retiring" from the board or "pursuing other personal plans" or some such. In the appropriate situations — this can't be every situation — there needs to be someone on the board who is independent enough to detect problems or unrest and is willing to raise issues for discussion. Having tried a half a dozen times myself in different board situations, you feel impotent when you're not being heard or supported.

**Kraemer:** Reuben makes a good point. If you do not have a way of being able to express your opinion and get the majority of the board members to understand your position, then you have a problem. In my experience, as long as we have executive sessions without the chairman-CEO being present, and we can talk openly, that has never been a problem.

The idea that you can't speak your mind because the chairman-CEO is in the room or that you feel uncomfortable speaking up sounds like dereliction of duty on the part of an independent director. That would raise a major concern for me about the independent directors not doing their job.

### The right person for the job

**Millstein:** Aside from Sen. Schumer — whom I helped elect, but I don't support his bill — nobody wants to mandate this. It should be left flexible for boards to determine what they want to do. I believe in the default rule. A split role should be the rule that boards consider first, and if they don't want to do it they ought to explain to their shareholders why they're not doing it. The board should never strip an existing CEO of his or her chairmanship. Splitting of roles should occur upon succession.

Charles, the paramount issue is this: What kind of person should the independent chairman be? It's critically important that he or she be someone who does not aspire to be CEO. It should be someone who sees this job as "the end of the line." At our Yale Center we convened a group of independent chairmen to talk about their role. These are individuals who have been both chairman and CEO, and they all think that having an independent chairman separate from the CEO is the right way to go. They emphasized, however, that it's not a panacea. It's not going to work in all situations. Most important, however, they stressed that you had better select the right person as chairman — one who knows that it's not his or her job to run the company but, rather, to run the board.

The debate ought to shift from whether to separate the roles to defining what kind of person should the chair be. What kind of characteristics should this person have? What kind of a relationship should he or she have with the CEO? With the rest of the board? We would make a bigger contribution to the debate if we moved past talking about "whether," because "whether" is going to happen.



**'We take no position on it as a matter of law, and that's the way I hope it remains.'**

— William Chandler

**Elson:** We are dealing with human beings, so how do you ensure that the person you select as chairman does not try to usurp the CEO's authority? In a situation I once heard about, the nonexecutive chairman was a good-natured person who didn't try to run the company. But people in the company who were dissatisfied with the job the CEO was doing would go to the nonexecutive chairman. Ultimately, that dynamic undermined the CEO's authority and ability to run the company.

**Millstein:** Selecting the chairman is almost as important as selecting the CEO. Boards go to great lengths to select the

right CEO of a company, and a board ought to do exactly the same thing when it thinks through whom it wants as its chairman. The role has to be carefully defined, and the person had better be selected based on his or her ability to get along with the CEO.

**Grant:** When you talk about selecting the right people for the split roles, would you advocate having someone as chair who is not an expert in a company's particular industry? Someone with general business acumen but not specific industry knowledge? Would that be a way to prevent conflict?

## Panel participants

**Charles Elson** (*moderator*) is the Edgar S. Woolard Jr. Chair in Corporate Governance and director of the Center for Corporate Governance at the University of Delaware. He has served on several corporate boards, including a present directorship on the HealthSouth Corp. board. He writes and speaks regularly on governance issues, has been active on several commissions of the National Association of Corporate Directors (NACD), and is a member of the *Directors & Boards* editorial advisory board.

**The Honorable William Chandler** is chancellor of the Delaware Court of Chancery, a premier forum in the country for adjudicating complex business litigation. He was appointed chancellor in 1997 after having served as vice chancellor of the Court of Chancery since 1989. He was in private practice before first joining the state judiciary as resident judge of the Delaware Superior Court in 1985.

**Stuart Grant** is co-founder and managing director of Grant & Eisenhofer P.A., a firm he formed in 1997 after serving as litigation partner in the Wilmington office of Blank Rome Comiskey & McCauley. He is nationally recognized for his representation of many of the largest public and private institutional investors in securities, regulatory, and corporate governance litigation.

**Jon Hanson** is founder and chairman of The Hampshire Real Estate Companies, a sponsor of real estate funds. He has served as non-executive chairman of HealthSouth Corp. since October 2005, following the leadership crisis that the health care provider faced with the

ouster of former CEO Richard Scrushy. He is lead director on the Prudential Financial Inc. board and a director of Yankee Global Enterprises, owner of the New York Yankees.

**Bess Joffe** is associate director of Hermes Equity Services Ltd. She joined Hermes in 2005 to work on corporate governance and responsible investment in the Americas. In her role, she actively engages at the board level with underperforming companies that are fundamentally sound but have a variety of strategic, financial or governance issues, with the objective of helping improve long-term financial performance.

**Harry Kraemer** is executive partner with Madison Dearborn Partners, a private equity investment firm based in Chicago that he joined in 2005 after a 22-year career with Baxter International Inc. He was named CEO of the global health care company in 1999 and chairman and CEO in 2000. He is Clinical Professor of Management and Strategy at Kellogg School of Management at Northwestern University and serves on several corporate boards.

**Reuben Mark** retired from Colgate-Palmolive Co. at the end of 2008, after having served as chairman of the board for 22 years and CEO for 23 years. He first joined the company in 1963 and held significant positions in the United States and abroad during his distinguished career. He had been on Colgate's board since 1983, and has served on the boards of Cabela's Inc., Citigroup Inc.; the New York Stock Exchange Inc., Pearson PLC, and Time Warner Inc.

**Ira Millstein** is a leading expert on anti-trust, government regulation, and corporate governance matters and a top counselor to corporate boards. He is senior partner of the international law firm Weil Gotshal & Manges LLP. In addition to his active legal practice, he serves as senior associate dean for corporate governance at the Yale School of Management and is a board member of the NACD and has spearheaded several of the NACD's Blue Ribbon Commissions studying key issues of board leadership.

**Robert Monks** has spoken, written and testified widely on corporate governance matters for the past 25 years. He founded Institutional Shareholder Services Inc. in 1985 and served as its president until 1990, following which he was a founder of the activist fund LENS. He has been a board member of 10 publicly traded companies, and is now the board chairman of Governance for Owners, a firm that provides a range of governance and shareholder engagement services.

**James D. Robinson III** has been general partner of RRE Ventures, a private information technology-focused venture capital firm, since 1994. He is also president of JD Robinson Inc., a strategic advisory firm. He served as chairman and CEO of American Express Co. from 1977 to 1993. From June 2005 until February 2008 he was non-executive chairman of the board of Bristol-Myers Squibb Co. He is presiding director of the Coca-Cola Co. board and an advisor and former director of Novell Inc.

— James Kristie

**Mark:** Having good motivational and people skills are by far the more important traits that a nonexecutive chair should possess. Industry expertise is almost secondary. You want someone who is able to communicate well, and who is able to allocate the discussion. That means going into a meeting knowing where each director stands on an issue, so that if one side is being overrepresented, the chairman can say, “Ira, what do you think about this?” — knowing full well what Ira thinks. The role requires one to be more of a good listener, debater, and psychologist than anything else.

### Lead director vs. nonexecutive chairman

**Elson:** Now let’s factor in the role of the lead director.

**Kraemer:** When I think about a well-run company and board, I’m not concerned about whether the board leader is a nonexecutive chairman or is a lead director. That again strikes me as more form over substance. I don’t really understand what the difference between the two is.

**Robinson:** I would agree with Harry. If you start defining the specific roles carried out by the nonexecutive chairman and the lead director, you see that they basically are the same. Unless you’re going to play “Hail to the Chief” every time the nonexecutive chairman walks in the room, there shouldn’t be a distinction. A conscientious lead director should be able to accomplish exactly the same things as the nonexecutive chairman.

**Mark:** I see an enormous difference between the lead director and the nonexecutive chairman, if for no other reason than the position of lead director is an informally instituted designation. At Colgate-Palmolive we allowed each director to serve as the lead director for two years. That doesn’t necessarily mean that each board member is uniquely qualified to fill the position. Choosing the nonexecutive chairman, if he or she is independent and not the ex-CEO, is a much bigger deal. The position is relatively high paid, filling it requires a recruitment process, and to a certain extent the shareholders have a role in it. A chairman is elected; a lead director is appointed.

**Joffe:** If there is no difference between a lead director and a chairman, then why are chairmen-CEOs in this country clinging to their title for dear life?

**Elson:** As strange as it seems, titles *are* important. They carry meaning. There’s something to be said about the title of chairman versus lead director. “Chairman” has certain connotations within the organization and in the outside world. There’s a perceptible difference — a different tone — to a meeting that a chairman presides over than one that a lead director runs.

**Hanson:** Charles is right. The chairman controls the flow of the meeting. In the situations where I am the lead director and happy to be the lead director, I can tell you that I do not control the flow of the meeting. The engagement with the board

is different as well. As a chairman, I can look at each of the directors and engage them in the board conversation. That is not something a lead director can comfortably do.

### A better window into the boardroom

**Elson:** To wrap up, there seems to be a consensus that it is a meritorious idea to split the two positions. Yes, there are plusses and minuses to doing so. But no one here believes splitting the roles should be mandated by government statute or judicial fiat. Let’s have a couple of closing thoughts.

**Monks:** Charles, let me make sure this element is raised as important to our debate today. We are getting to the point now where the size of corporations is a major factor in the political and social life of countries. ExxonMobil, for example, a company that many know I have had a particular involvement with as an activist shareholder, is the 14th largest enterprise — and that includes countries — in the world. What corporations of that size do has a huge impact on society. They have to be concerned not only with meeting their numbers but also meeting their responsibilities to society. This raises very complicated questions for them — questions of global warming, questions of hiring practices in different parts of the world, and many other difficult issues. With the legitimacy of corporations constantly on people’s minds, you need leaders who are sensitive to the company’s impact on society. That requires a range of skills that is not impossible to find in a single person, but if you can’t get that in a single person then that is another reason you may have to separate the roles at the top.

**Joffe:** Aligned with Bob’s comment, we at Hermes are responsible for protecting the interests of long-term shareholders. We recognize that different boards face different situations at different times. But shareholders need to understand with much more specificity why boards have made particular decisions at a particular time. Right now that information is really lacking. As we have seen in the U.K., splitting the roles of chairman and CEO can give us more of a window into the boardroom so that we can gain greater confidence that boards are making the right decision on behalf of the company’s long-term owners.

**Elson:** Chancellor, you have the last word.

**Chandler:** This panel, with its diverse set of views, has deeply explored the merits of separating the chairman and CEO roles. We have touched on the vital importance of selecting the right people to fill the split roles, because any competition or conflict between the chairman and the CEO can lead to all kinds of difficulties. A future panel might address how to go about identifying and selecting the best people to fill the chairman position. You might also cover whether we should develop a cadre of professional directors who, based on their skills and training and availability, are qualified to serve in the role of chairman in various companies that would benefit from the separation of the chairman and CEO roles. ■