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‘A Tremendous Insult:’ Boardroom Leaks Irk Directors

By Amanda Gerut
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Leaks of information about CEO hires, potential acquisitions and boardroom deliberations about executives accused of misconduct have become an increasingly acute concern as more activists, first-time directors and directors with varying business backgrounds join boards.

The spread of confidential information about boardroom discussions is an evergreen source of disquiet among directors. But as more boards contend with messy, difficult issues about company culture, for instance, dissent and rifts can sometimes lead to directors’ turning to outside sources to influence decisions. Staying abreast of group dynamics such as distinct majorities and minorities in votes, directors who feel their views aren’t being heard and general board dysfunction that can breed an environment in which directors might turn to the press or social media to air their views is important in maintaining an open — but confidential — atmosphere.

Meanwhile, the issue of information seeping out before a board has decided to formally communicate remains a frustration for directors.

“It’s a tremendous insult,” says **Roy Dunbar**, a director on the boards of **Humana**, **Johnson Controls** and **Lexmark International**. Dunbar spoke about his experience on other boards that are no longer independent public companies following deal transactions.

He recalled a past board meeting that concluded at 1 p.m. By 4 p.m. the same day, there was an online article in *The Wall Street Journal* that included “sufficient detail” about what had happened at the meeting, he says.

“It just shocked and angered me enormously,” says Dunbar. “We never got to the bottom of where that leak came from.”

Raj Gupta, a veteran director who currently serves on the **Arconic** board and as chairman of **Avantor** and **Aptiv plc**, writes in an e-mail that on most of his boards, confidentiality has been a high priority. In one unfortunate instance, however, there were leaks to the media. In addition, a confidential conversation that board members held about the CEO was leaked to the chief executive.

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“This is a very difficult situation for the board to handle and prevents board members from having a free and open exchange on important topics,” writes Gupta.

The way it’s supposed to work, says Dunbar, is that the board deliberates as it needs to and then issues of substance are announced to all shareholders at the same time. Shareholders should have confidence that there’s a fair process in place for information to be disseminated, he says.

“It’s a great disservice to shareholders when rumors are out there,” says Dunbar.

Still, articles continually appear in the news about impending CEO hires and fires, M&A activity and major strategic shifts boards are considering, particularly in *The Wall Street Journal*. When esteemed *WSJ* reporter and editor **Joann Lublin** — who has authored or co-authored thousands of such “scoops” over the past four decades at the paper— announced her retirement after 47 years, a colleague of hers posted a congratulatory note on **Twitter** that offers some insight into Lublin’s ability to get information from credible sources. One such tidbit: “A source texted Joann, saying he couldn’t talk, he was in a meeting. She told him to go to the bathroom and call her from there. He did.”

Most boardrooms, like a therapist’s office or a confessional, are considered “sacrosanct,” says Davia Temin, president and CEO of reputation, risk and crisis management firm Temin and Company. However, that confidentiality can break down in certain situations. For instance, leaks can occur when a director tries to influence a board decision and isn’t successful. In frustration, a director might turn to the press to put external pressure on the board to get directors to vote a certain way. Activist investors may feel an allegiance to their firm or other outside parties, or founders could disagree with other board members and leak information to try to sway investors to their side. Confidentiality can also break down in a crisis, Temin says.

Still, “even in this world of social media and transparency, boardroom deliberations really do need to be opaque,” she says.

Dunbar says that boards are at greatest risk when someone has a motivation or an advantage to gain from leaking.

“When it relates to M&A there are number of parties involved and they may have different motivations depending on where the discussions are,” says Dunbar. For example, private discussions happen in parallel on the boards of two companies in a deal setting. Moreover, the buyer and seller each have bankers and lawyers, and one party might gain an advantage in pushing information into the public domain that is still private, even if the matter is far from reaching a point of conclusion, he says.

Those leaks are particularly frustrating, he adds, because they can distort share prices and have a negative impact on certain shareholders. Meanwhile, other shareholders who aren’t privy to the leak,



which may or may not be true, are stuck on the sidelines wondering “what on earth” is happening, says Dunbar.

“That’s what makes it egregious — it’s not fair that information is going out before things are clear,” he explains.

While investment bankers and advisors — the “others” in the board meeting aside from directors — are often thought to be a source of leaks, Dunbar cautions that assumptions that advisors are the leakers may be misguided.

“It’s more a question of what are the specific circumstances that might encourage a leak,” he says. There could be an important motivation that stems from value, leverage or another advantage that a party gets from leaking something, he says. For example, another situation that Dunbar didn’t experience personally involved the CEO of a potential acquiring company. The CEO thought having the fight in public would lead large institutional shareholders to back his company because doing so would be advantageous to that shareholder group.

Unfortunately, there isn’t much recourse for a board if a director breaches boardroom confidence, says **Holly Gregory**, co-chair of **Sidley Austin**’s global corporate governance and executive compensation practices. Yet the stakes are considerable. Sharing information about a potential transaction in the works that hasn’t been announced publicly could give rise to insider trading liability if a director is behind the spread of information. Leaks are also highly damaging to board culture, she says.

“The board needs to know that people can share ideas and discuss and debate vigorously within the boardroom as a black box so that directors can be convinced and change positions and come to a consensus,” Gregory says. “To do that you need to know people aren’t leaking who said what to whom, and who took what position.”

To be able to have a free exchange of ideas in the boardroom on a difficult topic requires that directors be guaranteed confidentiality, Temin says. “Otherwise, the business of the board is compromised.”

It would be extremely rare for a board to take action against its own members, says Gregory. Doing so would become public and could be even more damaging to the company. Generally, if a leak is discovered, the board chair or lead director will have a discussion with the director and remind them of the board’s policies. Gupta notes that investigating any leaks and taking “appropriate action” should be a high priority for a board that has suffered a breach of confidence.

“This may very well result in asking the board member to step down,” says Gupta, in an e-mail.



However, often a board can't force a director to leave. If the issue continues, it can be factored into the board's renomination decision, says Gregory.

Boards can also do a workaround by forming a special committee that excludes the leaker, says Temin. Directors who aren't on the committee won't have access to the information until the committee is ready to make a recommendation.

Temin points out that boards, in recruiting, should always try to understand whether a potential director understands discretion and the need for confidentiality.

Dunbar also says that boards and management teams should be aware of whether certain advisory teams, including investment bankers and lawyers, have had leaks in the past. Each team is different, so it doesn't make sense to look only at whether a specific advisory company has a history of leaking information, he says.

In addition, all key discussions should take place among board members without the advisors present until it's absolutely necessary to bring them in, Dunbar says. When they come in, the board should remind them of their duty to maintain confidentiality, and when they're done providing financial and legal information, they should leave, he says. The board can continue in executive session, and on the most sensitive matters it might make sense to ask internal company leaders, such as the CFO or general counsel, to leave the room. Following that pattern can reduce the risk of leaks, but it will never be negated, says Dunbar.

Ultimately, the key issue is to continually work on board culture, says Gregory. If tensions are rising on the board, directors should understand the source. If one or two directors are consistently in a minority, the other board members should understand why and consider whether they need to look closer at an issue. And, even though it sounds "touchy-feely," says Gregory, directors' spending time getting to know and understand each other is an important component to board culture. Even if a director votes against a measure, he or she still needs to support the board's decision; understanding how people think can help directors do that, she says.

"It's attention to those things that helps prevent the dysfunction — and the leaks."