



The Board’s Legal Environment

A new installment of Egon Zehnder’s Directors Development Program unpacked legal principles and liabilities for board directors in a session titled “The Board’s Legal Environment.” Leading the discussion was **Sharad Abhyankar**, a Senior Partner at Khaitan & Co. who specializes in commercial and corporate law and corporate governance matters.

The Legal Responsibilities That Board Directors Should Keep in Mind

Abhyankar began his outline of board directors’ legal responsibilities with a recognition that these complex topics can appear ‘tricky’: at the same time, “I’ll also tell you that it is not that scary, since the duties and liabilities of directors are not that impossible to perform.”

The first aspect Abhyankar explained is what the law says about directors’ behavior

– duties, liabilities, responsibilities – on the board. Core to this is being able to explain to a court or regulator – should it come to that – how a director did his or her job and what they meant to achieve in service to the company.

But Abhyankar acknowledged that there is an inherent tension here: although board directors assume the highest responsibility for a company, they are not ‘on the shop floor’ doing administrative or management work. Thus, they will need to always strive for clear awareness of the issues facing the company. This starts at the board meetings – carefully reading meeting agendas and understanding the items up for debate. “Gone are the days when people will start opening their board packs at the board meeting,” Abhyankar said. Indeed, a lack of awareness in this phase does not remove one’s potential liability for these items down the road.

“Whatever you need to understand, you need to ask for clarifications,” said Abhyankar. “You have access to the entire corporate record. You are entitled

to review documents...the legal position is you have access to all the records of the company, and you can ask for that.”

Should a director decide that the item at hand is too complex for them to grapple with, the law allows them to consult outside counsel. “You can say that ‘I need counsel, I don’t want to rely only on the management of the company, and want an independent advisor to provide a view on what we are doing, whether it should be tweaked etc.’” Abhyankar remarked.

The Importance of Accurate Meeting Minutes and Consistent Policies

Besides the meeting agenda, the second critical board document from a legal perspective is the meeting minutes. The minutes should provide a detailed, accurate record of what was discussed at the meeting and how the deliberations proceeded.

Abhyankar gave an example from when he was doing due diligence on an internet service provider that was planning to lay copper under a city. “We were taken aback because in those days telecom laws did not permit that,” he said. Management said they were permitted to do so, yet the minutes from one meeting showed the exact opposite.

“The secretary was very dutiful in narrating everything that got discussed at the meeting and they just exposed the bluff,” said Abhyankar. “Was that injustice to the board? Of course not. It was impeccably well-written that they were continuing to operate the business in a particular way.”

Consistent board policies—in areas such as human resources, financial controls, whistle-blowing, and more—are also vital to maintain for legal considerations. “Why do you need policies?” asked Abhyankar. “Because you need to make the decision-making personality-agnostic. You want to create an institutional muscle and memory of how to make decisions.”

Take a board’s whistle-blowing policy, for example. When such a situation occurs, consistency in the actions taken and the speed at which they are pursued is critical to maintaining a culture of transparency at a company. Delays or changes to the process won’t reflect well to a court or regulator.

“The policies are here to make a more scientific way of making uniform and consistent decisions in the same manner.”

Abhyankar said.

How Directors Can Ensure Management ‘Owns Up’ to the Board

An important issue that may imperil a board is a poor relationship with company management. Specifically, when management does not reveal the full and true extent of the company’s challenges at the board meeting.

This problem can stem from a board that has been built to be ‘yes people’ or those chosen for corporate fame alone, rather than competence and/or true independence.

Such a situation can result in management rebuffing board counsel and contributions,

even when necessary. Or boards that focus narrowly on a management-set agenda without examining broader issues and potential challenges. This has the potential to create a dynamic in which management is not 'owning up' to their board – and also, the board isn't owning up to their responsibilities as directors.

“Don't pass the buck when the law expects you to do that job,” said Abhyankar.

Abhyankar brought up long-held advice he had once learned: Directors should spend more time thinking about their agenda papers than they spend reading them. In other words, directors need to take a long, hard look at the information in front of them, rather than thinking their responsibility ends after a simple review.

“If you want to be a director, you must mentally process that agenda,” he said. “Why are you looking at that agenda? Do you have relevant data? Do you have updated data? I can tell you some horror stories where the board happily approved transactions, say in 2018, when the data that was presented belonged to 2016.”

Board directors must be vigilant in uncovering such inconsistencies. Because, from a legal perspective, directors will still be culpable for the potential ramifications. “The law will not excuse it,” said Abhyankar.

Protecting Yourself as A Board and as A Director

A board is a collective body, setting priorities and making decisions as one cohesive unit. The same logic applies to the legal environment, meaning that any single director cannot expect to escape the consequences of failing to follow the

law if they ignored their responsibilities to it. “The principle still remains the same that by being the board, you are the final arbiter where the buck will stop,” said Abhyankar.

Subsequently, directors must keep the 'ear to the ground' and know what is going on in their companies beyond what's discussed at the quarterly board meetings. Abhyankar offered some ways to accomplish this, such as having off-site meetings or proactively engaging with management e.g. visiting their company's 'shop floor' or its equivalent to get a read on what's happening at the field or ground level and among those employees.

“You must watch carefully, you must listen attentively, And most importantly, whenever you see any aberration or something that you must illustrate to others, please speak up. Because that is something which is very important for any director to ensure that your views or your observations are brought to the attention of others.”

Abhyankar said.

Returning to an earlier point, directors who hold a differing view should record the same in the meeting minutes. This can protect individual directors who have noted issues or discrepancies the larger organization may have failed to address, and ideally promote a culture of compliance across all levels of the business.

“The cost of compliance is always lower than the cost of non-compliance,” Abhyankar summarized.

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