

MASS HIGH TECH

MIT

THE JOURNAL OF NEW ENGLAND TECHNOLOGY

OPINION

Stopping leaks from the boardroom legally, ethically

If you are a corporate board member or senior officer, your legal and fiduciary duty is to enforce board confidentiality and stop leaks of inside information. Leaked inside information can affect stock prices and can lead to shareholder lawsuits. But you surely don't want to end up under indictment for "plumbing" to stop the leaks, as recently happened to Hewlett Packard's former chairperson, Patricia Dunn. You want to do your duty, but stay on the right side of the law. So what is the right and legal way to solve the problem of a high-level corporate leaker without treading on anyone's privacy rights and without exposing yourself to criminal indictments?



HOW I
SEE IT

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One thing is clear — this problem is not new. The mess at Hewlett-Packard is not an isolated incident. In a survey conducted by the independent research firm Ponemon Institute, 53 percent of board members interviewed said they have used so-called "pretexting" (a nice name for lying to obtain otherwise unavailable information) or would consider using it to discover a leak of confidential information. And 56 percent said they have served on boards that used "aggressive surveillance methods" to investigate potential problems. They may think

such means are justified by the compelling need to find the source of leaks, but pretexting and other means of getting information without the subject's consent are illegal in many states. It is now clear that corporate pretexting can lead to scandal, professional downfall and even criminal indictments. Bills are pending in Congress which would allow civil and criminal penalties for engaging in pretexting. Phone companies have filed lawsuits against pretexters in an effort to stop the process.

So what is the legal and ethical option for executives and corporate boards to uncover the source of high-level leaks without jeopardizing themselves and others in the process? Quite simply, companies should develop a litigation plan that uses the courts to grant permission (and provide cover) for the process of obtaining access to confidential records.

Once a board becomes aware that confidential information is being leaked by one or more of its members, it can bring a lawsuit for breach of loyalty against the unknown defendant. In essence, the company files a lawsuit against an unnamed party — a "John Doe" or "Jane Doe."

Pleading against unnamed parties is allowed in order to proceed against people who are unknown at the time of the complaint, but whose identities may be learned through the discovery process. Normally, a complaint must be answered before any discovery is allowed. But by using "John Doe" pleadings, the company may request "pre-service" discovery in order to learn the identity of the defendant.

Employees, executives, and board members owe a duty of loyalty to their employer. Courts may allow corporations to get the information they need by allowing a subpoena to issue to a phone company, Internet service provider or other communications supplier. In reviewing any opposition to pre-service discovery, a court balances the First Amendment and rights of privacy of "John Doe" with the rights of the company to protect its proprietary and confidential information. Of course, the litigation process is a bit more complex than can be described here — however, once a lawsuit has been filed, the lawsuit itself will provide pressure to the source of the leak to stop the flow of confidential information.

If you are going to bring such a suit to stop a suspected leaker, get the entire board of directors to approve the litigation plan. That will be protection against any complaints later on.

There is, to be sure, some room for some methods of private investigation to discover corporate conundrums. But with the risks so high, it is much safer — and can be more effective — to obtain the sanction of a court of law for legal access to the needed information. Not only is it the right thing to do, it just might save your career.

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