

SECTION 4  
PRACTITIONER'S  
CORNER



WHY DO DIRECTORS FEEL SO SEPARATE WHEN THEY ARE  
INTERCONNECTED?

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The current events at Hewlett-Packard (HP) offer steadfast corporate governance professionals a new case study concerning: (1) the powers of the Board, (2) the role of the Chair, and (3) the expectation by individual directors to expect boardroom *due process* to redress issues.

While the Sarbanes-Oxley Act of 2002 (SOX) changed the requirements for transparency and financial disclosure for the CEO and CFO, it remained too silent concerning director-to-director transparency and the role of the Chair to take action without full board consent. This is a re-occurring directorship problem as Enron, Disney, and other exigent cases show. These cases point to the need for director-to-director transparency and disclosure if board members are to avoid unsubstantial board action.

In 2003, participating Fortune 1,000 board members responded to a personal research survey and indicated clearly that corporate governance was not a perfunctory role. Yet, there continue to be structural and control/power issues plaguing directorship excellence simply due to the absence of commonly held protocols that prescribe how boards exercise collective powers and interconnectedness.

Let's for a moment set aside the California Attorney General's HP probe dealing with the "complicated chain" of private investigators and contractors, and instead address the board's control

structure and information sharing protocols related to that event. A Washington Post article refocused the significance of the HP case in this quote:

*The extent to which the Silicon Valley computer company would go to identify the person who spoke anonymously to a reporter about confidential company operations has scandalized corporate America, launched federal and state investigations, and outraged members of Congress, who have called a ... hearing on the matter".*

People not concomitant with the events at HP can never fully know the intimate details of this situation and so we should avoid jumping to full conclusions. Yet conceptually, the act of investigating a fellow board member for information leaks and the act of divulging confidential board information are each problematic. More importantly, is the separateness both sides of this issue expressed when each ignored the *powers of the full board* and withheld transparency between board members.

Interestingly, there are two documents that govern directors that place "all powers" with the full board and not individual board members. These documents are the Model Business Corporation Act (MBCA) and the Delaware General Corporate Law (that applies to over half of the Fortune 500 companies chartered in Delaware - including HP). Each establishes a one-director one-vote or an egalitarian structure as the basis for board work.

This structure provides directors equal voting opportunities. Yet most members of boards of directors have risen through the ranks of a pyramidal and hierarchical management structure that sanctions veto powers by an overseer. It is therefore, natural for directors to see the Chair as holding veto powers or an imaginary vote-and-a-half.

In reality, it is the *whole Board* performing en masse through a meeting or through a signed consent document that constitutes Board action. This concept outlines the “*board due process*”. Acts by individual board members occur ONLY as the result of specifically and purposefully delegated authority, authenticated by corporate documents or minutes, which is described in the primary documents listed below for your review. Individual board member action should not deny or negate the voting rights granted to fellow board members or negate the directors’ ability to fulfill the fiduciary responsible to the shareholders and the organization as a whole.

The Delaware General Corporation Law states:

*A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number (bolding added for emphasis).*

The Delaware General Corporation Law further states, that in the absence of a meeting:

*(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form (bolding added for emphasis).*

The Model Business Corporation Act (MBCA), subchapter “A” titled “Board of Directors” - §8.01 titled “Requirements of and Duties for the Board of Directors” (b) states:

*All corporate powers shall be exercised by or under the authority of, and the business affairs of the corporation managed by or under the direction of, its board of directors, subject to any limitations set forth in the articles of incorporation or in an*

*agreement authorized under section 7.32 (titled “Shareholder Agreements”) (bolding added for emphasis).*

Further, the MBCA further addresses “Actions without Meetings” in §8.21 and states:

*(a) Except to the extent that the articles of incorporation or bylaws require the action be taken by the board of directors at a meeting, action required or permitted by this Act to be taken by the board of directors may be taken without a meeting if each director signs a consent describing the action to be taken and delivers it to the corporation.*

*(b) Action taken under this section is the act of the board of directors when one or more consent signed by all directors (bolding added for emphasis) are delivered to the corporation. The consent may specify the time at which the action taken is to be effective. A director’s consent may be withdrawn by revocation signed by the director and delivered to the corporation prior to delivery to the corporation of unrevoked written consents signed by all directors.*

*(c) A consent signed under this section has the effect of action of the board of directors and may be described as such in any document (bolding added for emphasis).*

These sources give rise to the easy and logical conclusion that the basic structure for Board work is as an egalitarian body of directors with equal opportunity to express voting rights. I propose the term *governequity* to describe this situation.

In the HP case, the full board should have been the body to delegate the authority to the Chair to enact surveillance on fellow board members. The corporate by-laws would then guide follow-up actions for directors whose actions failed to meet the standards of due care to the shareholders.

In this fashion, the full board would sanction the actions through majority voting in a meeting or by consent order and there would be no usual provisions for a Chair to exercise veto power until directors unwittingly or obligatorily delegate that power.

Further, when the corporate bylaws indicate the Roberts Rules as the meeting process protocol that further places restrictions on the Chair to remain a neutral organizer of the Board’s debate-based interactions. This egalitarian concept unfortunately remains foreign to standard corporate governance structures and processes, and directors may not understand its full application and implications to the balance of power of the full board to act.

As a point of comparison, our society is structured to impede the creation of a single all-powerful person exerting full and complete control to rule the masses. These balancing concepts have now found their time in the structuring of corporate governance. CEOs report to the Board as a balance to the powers and control of the position. The Board is balanced and controlled by regulatory agencies, Wall Street, watchdog organizations, and the force of its own stockholders.

The HP case provides lessons about the value of decision determined by the full board and the need for *all powers to rest with the full board*. Adherence to an egalitarian board structure balances the role of the Chair and the powers of each director. It allows boards to seek full board debate and collective action, in which each member exercises a vote that can be delegated but not officiously denied. Obfuscating the practice of egalitarian corporate governance is the absence of director-to-director transparency, and acts when some members seem to be *more equal than others*.

Individual board members must rise to the obligation to act in concert with the actions of the full board. It is also prudent for Boards to embrace rigorous boardroom debate and omit the public domain as a forum for redress. It is equally important for directors to communicate with discretion over matters before the board. Directors can and do impact the marketplace. Opposing views of board action are best reserved for active boardroom debate. When offered externally, such comments may devalue the organization, deplete market goodwill and lessen shareholders' value and confidence, or generate into the imbroglia experienced by HP.

## Conclusion

The "all powers" Board will (1) embrace and exercise the powers of the full Board, (2) balance and define the role of the Chair and eliminate the passive practice of wholesale delegation of individual board member voting rights, and (3) obligate individual directors to practice transparency and full disclosure in the matters that come before the board and (4) provide board due process and utilize the board table to redress issues -- avoiding the public domain as the forum for debate.

Individual board member differences should create the foundation for solid fact-finding and the corresponding rigorous debate that informs the decisions of the full board. Ignorance, willfulness, personal agendas and ego do not serve the shareholders and distort the ultimate value of board work.

The lessons offered by the HP case move corporate governance to embrace the collective power of the whole board to enact action that expands the expertise and knowledge of any one director. FULL BOARD POWERS and DUE PROCESS better serve

directors' needs, shareholders needs and the markets as a whole.

*Governymity*, defined as governance free from identification, conducted by the unnamed few, lacks the transparency and vehemence demanded by the new paradigm of corporate governance professionalism.

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