



## Torpedoing Board Investigations

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This is for every corporate, just make sure that your board, management and counsel disclose by plan, not by misadventure



02 January, 2019 by Dr M Muneer , Ralph Ward. Includes 'Print this article' and 'Font size' options.

Globally, boardrooms keep throwing up surprises one after the other. India is no better even with late reforms slowly taking shape at board governance. SEBI and Kotak Panel recommendations will take time to get implemented. Meanwhile we have had a series of mishaps in such esteemed boardrooms as Infosys, Tata Sons, ICICI, Axis and Yes Bank, not to mention various other smaller companies around the country.

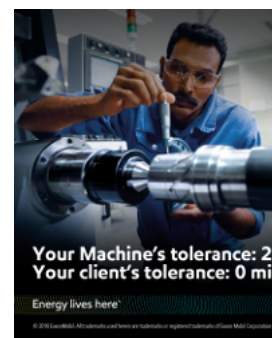
Take for instance, the ICICI imbroglio with the CEO taking a not-so-honourable exit after the board headed by its chairman and ex-HUL executive ceremoniously stayed unanimous in exonerating the CEO of all accusations of impropriety when she was in the same panel that approved loans to a company that had dubious connections to her husband. After the shareholders and media started questioning the board's decision, some board members decided to raise objections and the board wanted the CEO to step out and face an investigation that is currently going on.

So what if your company is facing some serious allegations – like the Infosys whistleblower accusations against its first outside CEO Sikka, a government inquiry like the ICICI case, an accounting fraud like Satyam, a sexual harassment or @metoo moment against the CFO or a mass exodus of executives as in the case of Tech Mahindra?

Good governance policy, and also possible legal protection, should compel a board to launch its own investigation, and the number of such probes is climbing fast. Without the government threat and SEBI involvement, ICICI board would not have ordered an internal enquiry on the CEO. However, boards of directors are not trained for sleuthing or sniffing work, and more often than not, commit boners that taint the results, weaken confidentiality – and sometimes bring fresh liabilities to the company and its directors.

What are the most popular ways of torpedoing board investigations?

The term "board investigation" itself is the root of many problems. Yes, you know that the board commissions lawyers or auditors (typically outside company experts) to lead the actual investigation. But directors still tend to meddle in the business



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even in bad times, and that can lead to disaster. We have spoken to a few expert investigators who worked on board investigations and they all say there has always been at least one “oops” in virtually all investigations.

We find that directors’ natural impulse to keep themselves posted on the investigation is a key source of trouble. The investigation committee members sometimes insist on communicating with counsel or external auditor on a joint basis, with several committee members being involved. This can lead to tainting the information the counsel receives.

Committee members trying to give each of their own direction to the investigation is another hassle. Then there are hidden political agendas, and conflicting anecdotes. Best move for the board is to commission the probe, and then back off, with just the investigation committee chair, or the board’s independent leader, acting as the sole liaison. It is especially important for the chairperson of the board to keep his or her absolute silence on the matter unless it is to the investigation team on their queries. Certainly Narayana Murthy didn’t “walk the talk” in his second term as chairman at Infosys in this context.

This “tainting” problem can extend its tentacles to the board itself. In many instances, the board directors communicate with one another on the matter under investigation without the counsel or auditor present, typically via email, phone or in-person over a drink. That’s a big torpedo and should be avoided. Aside from your intra-board chat on the issue being legally discoverable, it can also leave the impression (at least with regulators or hostile counsel) that directors are trying to get their stories “straightened” or “cleaned”. This is unfair to the enterprise they serve, to the directors themselves, and to the outside counsel.

Imagine that as a board member, you resist the gossipy impulses above, and counsel completes a proper investigation – what then? Boards often insist on a full written report from the counsel. But this may be precisely what you don’t want.

Our opinion is that the best process for the board is not to have a written report but an oral briefing from the counsel. Written reports definitely have their plusses – they provide solid legal evidence if needed, and showcase the board in the right light of making a thorough job of the investigation. But these reports could be liable for disclosure and often not as nuanced, as the counsel and board would like the matter to be. A verbal report to the board can more easily facilitate a good negotiation with the target of the investigation who may be on his or her way out for the termination terms. Recall how Infosys lost the legal battle with its erstwhile CFO and have been made liable to pay Rs 12 crore severance pay.

This brings us to a final way to screw up a board investigation – what happens after the board receives the information? In many instances, a board member will be dealing with dynamite that will explode – it’s just a matter of when and how. Should you disclose the findings to the regulators or outside investigators as a sign of cooperation? Do you waive the privilege? Are there public disclosure requirements? Do you use the findings to quietly negotiate the CFO’s retirement to tend his garden, unlike the Infosys board?

As lawyers love to say, every case is fact-specific. Just make sure that your board, management and counsel disclose by plan, not by misadventure.

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- board of directors



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**Katri** | 10 Seconds ago

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**Gobi** | 1 Day ago

Very relevant article in view of current board issues we see erupting all over. Practical tips to drive proper investigations and not the like the one that was done by ICICI when Chanda was very much in office. The then chairman Sharma was probably hand in glove with Chanda's hubby! Why do these people need so much money! Greedy?

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**Rachana Chowdhary** | 1 Day ago

Hi, great thoughts here Dr. Muneer and Ralph..

Oral/Verbal meet ups can also definitely add-up to the real orchestra....subject to the individual intentions...

Is there a way where the Auditors Roles can be expanded..

They are brought in for a quarterly check on decision-making and processes...

Instead of the traditional method of post-facto Audits on the close of FY each year.

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