

Board oversight of workplace conduct in the #metoo era

LEAD DIRECTOR NETWORK
September 2018

Board oversight of workplace conduct in the #metoo era

Over the last year, there has been a steady drumbeat of allegations of workplace sexual misconduct against dozens of prominent figures from media, politics, and business. A wide range of companies have seen top executives resign in the face of such allegations, with CBS CEO Les Moonves being a prominent recent example. For public companies, the consequences of sexual-misconduct allegations can be severe, and not just for the individuals charged with misconduct. The allegations against Harvey Weinstein, for example, led to the collapse of the Weinstein company, which filed for bankruptcy in early 2018.¹ In 2017 and 2018, the shareholders of Signet Jewelers, Twenty-First Century Fox, Liberty Tax, and Wynn Resorts filed lawsuits against corporate directors and officers at those firms related to allegations of sexual misconduct.²

In this context, boards are assessing their oversight of workplace culture and their role in preventing and responding to sexual misconduct. On July 19, Lead Director Network (LDN) members were joined by Wick Sollers and Sally Yates, partners in King & Spalding's special matters and government investigations practice, for a discussion on the board's role in overseeing matters of workplace sexual misconduct in the context of the #metoo movement. This *ViewPoints* synthesizes that discussion. A companion *ViewPoints* synthesizes another discussion held at the meeting related to the board's engagement with institutional investors.

The current moment

Nearly two-thirds of Americans agree that sexual harassment of women in the workplace is a serious problem, and approximately a third of women surveyed report having experienced unwanted sexual advances in the workplace.³ The problem of sexual harassment is by no means new, but awareness and tolerance of those behaviors has changed dramatically since the #metoo movement emerged in late 2017. *"The world has changed,"* one member observed, and another said, *"A dam has broken. But there is still a lot of force behind that dam."*

The risks to companies are real and significant. LDN members highlighted the reputational damage that allegations of sexual misconduct can do to a company. *"The right way to think about it is as a reputation risk issue."* Another member noted that because of social media, it is now possible for *"one person to voice an issue and it goes viral. You need a crisis management plan, and [you need to know] how to think about escalation."*

The reputational damage arising from current allegations can be compounded by the emergence of incidents from the past. One member noted, *“Some of the issues that emerge are 20 years old.”* Ms. Yates said, *“Any problems you have had, you have to assume, particularly if you have a current problem, that all that old dirty laundry can come up.”*

Board responses

“The days are over of putting our heads in the sand,” Ms. Yates said. Boards are struggling to respond appropriately. Mr. Sollers noted that the #metoo movement *“came on fast and with incredible intensity, and there is no silver bullet to deal with #metoo and its manifestations.”* Ms. Yates pointed out that even several months after the revelations about Harvey Weinstein that kicked off #metoo, a March 2018 poll of directors found that 57% of boards had not yet discussed the movement, and only 22% had agreed to a plan of action in response to it.⁴ LDN members discussed several possible actions boards could take.

- **Establish culture and tone at the top.** Ms. Yates noted, *“The role of the board in establishing values for the company is essential. The board needs to issue a clear statement that sexual misconduct won’t be tolerated. If it occurs, it will be dealt with fairly and taken seriously. There needs to be a public expression that this is important to the company and to the board.”*
- **Articulate clear policies.** Boards should ensure that their firms have policies in place—and that policies are actually working and being followed. Ms. Yates encouraged members to *“look at how it’s actually working, not just policies on the books. Is procedure being followed, regardless of where that person sits? Is there a policy in place regarding what gets reported to board?”*
- **Treat allegations seriously and fairly.** If there is an allegation, boards should ensure that a thorough, fair, and well-documented investigation takes place. Members noted the particular challenges posed by allegations made against top executives, but emphasized that there must be clear procedures in place to address such allegations. Mr. Sollers said, *“It is incumbent on the board to make sure if there is an allegation about top management that it is going to get to somebody who can take care of it. Whether it’s the audit committee or a select board member, it can’t be stopped by the CEO, or the system has a very serious flaw.”*
- **Look for trends and patterns.** Members stressed the importance of looking for trends and patterns that indicate a systemic problem, rather than a one-off incident. One member noted, *“It is challenging to get data from across the company and rolled up so you can see it in trend-based way.”* To meet the challenge, firms are deploying more robust reporting and discovery mechanisms and doing more to look for trouble proactively and *“take the pulse of the organization.”* Members noted that employee surveys can be a helpful tool in gaining a better understanding of the culture of an organization, but also warned that

boards need to be prepared to follow up on issues revealed by surveys. *“Don’t ask the questions if you don’t want to know answers or do anything about it,”* Ms. Yates advised. An LDN member noted that one of their companies created an ombudsman organization to receive confidential complaints.

- **Beware of creating an overly sterile environment.** LDN members expressed concerns that in the current context, caution about inappropriate behavior might lead to the loss of opportunities for mentoring relationships. *“I worry about what kind of environment are we creating,”* one member said. *“Opportunities are missed to nurture, develop, and engage people in an organization, especially across gender lines.”* Another member noted, *“Women feel like now they don’t have opportunities because people are too risk averse to even have a behind-closed-doors conversation.”* The member continued, *“The whole goal is to make it an equal workplace. It would be ironic if this actually held women back—an unintended horrible outcome.”*

The Lead Director Network (LDN) is sponsored by King & Spalding and convened by Tapestry Networks. The LDN is a group of lead independent directors, presiding directors, and non-executive chairmen drawn from America’s leading corporations who are committed to improving the performance of their companies and to earning the trust of their shareholders through more effective board leadership. The views expressed in this document do not constitute the advice of network members, their companies, King & Spalding, or Tapestry Networks.

ViewPoints reflects the network’s use of a modified version of the Chatham House Rule whereby names of members and their company affiliations are a matter of public record, but comments are not attributed to individuals or corporations. Italicized quotations reflect comments made in connection with the meeting by network members and other meeting participants.

© 2018 Tapestry Networks, Inc. All rights reserved. This material may be reproduced and redistributed but only in its entirety including all copyright and trademark legends.

Appendix: meeting participants

Bobby Burchfield, Partner, King & Spalding

Loren Carroll, Non-Executive Chair, KBR

Sandy Cloud, Lead Trustee, Eversource Energy

Don Cornwell, Lead Director, Avon

Jim Fogarty, Non-Executive Chair, Depomed

Ann Hackett, Lead Director, Capital One

Glenn Hubbard, Lead Director, MetLife

Johnny Johns, Lead Director, Genuine Parts Company

Dixie Johnson, Partner, King & Spalding

Ellen Marram, Lead Director, Eli Lilly and Ford Motor Company

Mike McCarthy, Lead Director, Union Pacific

Steve Reinemund, Lead Director, Exxon Mobil

Cal Smith, Partner, King & Spalding

Steve Specker, Lead Director, Southern Company

Dick Walker, Partner, King & Spalding

Jim Woolery, Partner, King & Spalding

Endnotes

- ¹ Brooks Barnes, ["Weinstein Company Declares a Winner in Its Bankruptcy Sale."](#) *New York Times*, May 1, 2018.
- ² Daniel Hemel and Dorothy Lund, ["Sexual Harassment and Corporate Law,"](#) *CLS Blue Sky Blog*, April 9, 2018.
- ³ Caitlin Gibson and Emily Guskin, ["A Majority of Americans Now Say That Sexual Harassment Is a 'Serious Problem.'"](#) *Washington Post*, October 17, 2017.
- ⁴ The statistics Ms. Yates quoted can be found in Jeff Green, ["America's Boards Are Still Afraid of #MeToo,"](#) *Bloomberg*, April 11, 2018.