



WomenCorporateDirectors  
*A Foundation Inspiring Visionary Boards Worldwide*



*Managing  
tough issues in  
the boardroom*  
*WCD Boardroom Strategy Briefing*

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# *What's needed for best-practice response*

Tough issues – from sticky conflict-of-interest situations to crisis events – are things every corporate board faces at some point, and are only becoming more common. In dealing with these challenges, boards are often torn between the need to deliberate confidentially and frankly about a very sensitive situation and a true desire to operate with transparency. Additionally, the desire for board consensus and alignment, especially around the most fraught issues, can be rocked by dissent among directors about the path forward.

At the 2017 WomenCorporateDirectors Global Institute, directors and advisors from several top global companies shared their experiences dealing with tough issues on both their current and past board tenures. The panel included:



**Jan Babiak**,  
Director, Walgreens  
Boots Alliance,  
Inc. and Bank of  
Montreal; WCD  
Chapter Chair



**Diane de Saint  
Victor**, General  
Counsel and  
Company Secretary  
of Swiss-based  
ABB, Ltd.



**Eunice Nyala**, CEO,  
Etiquette Xllent Co.,  
Ltd.; WCD Kenya  
Chapter

In this WCD board briefing, we draw upon several of the key “lessons learned” from the group of directors as they related some of the most complicated issues their boards faced. An important note: we have protected confidential details about specific individuals and companies, focusing instead on the types of tricky situations encountered by boards and the governance processes used to resolve the situations.

Most directors learn quickly from going through challenging issues that there is not a lot of room for error. “Small errors can cause bad navigation,” says Susan Stautberg, CEO and chairman of WCD. “Being just a few degrees off at the start of a problem can lead to being wildly off-course very soon.” With this in mind, we offer the following discussion to help your board be even more prepared for its next set of challenges – and have advance warning of some of the dangers that lie ahead.



**Caroline Blitzer  
Phillips**, Partner,  
Mergers &  
Acquisitions and  
Private Equity,  
Vinson & Elkins LLP



**Moderator:  
Phyllis Campbell**,  
Chairman, Pacific  
Northwest,  
JPMorgan Chase &  
Co, Lead Director,  
Alaska Air Group;  
WCD Member



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# *Growing risk of conflict-of-interest situations*

Corporate boards have been caught up in a broader outcry over conflict-of-interest issues involving elected officials and other governmental roles, and the risk of potential conflict in the corporate world is only rising. The blurring of lines between industry sectors – with everything from grocery chains making technology plays, to tech companies expanding their banking products – creates more opportunities for conflicts, as a director with an executive job in a non-competing firm may one day find that firm going head-to-head with the company on whose board she serves. The rise in M&A activity today also adds to this risk.

Vinson & Elkins partner Caroline Phillips has advised numerous boards on complicated conflict-of-interest issues, including one situation that emerged when a board member was appointed by an investor in a company that had commercial arrangements with the board member's outside firm – arrangements that eventually went south and into litigation. Complicating the situation was the financial distress the company was experiencing, resulting in board decisions that needed to be made around possible restructuring or even bankruptcy. "We faced a dilemma," said Phillips. "If we continued to let that director sit in on the meetings, he may have had access to information about the company's estimates, assumptions, strategy for managing the litigation, and how that played into the company's strategic alternatives that were being considered in connection with the overall restructuring for the company."

"Of course, the board understood that they couldn't just not give notice of the meeting to this director or withhold the information from the board packages from this particular director." So what were their options?

The risk of conflicts of interest is rising, driven by blurring industry lines, M&A activity, and activist investors on boards.

## Panel 6: Dealing with Tough Issues in the Boardroom

- Phyllis Campbell (United States) (Moderator), Chairman, Pacific Northwest, JPMorgan Chase & Co.; Lead Director, Alaska Air Group, Inc.; Former WCD Chapter Chair, WCD Advisory Board Member and Asia Pacific Chair
- Jan Babiak (United States), Director, Walgreens Boots Alliance, Inc. and Bank of Montreal; WCD Chapter Chair
- Diane de Saint Victor (Switzerland), Executive Director, ABB Asea Brown Boveri Ltd; General Counsel & Company Secretary, ABB Ltd; Director, American Chamber of Commerce in France; Former Director, Barclays PLC; WCD Member
- Eunice Nyala (Kenya), CEO, Etiquette Xllent Co.; Business Advisor, Goldman Sachs 10K Women Program; Board Member, Kenya Association of Women Business Owners; Former Director, G4S Kenya and Acorn Africa Group; WCD Kenya Chapter, Member Sponsorship Committee; WCD Member
- Caroline Blitzer Phillips (United States), Partner, Mergers & Acquisitions and Private Equity, Vinson & Elkins



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# *Developing a creative solution to a conflict-of-interest challenge*

The team, which included the board chair and general counsel as well as Vinson & Elkins, had to determine what their alternatives were. “One option was just to sit down with the director and work out an agreement where, at our request, he would recuse himself from the meetings, recognizing that that could be a recusal from possibly the entire board meeting for a number of weeks or months or longer.

“But the more interesting option that we considered quite seriously was trying to create some sort of committee of the board that would be comprised of all the directors except this one particular director, and we would call it a ‘Special Conflicts Committee.’ We were faced with a bit of a challenge because the director actually had the right contractually to sit on any executive committee of the board that was ever constituted.

“We had to thread the needle between a committee that functioned as an executive committee and a committee that we would describe as the Special Conflicts Committee, which frankly was going to have a very broad mandate in light of the significant decisions that the board would be making with respect to the bigger picture around the strategic alternatives for the company. We read the organizational documents of the company; we read the contracts with the investor; and we consulted with Delaware legal counsel to make sure that we could create this committee.

“When we presented it to the board, some directors were very much advocates of the committee, but not everybody on the board thought this was the right way to deal with the director. And, at the end of the day, we ended up being able to sit down with the director, working out a recusal arrangement and he was actually quite cooperative about being willing to step away from the meetings as we worked through the financial distress matters.

“So while our recusal option did end up working out, the fact that we developed a viable alternative – one that could be used in a similar kind of situation – was a huge plus,” said Phillips. “It’s important to fully explore your legal options, and strategically use your outside counsel to identify paths forward out of sticky situations.”

**Tough issues can call for creative solutions in board structure.**



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# *The vital role of the independent director*

Boards can also use special committees to provide a forum to explore options around critical strategic challenges, but they also need strong, independent voices that aren't afraid to ask questions. Eunice Nyala shared an experience about a previous board on which she served as an independent director – a major real estate company in Africa, based in Kenya. “The company was forming a strategic partnership with another firm, a ‘marriage’ with one providing the financial backing and the other providing the know-how.”

But the other company began buying up interests in companies that competed with its partner, and there was a breach on the shareholder agreement, she explained. Projects started delaying, and funding was not coming through when it should have. “As the independent director, I had to be bold and get in there and ask the tough questions,” said Nyala. “What was happening? Why are things not moving along as they should?”

“Other board members were all shareholders, and were very selective in what they would ask and not ask. I was not a shareholder, and I asked about everything. Because of this, my vote was very critical – very much needed to balance things out.”

“What I brought to the board was diversity,” said Nyala. “The company needed my competence due to my background and wealth of experience in financial services and having worked within multinational organizations, and well as the ethnic balance and gender balance I brought to the board. These were additional factors that drove my role in asking the questions that needed to be asked.”

Jan Babiak, who has served on boards in five countries, emphasized the need especially for women directors to “rock the boat” when the situation calls

for it. In a previous board on which she served, “there were a whole lot of male CEOs, and they wouldn't ask questions that they wouldn't want to be asked themselves in their own boardroom. In this kind of situation, directors are more likely to have consensus and collaboration, but they also think alike. Women may ask questions in a different way, and the very fact that we're asking a question rocks the boat and sometimes makes people uncomfortable with us.”

Babiak did provide a word of caution: “It's very important that we disagree without being disagreeable. A woman director kind of has to be the ‘velvet hammer’ in that she really has to make her point, but do it in a consensus-building way.”

**The very fact that a director is asking a question about a particular issue can rock the boat and make other directors uncomfortable.**

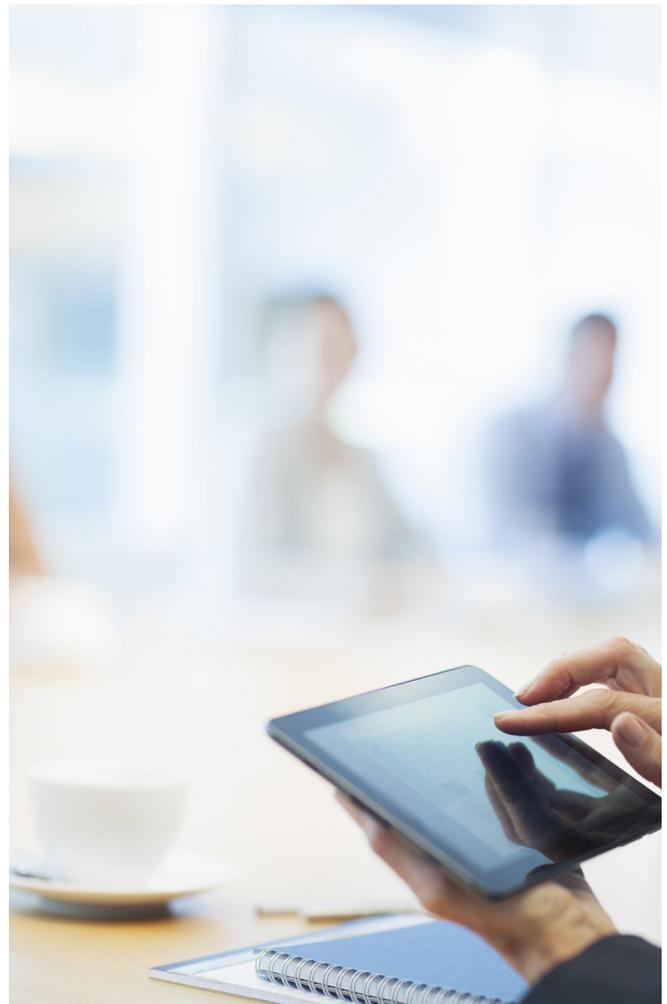


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# *A careful balance: Protecting board deliberations while documenting the decision- making process*

The process by which the board makes its decisions around tough issues can be just as important as the decision itself. While successful boards protect their deliberations – allowing directors to express dissent and take a deeper look at issues that need examining – this must be weighed by a careful adherence to and documentation of the deliberative process.

“A very large part of the role that we play in advising companies is ensuring that not only did the process actually happen, but that it is documented appropriately in a way that indicates there was robust discussion and conversation about the issue. It’s not about quoting what different directors said specifically. Rather, we have ways of generally describing the process,” said Caroline Phillips.



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“Documenting all of this is very important today because of the increased involvement of activists,” said Phillips. “There’s a lot of reviewing in hindsight, and then challenges and lawsuits that can result even after a board makes a very thoughtful and good decision. The board needs this in the case of litigation to defend the decision that’s been made.”

Diane de Saint Victor, general counsel and company secretary of Swiss-based conglomerate ABB, Ltd., echoed Phillips. “At the end of the day, it boils down to two fairly basic questions. Can we live with it? – ‘it’ being the outcome – and can we live with the decision-making process that led to this decision? We have to assume that it will become public, and we have to feel comfortable that if it does become public, we’re fine.

“Transparency has dramatically changed the overall dynamics in the boardroom,” de Saint Victor commented. “Transparency ends up driving honesty, and the overall outcome is probably better.”

Documenting the process is very important because of the increased involvement of activists.



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# Tackling tough boardroom issues: Strategies for success



**Get creative around board structure and committees.** Special times call for special solutions that may fall outside a traditional board structure. Does the board need to establish a new committee to work on a specific sensitive issue?



**Leverage outside counsel.** When a board feels it may have reached its limits of action around a particular challenge, outside legal counsel can be tapped for problem-solving. Does the situation require an external perspective to broaden the board's capacity?



**Ask the tough questions that everyone else is afraid to ask.** The desire for consensus and alignment is powerful, but cannot undermine a board's duty to dive in and ask questions. Is there enough "friendly dissent" in a discussion to responsibly examine all sides of an issue?



**Protect the board's deliberations.** A well-functioning board demands a frank discussion of issues that protects the sensitive nature of what's being discussed as well as the directors who ask bold questions. Is the boardroom a "safe space" for candid deliberations?



**Document the decision-making process.** Heightened expectations around good governance – stemming from investors and regulators – requires boards to be able to communicate, when needed, their governance process. Is the board documenting the deliberative process to accurately convey the solid governance being practiced?

Ask the tough  
questions that  
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## About WomenCorporateDirectors Education and Development Foundation, Inc.

The WomenCorporateDirectors Education and Development Foundation, Inc. (WCD Foundation) is the only global membership organization and community of women corporate directors. A 501(c)(3) not-for-profit organization, the WCD Foundation has 80 chapters around the world. The aggregate market capitalization of public companies on whose boards WCD Foundation members serve is over \$8 trillion. In addition, WCD Foundation members serve on numerous boards of large private and family-run companies globally. For more information visit [www.womencorporatedirectors.org](http://www.womencorporatedirectors.org) or follow us on Twitter [@WomenCorpDir](https://twitter.com/WomenCorpDir), #WCDboards.

Upcoming WCD Institutes include:

- **EMEA Institute** – October 24-25, 2017; Madrid
- **Americas Institute** – March 7-8, 2018; Miami
- **Global Institute** – May 8-10, 2018; New York

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