

KEEPING SECRETS IN THE FAMILY BUSINESS

At an early age, most of us learn that it is extremely difficult to keep secrets in a family. Mothers and fathers tell each other most things – often deliberately as a way to assure the family’s proper function. Siblings, too, share information for a variety of reasons. Generally, at least one family member is naturally gregarious and seems constitutionally incapable of keeping a secret. Others can keep secrets much of the time, but may find it difficult to do so in times of crisis.

One of the challenges in keeping secrets in the family is a common belief that communication is often a good thing. The marriage partnership requires a great deal of communication, and few siblings can readily accept the view that a brother or sister is entitled to know something that he or she is not.

Thus, the vital importance of keeping secrets in today’s business world runs counter to much of our family experience. As direct or indirect shareholders in a family business, family members feel entitled to know a great deal about what goes on in a business and often feel entitled to share such information with others.

If, then, a family business is to keep any secrets, the first step will be to teach all family and non-family participants the need for confidentiality itself. This means teaching every one that “intellectual property” in the broadest sense of the term, including any information, ideas, names, methods, designs, inventions, creations or plans, constitutes a core asset of any business that is always vulnerable to attack and vital to protect. In an age of outsourcing, many businesses are discovering that while most of the things associated with a business are interchangeable with resources available outside the business, what makes any business unique is its particular mix of information, know-how, future plans, and other confidential information. Because any single individual can intentionally or unintentionally release information to the outside world, keeping confidence in the family business must become the job of everyone.

How, then, are we to develop a climate of confidence keeping? Here are some of the key steps that every family business should consider:

- Change in any group of people must begin with a concensus. Family meetings, boards of directors, advisory boards, management teams, and other such groups in the company should regularly discuss the topic of confidentiality and its application to the particular business at hand. All shareholders or owners should be encouraged to “buy in” to the concept of confidentiality and should be taught what it really means.
- Education of family members about the need for confidentiality should begin the first time such information is shared. All family members should be taught that information about the family business is a privilege

that comes with responsibility. Dinner table discussions should be preceded with warnings like, “Remember that it is important that this information be kept within the family”, and the reason for this should be explained.

- Beyond common value and culture, every business should develop policies regarding confidentiality. Separate policies may be developed for the Board of Directors, officers, family council members and employees. To be effective, these policies must be formally adopted, included in the appropriate policy manuals, and reviewed from time to time. Such policies should provide for consequences for the breach of the policy, which may include both removal and denial of future access to confidential information.
- Management should regularly assess the unique confidential information of its business, and consider what legal steps should be taken to protect it. Legal counsel, in addition to assisting in obtaining protection for patentable inventions, trademarks, service marks, copyrights, and the like, can assist management in developing policies for identifying and maintaining the trade secrets of a business.
- Confidentiality agreements of many different types are useful for the family business. Employment agreements of key executives often contain extensive confidentiality provisions. These may be associated with covenants against competition and may include provisions permitting the company to obtain an injunction against the unauthorized use or disclosure of confidential information.
- At-will employees and other persons who are not parties to employment agreements may also be required to sign a simple confidentiality agreement or a statement acknowledging the need for confidentiality and agreeing to comply with the firm policy. Many businesses today find such simple agreements to be a practical way to bind employees, owners and advisors to secrecy, both morally and legally.
- Confidentiality agreements should be the first step in any transaction with outsiders that require the sharing of confidential information. Confidentiality agreements are required before discussions concerning major transactions regarding the purchase of a business, but also before more routine discussions, such as those pertaining to the development of a software package for internal use. Whenever a business is permitting

outsiders any access to confidential information, such agreement should be considered

In short, while keeping secrets in the family is always difficult, it could not be more important than it is in today's family business. Confidentiality is everyone's job.