

## **The AI Drop | #3: Check Engine Light – What Every Board Needs to Know About AI Oversight with Doru Gavril**

Anna Gressel (00:01):

Hey everyone. This is Anna Gressel and you're listening to The AI Drop. Your briefing on how AI is reshaping the future of business, law, and industry. We bring you fresh drops each week so you never miss a beat. Welcome to the podcast. Welcome everyone. We're back with The AI Drop and I'm Anna Gressel. Today we're tackling something that should be keeping a lot of boards and general councils up at night, which is the topic of AI oversight. And specifically, when your company is building, buying or developing AI, what does the board actually owe to shareholders and what does good governance look like? To help us figure that out, I've brought in my colleague Doru Gavril, who spends a lot of his time advising boards and senior leadership on exactly these questions. Doru, I'm thrilled you're here. Welcome.

Doru Gavril (00:49):

Thank you, Anna. Really appreciated being on The AI Drop.

Anna Gressel (00:52):

So I want to start, Doru, you have such a fascinating practice. Tell us a little bit about what you do and what's your favorite thing about your kind of board facing part of your practice?

Doru Gavril (01:01):

Yes. So I'm a securities litigator. I defend some of the largest companies in the world, Alphabet, Tesla, Instacart, Roblox. All of them tend to ask the impossible of their lawyers. What I specialize in really is the art of the impossible. I particularly enjoy making the impossible possible. So that's really what I do.

Anna Gressel (01:21):

I love that because I feel like that really speaks to what I do on the tech side. It's like we help all of this cool technology come to life. But Doru, one of the things I absolutely loved when we were like chatting about having you on the podcast is that it turns out that you love the radio show Car Talk. Tell us about that.

Doru Gavril (01:39):

I sure do, Anna. I remember in grad school for three years waking up to the tunes of Car Talk, it was very successful. I never understood anything that those people were saying at all.

Anna Gressel (01:49):

So Doru and I were talking and we were like, "We could do this, talk on board oversight of AI in this very serious lawyerly way." Or we could mix it up and do it in the style of the greatest radio show of all time, Car Talk. So let's do that. Doru, you are going to be our mechanic, except instead of fixing a car, you're diagnosing board level AI governance issues. Are you guys aimed to play?

Doru Gavril (02:15):

I'm ready to roll.

Anna Gressel (02:16):

Excellent. Okay, Doru. So here we have our first caller.

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Aaron Stanislawski (02:22):

Hi. Yeah, thanks for taking my call. So I'm on the board of a mid-cap tech company, let's call it, I don't know, ACME Synergy Solutions. And our CEO just came in hot at the last board meeting, very excited, saying we're rolling out AI across customer service and HR and underwriting, you name it. Everyone on the board nodded along. Nobody asked any hard questions. I didn't ask any hard questions. Now I'm lying awake at three in the morning. Sign up for personal liability? Where does the liability actually come from if any of this AI stuff goes sideways? Thanks.

Anna Gressel (02:57):

Okay. So Doru, our caller is hearing a weird noise under the hood and he's worried about whether he's not exercising sufficient oversight of AI at the board level. Where should he start looking? How should he start diagnosing this problem?

Doru Gavril (03:11):

Well, what I learned from Car Talk was that it's always the carburetor, so I'm going to go with, it's likely the carburetor. But let me tell you where the source of liability comes from. It comes from the law of your state of incorporation. So you need to think a little bit about where you're incorporated. Now, you mentioned you are a mid-cap tech company, so let's assume for a moment that you're incorporating Delaware. In that case, and we'll come back to that in a second, but let's say you're incorporated in Delaware. So in that case, the source of liability comes from, as a director, from the duty of loyalty that you owe to the company. There are two duties, duty of loyalty and duty of care. The duty of loyalty requires you to act in the best interests of the corporation, and you may not knowingly act against them.

(03:57):

You also cannot engage in self-dealing. So that's the duty of loyalty. The duty of care is very different. That one cannot be excused for directors. It simply says, don't be negligent. So in other words, the standard of conduct that you need to think about is not negligence. It's not knowing wrongdoing or knowing indifference to the welfare of the corporation. It's a pretty high standard. So when you are applying this to AI, you need to think a little bit about, am I doing something that would be seen as reckless? Is this something that I am like the proverbial ostrich sticking my head under the hood and I'm refusing to look outside? So as long as you're not doing any of those things, you should be fine. But here's the problem. In the last 10 years or so, courts in Delaware have been increasingly likely to look at issues having to do with board fiduciary duties and generally oversight a little bit with hindsight.

(04:53):

So you know now that you're going to be judged based on the ultimate results as opposed to the process that you utilize to get to them. That's quite a change in the law in the last 10 years. So nobody knows, right, what the future will bring with respect to AI. It's a new technology. It's really exciting. It's going to permeate everything, but nobody really knows where it's going. So we just know this. Whichever way you're going to be judged about it is going to be in hindsight and likely a little unfair. So you need to think ahead and you need to figure out where is the buck going to be one, two, three years from now when the results of the strategies that you're adopting today are going to be. So when somebody could be your CEO, could be another board member, could be the general counsel, could be a consultant that you hire, just coming and says, look, we can roll out all of these AI empowered products across our company, dealing with things from, I don't know, GNA to perhaps even product development.

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(05:49):

You need to ask yourself, what are the two or three questions that I need to have answered? In order to understand how this is going to integrate with existing systems, I was going to replace those existing systems and what it's actually going to do with respect to revenue generation and risk profile for the company. If it's not touching those things, and if it's more of a, let's save some costs by utilizing some internal AI product to resolve some internal issues, then it's pretty straightforward. You don't really need to worry about it to the same degree. If it's touching revenue, if it's touching reporting functions, if it's touching some of those things that usually have been called by courts mission critical, that's where you need to start paying attention.

Anna Gressel (06:36):

And Doru, I think that's such a good point. What about this other piece, like the competitive landscape, the revenue opportunity, the potential upside, and the potential business landscape around AI? How do you see that as fitting within the kind of scope of questions the board should be asking?

Doru Gavril (06:52):

So let me tell you what the law says about that, and let me tell you where I think the law is going to go. So historically, the law has said boards are not liable for missed opportunities. In other words, if there is an exciting new technology that comes along and somehow you fail to adopt it in time, and over time your company becomes less competitive or you are neglecting to keep up with the state of technology, you don't really have fiduciary duty liability for that. You may not be a terribly successful company. It might not be such a great business, but you don't have necessarily fiduciary duty liability for that. I'm not sure that law is going to hold. I'm really not sure that you're not going to have a doctrine. Yeah, I'm not sure that you're not going to have a doctrine evolve where you have some responsibility at some level to inform yourself of new technologies and consider adopting them.

(07:47):

Delaware law has been very dynamic with respect to fiduciary duties and in particular, the obligations to exercise oversight that board members have over the last 10 years.

Anna Gressel (07:58):

I mean, certainly it's like such a fascinating area of the law to watch. And I know we're constantly looking at the cases coming out of Delaware very, very closely. I'm sure you are too. Okay. With that, I want to take us to our next caller.

Serwaa Amankwaa (08:11):

Yeah. Hi, first time caller. So I'm the lead independent director on a public coupling board, consumer facing business, you know, lots of data. We keep reading that boards need to exercise effective oversight over AI, and I'm not alone because that sounds very reasonable, but honestly, I have no idea what that actually means in practice. I'm not an engineer and half the board can barely work the Zoom mute button. So what does effective oversight actually look like when it's Tuesday morning and I'm sitting in a boardroom?

Anna Gressel (08:42):

Doru, this is a great question and I think it's particularly great because it's one we get all the time. And I want to situate you in answering it in the present moment in 2026, not back like a decade ago or two decades ago, because I think the temperature has changed. And

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so for a board that's trying to stay on top of its game and ahead of the curve, what does the minimum viable AI governance posture look like today?

Doru Gavril (09:05):

That is a great question. In 2026, minimum governance looks very different than it did in 2016. In 2016, you may have been told when you were a brand new public company director, "the Delaware law will see you through as long as you have good process, as long as you're diligencing questions, as long as you are documenting what you're doing, as long as you have a good process in place and you take good minutes, that's enough." I would say in 2026, that's no longer true. Passive boards no longer clear the minimum requirements for fiduciary duties. You need to be active. You need to ask questions. You need to inform yourself through a dialogue, whether it's with other board members, whether it's with the management, whether it's with consultants, lawyers, whoever they may be, could be strategic consultants. You need to inform yourself you need to ask questions.

(10:01):

And this is very important and many, many boards, especially in areas like technology where the board member has great strategic insight and great business insight, but perhaps treads a little more carefully on the specifics of the technology involved. You need to give homework to management and sometimes you need to ask, "We need a briefing on this particular topic. We need to understand how revenue is generated by this product. If we now start rolling out moderation, for example, that's done by AI as opposed to moderation that is done by humans, how will that affect the ultimate product? What will be the user experience? What will be the security implications? What will be the data collection implications?" You need to ask those questions. So it's true that perhaps you're not an engineer. Perhaps you do not understand exactly how the technology works, either behind AI or even your own product, but you are a very experienced business person and you know what questions to ask and it's critical that you ask them.

(11:07):

It's also important to have in the boardroom, and that this is a conversation to have with your general counsel and fellow directors. This is especially true if you're the lead independent director, as our caller said. You need to have a culture of engagement, of back and forth. The passive receipt of information, which in 2016 would've been perhaps enough, no longer is in 2026. Now, that's a Delaware standard. If you are in Nevada or in Texas, or perhaps other states to come, the standard might be a little bit different. It might be a little more permissive.

Anna Gressel (11:39):

So Doru, I want to pick up on this because in different version of this question we get a lot, including from the legal team is, where does board oversight end and management responsibility begin? Particularly because sometimes my team would be brought in to help with AI policies and AI governance and helping kind of mature within the organizational level what the company is doing. But is that a board role? Where does the board touch need to be on issues around AI governance?

Doru Gavril (12:08):

There are two directions that at the board level, I would think you need to pay very close attention to. There are several other things that you need to keep in mind, but two in particular come to mind when you are thinking about AI. One is strategic. There, you need to think about from business standpoint, how does this make sense for us? How do we

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integrate this exciting new technology into our business? Think about this as being the DVD rental service of the year 2000. And if you do not adopt streaming technologies, Netflix is going to eat your lunch. So that's the type of risk that you have. Now, that is not the kind of risk that is covered by fiduciary duties under Delaware law. That's a business risk. Separate from that, there's an operational risk that has to do with oversight of the ways in which your business impacts the world.

(12:58):

So very briefly, can your technology, can your products injure people? Can they kill them? Can you cause very large economic losses? If so, you need to have controls, internal controls over those functions that can cause this type of impact. And then you need to make sure that those internal controls, you test them from time to time. So speaking to the Car Talk analogy, every now and then, you need to rev up that engine, make sure it works. And you need to see that it generates information. And once you see that those controls generate information, you need to think, am I doing something with this information? Because if you're sitting there and you're looking at your dashboard, turn all colors like a Christmas tree, but you do nothing, then you've got a problem. You've got to react to the stimuli that come to you from these internal controls.

Anna Gressel (13:50):

Yeah, I think that's such a good point. And it's part of the reason why sometimes we'll talk to folks about not only setting up their governance, but testing their governance. It's often a good moment to see, you know, much like with cybersecurity, if you can tabletop your way through some of these exercises, if you really even understand how would we catch this AI issue if it came up. Of course, that's not necessarily going to be the case for every company. They may not be using AI in a way that merits that to your earlier point. You know, if you're using AI for contract review, I don't know that you really need to have a board level tabletop exercise about that. But it is to say some companies are adopting AI in ways that are increasingly significant. And that merit's a different kind of discussion at the board level. I would assume you agree with that, but feel free to just tell me I'm way off base.

Doru Gavril (14:33):

Not at all. And Anna, one of the questions that I get most frequently, and I get this from both management and directors, is who should be designing? AI is a new technology. It's a new era. It's opening new possibilities. There isn't really something out of the box that you can simply adopt and put on the shelf. So who should be designing these internal controls? And the answer is, and I know that this will hurt your feelings, the answer is Anna and Doru can help you with this to some extent, but you already have the people who know how best to do this within your own organization. You just need to listen to them. You can bring in all the consultants and all the lawyers out there in the world, but remember, professionals built a Titanic.

Anna Gressel (15:17):

The thing that I would say is that, particularly for companies that are operating in domains that are already highly regulated or high risk, let's take a step away from the board and now talk a little bit more at that management level. A lot of the risk management systems you have in place are going to be the most critical ones to use, right? Like you're designing a product, it is being released in your industry. You already have safety programs. You already have kind of market monitoring programs. A lot of that is about making sure they work for AI, not about replacing them whole cloth. And that's something that I think we sometimes see companies really struggle with. Do we need a net new AI process? Do we

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use our current process? It's sometimes a mix, but remember that you have that muscle internally. That is something we talk a lot about with companies.

(16:00):

And then it's just that kind of uplift to make sure that it's state of the art. It's really prepared to deal with these issues, but otherwise you want to use and leverage your strengths in this way. So I think that actually is a good segue into our next caller.

Aaron Stanislawski (16:16):

Yeah. Hi, Anna. Hi, Doru. Thanks for taking my call. I keep hearing about Caremark duties. Someone at a conference told me that if AI blows up at our company and the board never put any reporting structure in place, we could face a Caremark claim. Is that real? Because I thought Caremark was basically impossible to lose on. Has something changed?

Anna Gressel (16:35):

Awesome question, right? Okay, Doru. Hit us with the answer.

Doru Gavril (16:39):

It has. It has. Again, I think the answer is the carburetor. I really think that Caremark is an ever-evolving doctrine. You could argue that from the moment it was created, it was a revolution in the way somebody thinks about fiduciary duties. So very briefly, what happened was within the broader duty of loyalty that the director owes a corporation, a smaller area of responsibility was created, which is to exercise oversight over the primary functions of the corporation. You do that in two ways. First, you need to ensure that there are reporting structures and controls in place, and the standard is that you have some, not necessarily that you have the best, but obviously in most companies, you would want to have pretty good ones. And number two, if these controls and information systems are functional and they're sending you information at the board level, you do something with it.

(17:38):

In other words, you do not blind yourself to the results of these analyses and these controls. As long as you do those two things or as long as you did these two things, Caremark would leave you alone. That's not quite true anymore. And no, it's actually significantly easier today to lose as a director on a Caremark claim than it was 10 years ago, and certainly more so than 30 years ago. So what has changed? This notion of the passive board, the passive board no longer clears the Caremark measure. You need to now ask questions. You need to be prompting reflection. You need to be asking management to do things. You need to give them homework. Now, alluding to what we were just saying earlier, you have wonderful resources internally. You probably have a person, possibly even at the VP level who understands AI very well.

(18:36):

You probably have some strategic thinker who has actually mapped out the integration of whether you're bringing AI to help with business functions or whether you're building it within the product. Empower that person. One of the ways in which you can check your duties with respect to your Caremark oversight obligations, and at the same time, make sure that you empower these individuals within your organization is to ask for a briefing at the board level. Keep on top of this. Have this individual give a 10-minute presentation every six months, every year, depending on whatever the cadence that you feel is necessary. Make sure that you are getting this education internally, and then have a session to reflect where you ask other board members, do we feel like we know more now? Did this

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person present at the right level of granularity? Do we feel that we have important advocacy that's occurring internally, or do we need to hire somebody?

(19:35):

Do we need to bring in additional firepower within the organization?

Anna Gressel (19:39):

Yeah, I think it's interesting. One of the reasons we're sometimes called is because we work so much on AI development side. We have a sense of how fast things are moving. And we used to say, "Get briefed every year," and then it was every six months. It's interesting that the pace of change just continues to quicken. And I know folks who are listening will continue to hear me say that, but one of the things I think can be really helpful for board members is just periodic and ongoing education about what is happening with AI, not even necessarily what your company is doing with it, but just what is the technology. Every time we use AI, it feels like we're kind of talking about something different these days. And so as the industry continues to evolve, it's a great opportunity at the board level, but also at the management level to make sure that everyone is kind of on top of that, understands what those terms even mean and have a sense of what that might imply for the competitive landscape, even outside of that formal company briefing process.

(20:31):

With that, okay, let's, Doru, take it to a topic that I know is close to your heart as a securities fraud litigator, which is public disclosures around AI. So let's take our last and final caller on this.

Aaron Stanislawski (20:45):

Hi. Yeah. So I'm a general counsel at a public company, and our IR team and our CEO are very enthusiastic about AI. Every earnings call, every investor presentation, it's AI this and AI that, and we're transforming our business with AI. And look, I get it. The market loves it. Stock pops every time we mention it. But I've also been in this business long enough to know that when you start making big promises to investors about a technology that you don't fully control, bad things happen. And so my question is, should I be worried about securities liability for what we're saying about artificial intelligence?

Doru Gavril (21:22):

Yeah, that's such a great question. So, you know, I would likely tap the dashboard a few times and see if a few more lights pop up. That's just where I would start. But what I would say is, look, you are the general counsel of a public company. You probably worry all the time. So the short answer is, yes, you should be worried about this too. The good news is you have a pretty clear cut way ahead. So the first principle I think that you need to think about, you're not going to restrain your business folks from adopting new technologies. I think the dream of every lawyer is that everybody would just follow their advice and they would not do anything unexpected. That's just not realistic. So we need to allow the business side to embrace new technologies. They are naturally going to be enthusiastic about it. Now, what you can do is to have a conversation with the folks who you know are most enthusiastic and ensure that you have a very clear script and a very clear set of talking points so that when you make these disclosures, it is very clear on what particular message you are going to iterate.

(22:32):

If it's ad hoc and if it's something that one of your principal officers is saying at the conference with no script, no forethought, and it seems to an investor that it prefaces a

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very large shift in your company strategy, that's probably not how it should be done. So it's probably going to attract some level of risk, whether it's actually going to materialize into anything or not, that's a different story. You are now taking on risk that you could have avoided. So first, have that conversation about how we approach these disclosures, not from the perspective of ending them because that's never going to work, but from the perspective of let's make sure that we have a very clear, clean message on them. The second thing that you need to do, and this you can do within the organization on your own, is to make sure that you are now identifying the risks to these statements that have been made.

(23:22):

So okay, we said that by 2030, all of our functions involving sales are going to be delivered by AI. Okay, that's only four years ahead. What is the path from point A where we are today, where we have humans do most of the sales, to point B where we are going to have AI do most of the sales. What are the risks to that? How do we know that we are going to be selling to the right people? How do we know that we are going to be compliant with regulations? So you need to iterate on those questions and you need to make sure that you've identified the risks. And then obviously in conjunction with your disclosure council, you should be working on disclosing the material risks that you are identifying. Those usually, this combination of factors where you have a very clear message and then you identify the risks and you disclose them, most of the time will insulate any kind of forward looking statements from liability.

Anna Gressel (24:19):

That's such good advice, Doru. And I feel like we've covered amazing ground today. I know we'll continue this conversation. You and I and some of our colleagues will continue talking about board oversight of AI, but let's close out. Given that we've been doing Car Talk, if you could leave our listeners with one sentence, or let's call it one bumper sticker, on board oversight of AI, what would it be?

Doru Gavril (24:41):

AI is here to stay. It's going to be a technological revolution akin to the industrial revolution and akin to the internet. It's going to permeate everything. You have time, but you also cannot wait. You need to start thinking about it now, both strategically and operationally.

Anna Gressel (25:01):

We always say with governance, the hardest part is just getting started. And so just putting one foot in front of the next is the right way. Even if you feel behind, you can catch up. Even if you feel ahead, you can still keep up. And so I think it's so important to just bite off little bits and just kind of move things forward. So Doru, thank you for joining us today. It was such a thrill to have you on. And to all of our listeners, thanks for listening to The AI Drop, like and subscribe if you've been enjoying the podcast.

Doru Gavril (25:29):

Thank you, Anna.

Anna Gressel (25:30):

That's today's drop. Thanks for listening. If you'd like to hear more of The AI Drop, hit subscribe and join us each week for fresh insights on what's shaping the future of AI. This podcast is for informational purposes only, and it does not constitute legal advice or establish an attorney-client relationship. It may be considered attorney advertising, so prior

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