

**FUNDAMENTAL
OBLIGATIONS OF HEALTH
CARE BOARDS:
What Every Board Member
Needs To Know**

**HOSPITAL BOARD MEETING
COMPLIANCE TRAINING**

Why Do You Care About This Presentation?

- Breach of fiduciary duties means exposure to liability – organizational (high risk) and personal (usually not – there are protections).
- Three primary areas of potential personal liability for board members:
 - Liability to individuals outside organization.
 - Liability to the organization itself.
 - Liability to the IRS for improper transactions.

Two Major Categories of Board Fiduciary Duties

- Duty of Care
- Duty of Loyalty

Duty of Care

- A director must be informed and must discharge his or her duties in good faith, “with the care that an ordinarily prudent person in a like position would reasonably believe appropriate under similar circumstances.”
 - Decision making (Voting)
 - Oversight (General Activity / Day to Day)

Important Distinction in Board Oversight

- Oversee, but...
- DO NOT MICROMANAGE.
- Leave the management to the CEO and his or her team – it is your job to:
 - Find the right CEO.
 - Set oversight guidelines.
 - Weigh in on substantial organizational matters.
 - Leave the administrators to run the business.

Satisfying the Duty of Care

- Knowledge of Governing Documents
- Attending Meetings
- Exercising Independent Judgment
- Informed Voting
 - Source of Information
 - Reliability
- Delegation
 - Proper Supervision
 - Understand the Scope of the Delegation

Satisfying the Duty of Care Regarding Compliance

- Have a defined compliance function.
- Make sure you get reports or that a committee of the board gets reports (clearly delegate management to that committee).
- Understand the regulations.
- Understand your options when a compliance problem is discovered.
- Promote and support a culture of compliance / education / awareness.
- Do not tolerate heads in the sand.

Business Judgment Rule

- Under the “business judgment rule, so long as the director exercises his or her duty of care appropriately, in good faith, he or she is entitled to the rebuttable presumption that he or she has exercised the duty of care, and directors will not be held liable for losses to a corporation resulting from board decisions.”
- You get the benefit of the doubt!

Duty of Loyalty

- Directors must act in the best interests of the corporation rather than in the interests of themselves or another entity. “The director shall not use a corporate position for individual personal advantage.”
- Includes:
 - Conflicts of Interest
 - Corporate Opportunity
 - Confidentiality
 - Excess Benefit Transactions

Conflicts of Interest (Loyalty)

- “A conflict of interest is present whenever a director has a material personal interest in a proposed contract or transaction to which the corporation may be a party.”
- Conflicts of interest may be direct or indirect.
- Full disclosure required.
- Examples:
 - Family member involved in transaction with the organization.
 - Director performing professional services for the organization.
 - Director serving on boards of multiple other organizations.

Corporate Opportunity (Loyalty)

- Prior to engaging in a transaction that may be of interest to the organization, a director should disclose that transaction to the Board of Directors.
- The director may be obligated to offer a business opportunity to the corporation before taking advantage of such an opportunity outside his or her capacity as a director.
- Even if taking advantage of an opportunity does not breach the director's duty of loyalty, a director should be cautious of the appearance of impropriety.

Duty of Confidentiality (Loyalty)

- A director should treat all matters as confidential until they have been publicly disclosed or they become a matter of public record.
- Directors are not and should not be “spokespersons for the corporation.”
- Improper disclosure of confidential information can result in financial loss to the corporation, destruction of attorney-client privilege, and personal liability for the disclosing director.

Tax Exemption and Excess Benefit Transactions (Loyalty)

- Transactions that are inconsistent with the hospital's charitable purpose threaten the hospital's tax exempt status.
- Personal tax liability for voting directors (and others with substantial influence) who receive excess benefit – penalty excise tax.
- Personal tax liability for voting directors who are involved in the decision to overpay OTHER disqualified persons, e.g. CEO, COO, CFO.
- Rebuttable presumption of reasonableness.

Statutory Protection for Directors

- Wis. Stat. s. 181.0855 – a director or officer is NOT liable to the corporation or third parties for a breach of duty UNLESS:
 - Director willfully fails to deal fairly with corporation or its members where the director has a material conflict of interest.
 - Director violates criminal law (unless director reasonably did not know).
 - Director derives improper personal profit from corporate transaction.

Statutory Requirement of Indemnification

- The hospital must indemnify a director or officer who has been successful in defending a proceeding if involved due to role as director, per Wis. Stat. s. 181.0872.
- In other cases, the hospital must also indemnify the director or officer, unless there has been a breach of duty.
- Hospital may limit indemnification.
- There are procedural steps that director must follow and limitations on the scope of indemnification.

Insurance

- D&O policy - can extend beyond statutory protections. Some claims are not indemnifiable but may be insurable.
- There will be limits to the policy coverage, certainly for willful misconduct.

Proceeding with Caution

- Stark Law
- Anti-Kickback Statute
- Fraud, abuse, and exclusion
- Fair Market Value
- Antitrust (i.e. boycotting, price-fixing)
- Other common health care compliance pitfalls include:

- Billing for services not actually rendered
- Providing medically unnecessary services
- Upcoding
- Outpatient services rendered in connection with inpatient stays

- False cost reports (or portions thereof, whether or not intentional)
- Unbundling
- Billing for discharge in lieu of transfer
- Excessive executive compensation
- Patient's freedom of choice
- Patient dumping

- Credit balances — failure to refund
- Financial arrangements between hospitals and hospital-based physicians
- Knowing failure to provide covered services or necessary care to members of a health maintenance organization
- Duplicate billing

Affordable Care Act – What Board Members Need to Consider

- Reimbursement cuts.
- ACO related pressure to affiliate vs. going at it alone.
- Consider restrictions on billing, collection and financial aid / charity care.
- Mandated formal compliance plans - details still unfolding.
- 60 day repayment obligation from identified overpayments (or becomes a "knowing violation").

Board Role in Quality Oversight

- Demonstrate engagement and commitment to quality.
- Consider and support devoting resources to:
 - How quality will be measured.
 - Promoting transparency of quality.
 - Accountability at all levels to high quality care.

Stark Law

- Provides that if a physician has a “financial relationship” with an entity, the physician may not make a referral to the entity for the furnishing of “designated health services” for which payment may be made from Medicare or Medicaid.
- Stark law is structured as a broad prohibition with numerous limited exceptions.
- Intent of the parties is irrelevant to determine violations (strict liability).
- Sanctions for violation include:
 - Denial of payment for services.
 - Repayment of amounts collected.
 - Civil penalties of up to \$15,000 per service arising out of a prohibited referral.
 - Exclusion from participation in federal health care programs.
 - Civil penalty of up to \$100,000 against parties that enter into a scheme to circumvent the law.

Tuomey Case - The Facts

- Local specialty physicians threatened to go elsewhere.
- Hospital entered into part time employment agreements to keep them happy.
- Productivity bonus of 80 per cent of collections and additional percentage for incentive bonus.
- Negotiations with one of the orthopods broke down.
- He filed a whistleblower claim that arrangements violated Stark and FCA.
- Government intervened.
- Went through many procedural stages culminating in retrial May 2013.
- Violated Stark and FCA - ultimately award to government of \$238 Million in penalties.

Tuomey Case – The Stark Law Problems

- Employment exception did not fit because the compensation:
 - Varied with the volume / value of TECHNICAL COMPONENT billings from anticipated referrals (even though the professional services were personally performed).
 - Was more than fair market value (which also by definition can't vary with referrals).
 - Was not commercially reasonable, the hospital was LOSING MONEY.
- No other exceptions fit - no FMV which is essential element.
- Tuomey argued community need, physician shortage, and reliance on law firms and consultants.
- Court focused on the fact that hospital obtained legal and consulting opinions that there was a problem and ignored them in favor of more favorable opinions.

Lessons From Tuomey Case

- Employment is not a "get out of Stark free" card.
- Personally performed services are not a "get out of Stark free" card.
- All arrangements with physicians should be documented and analyzed for which Stark law exception applies.
- Whistleblower claims are real.
- Do not disregard third party opinions that you have a problem.

Anti-Kickback Statute

- No remuneration for referrals – very broad.
- Big penalties for anyone who knowingly / willfully solicits or receives financial incentives in return for business reimbursable by a public health care program.
- The statute is intentionally broad so as to apply to virtually any direct or indirect financial incentive, and court cases have upheld broad applications.
- Safe harbors.
- Not strict liability.

Fraud, Abuse, and Exclusion

- The Office of Inspector General (OIG) has the ability to exclude individuals and entities from participating in federally-funded health care programs (i.e. Medicare and Medicaid).
- Exclusion actions can be taken in response to program-related fraud and abuse, patient abuse, defaults on Health Education Assistance Loans, and licensing board actions.
- An entire hospital may be excluded.
 - “When used against a hospital, exclusion effectively closes its doors.”

Fair Market Value

- Establishing fair market value (FMV) is critical in many health care transactions.
- FMV plays a significant role in analyzing Stark Law, Anti-Kickback Statute, and tax-exempt considerations.
- FMV is a range...not a specific number – cannot pay over.
- It is important to establish and document FMV in order to ensure compliance with applicable laws.
- Not taking into account volume or value of referrals.
- Also needs to be commercially reasonable

General Checklist For Compliant Financial Relationships with Physicians

- Written agreement.
- Term of at least one year.
- Fair market value compensation unless recruiting (special rules then apply).
- Compensation cannot vary with volume or value of referrals.
- Commercially reasonable.
- Compensation set in advance (usually but not always).

Antitrust

- Premise: Competition is good. Arrangements that chill competition are bad.
- Rule of reason: Does it benefit consumers more than it hurts them?
- Stiff penalties.
- ACOs / integration from ACA raises antitrust issues.
- Examples:
 - Price fixing, boycotting, bundled discounts, agreements to divide market share.

Corporate Integrity Agreements

- Agreements with the government.
- Can be onerous.
- Strict monitoring and limitations – e.g. dictated structure of compliance committee, reporting, consultants, constant audits.
- Expensive.
- MUCH BETTER to be compliant on the front end, and to self-disclose confirmed violations.

Hospital Board Involvement in Medical Staff Credentialing

- Governing board is responsible for oversight of medical staff, including:
 - Practitioner eligibility for medical staff appointment.
 - Medical staff's structure.
 - Processes for credentialing and delineating privileges.
 - Medical staff bylaws and rules and regulations.
- Must have communication systems for all subjects relevant to joint operations.

Hospital Board Involvement in Medical Staff Credentialing

- Medical staff must recommend to the governing board.
 - Duty of care
 - Joint Conference Committees
- Governing board makes the final decision based on the recommendation from the medical staff.

Tips for Hospital Board Involvement in Medical Staff Credentialing

- Numerous sources of potential liability for all involved in the credentialing process.
 - Wisconsin and federal and TJC requirements – regulatory violation / accreditation risk.
 - Physician claim for failure to provide due process.
 - Losing HCQIA or state immunity.
 - Antitrust – exclusive arrangements must be structured appropriately.
 - Physician in a protected class or is disabled (Civil Rights laws or ADA).
 - Patient claims negligent credentialing.

Hospital Board Involvement in Medical Staff Credentialing

- Ideas for managing potential liability:
 - Threshold Criteria
 - Recruitment Plan
 - Clear Conflicts
 - Avoid Denials

Practical Compliance Tips

- Understand fiduciary duties.
- Ensure a system for effective Board communication with administration.
- Develop a mechanism for personnel to report compliance issues directly to the Board.
- Frequently visit your conflict-of-interest policy.
- Implement a system for ongoing community needs assessments, and incorporate the results into a formal community benefit plan.

Practical Compliance Tips

- Implement an educational system to ensure that Board members are aware of the basic legal and regulatory requirements governing health care systems as well as typical compliance pitfalls.
- Ensure that adjustments in executive compensation are linked directly to results of the executive evaluation process.
- Ensure Board familiarity with basic corporate policies and the compliance plan.
- Have a plan for auditing and monitoring the compliance program and for responding to identified concerns.

Practical Compliance Tips

- Be able to demonstrate knowledge of how personnel are trained on compliance issues and how personnel are made aware of disciplinary consequences for compliance violations.
- Ensure that the organization has policies addressing the appropriate protection of “whistleblowers” and those accused of misconduct.

Questions?