

# CP Association/NYSARC 2012 Compliance Conference

HISCOCK & BARCLAY

## What Your Board of Directors Needs To Know: It's More Than It Used To Be

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# Board of Director Duties

A. Duty of Care – standard of care is not perfection.

- Good faith using the degree of diligence, care and skill which prudent people would use in similar positions and under similar circumstances in a manner that is reasonably believed to be in the best interests of the Agency.

# Board of Director Duties

## B. Duty of Loyalty

- Avoid/disclose conflicts of interest;
- Act in best interest of the Agency; and
- Remainder of Board must carefully analyze transactions where conflict is disclosed for fairness and reasonableness.

# Board of Director Duties

## C. Duty of Obedience

- Comply with applicable laws, regulations and organization policies.

# The Caremark Case

“[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the Board concludes is adequate, exists, and that failure to do so under some circumstances, may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.”

# Case Law Regarding Boards of Directors

Courts traditionally have been reluctant to second-guess Boards of Directors that have followed a careful and thoughtful process in their deliberations, even where ultimate outcomes for the corporation have been negative.

# Guidance from the U.S Department of Health and Human Services Office of the Inspector General

“It is the process the Board follows in establishing that it had access to sufficient information and that it has asked appropriate questions that is most critical to meeting its duty of care.”

# HHS OIG Provider Compliance Training

- Promote Quality of Care
  - Policies and objectives defining quality improvement and consumer safety program. Incorporate objectives into performance evaluations.
  - Establish board quality committee and make quality standing board agenda item.
  - Expertise regarding services on board.
  - Ensure credentialing being performed.
  - Implement conflict of interest policy and manage.
  - Use benchmarks and measures.

# HHS OIG Provider Compliance Training

- Evaluate Compliance Program
  - Ask questions.
  - Protect Compliance Officer's independence. Ensure exit interview of Compliance Officer by board.
  - Learn how quality, consumer safety and compliance information flows to board. Educate board. Publicize they receive training.
  - Ensure you can validate accuracy of quality data.
  - Talk to employees to learn how they see the organization's values and culture.
  - Assess board and committees, including composition and response to systemic failures and lapses in quality.

# Board Responsibility for Quality

- A. How effective is the quality improvement program?
- B. How is it improved?
- C. Policies and Procedures appropriate?
- D. Quality measured?
- E. Board educated?
- F. Expertise on Board?
- G. Coordinated with Compliance Program?
- H. Reporting encouraged?
- I. Information getting to Board?

# Board of Director Guidance

- The Office of Inspector General of the U.S. Department of Health and Human Services and American Health Lawyers Association publication Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors;
- The Office of Inspector General of the U.S. Department of Health and Human Services and American Health Lawyers Association publication Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors;
- The New York State Attorney General's Office publication Right from the Start: Responsibilities of Directors and Officers of Not-for-Profit Corporations; and
- The New York State Attorney General's Office publication Internal Controls and Financial Accountability for Not-for-Profit Boards.

# U.S. Sentencing Guidelines

- A. The “organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.”
- B. Effective 11/1/10, amendments require that the officer responsible for the compliance and ethics program be in a position to communicate personally with the governing authority of the organization promptly in the case of any matter that may involve criminal conduct.

# OPWDD Recent Reviews

- Looking for Board involvement
- Looking for increases/decreases in funding for compliance/quality reviews
- Looking to see how much information Board receives
- Looking for proof that the Board gets information

# Effectiveness of Compliance Plans

OMIG is auditing compliance program effectiveness. On site visits include:

1. Interviews of staff and board
2. Review of agency “culture”
3. Comprehensive review of implementation of plan
4. Site visits of up to a week

# Brooklyn Hospital Report

- A. Suggestion that the State Health Commissioner should be given the authority to replace hospital management and remove board members as part of the effort to force self-interested and unqualified hospital officials to reverse the declining quality of care in the borough.
- B. Questions being raised about whether the government can decide when health care leaders can no longer be entrusted with the responsibility of managing a health system.

# Brooklyn Hospital Report

“The boards of some of these hospitals have failed to satisfy fully their responsibilities to the organizations and their communities. They have not evaluated financial and clinical performance, set strategic goals to address them, and held management accountable for achieving them. Instead, they have adopted a strategy that seeks merely to be the last man standing in their communities. It is clear that this strategy is a failed one.”

# Scrutiny of Not-for-Profits

- A. The State of New York Governor's Task Force on Not-for-Profit Entities issued numerous letters to not-for-profit corporations across New York State, requesting a laundry list of information aimed at targeting the compensation packages of individuals at the respective corporations.  
<http://www.hblaw.com/pdf/HCHS%2011-11.pdf>
- B. Executive Order - State funding, including contracts, Medicaid, and State Aid deficit financing would not be provided to support the compensation of any executive whose compensation exceeds \$199,000 per annum. We await regulations.  
<http://www.hblaw.com/pdf/HCHS%201-20-12.pdf>

# Compensation

- A. The need for a compensation analysis.
- B. Compensation committee?
- C. Independence of compensation consultants and advisors.

# Scrutiny of Not-for-Profits

- A. The Attorney General's Report "Revitalizing Nonprofits/Renewing New York" provides a series of 38 recommendations for not-for-profit organizations, focusing on three categories: reducing burdens on not-for-profit organizations; enhancing public trust and board governance; and practical solutions to build better governing boards.
- B. The AG also announced a number of partnerships with the business and academic communities to help not-for-profits address financial and strategic challenges by enhancing the quality of their governance.
- C. More to follow.

# AG's Report - Recommendations

Cash Flow Loans	Directors U	Electronic Filing
Office of Contracting Reform and Accountability	Continue Collaboration	Create State Contracting Website
Data Vault	Lengthen Contract Period	Make Easier to Form
Updating Law	5 <sup>th</sup> Quarter Financing	Expedite Approvals
Compensation Oversight by Board - Independent	Multi-Year Contracts	Interested Person Transactions - Fair and Reasonable
Board Oversight of Audits	Standardizing Contracts	Conflict of Interest Policies
Giving AG More Authority to Investigate	Nonprofit Liaison to Governor	Whistleblower Policies
New York on Board	Centralize Audits/Reviews	Board Independence

# Introduction to Conflict of Interest

- A. Evolution in Health Care and Not-For-Profit Law
- B. Fundamental Rule – Responsibility and Accountability
- C. Must Be Ethical and Be Perceived to Be Ethical

# Definition of Conflict of Interest

*Conflict of Interest:* Any situation in which financial or other personal considerations may compromise or appear to compromise (1) an employee or Board member's business judgment; (2) delivery of services; or (3) the ability of an employee to do his or her job. An actual or potential conflict of interest occurs when an employee or Board member is in a position to influence a decision that may result in a personal gain for that employee, Board member, or for a relative as a result of business dealings. Relative is often defined as any person who is related by blood or marriage, or whose relationship with the employee or Board member is similar to that of persons who are related by blood or marriage.

# Conflict of Interest Policies and Procedures

Business dealings with outside entities should not result in unusual gain for those entities, the organization, a Board member, or an employee. Unusual gain refers to gifts, bribes, product bonuses, special fringe benefits, unusual price breaks, and other windfalls.

Materials, products, designs, plans, ideas, and data are the property of the organization and should never be given to an outside firm or individual except through normal channels with appropriate prior authorization. Any improper transfer of material or disclosure of information, even though it is not apparent that an employee has personally gained by such action, is prohibited.

# Disclosure Statement

1. Outside Interests - To hold, directly or indirectly, a position or a financial interest in any outside concern from which the individual has reason to believe the organization secures goods or services, or that provides services competitive with the organization. To compete, directly or indirectly, with the provider in the purchase or sale of property or property rights, interests, or services.
2. Outside Activities - To render directive, managerial, or consultative services to any outside concern that does business with, or competes with the services of the organization, or to render other services in competition with the organization.
3. Inside Information - To disclose or use information relating to the organization's business for the personal profit or advantage of the individual or his/her immediate family.

# Disclosure Statement

4. Gifts, Gratuities, and Entertainment - To accept gifts, excessive entertainment, or other favors from any outside concern that does, or is seeking to do, business with, or is a competitor of, the organization under circumstances from which it might be inferred that such action was intended to influence or possibly would influence the individual in the performance of his/her duties.
5. List any family members employed by the organization or serving as a member of the organization's Board of Directors.

# Examples of Potential Conflicts of Interest

1. A board member or employee makes a decision motivated by considerations other than the “best interests of the not-for-profit organization.”
2. A board member/employee or close family member personally contracting with the organization.
3. A board member/employee learns of an opportunity for profit through his or her affiliation with the organization which may be valuable to him/her personally or to another organization of which he/she is affiliated.
4. A board member/employee assists a third party in their dealings with the organization, where such assistance could result in favorable or preferential treatment being granted the third party.

# Conflict of Interest

The key is meaningful disclosure and transparency. Must be a focus on education and obtaining information. Employees and others must understand that health care is different than other businesses.

# Consider Organization Policies and Procedures

## 1. Employment of Relatives

- a) Disclosure and transparency
- b) Ensure the following are not impacted: reviews, compensation, discipline
- c) No immediate family members in same unit
- d) No direct reporting
- e) Notification to HR of hire
- f) No preference to relatives

# Provide Ethics Training – What Does an Ethical Culture Value?

- A. Mindfulness – gut reaction or feeling of discomfort.
- B. Voice – a public conversation so that ethical issues can be explored.
- C. Respect – listening to others with generosity rather than suspicion and valuing different views. Work on issues as colleagues, not critics.
- D. Tenacity – not avoiding difficult discussions or problems.
- E. Legacy – understanding that what we do now makes a difference in the future.

# Legal Compliance is Different Than Ethics But Very Important

Intended to prevent, detect, and punish violations of law.

- Communicating minimal legal standards
- Monitoring employee behavior to assess compliance
- Instituting procedures to report employees who fail to comply
- Disciplining offending employees

# Ethics is More

There can never be enough laws to address every circumstance. We need critical thinking and critical reasoning to deal with ethical issues. Judgments need to translate organizational values into action.

# Leadership in Ethics

Leaders affect the environment and culture in subtle ways; they shape culture through:

1. what they pay attention to, measure and control
2. how they react to critical incidents and organizational crises
3. how they allocate resources
4. how they act as a role model, teach and coach
5. how they reward and promote
6. how they recruit and select

# We Should Never Say

“All that really matters is the bottom line.”

“What are the chances anyone will find out?”

“You’re naive – everyone does it.”

“I don’t care how you get it done.”

“By any means” or “No matter what.”

“ I expect 100 percent compliance.”

“Just do it.”

“I don’t want to hear why you can’t.”

# Decision Making

1. Ask:
  - a) Is my action legal?
  - b) Is my action ethical?
  - c) Does my action comply with organization policy?
  - d) Am I sure that my action does not appear inappropriate?
  - e) Am I sure that I would not be embarrassed or compromised if my action became known within the organization or publicly?
  - f) Am I sure that my action meets my personal code of ethics and behavior?
  - g) Would I feel comfortable defending my actions on the 6 o'clock news?

# Recommendations

- A. Consider ethics training for managerial staff;
- B. Prepare your Board through literature, training and reporting;
- C. Get them training on responsibilities, the legal framework, legal and ethical issues, conflict of interest, compliance and quality;
- D. Ensure conflict of interest policies are in place and followed; and
- E. Proceed as if the Board may be interviewed and that you would have to prove the Board's education and knowledge.

# Conclusion and Questions

Thank you for your time.