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This newsletter is designed to inform you about new research and expert opinions in the area of hospital and health system governance, as well as to update you on services and events at The Governance Institute. Please note that you are receiving this newsletter because you are a Governance Institute member or expressed interest at one of our conferences.

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Terms of Engagement: Board Support of the General Counsel

This is the third article in a series examining governance tasks that may now require a heightened level of attentiveness.

By Michael W. Peregrine, McDermott Will & Emery, LLP

A subtle but critically important task of the hospital and health system board in the current environment is to ensure a suitably prominent role of the general counsel as part of the executive management team. To some, this might appear as an inappropriate interference with the CEO's authority over executive leadership. However, expectations with respect to the (increased) role and responsibilities of the general counsel have dramatically changed over the last 10 years. Indeed, best practices now perceive the general counsel as having greatly expanded duties as both legal counsellor and business advisor. This is especially the case in an industry as complex and evolving as healthcare.

The Traditional Role

The traditional role of the general counsel was always fairly clear-cut. She/he serves as a) the legal advisor within the corporation to constituents in an individual professional capacity, b) a corporate officer and member of the executive leadership team, c) manager of the corporation's office of legal affairs, and d) the corporate agent in connection with the organization's dealings and relationships with third parties.¹

In this role, the general counsel has provided legal advice to corporate officers, board members, and other organizational constituents on such matters as legal and regulatory compliance, internal

investigations, corporate transactions, litigation/dispute resolution, corporate governance, and trends in the law and the potential impact to the organization. The general counsel has always assumed final responsibility for all legal matters that impact the organization.

The "New Reality"

Yet much has changed in this regard, and multiple new surveys, studies, and "best practices" reflect the evolution of the general counsel's role from that of a pure legal counsellor to also being a valued business advisor to corporate management and a primary protector of the corporate reputation. The new role projects a broad portfolio, including direct involvement in the corporation's legal matters as well as shared responsibility for its position on ethics, reputation, public policy, communications, and corporate citizenship.²

In this new, more prominent role, the general counsel performs a wide variety of functions, including: 1) "creative, affirmative partner" to the management team in support of corporate goals, 2) providing advice from both legal and business perspectives, 3) advising the board on matters of corporate law and governance, 4) playing a leadership role in the development of the organization's ethical standards, 5) adopting and monitoring an effective risk management process,

¹ E. Norman Veasey and Christine T. Di Guglielmo, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (New York: Oxford University Press, 2012), pp. 2-14.

² Ben W. Heineman, Jr., "The General Counsel as Lawyer-Statesman," Harvard Law School Program on the Legal Profession, September 5, 2010; see also Veasey and Di Guglielmo, 2012, Preface.

6) being a key participant in corporate crisis response teams, 7) serving as a “problem solver” on multiple issues (e.g., legal, compliance, ethics, corporate integrity), 8) serving as a mediator of disputes between corporate constituencies, and 9) coordinating corporate communications and government affairs—among many other new roles.³

Where Did This Come From?

What has happened to change things so dramatically? The basic answer should be recognizable to board members—the dramatic increase in the business and legal complexities facing corporations across industry sectors over the past 10–15 years. During this period, government has adopted a markedly more prescriptive approach to regulating corporate affairs than ever before. This has, in turn, required corporations to confront rapidly changing, broad-based new laws and intense regulatory and litigation barriers. The general counsel has evolved to become the keystone of the organizational response, as both a legal and business advisor and guardian of the organization’s reputation.

There are at least five specific elements to this change. First is the way in which the Sarbanes-Oxley Act in 2002 changed the dynamic between government and corporations (and, indirectly, between governance and management). Second is the manner by which the Dodd-Frank Act in 2010 served to increase the level of oversight of corporate governance and operations. Third is the manner in which state and federal regulators have increased their scrutiny on corporate law and governance matters. Fourth is the impact on corporate governance of the proliferation of “best practices” relating to the structure, composition, and role of governance. Fifth is the enactment of federal legislation that has served to fundamentally alter the financial and operational models of particular industries (e.g., healthcare and the Affordable Care Act).

Each one of these elements has proven to have direct application to the non-profit hospital and health system. The collective impact of these elements has resulted in a complete, evolutionary shift in the environment in which the general counsel is expected to function, together with a new “retinue” of interest groups with a significant interest in the role, function, and advice of the general counsel. Indeed, many prominent new corporate surveys have been published in 2014 to date that

³ Heineman, 2010, pp. 7–11.

emphatically emphasize the prominent new role of the general counsel.⁴ These surveys should be required reading for the board.

What Should the Board Do?

The board should play a key oversight role in ensuring that the general counsel assumes the role and prominence that these new developments and best practices suggest. This is principally because the board has a fundamental duty to ensure the proper role of the general counsel within the context of corporate affairs. This notwithstanding, the CEO has the right to hire, evaluate, determine the compensation of, and perhaps ultimately terminate the general counsel. Best practice requires that these rights be subject to board oversight and ratification.

In this regard, it will be particularly important for the board to recognize the unique tensions that may arise for the general counsel as she/he assumes these multiple new “counsellor/advisor” roles, and be prepared to provide support and guidance.

The multiple functions that the general counsel is now being called upon to perform assign her/him a complex responsibility for which different internal constituents may have varied understandings and expectations. This places the general counsel on what a knowledgeable observer refers to as the “balance beam”—in which she/he must adhere to professional responsibilities within an environment in which different interested parties pull her/him in different directions. A primary source of this tension arises from the expectation that the general counsel will be “independent” (i.e., independent from influences that would jeopardize her/his “ardor for the client,” and independent of client influences so that she/he is able to act in the best interests of the client).⁵

The board should be also attentive to the need for a clear articulation between the roles of the general counsel and the compliance officer. The term “compliance” is increasingly being used in the

⁴ *Over the Horizon: How Corporate Counsel Are Crossing Frontiers to Address New Challenges*, KPMG International, 2014 (available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/broadening-role-general-counsel/Documents/general-counsel-survey-report-v3.pdf>); *GCs in the Boardroom and Beyond: a 2014 Survey*, NYSE Governance Services, Corporate Board Member and BarkerGilmore, 2014; *Skills for the 21st Century General Counsel*, Association of Corporate Counsel, December 2013.

⁵ Veasey and Di Guglielmo, 2012, Chapter 3; see also Heineman, 2010, pp. 14–15.

media, in governance publications, and other sources to encompass tasks and functions that are properly (or primarily) the responsibility of the general counsel. Board direction can help protect against role confusion that could encroach on the general counsel's rightful responsibilities and otherwise create organizational confusion and risk.

Conclusion

Emerging best practices envision a greatly expanded, more prominent role of the general

counsel. In this expanded role, the general counsel serves not only as a legal counsellor but also as a strategic business advisor, among other roles. The board is generally responsible for the oversight of the corporation's legal function to make sure it is properly structured and staffed. For similar reasons, the board will want to work with the chief executive officer to ensure that the new concept of the lawyer as both counsellor and advisor is properly implemented by the healthcare organization.

The Governance Institute thanks Michael W. Peregrine, Esq., partner, McDermott Will & Emery, LLP, for contributing this article. He can be reached at mperegrine@mwe.com.



Where the Buck Stops with Director Performance

By Paul J. Taylor

Imagine the surprise if one of your brightest directors told you that he was “clueless” about key aspects of board business. I was shocked when it happened to me. And the director was one of the best on a high-performing board and in his fourth year as a director.

Some basics were mysteries to him—despite new director orientation, regular board education sessions, strategic retreats, and routinely shared materials from healthcare groups and governance thought leaders, not to mention personal business acumen and success. Turns out, when we asked other directors about this they harbored the same uncertainties. And why not?

Healthcare is complex. Our organizations are microcosms of the entire work world but with patient safety and stewardship woven into the fabric. Knowledge of the myriad and often arcane details of healthcare can test even those who devote careers and every waking moment to it.

Should the director who is a finance expert know about or remember nuances of quality assurance? Should the physician director trained in the scientific method appreciate the reliability of patient satisfaction opinion sampling? Should the consumer advocate learn to command the counter-intuitive world of healthcare finance? And what about the changing language and acronyms of

healthcare—can any director be faulted for not mastering them?

How does the volunteer director learn the ropes and remember them? Many respected governance sources recommend that every board have a formal education plan and/or director development system. Consider this straightforward advice from *Principles for Good Governance and Ethical Practice*: “The board should establish an effective, systematic process for educating and communicating with board members to ensure that they are aware of their legal and ethical responsibilities, are knowledgeable about the programs and activities of the organization, and can carry out their oversight functions effectively.”⁶

Who could disagree with the motherhood-and-apple-pie notion of continuing board education? But there are still lingering question about how to do board education, how much is enough, what should the content be, and when to make time for board education? Also, how is success measured? Standards for board education don't exist. Even models are difficult to find.

⁶ *Principles for Good Governance and Ethical Practice: Guide for Charities and Foundations*, Panel on the Nonprofit Sector, October 2007 (available at <http://www.nacua.org/documents/GoodGovernance.pdf>).

Consider two of the most commonly mentioned of many approaches in governance literature. The first is that every board meeting agenda include an educational component. The other is that special seminars or regular retreats be dedicated to background information that may be too complicated for regular board meetings. Such ideas have merits on the surface. But will a one-size-fits-all approach work, especially with jam-packed board meeting agendas and precious time availability on the part of volunteer directors? And will an off-the-shelf system meet the exact needs of your directors?

This article proposes the following three steps that can boost individual board member efforts to satisfy their knowledge and information needs. These steps can work together or independently.

Step One: Determine What's Needed

When an experienced director pondered the question of identifying director knowledge gaps, he wondered aloud, "But how do we know what we don't know?" The trail should begin with a board self-assessment, and tools are available that can help. The model that our board preferred is The Governance Institute's BoardCompass system. It is used annually as a starting point in working toward optimal board performance. The survey instrument covers all key categories of governance and provides not only an assessment of board performance, but also a comparison to other hospitals and health systems from a database of participating hospitals.

Results of the self-assessment will help determine the needs of your directors. If, say, 80 percent of directors answer one way, 10 percent another, and the final 10 percent doesn't know, at least two of the groups need to know more. If the analysis of results compared to the national database puts your board into a lower percentile overall or in specific categories of governance activity, a combination of group and individual learning experiences may be the right prescription.

If your board is high-performing, avoid the temptation to pat each other on the back and put board development on a back burner. Acting on self-assessment results can bring the board to an even higher level. Results will inevitably show that every director is not equal in knowledge. Some will need to focus on certain aspects of governance that they never understood, have forgotten, or feel a need to address.

Board self-assessments, while not the same as individual director assessments, can provide information related to individual director knowledge and expertise. Do board members come prepared for board meetings? Are the meetings conducive to strategic and generative discussions? Does the board understand and adhere to the difference between its role, the role of the management team, and that of the medical staff? Does the board regularly review its policies and how it conducts its business to ensure that its processes are rigorous enough to get results from management and the medical staff to achieve strategic/organizational goals?

While it can be difficult to employ appropriately and with diplomacy, individual director assessments are also highly effective tools to determine education needs. Not as many boards conduct individual director assessments due to their somewhat controversial nature, but there are a number of fair and confidential approaches that high-performing board members should be amenable to, and The Governance Institute considers this to be a recommended practice to enhance the board's overall performance.⁷

Step Two: Get Up Close and Personal

Two other approaches can be used, in conjunction with or independently of, the board self-assessment. The first is a periodic, informal three-way dialog between each director, the board chair, and the CEO. These private sessions are opportunities to explore each director's views about areas for improvement from the self-assessment, or perspectives about the question, "How are we doing?" either in the boardroom or as an organization. The board chair can express views on what the director brings to the table (or doesn't), and related issues including reappointment or other service issues (this can be the starting point for an individual director assessment, in fact).

Another practical idea is to ask experienced directors to mentor newcomers. The success of a mentoring relationship stems more from the mentor than the new director. The mentor should initiate contact prior to every board meeting to touch on the agenda and meeting materials, and to probe for questions that the new director might be reluctant to ask during a meeting. A brief private review after each meeting also will help both the mentor and

⁷ For more information on ways to conduct individual director evaluations, see Elements of Governance®: *Individual Board Member Assessment, 2nd Edition*, The Governance Institute, 2010.

new director. The mentor also can suggest resources to resolve any questions not easily answered.

Step Three: The Buck Stops Here

Each director has an obligation to competently be a good steward, safeguard patient safety, advance mission, set responsible policies, and ask the right questions about organizational integrity. The qualities that led an individual to be elected to the board should also lead them to proactively identify areas for self-improvement. No director should be immune from regular self-reflection and follow-up. The complexity of healthcare should not be a long-term excuse for underperformance.

But how can each director's responsiveness be measured objectively? The following is a prototype that might work for your board.

Our directors identified the creation of a governance education/development plan as a priority. The process began by surveying directors about what topics should be addressed. All 14 directors suggested dozens of different subjects. No more than four of them focused on any single one. The reason? This high-performing board had diverse members whose knowledge bases or gaps were equally diverse. Group learning wouldn't work without most of the group being bored to death during a group program suited for a few of them.

A small group of directors was asked to consider options. They began by researching how other boards addressed the same challenge. Finding none that fit their needs, they created their own.

The result was a pioneering system for continuing education based on the needs of individual board members. Responsibility for improvement rests with the individual director, while recognizing that their participation in key board activities is inherently educational.

The system is a Chinese restaurant-like "Choose one from Column A, choose one from Column B" menu of options that requires each director to meet a minimum number of development actions each year. The board collectively agreed to assign point values to each option, and then asked each director to achieve at least 10 points a year. Some participation can be tracked by the board chair and secretary, but much of it is an honor system of regular reporting by directors.

Exhibit 1 (on the following page) shows how one board created its system. Content should differ based on the practices and needs of each board. Directors might debate whether the system should cover only "extra" efforts above and beyond routine director responsibilities. One position might suggest that meeting attendance be included if an agenda included an educational component. Our board decided that most routine obligations would be excluded while some basics would remain to acknowledge effort and educational value, and for which the bylaws did not require 100 percent participation. The system rewards those who participate, and places an obligation on those who don't. Flexibility was delegated to the board chairperson.

The next most common question might involve variations of the following: "But what if something happens that makes me fall under the minimum points?" The answer is that directors know best what they need to improve. Collectively, the board agreed that achieving the annual goal didn't involve heavy lifting. In other words, this system makes it easy and possible for a busy director to do the right thing and get up to speed.

One question that is so sensitive in many boardrooms needs to be asked: Should a director who never "catches up" on the educational points be worthy of reappointment? Our board leaders observed that director responsiveness to self-improvement should be a factor in decisions involving their reappointment to the board if eligible at end of a term. Objective criteria for measuring individual director performance is typically weak or non-existent for most healthcare boards (again, because not many boards actually conduct individual director assessments, and thus making it difficult to put in place reappointment criteria). Single terms on our board were for three years with a maximum of three terms. Missing the personal development goal in a year might not be a problem; missing it in multiple consecutive years certainly would be. Active engagement in the development plan was viewed as a starting point in the re-nomination process.

Continuous performance improvement, by whatever moniker, is a way of life in healthcare. Most, if not all, healthcare organizations have standards for employees and medical staff to show regular engagement through continuing education. The same standard should apply to the volunteer leaders of the governing board.

Exhibit 1: Sample Individual Director Development Plan

<i>Action by Individual Director</i>	<i>Point Value</i>
For new directors: participate in formal governance orientation program.*	5
For existing directors: audit new board member governance orientation program as a refresher.	2
Self-identify to the board chair or management a topic that the director would like to know more about, and then participate in an educational process designated to fulfill that need.	5
Report to the full board about insights from the educational process.	2
Participate in an association or other third-party governance conference, seminar, or Webinar.	3
If multi-day, add one point for each day.	1+
Serve as chair of a governance committee/work group.	2
Participate in a governance committee/work group.*	2
Participate in the organization's annual strategic planning retreat.*	2
Participate in the board's annual retreat exclusive to governance topics.*	2
Participate in the annual Foundation retreat exclusive to philanthropy and fundraising topics	2
Participate in tours of the organization (add one point for each tour).	1+
Serve as a board officer or officer of a subsidiary or affiliate.	5
Serve as a committee member of the Foundation or Friends/auxiliary.	2
Participate in another educational initiative approved by the board chair.	TBD

Goal: 10 points each year for each director

**These items should be considered a requirement for all board members, but do qualify as education opportunities, which is why they are included in this grid. Adjust this list of action items to fit your board members' needs appropriately.*

The Governance Institute thanks Paul J. Taylor for contributing this article. Mr. Taylor has worked with hospital boards and CEOs on governance affairs for more than 40 years, and currently consults and writes on governance best practices. He also has served as a director on foundations, trusts, business, and community boards. Mr. Taylor was previously senior vice president of South Shore Hospital, Weymouth, Massachusetts. He can be reached at pjtaylor7X@gmail.com.



New Publications and Resources

[Episode 3: Physician Alignment in Population Health](#) (PopCity DVD, June 2014)

[Building a Culture of Accountability from Within: The Transformation of Scripps Health](#)
(Case Study, June 2014)

[Governance across the Continuum: Leadership Accountability for Creating Healthy Communities](#)
(Signature Publication, 2014)

[BoardRoom Press, Volume 25, No. 3](#) (*BoardRoom Press*, June 2014)

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Governance Support Conference
The Nines
Portland, Oregon
July 27–29, 2014



Leadership Conference
The Broadmoor
Colorado Springs, Colorado
September 14–17, 2014



Leadership Conference
The Greenbrier
White Sulphur Springs,
West Virginia
October 19–22, 2014

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Upcoming Webinar: Patient-Centered Medical Homes and the Board's Role: From Questions to Deliverables

Join us **Thursday, July 24**, from **2:00–3:00 p.m. Eastern/11:00 a.m.–12:00 p.m. Pacific** to learn about the PCMH model and how it differs from traditional managed care. Gain an understanding of the questions boards and leaders should be asking from a position of governance to stimulate dialogue and support organizational success. This Webinar will cover the relevant considerations of financial incentives, physician engagement, and tangible takeaways for evaluating your present level of organizational readiness or performance.

