Governance Notes
A Quarterly Summary of News, Resources, and Events for Governance Support Professionals
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This newsletter provides governance support professionals with information and expert opinions in the area of hospital and health system governance and gives updates on services and events at The Governance Institute.

News, Articles, and Updates

Toward a More Effective Board Support Process

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Health system general counsel and governance support personnel (GSP) can combine to provide enhanced assistance to the board of directors in the exercise of their fiduciary duties. The combination of operational, regulatory, and competitive forces is creating board agendas of previously unanticipated complexity and challenge. The expectations of, and demands upon, health system directors are evolving dramatically with the rapid pace of industry evolution and consolidation. A premium will be placed on management's ability to develop an accessible and practical platform from which board members can more efficiently act in compliance with their fiduciary responsibilities. The GSP, acting in coordination with the general counsel, can "team up" to implement a series of non-disruptive actions that can increase information flow efficiency, enhance documentation, and reduce individual liability exposure. This is especially important given the increasing reliance on digital technology in the governance process.

The underlying premise is that both the general counsel and GSP have substantial, if differing, roles to play in how the board receives information, processes that information through oversight and decision making, and documents the actions that the board ultimately takes. To the extent that the general counsel and GSP can more effectively team up in pursuit of these shared roles, it will become materially easier for the organization to demonstrate that, on any particular issue, the board acted in a manner consistent with applicable fiduciary duties.

Neither the general counsel nor GSP can, of course, ensure that board members will always act in a manner consistent with the standard of conduct. But, by jointly focusing on the facilitation and documentation of such conduct, they can significantly increase the likelihood that the appropriate standard is achieved. Conduct to be emphasized includes loyalty to charitable mission, constructive skepticism, attentive oversight, informed business judgment, good faith, disinterest, legal compliance, and adherence to corporate/board policies.

The "model" board support platform for today's health system would be built on at least eight separate "planks":

1. **Effective board education.** Targeted, frequent board education contributes significantly to the exercise of the requisite good faith, oversight, and business judgment, and is typically recognized as "best practice." The general counsel and GSP can team up to support satisfaction of this best practice by developing an organized schedule of educational sessions that are designed to address the developing issues of interest to board and committee members. The sessions can be either in-person or Web-based, with supporting reading materials. Education is at the core of informed decision making and the board's agenda should reflect a commitment to organized, periodic education programs through a variety of presentation modes.
2. **Proper information flow.** A key method for empowering the board to satisfy its fiduciary obligations is to ensure the delivery of relevant information on a timely basis and in a format and context that is useful to the board. The specific type (e.g., electronic or written), format, timing, and source of information will depend upon the composition, mix, and sophistication of the board and of the nature and scope of the

system's business and operations. The general counsel and GSP can work together to actively engage the board in a dialogue as to what manner of information delivery works best for their needs and oversight/decision-making obligations. They can work jointly to organize the material in a reader-friendly manner that will better guide board members to the most important and time-sensitive issues. This dialogue can also help confirm the sources from which information is authorized to be sent to the board (e.g., senior executives, other members of the management team, and external advisors). Such dialogue frequently serves as the catalyst for moving from the traditional written "board book" approach to a digital technology method of providing information to the board.

3. **Instructive board agenda.** The meeting agenda is often one of the most underutilized board communication and documentation tools. A properly prepared agenda will reflect input not only from the chair and CEO, but also from the general counsel and GSP. This "team" can help the agenda achieve important governance support benefits, for example, preparing the board for the issues to be addressed at the meeting, facilitating advance information requests from directors, assisting in the identification and disclosure of potential conflicts of interest, identifying documents provided in advance of the meeting, combining with the meeting minutes to serve as a historical reference of matters discussed (and documents provided) at the board meeting, and serving as supportive evidence of the board's advance preparation and diligence. The GSP and general counsel can work together to help ensure the most effective use of the meeting agenda.
4. **Effective minute-taking practice.** We could spend several hours on this topic, but the main point here is that the general counsel and GSP can collaborate to ensure a proper, efficient, and accurate minute-taking practice that memorializes (hopefully) good faith board conduct. Areas of general counsel/GSP collaboration include the style of minutes (e.g., length and context, taping minutes, and the use of board member notes), increased ability to document the genuine exercise of desired conduct and satisfaction of elements of safe harbors and best practices, appropriately addressing sensitive agenda items that are presented in the context of privileged discussion or executive session, appropriately documenting the key items from any consent agenda process, and protecting against excessive editing of the draft minutes by multiple parties.
5. **Preservation of legal privileges.** Substantial documentation benefits can be obtained from a coordinated general counsel/GSP effort to ensure that processes are in place to preserve the attorney–client and related legal privileges when intended to apply to board presentations and distribution of supporting documents. The GSP can rely on the general counsel's familiarity with the relevant privileges to ensure that, where appropriate, communications are recognized as privileged, the control group is properly maintained, protections are in place to prevent inadvertent waiver, and privileged material is stored in a discrete manner. The GSP should not need to "guess" in connection with privilege issues but should have the ability to regularly consult with the general counsel to help ensure preservation of the privilege.
6. **Board records retention.** The GSP and general counsel should work together to design a records retention protocol for board documents. The goal would be to ensure storage in safe, secure, and redundant files—both paper and electronic. The goal is to allow for ready access by officers and directors for their own needs and to facilitate prompt response to record requests made by regulatory/judicial authorities, as well as in the context of third-party due diligence. Examples of governance documents that should be subject to special retention protocols include (but are not limited to) organizational documents; board, committee, and executive session agenda minutes; privileged information; resolutions; committee charters; conflict disclosures (and their resolution); conflict management plans; waivers of notice and of quorum; and correspondence and agreements to which the board itself (or a committee) is a party. The general counsel and GSP should coordinate efforts to ensure that all board and committee document retention practices are consistent with applicable law and corporate policy.
7. **Meeting "shortcuts."** The general counsel plays a vital role in guiding the GSP, chair, and CEO in effectively applying the various corporate governance "shortcuts" available under non-profit corporate law and best practices. These "shortcuts" include the use of consent agendas, action by "informed written consent," meetings held by telephone or video conference, and proxies and voting agreements (where applicable). The GSP should reach out to the general counsel to ensure that the intended use of the "shortcut" is

consistent with relevant law, that appropriate notices and advance distribution of materials are made, and that the board's satisfaction of the statutory requirements for the shortcut are appropriately reflected in minutes.

8. **Digital technology issues.** Again, this is another broad and involved topic. In sum, the GSP and general counsel should work very closely together across a broad array of matters relating to the board's use of digital technology in the governance process. This is especially the case with respect to popular items like board portals and dedicated iPads for board members. Key areas for collaboration include the intended primary use of the technology (e.g., posting meeting materials, in-between meeting communications, distributing minutes, and storing board policies), and possible secondary usage (e.g., self-evaluation and board evaluation processes, conflict disclosures, and surveys and questionnaires). Other digital-related topics for general counsel/GSP collaboration include director training, ensuring dedicated IT support, whether printing is allowed, the use of such technology under state corporate law (e.g., for voting), user limitation/vendor access, role-based access use, and, of course, security and authentication.

There is great benefit to be achieved for the health system governance process in the consistent collaboration between the general counsel and GSP. Teaming regularly, they can implement a series of low-cost and non-disruptive measures that will improve the board information and communication process and enhance the value of related digital governance practices. Working together, these two critical health system leaders can create an enhanced platform for effective board conduct, which in term can be appropriately documented. Such collaboration can produce meaningful benefits in terms of increasing the efficiency of board processes and reducing the individual liability profile of board members.

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