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Providing CEOs, board chairs, trustees, and support staff with the fundamentals of healthcare governance

A SERIES BY THE GOVERNANCE INSTITUTE

Fundamental Fiduciary Duties of the Non-profit Healthcare Director

The Governance Institute

The essential resource for governance knowledge and solutions™

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Elements of Governance™
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Elements of Governance™ is designed to provide CEOs, board chairs, trustees, and support staff with the fundamentals of not-for-profit governance. These comprehensive and concise governance guides offer quick answers, guidelines, and templates that can be adapted to meet your board's individual needs. Whether you are a new or experienced leader, the Elements of Governance series will help supply you and your board with a solid foundation for quality board work.

This *Elements of Governance*™ was adapted from a Governance Institute white paper entitled ***Fundamental Fiduciary Duties of the Nonprofit Healthcare Director*** (Summer 2002), written by Michael Peregrine.

About Our Organization

The Governance Institute serves as the leading, independent source of governance information and education for healthcare organizations across the United States. Founded in 1986, The Governance Institute provides conferences, publications, videos, and educational materials for non-profit boards and trustees.

Recognized nationally as the preeminent source for unbiased governance knowledge, The Governance Institute conducts research studies, tracks industry trends, and showcases the best practices of leading healthcare boards across the country. The Governance Institute is committed to its mission of improving the effectiveness of boards by providing the tools, skills, and learning experiences that enable trustees to maximize their contributions to the board.

We believe that strong leadership and sound decision-making skills foster excellent governance. The valuable time, expertise, and personal commitment of our nation's voluntary trustees can be put to their highest and best uses when a commitment to continuous governance education is present. Only when the trustees are recognized for their hard work, provided the latest information, and exhorted to their highest level of service can the organization achieve great success.

The Governance Institute creates such an environment for its members and leverages the good work of boards across the country on behalf of each of its member organizations.

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Introduction

Serving as a director of a non-profit healthcare organization obliges you to carry out that service in a manner consistent with certain fundamental duties—the core fiduciary duties of care, loyalty, and obedience to the organization's purpose. These duties are owed on an individual and collective basis by the board of directors to the organization, its charitable mission, and to the members (if any) of the organization. As such, these duties form the "standard of care" against which a director's conduct will be evaluated. These duties are based in large part on statutes and litigation involving organizations and are generally recognized in most states by statute or case law.

In this "corporate responsibility" environment, it is important that directors of non-profit healthcare organizations familiarize themselves with applicable standards of fiduciary conduct and the basic charitable mission of the organization. Increased scrutiny is likely of non-profit corporate governance. Yet, there has been *no change* to the basic laws affecting fiduciary duty; Sarbanes-Oxley imposed no new legal liability for directors. However, changing public and policy expectations concerning the manner in which directors should function may well increase the standard by which directors will be evaluated.

The non-profit board must be perceived as pursuing a measured response to the environment. However, concerns about increased liability exposure to non-profit directors are basically unfounded, as long as the board:

- Is cognitive of its basic duties and obligations, contributes an appropriate amount of time for these duties, and extends individual "best efforts"
- Is sensitive to the fundamental premises of corporate responsibility, and balances that with the benefits of innovation and risk-taking
- Has adopted (and follows) policies and procedures designed to assist it in the performance of these duties and obligations

The Fundamental Duties of Care, Loyalty, and Obedience

Duty of care (as the name implies) refers to the obligation of directors to exercise proper diligence of care in their decision-making process. State statutes that create the duty of care and court cases that interpret it are often nearly identical for both for-profit and non-profit organizations.

In most states, duty of care involves determining whether the directors acted 1) in "good faith," 2) with that level of care that an ordinarily prudent person would exercise in like circumstances, and 3) in a manner that they reasonably believe is in the best interest of the organization. An evaluation of whether a director or a board has adhered to its duty of care requires that each of these three components be separately addressed.

The "good faith" analysis typically centers upon the presence of any self-dealing or similar attempt to place personal interests ahead of the interests of the non-profit organization (a corollary to the duty of loyalty). The "prudent person" analysis examines whether the directors conducted the appropriate level of due diligence to allow them to make an informed decision. In other words, directors are charged with the responsibility of being aware of the organization's business. They must, in appropriate circumstances, make such reasonable inquiry as would an ordinarily prudent person under similar circumstances. And, finally, directors are obligated to act in a manner that they reasonably believe to be in the best interest of the organization. This normally relates to the director's state of mind with respect to the issues at hand.

Duty of Loyalty requires directors to discharge their duties unselfishly, in a manner designed to benefit only the organization and not the directors personally. It is the duty most focused upon by regulators because it is a duty affected by self-dealing, related party transactions, and other arrangements that may result in improper personal benefits to individuals. It incorporates a duty to disclose situations that may present a potential for conflict with the organization's mission, as well as a duty to avoid competition with and appropriation of the assets of the organization.

Duty of Obedience requires that directors be faithful to the underlying charitable purposes and goals of the non-profit organization they serve, as set forth in the organization's governing documents. It presumes that the mission of the organization, and the means to achieve it, are inseparable.

Practical Limitations on the Duty of Oversight

A judicial examination of the exercise of a board's oversight responsibilities will focus primarily on the board's decision-making process and on evidence as to whether a board has acted in a deliberate and knowledgeable way. Implicit in this is the acknowledgment that:

1. **The appropriate standard is not "perfection."**
2. **Directors are not required to know everything on a topic they are asked to consider.**
3. **The directors' decision in choosing which materials to study and which to ignore is a decision to which courts should generally defer.**

Directors should, however, be attentive to obvious signs of financial or regulatory problems and of employee wrongdoing. The so-called "duty of making inquiry" exists when suspicions are aroused, or should be aroused; i.e., when the director is presented with the proverbial red flag. In such a case, a director should make further inquiry until he or she is reasonably satisfied that management is dealing with the situation in an appropriate manner. Inattentiveness to organizational affairs is never a defense.

However, some states will apply the "business judgment rule" to determine whether a non-profit director's duty of care has been met with respect to organizational decisions. The rule provides, in essence, that a director will not be held liable for a decision made in good faith, where the director is disinterested, reasonably informed under the circumstances, and rationally believes the decision to be in the best interest of the organization.

The various corporate accounting scandals that prompted enactment of the Sarbanes-Oxley Act have increased the pressure on directors to be attentive to warning signs that the organization is, or may be, experiencing business problems or facing legal compliance challenges.

Reliance on Outside Experts

Directors are entitled to rely upon reports submitted to them by experts provided that a) the experts are thoughtfully selected; b) the director acts in good faith in relying on the report; and c) there is no red flag that should otherwise prompt a prudent person to question the expert. Directors should be allowed access to the experts and their work product, and be allowed to ask the experts questions.

Relationship with Managers

Directors are expected to play an active, independent role in the oversight of senior management and of organizational affairs. They must abandon a passive role and replace it with a boardroom culture that stresses "constructive skepticism." Even so, directors are entitled to rely on reports presented by company employees or officers, board committees, or other individuals as long as the director reasonably believes that the subject matter is within this person's professional or expert competence. In such cases, the director should not be subject to liability even if the report is wrong. Management is obligated to keep the board advised on the conduct of organizational affairs, and to present such advisories in an accurate, timely, and easy-to-understand manner. Given the current focus on effective

governance oversight, directors should nevertheless be gently cautioned to respect the traditional separation of governance and management (in the absence of warning signs). The emphasis on active and informed stewardship does not require that a director "get down in the trenches" and seek management-level involvement in organizational affairs.

When Are a Director's Duties Heightened?

The non-profit director's fiduciary obligations may be heightened in certain situations. Enhanced attention may include greater evaluation of the facts and legal scenario, alternatives, financial implications, use of experts, and application of conflict-of-interest policies. Also, proposals that are dramatically outside the ordinary course of business and/or may involve arrangements or transactions of fundamental significance to the organization may have an impact on the organization's mission. A higher level of attention may be expected in response to situations such as a major corporate transaction, financial emergency, challenge to organizational sponsorship, or regulatory compliance challenges. These types of situations present material financial, operational, strategic, and/or compliance issues that run to the core of the organization's charitable mission.

"Best Practices" Compliance

One of the most significant and valuable developments of the post-Sarbanes-Oxley environment is the emergence of governance "best practices" proposals designed to enhance and improve corporate responsibility and governance.

These proposals come from a wide variety of sources, ranging from self-regulatory agencies (e.g., NYSE, NASDAQ) and commercial policy groups (e.g., Business Roundtable, The Conference Board, National Association of Corporate Directors) to professional associations (e.g., American Bar Association) and major organizations (e.g., General Electric, WorldCom, TIAA/CREF). While most of these best practices have been focused on public/publicly-traded companies, their applicability to not-for-profit organizations and non-publicly-traded companies is widely recognized.

Best practices aim to enhance corporate responsibility through changes in attitudes and practices and are designed to address the governance failures that have figured so prominently in many recent corporate accounting scandals (although certainly not exclusive to public companies).

Non-profit governing boards are encouraged to employ "best practices," as an affirmative demonstration of good faith. However, a fundamental distinction remains between "best practices" as an aspirational goal and fiduciary duty as a legal obligation. While governance "best practices" include compliance with fiduciary duties, compliance with fiduciary duties may not always be enough to satisfy "best practices." In other words, failure to comply with best practices does not constitute a violation of law.

Sarbanes-Oxley Compliance

The Sarbanes-Oxley Act was signed into law in July 30, 2002. Conceived as a reform proposal in response to the notorious corporate accounting controversies of the period, the Act was designed in large part to protect the interest of investors and to provide stability to the financial markets.

The Act directly creates—or requires the Securities and Exchange Commission (SEC) and other bodies to implement—a series of fundamental corporate financial reforms. Basic legislative themes include auditor independence, corporate responsibility, enhanced financial disclosures, and transparency/integrity of financial statements and disclosures. Specifically, the Act establishes a new oversight mechanism for the public accounting profession, creates new rules for the auditor/client relationship, institutes new criminal penalties for corporate finance-related crimes, establishes new "corporate responsibility" rules and procedures for executive and board conduct, and provides new protections for corporate investors.

Most provisions of the Act are applicable only to publicly-traded companies, and not to non-profit and other non-public entities. This exclusion even applies to non-profit organizations that have issued securities such as tax-exempt bonds, due to specific exemptions from the federal securities law registration and reporting requirements. The only specifically applicable provision is that for penalties for obstruction of justice (including document destruction and retaliation against "whistleblowers"), which applies to all types of organizations.

However, many non-profit organizations—including hospitals and health systems—have voluntarily elected to adopt those portions of Sarbanes that appear to be most relevant to non-profit organizations. Experience indicates that their motivation has come principally from one of three principal sources: 1) the desire to adopt "good governance practices," 2) a recognition that the fundamental themes of the Act (financial transparency, integrity of financial statements, enhanced governance oversight) benefit the constituents of non-profit organizations, and/or 3) as a response to external forces, e.g., rating agencies, donors, organizational associations, and third party interest groups.

Indeed, some states have enacted their own versions of Sarbanes to apply to non-profit organizations. Furthermore, several industry credit rating agencies have recommended that non-profit hospitals adopt Sarbanes principles as a matter of "best practices."

Special Rules: Financially Distressed Organizations

Directors of organizations at, or approaching, financial distress should be aware of the "insolvency exception" to the rules with respect to the above-described fundamental duties. In essence, this exception provides that once an organization becomes insolvent (prior to entering into bankruptcy), the obligations of the directors "shift" from being owed to the organization to being (at least primarily) owed to the creditors of the organization.

In other words, during the period of time the organization is considered insolvent and before bankruptcy, the directors must exercise their obligations for the benefit of the creditors or risk breach of duty challenges. This obligation to consider the interest of creditors often places directors in a difficult conflict with the duty of obedience to the organization's purpose or mission.

Enforcement of the Duty of Oversight and Scope of Potential Liability

The Authority of the Attorney General

In general, for most states, the attorney general has the sole (or primary) standing to pursue enforcement actions against directors of non-profit organizations for alleged breach of fiduciary duties. This role dates back to the early history of charities. State attorneys general share a fundamental obligation to preserve the assets of charitable, non-profit organizations located in their jurisdictions, and many of the new corporate responsibility concepts are consistent with that obligation.

Risk of Enforcement Activity

The substantial increase in the number of non-profit organizations in existence, the sophistication of their business operations, and the broad manner in which they can affect the public has led to a corresponding rise in fiduciary-duty enforcement activity in recent years. Particularly since the "AHERF" controversy of the late 1990s and the enactment of Sarbanes, the monitoring and scrutiny by attorneys general of the activities of non-profit organizations has increased, especially with respect to controversies that threaten charitable assets. It is recognized that in the federal-state regulatory scheme, the IRS looks to the state to be the principal "policeman" in preventing abuse of charitable assets.

Available Remedies

The attorney general has a broad base of potential remedies to assert with respect to oversight of non-profit organizations and their directors. These remedies include:

- Injunctive relief
- Rescission or cancellation of problematic agreement(s)
- Compelling an accounting of the organization
- Removal of director(s)
- Monetary damages from the organization or its directors (e.g., surcharge for waste of corporate assets or restitution for loss)
- Placing the organization in receivership
- Other, more extreme penalties in extreme circumstances

Difficult to Monitor

In an effort to be more proactive in their efforts to protect charitable assets, state attorneys general are increasingly more visible in their scrutiny of the business and operations of non-profit organizations and their governing boards. This has particularly been the case in terms of: a) "business compliance reviews" of non-profit hospitals and health systems; b) scrutiny regarding alleged wasteful corporate expenditures and executive compensation; c) travel and entertainment expense issues for directors, officers, and their spouses; d) alleged lapse of board oversight of senior management; and e) major proposed corporate transactions lacking a sufficient nexus to the corporate mission.

The Rights of Third Parties

Third Party Claims

The traditional view is that a breach of a fiduciary duty does not provide a basis for a claim by a third party (such as a community action group, patients, labor union, or medical staff) because the duty is owed to the organization and not to the third party. However, recent litigation (typically instituted by aggrieved donors) is challenging the traditional view that donors do not generally have standing to allege breach of fiduciary duty claims unless they have retained an interest in the property gifted.

Derivative Actions

Many state non-profit organization statutes allow directors/officers to pursue breach of fiduciary duty claims on a derivative basis (i.e., on behalf of the organization) to obtain equitable relief (e.g., to direct the organization to take certain actions), or to obtain damages against the organization and its board. The most likely subjects of derivative litigation are matters relating to the duty of obedience and activities that may (or may not) be consistent with the organization's charitable mission.

State Liability Shield

A number of states have enacted legislation that:

- Provides a specific "shield" or other form of relief from monetary damages for non-profit directors acting in accordance with a designated standard of care (i.e., "mandatory protection")
- Allows the individual non-profit organization the opportunity to specifically adopt such protection for its directors (i.e., "permissive protection")

It is important to note that the degree of protection afforded under mandatory protection and permissive protection statutes often differs from state to state and typically relates only to relief from monetary damages and not other potential remedies.

State law may also authorize the organization to indemnify non-profit directors and officers for their expenses incurred in defending themselves in litigation associated with organizational affairs. Indemnification statutes may vary from state to state in scope (e.g., both civil and criminal allegations), and whether indemnification on the part of the organization is discretionary or mandatory.

D & O insurance continues to be an effective mechanism for protecting against personal liability expense. However, in a post-Enron environment, it is wise for directors to confirm the sufficiency of their D & O coverage, and confirm that the policy contains a "severability" clause protecting the directors in the event of allegations of corporate (as opposed to board) misconduct.

Trends and Developments Affecting the Duty of Oversight

Have Fiduciary Duties Changed?

The simple answer is no. The basic fiduciary duty of oversight as manifested through the duties of care, loyalty, and obedience has not changed except to the extent specific clarifications of those duties are made (e.g., Caremark and the duty to oversee compliance activity). Even Sarbanes-Oxley made no changes to the basic law of fiduciary duty.

However, a court's perception of how a "reasonable, prudent director" might act in a similar situation may well be changing; i.e., a higher standard of attention and review may well be expected of the reasonable, prudent director analyzing transactions given the current economic and regulatory environment affecting non-profits. This is particularly the case in a post-Sarbanes environment where state charity law officials have an enhanced desire to ensure protection of charitable assets.

For example, would not the reasonable, prudent director of a healthcare organization that has adopted a corporate integrity plan be expected to more closely review corporate operations, consistent with the plan's "standard of conduct?" Further, a director of a non-profit organization considering a major transaction affecting its charitable objectives might also be expected to apply a heightened level of scrutiny to the purposes and terms of the transaction. A director of a healthcare organization with a board consisting of multiple constituencies served by the organization might be expected to consider more closely the potential for (debilitating) conflicts of interest on the board. Following the enactment of the Sarbanes-Oxley Act with its clear "spillover" onto non-profit healthcare, a director is likely to be expected to exercise greater oversight with respect to the business and financial affairs of the organization.

Accordingly, directors of healthcare entities are wise to revisit the manner in which they evaluate corporate operations and major transactions. It is important to have a basic familiarity with:

1. **The key federal healthcare laws that apply to most of the typical major types of transactions considered by healthcare organizations**
2. **The non-profit and charitable trust law implications of such transactions**

Summary:
Practical Observations and Recommendations on Exercise of Oversight Responsibilities

Specific Duty of Care-Related Recommendations

Board Processes

Review the manner in which major organizational decisions are brought to the board for approval. Specific focus should be placed on such factors as:

- The extent to which directors can make informed decisions
- Meeting attendance
- Appropriate reliance by board members on reports of management, committees, and outside experts
- Meeting schedules and dissemination of important information with sufficient advance notice
- Confirmation of (evidence of) financial fairness to the organization where relevant
- Consideration of the identified risks of the particular transaction and of transaction alternatives
- Reasonable inquiry by board members
- Evidence of community benefit/relevance to the core mission
- Review of due diligence information where relevant
- Thoughtful use of minutes and resolutions

Board Policies

Adoption of clear, concise governance policies offers an effective means for guiding director conduct in a manner consistent with fiduciary duties. Boards with existing policies should evaluate them in light of Enron and Sarbanes-Oxley, particularly with respect to oversight of management and of the organization's finances, as well as the decision-making process.

Operational Matters

Review the manner in which the board provides oversight to management activities, both day-to-day and "out of the ordinary course" activities:

- Proper use of Executive Committee
- Preservation of independence of corporate audit
- Regular evaluation of senior management
- Financial condition of the organization
- Support of compliance initiatives
- Proper use of other committees

Investment Management

Review the manner in which decisions are made with respect to the management/investment of institutional funds. Specific focus should be placed on such factors as:

- The purposes of the portfolio
- The sufficiency of the investment decision portfolio
- The role of internal and external advisors
- Absence of conflicts of interest

Specific Duty of Loyalty-Related Recommendations

Review Status of Conflicts Policy

Evaluate the scope and sufficiency of the organization's conflict-of-interest policy; confirm its compliance with current state law, and amend as necessary to reflect changes in the law and to ensure compliance with IRS recommended policy.

Emphasize to board members the general "duty to disclose" and the opportunities available to an individual director to disclose the nature and extent of a potential conflict of interest (including but not limited to annual conflict statements).

Outside Board Service

Establish a policy setting forth the organization's position with respect to board members and senior management serving on other (outside) boards (and related compensation).

Identify Corporate Opportunities

Identify, to the extent possible, the particular opportunities to help prevent a director from unintentionally "appropriating" for the director's own interest such opportunities of the organization (without the board's prior consent).

Confidentiality

Consider extraordinary measures (including use of a confidentiality agreement) to assure the confidentiality of board members on sensitive matters.

Nominating Committee

Review the standards of the nominating committee to reduce the likelihood that individuals with potential conflicts will be selected for board or committee positions.

Loans to and Compensation of Directors

Consider instituting an absolute ban on loans to directors; provide compensation to directors *only* as authorized by state law and *only* to the degree compensation will not jeopardize favorable standards of review of director conduct and/or insurance coverage.

Specific Duty of Obedience-Related Recommendations

Review the "statement of charitable purposes" clause in the governing documents for strategic operating flexibility; consider making changes (with appropriate legal approval).

Adopt decision-making processes that address the impact of a particular transaction/ strategic decision on the charitable mission of the organization.

Additional Oversight Recommendations

Status of State Fiduciary Duty Law

The board should receive periodic briefings from its counsel on issues relevant to the exercise of fiduciary duties; e.g., status of state law interpreting the duties of care, loyalty, and obedience; availability of "statutory shields;" management of institutional funds; and trends in enforcement activity.

Director Fitness

The board should adopt mechanisms that assist in evaluating and monitoring the director's continued fitness to serve in a fiduciary capacity, and in addressing situations where fitness challenges may arise.

Increase Board Education

The board should make a concentrated effort to improve board members' knowledge and appreciation of their duties as board members and of the various methods available to protect their prudent decision making. This can be accomplished through orientation, continuing education, and self-evaluation methods.

Specific Corporate Governance Protections

The board should review the bylaws of the organization to determine whether they provide adequate protection to a) the organization, from potential malfeasance/lack of contributions from individual directors; and b) individual directors, from liability for actions taken/not taken.

Foster a Supportive Environment

The board, and the organization as a whole, should take all reasonable steps to foster a corporate environment in which directors are encouraged to exercise their discretion and expertise for the benefit of the non-profit and its charitable mission, and to take prudent and informed risks without fear of exposure to debilitating personal liability.