

Healthcare Board Oversight During the COVID-19 Pandemic

By Anne M. Murphy, Partner, Arent Fox LLP

Hospitals in the United States find themselves on the front lines of the COVID-19 pandemic. For the governing boards that oversee them, this requires an intensive and focused response to assure that multi-faceted challenges are being addressed in a manner that advances mission and preserves the organization's viability. This article highlights key organizational approaches and risk areas for hospital and health system boards to consider.

COVID-19 is upending every aspect of society across the globe. With each day that passes, it is increasingly clear that the United States is among the hardest hit of countries. As confirmed cases skyrocket, hospitals must implement plans for the care of patients, the welfare of employees and medical staffs, and the short-term and long-term financial health of the enterprise. While management bears much of the responsibility for implementing these measures, the governing board has a responsibility to adjust its oversight in response to the crisis.

Fiduciary Duties in a Pandemic

Governing boards have three well-recognized essential fiduciary duties:

- The **duty of care** requires directors to make thoughtful, informed decisions through active engagement and

Key Board Takeaways

- Hospital and health system boards have a fiduciary duty to adjust board oversight in light of the COVID-19 pandemic and its impact on the organization.
- The board should assure that it is organized in a manner that facilitates the effectiveness of its COVID-19 oversight. This may include a virtual special meeting schedule, assignment of crisis-related responsibilities among committees, formation of an interdisciplinary working group, consultation with internal and external subject matter experts, and focused management interface to assure that the board is appropriately informed and involved in important decisions. The board's response should be customized to the particular realities for each hospital, and there should be robust documentation regarding the board's decision-making.
- The board should understand and provide direction on significant issues regarding patient safety and quality, workforce management, liquidity and financial stability, liability exposure, and legal compliance. Some of these issues are unprecedented, and the resolution of them could affect the enterprise's future viability and reputation.
- While it may be tempting for legal compliance to take a back seat to the immediate clinical and operational challenges of COVID-19, the board should assure that legal counsel and compliance professionals are fully integrated into the decision-making process. A complex series of federal, state and local regulations, laws, and guidelines are being issued on a rapid fire basis that impact hospitals.

oversight. Boards should assure themselves that they have sufficient information to make informed decisions, have ample opportunity to review the information and, if warranted, have the advice of experts.

- The **duty of loyalty** requires each director to act in good faith and in the best interest of the organization; no personal interest can be put ahead of this responsibility.
- The **duty of obedience** mandates that the board of a

non-profit organization assure its operations are consistent with its mission and purpose, and that it complies with all state and federal laws.

In a crisis such as the COVID-19 pandemic, governing boards are expected to implement measures to monitor and oversee the organization's responses and plans. This requires customized action proportionate to the magnitude of the crisis itself.

As a result, a hospital or health system governing board should assure itself that it adjusts the following to accommodate the numerous pressing and novel questions that the COVID-19 pandemic will trigger for its healthcare operations:

- Interaction with management
- Meeting schedule
- Communications strategy
- Oversight structure

Board leadership will need to take concrete steps to achieve this crisis oversight.

Board Action to Address COVID-19

In deploying a strategy for board oversight of hospitals during the COVID-19 crisis, board leadership should consider several possible steps:

- **Meet.** The board as a whole, and perhaps the executive committee, should schedule a series of special virtual meetings (implemented in accordance with state law and the organizational documents) in order to organize the board, receive reports from and provide direction to management, and identify key COVID-19 issues and decisions requiring board approval. These issues will span across a wide range of mission-critical matters such as patient safety, infection control, access to supplies and equipment, employee and medical staff well-being, liability exposure, compliance risk, and financial exposure (see discussion in the next section below).
- **Organize the board's approach.** The board must determine how best to organize itself to provide COVID-19 oversight. Depending on the organization, the entire board may be engaged on all key issues, or it could fall to the executive committee

In a crisis such as the COVID-19 pandemic, governing boards are expected to implement measures to monitor and oversee the organization's responses and plans.

to assess and make key recommendations. For boards with numerous committees, it may be appropriate to delegate certain COVID-19 primary board oversight functions to the audit, finance, compliance, quality or other committees. If numerous committees will be involved, it will be important to assure that these efforts are coordinated. In addition, the board may want to consider an interdisciplinary working group that would include directors, management, clinical leadership, risk management and legal counsel, and other subject matter experts.

- **Consult experts.** The board may decide that it needs to consult with internal or external experts in fields such as bioethics, supply chain, public health, infection control, law, insurance, and privacy and security. Remember that part of the board's duty of care is to assure that it has these resources as needed. These experts could serve as advisors on an as-needed basis, or potentially join *ad hoc* working groups or standing committees, as non-board members.
- **Interface with management.** Board leadership should have a clear understanding with management as to the extent of communication between management and the board, and the types of COVID-19 issues the board expects to weigh in on. While management is understandably burdened with primary responsibility for hospital operations in these difficult times, the board should

expect prompt notice of current and potential issues raising important mission, clinical, ethical, legal, risk, reputational, or financial considerations.

- **Document.** While good documentation of board decision making is always important, it is especially the case now. In this fast-moving environment in which unprecedented questions are being raised, it will be helpful in the future to have a complete record as to why a certain action was deemed appropriate and in the organization's best interest.
- **Customize.** The board's approach to COVID-19 oversight should be customized to the particular challenges faced by the organization. For example, teaching hospitals will need to address student and faculty safety issues. And those already in COVID-19 hot zones, or that believe hot zone status is immediate, must make urgent and real time decisions regarding supply chain, infection control, allocation of resources to patients, and in many cases, liquidity.

Key COVID-19 Issues for Board Oversight

While it is impossible to identify all issues that may arise for hospitals during a pandemic, the following are some key topics that hospital and health system boards should address with management:

- **Patient safety and quality.** The board should understand the challenges faced by management and clinical

leadership, and provide overall direction, in areas such as securing critical medical supplies and equipment, patient triage and discharge policy, use of off-site non-hospital facilities for diagnosis and treatment, infection control, and bed capacity. Areas of special focus may be bioethics and legal issues associated with application of end-of-life healthcare directives, and the potential prioritization of patients who will receive treatments in short supply.

- **Workforce considerations.** As employees and clinical staff in all parts of hospital operations prepare for and respond to COVID-19, each hospital needs to address the sufficiency of staffing, potential infection among staff and resulting staff shortages, PPE supply shortages, feasible means to reduce the risk of infection for workers and clinicians, and resources to address workforce wellness and stress. A succession plan should be in place for key personnel who may become infected, in the larger context of a business continuity plan. In hospitals with a union presence, it may be necessary to address union concerns. And, in a hospital with liquidity challenges, the harder decisions regarding furloughs, layoffs, or other cost reduction strategies affecting staff will need to be planned for and implemented in a compliant manner.
- **Financial stability.** The board should undertake a focused assessment of the short- and long-term financial challenges

for each hospital, including cash flow details, current debt structure, possible vendor accommodations, and payment cycles from government and private payers. In some cases, liquidity may be an immediate concern, particularly with the suspension of elective procedures. There should be an integrated strategy for accessing emergency funding and other measures such as enhanced reimbursement through the CARES Act and other state and local resources.

- **Liability exposure.** Working with risk management and legal counsel, the board should be informed as to potential areas of liability exposure, whether contractual or based on a standard of care, and potential insurance coverage under business interruption, general liability, professional liability, Directors and Officers, cyber, and other plans. This may require enhanced communication with carriers, and re-assessment of reserves. In addition, emergency declarations and state and federal law may provide immunity or similar protections in public health emergency response, for example by utilizing retired or out-of-state personnel.
- **Legal compliance.** In the context of a global pandemic and its myriad clinical and operational consequences, there is a risk that legal compliance will give way to expediency and a sense that “all bets are off.” In reality, government at all levels is issuing detailed guidance regarding how to comply with

everything from EMTALA to fraud and abuse to HIPAA. And requirements are being relaxed around professional and facility licensure, patient charges, reimbursement and other core operations, but with conditions that must be met. And, significant novel legal questions are surfacing, including those around how hospitals secure PPE and supplies on the open and increasingly-competitive market, triaging and discharge of patients, application of health care directives, and allocation of treatments in short supply. The board should assure that legal counsel and compliance are appropriately included in the decision-making process, and that the board itself understands these issues.

Recommended Resources

- [CDC: Information for Healthcare Professionals](#)
- [CMS Waivers and Flexibilities for Providers](#)
- [CMS Guidelines on Elective Procedures](#)
- [CMS Guidelines on EMTALA Compliance](#)
- [CMS FAQ Telehealth](#)
- [HHS OIG COVID-19 Portal](#)
- [HHS Office of Civil Rights Bulletin on Obligation to Provide Care](#)
- [HIPAA Privacy and Novel Coronavirus](#)
- [COVID-19 and HIPAA: Disclosures to law enforcement, paramedics, other first responders and public health authorities](#)
- [Information from the Infectious Disease Society of America](#)

The Governance Institute thanks Anne M. Murphy, Partner, Arent Fox LLP, for contributing this article. She can be reached at Anne.Murphy@arentfox.com.

