

Teaming with the General Counsel to Increase Information Flow Efficiency and Reduce Board Liability Exposure

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Preparing and delivering board materials to a hospital or health system's governing body is an important—yet often overlooked—opportunity for governance support professionals (GSP) to make a significant impact on board efficiency and reduce legal exposure. As healthcare boards come under increased scrutiny from both regulators and the public, effective board practices, including information sharing and review, are playing an increasingly important role in protecting the organization and board from potential exposure. Accordingly, effective governance support programs must go beyond just acting as a conduit for passing information from management to the board. Instead, an effective governance support program should aim to identify the information the board needs to fulfill its fiduciary and oversight duties, and to distill such information into meaningful content presented to the board through agendas and board packets. In doing so, the GSP should partner with the organization's general counsel (GC) to ensure effective use of legal privilege; thus, reducing liability exposure for the board and the organization.

Communicating the Right Information to the Board

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Key Takeaways

Boards are coming under increased scrutiny by regulators and the public, therefore the importance of fulfilling and documenting the board's fulfillment of its fiduciary duty is ever increasing. To help in these efforts GSPs should:

- Work, in coordination with the GC, to ensure board communication efficiency and effectiveness.
- Make sure that the board is receiving the correct format, amount, and source of information that it needs to make effective decisions.
- Use a variety of tools to increase communication with the board, including agendas and procedural mechanisms.
- Team up with the GC and pay special attention to using and maintaining legal privilege.

what relevant materials to supply to the board, the GSP should balance the temptation to produce everything available, with the urge to provide the board with only high-level overviews. Depending on the composition and sophistication of the board, the correct type and amount of information that is supplied is probably somewhere between the two extremes, where the board has enough of the underlying information to form its own conclusions, but not so much that directors get lost in the information or do not even bother reviewing it all.

Finding and delivering the correct balance requires the GSP to actively engage the board to determine what type of information works best for its needs. If information is provided to the board through a portal, the GSP may also be able to confirm

to what extent board members are downloading the materials and whether there are any trends in the type of information downloaded. Finding the correct balance also requires that the GSP similarly engage with management and other key stakeholders to communicate corresponding guidelines to be used when they collect and provide information to the GSP for inclusion in the packets. The GC can contribute to this process by helping the GSP identify the guidelines necessary for the board to fulfill its fiduciary duty for each matter under board review, as well as help communicate these guidelines to management and the various stakeholders.

Practical Tip: It is safe to assume that if the GSP has the ability to check whether board members are downloading materials from a board portal, third parties, such as

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government authorities, could just as easily use the same information to evaluate whether board members are exercising proper oversight and making informed decisions.

Communicating with the Board through Agendas and Procedures

Although often overlooked as communication tools, the GSP, working with the GC, can use board meeting agendas and procedural mechanisms to increase communication efficiency. A well-planned meeting agenda, provided to board members in advance of the meeting and prepared with input from the chair and CEO, can provide an introduction to the issues to be discussed at the meeting, cross-reference information being produced for the board's advanced review, and allow board members an opportunity to seek follow-up information when needed. Further, the meeting agenda provides an opportunity to categorize matters as either informational items or action items, therefore allowing the board to focus its review and come prepared for the meeting.

Practical Tip: In connection with the GC, make sure agenda items include enough detail to communicate the item to be discussed. For example, listing "Evaluate whether to limit board members to three consecutive terms" will result in members being more prepared to discuss the item

than would simply listing "Term Limits" on the agenda.

Similarly, procedural mechanisms such as consent agendas, action by informed written consent, and proxies and voting agreements can be used to efficiently work through matters before the board that require varying degrees of board oversight and decision making. GSPs should work closely with the GC to understand when these mechanisms are allowed under applicable law and governing documents, whether any notice or advance distribution of information is required, and how the mechanisms should be documented. By incorporating these mechanisms into the board's tool belt, the GSP and GC can help the board focus its efforts in the correct areas.

Teaming with the GC to Preserve Privilege

Boards frequently review presentations and documentation subject to legal privilege, such as attorney-client privilege. The GSP and the GC play a crucial role in ensuring that board processes are properly structured and managed to preserve the privilege when intended to apply to presentations and supporting documents.

The GSP should coordinate closely with their GC to ensure that applicable privilege is correctly recognized and maintained. The GC can review communications and

supplemental information to help confirm that it is correctly identified as privileged, the control group is accurately identified and maintained, privilege is not inadvertently waived, and privileged documents are correctly labeled and maintained. The GC can also help the GSP consider when and how separate documents should be used to record and preserve privileged portions of board meetings. In general, board meetings and communication are not privileged simply because the GC attended the meeting or because the communication was marked as privileged. Rather, the meeting or communication must involve the seeking or conveyance of legal advice. Although the GSP should be sensitized to privilege issues, the GSP should always feel comfortable consulting their GC any time a privilege question arises. It is better to be safe than sorry.

Practical Tip: Be careful when using email to distribute privileged materials to board members given the ease at which materials can be forwarded and risk of inadvertent waiver of the privilege. Consider using a board portal or handouts to distribute privileged materials.

GSPs should aim to identify and distill the information the board needs to fulfill its fiduciary and oversight duties, and partner with the organization's GC to ensure effective use of legal privilege. By taking a few simple steps to effectively prepare and deliver board materials, GSPs can help protect the organization and board from potential exposure.

The Governance Institute thanks Brad Dennis, Associate, and Megan R. Rooney, Partner, McDermott Will & Emery LLP, for contributing this article. They can be reached at bdennis@mwe.com and mrooney@mwe.com.

