

The Shift to a More Professional Board:

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"In a Nutshell"

- There is an increasing premium placed on the provision of sophisticated, ongoing education programs and information reporting systems for health care boards.
- This is a byproduct of a rapidly evolving and consolidating health care provider industry and more focused judicial and regulatory expectations of fiduciary engagement.

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"In a Nutshell" (Cont'd)

- The ultimate goal is to position health care board members to make informed decisions, and exercise informed oversight for the benefit of the system's mission.
- The goal is not to make directors health care experts or to replace the experience of executives and advisors. Rather, it is to position directors to better effect their responsibilities (including analyzing the input of executives and advisors).

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The Elements of Effective Education

- This relates to each of director orientation; ongoing director education as to matters of organizational, industry, regulatory, economic and political concerns; internal management-to-board reporting relationships; agenda development and board member access to members of the executive team.

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The Concept of Board Professionalism

- As it relates to director education, "professionalism" refers to a programmatic commitment that is commensurate with the needs of the directors of an organization of a particular financial status, operating in a highly regulated industry.
- Not looking at necessarily just at what individual directors are interested in receiving, nor at what executive leaders believe the agenda can tolerate-but rather what corporate law would expect.

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Legal Implications

- What constitutes sufficient education and information flow is NOT a "touchy-feely" topic.
- It relates directly to the ability of the board to exercise its fiduciary obligations.
- More directly, it affects the sustainability of board decision making and the quality of oversight.
- Case law and state statutes are increasingly focusing on the quality of director education/reporting,
- Thus, the scope of education and reporting is a matter for general counsel advice.

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The Core Prerequisites

- Partnership between the board and management in addressing the issue.
- Ability of board to rely on the scope of education and information reporting by management.
- Appreciation by senior leadership for scope of board duties and responsibilities.
- The unique nature of the health care industry.
- The requisite engagement of individual directors.

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Element #1: Orientation and Onboarding

- 'Companies should conduct a thorough and robust orientation program for their new directors, including background on the industry and the competitive landscape in which the company operates, the company's business and operations, important legal and regulatory issues, etc.' [Source: The Commonsense Governance Principles 2.0]

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Element #1 (Cont'd.)

- New directors should participate in a robust orientation process designed to familiarize them with various aspects of the company and board service. [Source: The Business Roundtable Principles of Corporate Governance 2016]
- Possible topics might include, e.g. business operations, strategies, major risks, primary competitors, regulatory and compliance climate; executive hierarchy, corporate organizational documents, committee structure, identification of primary advisors and external auditor, executive briefings.

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Element #1 (Cont'd.)

- This relates to the obligation of the board, in conjunction with management, to position incoming board members to be able to participate in board and committee matters as soon as possible upon being seated.
- While the development of the orientation/onboarding program should be the responsibility of management under the oversight of the Governance and Nominating Committee, the incoming director(s) is expected to participate actively in the development and functioning of the program.

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Element #2: Traditional Board Education

- "A board should be continually educated on the company and its industry, seeking information from a variety of sources, including research reports, audit reports and, where relevant, regulatory pronouncements. If a board feels it would be productive, outside experts and advisors should be brought in to inform directors on issues and events affecting the company". [Source: The Commonsense Governance Principles 2.0]

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Element #2 (Cont'd.)

- "Directors should be encouraged to take advantage of educational opportunities in the form of outside programs or "in board" educational sessions led by members of senior management or outside experts". [Source: The Business Roundtable Principles of Corporate Governance 2016]

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Element #2 (Cont'd.)

- This should be a formal program, developed by the Governance Committee with management support, designed on an annual basis to address education needs of board and committees.
- Note the emphasis on use of outside advisors, as a means of both diversifying the perspectives of those who present to the board/key committees, as well as assuring expert commentary on key concerns.
- Should be flexible enough to incorporate updates on new developments of significance to the board/committees and their duties.

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Element #2 (Cont'd.)

- The development of such a formal program can be a useful means of demonstrating the board's good faith performance of its duties.
- To this extent, management is expected to demonstrate its commitment to such a program and to preserve agenda space for its provision.
- Further, individual directors and committee members are expected to be fully engaged in the education programming.

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Element #3: Internal Management-to-Board Reporting Relationships

- The quality and timeliness of information that the board receives directly affects its ability to perform its oversight function effectively.
- The board should work to foster open, ongoing dialogue between management and members of the board. Directors should have unfettered access to senior management outside of board meetings, in a manner authorized and coordinated by the board. [Source: The Business Roundtable Principles of Corporate Governance 2016]
- This topic has been a significant area of focus in recent Delaware decisions.

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Element #3 (Cont'd.)

- This is an area of critical importance to the ability of the board to render effective oversight and decision making, and is frequently referenced so in judicial decisions.
- This should be the byproduct of discussions between the board, its committee leaders and executive leadership team.
- Topics of information reporting should relate to all aspects of corporate operations: risk, financial performance, compliance, quality of care, strategic planning, talent development, culture, benefits and compensation, etc.

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Element #3 (Cont'd.)

- Effective management-to-board reporting will be designed to:
 - Assist the board in being monitors, not managers, of corporate operations;
 - Support the board in its ability to exercise of "vigorous and diligent oversight of a company's affairs"; and
 - Facilitate the ability of the board to exercise those functions for which it has primary responsibilities.
- [Source: The Business Roundtable Principles of Corporate Governance 2016]

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Element #3 (Cont'd.)

- The adequacy of such reporting relationships are a critical focus in any regulatory controversy or litigation involving the company and the board's performance of its duties.
- The board will appear compromised in such controversies if it is unable to demonstrate effectively that it has worked closely with management to assure a comprehensive and timely reporting system.

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Element #4: Agenda Development

- The effective organization, structure and administration of the meeting agenda is an underappreciated aspect of a comprehensive director education and management-to-board reporting program.

Element #4 (Cont'd).

- Agenda development is a critical activity of the board.
 - "The board's agenda must be carefully planned yet flexible enough to accommodate emergencies and unexpected developments, and it must be structured to maximize the use of meeting time for open discussion and deliberation."
 - "The full board (including, where appropriate, through the non-executive chair or lead independent director) should have input into the setting of the board agenda."
 - "The board chair should be responsive to individual directors' requests to add items to the agenda."
- [Sources: The Business Roundtable Principles of Corporate Governance 2016; The Commonsense Governance Principles 2.0]

Element #4 (Cont'd.)

- The ability to accommodate regular board education programming within the board agenda will be an important, but not exclusive, means of providing education material and operational and risk information to the board and its key committees.

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Element # 5: Other Vehicles for Providing Education

- As noted above, opportunities to provide director education and management-to-board reporting should not be limited to the agenda of regular and special agendas of the board and of its committees.
- Other acceptable vehicles would include, but not be limited to membership in external governance organizations and industry trade associations; participation in external governance seminars; board retreats with governance focus; distribution of written and electronic/video materials on governance issues.

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Comments You Want to Hear:

- "That was a great presentation; I learned a lot."
- "It's a different take on things but it made me see the issues in a new way".
- "That was a tough message, but by gosh we needed to hear it."
- "I have a better understanding of our strategy after hearing this."

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You Want to Hear (Cont'd.)

- "I feel more comfortable voting on the issue after listening to this briefing".
- "Great presentation; bring her back again, please."
- "So timely. I just read about this in The Journal this morning."
- "This is particularly relevant to my duties as a committee member".

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"Comments You Don't Want to Hear"

- "Wonder why management never told us about that?"
- "Don't bring that guy back; all he was trying to do was sell his firm's services."
- "Why weren't we given this program two years ago?"
- "Is this guy just a shill for management?"

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You Don't Want to Hear (Cont'd.)

- "That speaker was supposed to be an expert?"
- "Might have been nice if she knew who her audience was."
- "I learned that stuff in my first year of business school."
- "Whoa, looks like it's time I got off this board-and fast!"

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Summary and Conclusion

- Board member professionalism- including meaningful board education- is critical to informed decision making
- Governance support professionals and the Office of the General Counsel have important roles in information flow to Board members