



Important New Governing Board Focus on Quality and Patient Safety

By **Michael W. Peregrine**, Partner, and **Sandra M. DiVarco**, Partner, *McDermott Will & Emery LLP*

The institutional challenges presented by the COVID-19 pandemic and recent judicial decisions interpreting board conduct combine to enhance the vital role of the governing board in monitoring matters of quality and safety. These issues are of particular concern with children's hospitals, given the unique and vulnerable nature of their patient population, and their extraordinary reputation in their respective communities.

Increased attentiveness to quality and patient safety is also merited given the important lessons from recent high-profile patient safety incidents at several leading children's hospitals. Each of these implicated the role and structure of corporate governance to a certain degree, and it is critical that the governance lessons from those incidents are part of any recommended changes to the oversight of quality and patient safety.

Lessons from Recent Case Law

Directors have specific fiduciary responsibilities to exercise oversight of executive leadership and aspects of corporate operations, including (for healthcare facilities) quality and patient safety. These responsibilities include establishing and maintaining effective internal compliance plans and risk reporting systems. Yet the courts have historically attached a high bar to the ability of plaintiffs to successfully prove breach of the duty of oversight claims; they are often referred to as one of the most difficult theories in corporate law to sustain.

Indeed, over the last two years, state courts have been willing to allow such claims to proceed, when presented with specific allegations that the board was essentially

indifferent to its obligation to exercise oversight of the company's compliance with positive law—including regulatory mandates. This scrutiny has been applied to matters of public health and safety (e.g., food, healthcare, and pharmaceuticals). These cases represent a level of exposure that the board should be able to avoid with affirmative focus on fiduciary efficiency—an effort often easier said than done.

Lessons from Recent Quality Incidents

The circumstances surrounding recent high-profile quality and safety events at children's hospitals bear out an important foundational concept: fiduciary obligations are not just financial and strategic in nature, but rather must be viewed through a holistic lens. The hospital governing body is tasked with more than monitoring philanthropy and choosing capital projects; it has an obligation to "steer the ship," and in so doing, ensure quality and safety remain in sharp focus.

Success in meeting community needs, expanding services, and establishing a hospital as a healthcare destination is a hollow effort without commensurate

→ Key Board Takeaways

The pandemic and recent judicial decisions have intensified the need for boards of children's hospitals to focus on quality and patient safety. In the current environment, boards should:

- Establish and enforce a culture of safety that stretches from the boardroom and C-suite to the point of care.
- Hold leadership accountable to quality improvement by evaluating management and executive performance using quality and safety reporting and goals.
- For systems, create communication flows to ensure data and information informs the entire system. Everyone at every level should have accountability, transparency, and access to the information needed to enhance quality and patient safety.
- Make quality and safety part of strategic planning. Strategic goals, such as changes in operations or expansion of services, often call for more quality and safety monitoring, not less.
- Be attentive to the advice of the general counsel on how best the board may demonstrate its commitment to effective and fulsome fiduciary conduct.

growth and development in the areas of quality and safety. In the absence of these characteristics, hospitals cannot (and should not) function. Beautiful state-of-the-art buildings with kid-friendly features are one thing, but the ability to render safe care with positive patient outcomes is another, far more important, metric of success. The children's hospital board that fails to recognize and learn from recent history does so at its peril.

What can the board do to "steer the ship" in these circumstances?

A critical first step is to identify and deconstruct the traditional "silos" where hospital management and staff are solely responsible for oversight of quality and safety. Separating these responsibilities is antiquated and dangerous. Rather, the board should establish and enforce a culture of safety that stretches from the boardroom and C-suite to the point of care, and ensure leadership is accountable by evaluating management and executive performance in a manner that includes quality and safety reporting and goals. Monitor quality and safety operations and take steps to avoid concentrations of power and responsibility in any one person or small group. System-level involvement and oversight of hospital quality and safety needs to both reach down and pull up—establish communication flows to ensure data and information informs the entire system, so that everyone at every level has accountability, transparency, and access to information. While this may be uncomfortable at first, it will inure to everyone's benefit—and most importantly, to the benefit of patients.

None of these steps are meant to suggest that the vital strategic aspects of board governance are to be set aside. To the contrary—all the better to include quality and safety *as part of* strategic planning. Changes in operations, expansion of services, or geographic reach call for more, and not less, quality and safety monitoring. Work with leadership to incorporate quality and safety into enterprise risk management activities to ensure that "lessons learned" don't take years to surface and "death by committee" is not tolerated.

For some hospital governing bodies, this enhanced focus will impact how they view and review important topics. Resistance, in most part, is futile; the rightful focus on quality and safety in healthcare is not a trend, and executives and management need to work together with the governing body to chart the course for this "next normal." The COVID-19 pandemic and resultant shifts in care patterns are instructive. Our communities are more focused than ever on quality of care and the safety of the care environment. If your hospital does not achieve and maintain a reputation for safety and provision of quality care, patients (and for children's hospitals, their parents and

caregivers) will not want to seek care there. Even the shiniest new building will lose its luster if it remains empty.

Observations

To be sure, the “sky isn’t falling” from a director liability perspective. State law generally places a high factual burden for establishing a breach of fiduciary duty claim; it remains one of the most difficult theories in corporate law upon which to sustain a claim.

But it’s not “crying wolf,” either. As the new cases demonstrate, regulators and plaintiff’s attorneys will seize upon evidence in the corporate records of inattentive or lax director conduct to establish the basis for claims, and to pursue some form of remedy. And there are plenty of lessons on quality of care oversight from the recent children’s hospital risk management crises. Keep in mind that service on a children’s hospital board does not, in and of itself, provide protection from such claims, which can be damaging financially, and also with respect to individual and organizational reputation.

Nobody likes spending time in board meetings on director liability issues. It’s bad for director recruitment and retention, and it’s a “downer” topic in board meetings. But it’s actually worse to ignore the recent risk markers, and not to confront the realities with the board. After all, the governance “fix” can often be straightforward.

For those reasons, it is important for board and executive leadership to be attentive to the advice of the general counsel on how best the board may demonstrate its commitment to effective and fulsome fiduciary conduct. In today’s environment, that is time well spent.

The Governance Institute thanks Michael W. Peregrine, Partner, and Sandra M. DiVarco, Partner, McDermott Will & Emery LLP, for contributing this article. They can be reached at mperegrine@mwe.com and sdivarco@mwe.com.

