

Ensuring Conflict-Free Governance

It's a simple fact that conflicts of interest erupt in hospital boardrooms from time to time. It is the board's fiduciary duty to ensure that all governance deliberations and decisions are carried out without conflict of interest, always with the best interests of the hospital at the forefront.

Hospital board members are often involved with many other organizations in the community, resulting in a wide range of business and personal relationships. Ethical codes and policies developed by a hospital and its board members serve as a foundation to ensure a conflict-free environment. Hospital leaders who create and adhere to a strong conflict of interest policy will be successful in ensuring open and honest deliberation.

What is a Conflict of Interest?

A conflict of interest exists when a board member, senior leader, or employee has a personal or business interest that may be in conflict with the interests of the hospital or health system. A "red flag" should be raised anytime the personal or professional concerns of a board member affects his or her ability to put the welfare of the organization before personal benefit.

Board members are often affiliated with many businesses, social, charitable and religious organizations in the community. There may be times when trustees feel pulled in conflicting directions and where they must decide between loyalty and fiduciary service to the hospital or to

another community organization, friend, or family member where there is a close and potentially conflicting connection.

The key for boards is to establish a process for preventing and addressing the inevitable conflicts that arise and ensuring that conflict of interest policies and procedures are consistently adhered to.

Conflicts Are Not Always Cut and Dried. Conflicts of

interest can be complicated and are almost always unintentional. In some cases, no conflict actually exists, but the perception of a conflict of interest can be just as detrimental.

For example, questions may arise when board members serve in various roles with other organizations. There might be interpersonal and financial relationships that call into question whether the individual will be able to make

A "red flag" should be raised anytime the personal or professional concerns of a board member affects his or her ability to put the welfare of the organization before personal benefit.

What's Included in a Conflict of Interest Policy

- **Statement of purpose**—An overview of the purpose of the policy, including protecting the organization's interests.
- **Definitions of who the policy addresses**—The legal definitions of who the policy applies to, including any director, principal officer, or member of a committee with governing board delegated powers.
- **Financial interest**—The definition of when a person has a financial interest.
- **Procedures**—Details of the procedures included in the policy, including a duty to disclose, determining whether a conflict of interest exists, procedures for addressing the conflict of interest, and what to do when violations of the conflict of interest policy occur.
- **Records of proceedings**—What's included in the minutes of all board and committee meetings.
- **Compensation**—Details about what voting members may and may not do related to compensation.
- **Annual Statements**—The requirement that all directors, principal officers and members of a committee with governing board powers sign annual a statement agreeing to receiving, understanding and agreeing to abide by the conflict of interest policy.
- **Periodic Reviews**—Organizations must conduct periodic reviews of specific components of the conflict of interest policy to ensure the organization's tax-exempt status is not jeopardized.
- **Use of Outside Experts**—Outside experts may be used for periodic review of the policy, but if they are used they do not relieve the governing board of its responsibility to ensure that proper periodic reviews are conducted.

Source: *Instructions for Form 1023. Internal Revenue Service. <http://www.irs.gov/pub/irs-pdf/i1023.pdf>. Rev. January 2020.*

decisions free from the influence of their other roles.

Questions should arise when the personal interests of a board member appear to be at odds with the interest of the hospital or health system.

What Can Boards Do to Prevent a Conflict of Interest?

Having multiple systems in place to safeguard against conflict of interest ensures hospitals will minimize personal dilemmas covering a variety of issues, such as financial gain or business or family benefits. These safe-guarding

procedures will help the hospital and its board to be prepared when real or perceived conflicts do occur.

Encourage Self-Monitoring. It may be uncomfortable to “call out” a board member on a potential conflict of interest. For “self-monitoring” to be effective, it is critical to have a clear policy in place and tools for board members to use to either declare a conflict of interest or to request consideration about whether a fellow board member has a potential conflict of interest. When this happens, the process of determining potential conflicts becomes less personal, and instead is simply a part of the board's standard processes and procedures.

Best Practices in Addressing Conflict of Interest

- Provide board education about conflict of interest and what it means to be “independent.”
- Have a conflict of interest policy in place that complies with IRS requirements.
- Require every board member and senior leader to annually complete a conflict disclosure statement.
- Ensure a clear process for declaring real or perceived conflicts that arise mid-year.
- Facilitate a board culture that encourages “self-monitoring” and transparency as a part of everyday board processes and procedures.
- Encourage communication about potential conflicts that occur during a board discussion and ask conflicted board members to step out for both discussion and voting where any conflict exists.
- Document all real or potential conflicts and how they were addressed in meeting minutes.
- Consider if the board requires a specific committee to address potential conflicts.
- Ensure that at least the majority of the full board is “independent.”
- Change committee charters to include “independence” requirements, including 100% of the Executive Compensation Committee and 100% of the Audit Committee.
- Ensure the process for recruiting and selecting new board members aligns with the organization’s conflict of interest policies and that candidates are willing to be candid about potential conflicts.

It is the board chair’s responsibility to oversee this process. The chair should encourage board members to be transparent about any potential concerns they may have. The chair should meet with individuals to discuss potential conflicts and determine if any issue needs to be re-opened or re-examined if an individual’s conflict may have influenced the discussion or decision.

Rural Hospitals Have Greater Challenges.

Small and rural hospitals may find it more difficult to minimize or eliminate conflicts of interest because they generally have a smaller pool of potential candidates from which to choose. Often in a small community, one individual may serve on multiple boards or be involved in some leadership or financial capacity with multiple organizations and/or community groups.

The key to ensuring conflict-free discussion and decision-making is to recognize and minimize conflict of interest as much as possible, even

though it may not be completely eliminated. Ensuring that a comprehensive conflict of interest policy is in place that requires full disclosure is a critical first step, allowing for board members with conflicts to remove themselves from discussions and decisions when appropriate.

Physicians On Board. Physicians bring valuable knowledge and expertise to governance, and their inclusion as board members is also recognition of the stake they have in the delivery of well-integrated, patient-centered care. However, physicians may also confront significant conflicts of interest as trustees of hospitals or health systems for whom they are employed or part of the medical staff.

Physicians must enter trusteeship with a clear understanding that their contribution is one of leadership and clinical competency. Physicians should not expect, nor be expected, to serve as

representatives of the entire medical staff. In observing their fiduciary duties, physician trustees must put the organization's interests ahead of their own.

If the real or perceived conflict of interest is too great, organizations may consider recruiting non-employed physicians or other clinicians to serve on the board.

Recruit Outsiders. Some hospitals may find it difficult to recruit individuals with specific skill sets who do not have a conflict of interest due to other business, governance or family relationships. If the board seeks a new trustee with a desired skill or experience, recruiting someone from outside the service area may be a workable option. Non-local board members can often bring fresh perspectives to the board and are less likely to have conflicts of interest. If this happens, the board must be assured that trustees recruited from outside the community are committed to the hospital and the community it serves.

Ensure a Proper Process for Recruiting and Selecting New Board Members. When selecting new board members, a primary objective should be to ensure a wide range of knowledge and experience. This should involve an evaluation of potential candidates' strengths and discussion about how those strengths best complement existing board members' talent, knowledge and experience.

When governance candidates are interviewed, they should be asked about any potential conflicts prior to their appointment to serve on the board. Although conflicts may not necessarily disqualify a candidate, the candidate's willingness to talk candidly about and fully consider potential conflicts they may have should play a key role in the nominating committee's decision.

Conflict of Interest Case Example

A conflict of interest scandal involving Memorial Sloan Kettering Cancer Center in New York provides a high-profile example of policies not being followed.^{2,3}

- A world-leading breast cancer doctor and the chief medical officer at the center had collected millions of dollars from deals with pharmaceutical companies, medical device manufacturers and consultants.
- The same doctor also served on the boards of Bristol-Myers Squibb (a drug manufacturer) and Varian Medical Systems (a company that sells radiation equipment).
- An independent review determined that while the conflicts weren't intentional, they happened because the Memorial Sloan Kettering board lacked oversight. The investigation also identified other conflicts of interest occurring.
- The review determined that the conflicts and profit-making deals did not occur through intentional misconduct, and that no harm was done to patients or to research.
- The organization immediately took corrective action, including creating a board committee to oversee conflicts.

Reporting Conflicts of Interest

The best way to prepare for conflict of interest situations is to establish a process for declaring potential conflicts before they arise. Declaring real or perceived conflicts in advance ensures open communication amongst board members and senior leaders and prevents potentially problematic situations down the road.

Disclosure Statements. Once a conflict of interest policy is in place, every trustee and senior leader should annually complete a

conflict disclosure statement. While the conflict of interest policy defines what a potential conflict is, the disclosure statement is the mechanism for individuals to declare any potential conflicts they may have.

A disclosure statement is generally a standard form prepared by the organization that requires individuals to initial or agree that they:

- 1) Have read and are familiar with the conflict of interest policy; and
- 2) Are not aware of any direct or indirect conflicts of interest, based on the definitions developed by the organization, or have attached a letter describing any direct or indirect conflicts of interest that exist.

In addition, individuals should sign a statement agreeing to report any new conflicts that arise throughout the year in a timely manner. Each trustee should complete the statement annually.

Collecting and Reviewing Disclosure Statements. Organizations may designate a compliance officer who is responsible for reading the disclosure statements and monitoring for potential conflicts when they arise. The compliance officer should be responsible for collecting disclosure statements from all board members covered by the policy. In addition, board members should report any new conflicts (whether actual or perceived) that arise during the year to the compliance officer. Board members should never wait until it is time to update their annual disclosure statement to declare a new conflict.

If the board has appointed a specific committee to address potential conflicts, the compliance officer may also be the chair of the group or committee charged with handling conflicts. In some cases, larger organizations may contract

with a legal expert to handle the collection and review of disclosure statements and to help ensure compliance.

Addressing Conflicts of Interest After They Arise

Conflicts of interest may happen unintentionally if an individual does not recognize a potential conflict of interest or recognizes the conflict after the fact, or intentionally if an individual chooses not to reveal a known conflict. Regardless of the source of the breach, the board must have a process in place for dealing with these difficult situations before they occur.

Known Conflicts. If a conflict arises that has been disclosed through the annual disclosure statement, the board meeting minutes should reflect the conflict and describe the action taken. For example, did the board member remove himself or herself not only from the discussion but from the board room? Did the board continue the discussion and determine their decision was in the best interest of the hospital despite the potential conflict?

Although there are a few exceptions, in most instances, the board should not allow conflicted board members to participate in the discussion or vote on any issue where a conflict of interest exists.

Unknown Conflicts. The situation becomes more complicated if a conflict becomes apparent that has not been previously disclosed. A potential new conflict can be recognized by a board member or recognized or perceived by another board member. In this situation, discussion should take place between the board member with the potential conflict and the board chair or committee that

oversees conflicts of interest. If an agreement is reached about how to address the conflict, no further discussion is necessary. If the board member does not recognize the potential conflict, the issue should be brought before the full board for discussion.

Unknown conflicts can arise during board meeting discussion or after a board meeting. The key is to communicate, and be honest. If

the conflict can be addressed at the board meeting, the board can decide how to proceed and note the decision in the meeting minutes. If the conflict is realized or communicated after a board meeting, the board must decide how to address the conflict and take a re-vote if necessary.

Sources and Additional Information

1. Instructions for Form 1023. Internal Revenue Service. <http://www.irs.gov/pub/irs-pdf/i1023.pdf> . Rev. January 2020.
2. Price, Nicholas J. Healthcare Boards & Evaluating Conflicts of Interest. Diligent Insights. September 11, 2019.
3. Memorial Sloan Kettering Leaders Violated Conflict-of-Interest Rules, Report Finds. *Health Leaders*. April 5, 2019.
4. Knecht, Pamela R. Fiduciary Duties, Conflicts of Interest and Independence Refresher. AHA Trustee Services. June 2017. <https://trustees.aha.org>.
5. Stock, Deb. Overcoming 10 Barriers to Effective Governance. AHA Trustee Services. May 14, 2018. <https://trustees.aha.org>.

Resources used for research and context purposes have been sourced as accurately as possible at the time of publication. If you believe something has been cited incorrectly, please contact governWell™ at contact@governwell.net.

governWell™

Better governance. Better healthcare.

Illinois Office

One Mid America Plaza, Floor 3
Oakbrook Terrace, IL 60181
630-613-7580
blorsbach@governwell.net

Oregon Office

31090 SW Boones Bend Rd
Wilsonville, OR 97070
630-613-7580
larry@governwell.net

www.governwell.net