

Educating Your Board to Govern More Effectively

The governing board of a healthcare organization is ultimately accountable for the operation of the facility, including the performance of clinicians and the level of care provided. Some directors may possess only a lay understanding of healthcare issues and liability trends. These board members must be educated in the basics of healthcare risk management (HRM) in order to make better decisions and effectively carry out their oversight duties.

This *ALERT Bulletin* has been prepared to help you communicate with the board regarding the fundamental responsibilities of board members, major liability topics and ways to improve institutional governance. Possessed of a working knowledge of HRM and insurance concepts, your board will be poised to respond swiftly to potential liability crises and take preventive action to minimize risk.

Orienting the Board

You can begin the task of educating your board by assembling a panel of speakers to orient members. The panel should include your facility's legal counsel or a local business attorney, an insurance broker and an HRM specialist who are competent to discuss the following core elements of governance and risk management:

Board duties and functions. As a governing body, the board of directors has certain primary duties to the entity, including

- **duty of loyalty:** Board members are fiduciaries, entrusted to subordinate their self-interest to the larger interests of the organization.
- **duty of obedience:** Directors must not exceed the authority granted to the board by corporate bylaws.
- **duty of diligence:** Directors must exercise reasonable care and prudence in performing their organizational duties.
- **duty to exercise the "business judgment" rule:** Directors are expected to make informed and rational decisions of risk and reward, without conflict of interest.

The panel should emphasize to the board that directors may be held individually liable for breach of these fiduciary duties. However, they are typically not subject to damages for losses resulting from poor business judgment.

The primary functions of a board of directors include the determination of general policies and procedures, appointment of officers to carry out approved policies, and monitoring of performance and compliance. Specific responsibilities include

- approving bylaws
- evaluating management performance and strategic plans
- overseeing quality issues
- reviewing and acting upon plans and reports by board subcommittees (e.g., credentialing, risk management, quality improvement, medical advisory, etc.)
- setting policy on such issues as organizational structure and compensation

D&O exposures. Directors and officers (D&O) claims may result if board members fail to perform their duties in good faith and make decisions that are not in the best interest of the organization. D&O liability insurance policies typically cover directors and officers for liabilities related to their corporate positions, but do not cover liabilities stemming from the delivery of professional services.

D&O policies often include two major types of protection: "Side A," which directly covers directors and officers when they are not indemnified by the organization for claims against them, and "Side B," which reimburses the organization for losses when it does indemnify its directors and officers. Other varieties of D&O coverage, such as entity securities and employment practices liability, are also available. Ensure that board members understand the provisions of your facility's D&O insurance policy and the types of allegations that may be excluded, such as slander, fraudulent or criminal acts, or mismanagement of biochemical waste.

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In addition, have all directors review the following sources of liability-related information:

- **board minutes** from the prior two years relating to legally sensitive subjects, such as decisions to close or sell facilities, mergers, financial losses, etc.
- **court reports** revealing the types of lawsuits most commonly brought against healthcare governing boards in your area
- **financial records** dealing with the organization's reserves and performance
- **indemnification provisions** contained in the bylaws
- **pending and closed claims** brought against the board and/or facility
- **state statutes** granting immunity from liability for boards of not-for-profit organizations, if relevant

By reviewing the above documents carefully, board members can take steps to protect the organization and themselves against a variety of potential allegations, including

- **discrimination**, negligent hiring and firing, defamation and other employment issues
- **ERISA violations** and other regulatory infractions
- **failure to perform necessary peer-review** or to implement peer-review decisions
- **improper decisions** made on behalf of the facility
- **negligent credentialing** of physicians and mid-level providers
- **negligent review** of third-party contracts and/or breach of contract
- **waste-management deficiencies** resulting in air or water pollution

Risk management fundamentals. It is important that the board members understand that your organization's HRM program serves the key strategic objectives of preserving and protecting the organization's assets and improving the quality of care. A risk management representative should discuss with directors

- **the definition**, purpose and activities of HRM
- **the differences between HRM and Quality Improvement**, and how the two areas overlap and collaborate for mutual benefit (See also *inBRIEF*, 2006-Issue One, "Integrating Risk Management and Quality Improvement.")
- **HRM data-gathering** and risk-identification techniques
- **methods for reporting risk issues** to the board, including comparisons over time, organizational benchmarking and graphic-presentation formats
- **the relationship between the insurance, claims and safety functions** of your HRM program
- **the role of the risk manager** and the structure of your HRM program

Strengthening Oversight

For any healthcare organization, ineffective governance can invite unwelcome liabilities. The following strategies can help ensure that your board rigorously and judiciously executes its oversight function and responds in a timely manner to operational and clinical issues.

Encourage the board to govern according to formal organizational rules and regulations by

- **making sure that bylaws, policies and procedures are in written form**, legally approved and up-to-date
- **having board members carefully review** these governing documents

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- **ensuring that the purposes, reporting relationships and authority of all board committees are clearly outlined** in the written charter and that all members understand their responsibilities
- **developing and approving a conflict-of-interest policy** that requires board members to identify any possible conflicts before joining the board, and to disclose any changes that may compromise their objectivity

Focus board members' attention to detail by

- **requiring board members** to prepare for and attend every meeting
- **providing members with minutes** of past board and committee meetings, a detailed agenda and supporting materials at least 10 days prior to any scheduled meeting
- **ensuring that board minutes are complete**, accurate and well-documented, clearly noting the who, when and why of every action
- **reporting information lucidly**, making appropriate use of charts and graphs that compare findings over time
- **conducting board meetings in an organized and unbiased manner** in accordance with established rules of order
- **maintaining confidentiality** of patient-related data and information
- **carefully recording all votes** – especially dissenting ones – in the minutes

Foster legal compliance and prudent decision-making by

- **briefing directors on any legal issues or requirements** pertaining to pending board decisions
- **encouraging board members to consult legal counsel** in any situation that warrants such advice, e.g., speaking with the media
- **reminding members to consider each issue carefully** and to decide according to objective, documented criteria
- **allowing the board adequate time** to review all materials necessary for sound decision-making
- **warning board members against "rubber stamp" decisions** based on incomplete information, especially regarding staff appointments and the granting of hospital medical staff privileges
- **thoroughly documenting** the board's decision-making process

Improve management-board communication by

- **creating a strategy committee** to facilitate the flow of information between management and the board of directors
- **presenting HRM issues** and information to the board in terms of established organizational goals
- **anticipating issues** by preparing and distributing a calendar of reporting dates for routine quality indicators
- **providing executive summaries** to accompany detailed narrative reports to the board

Good governance and communication practices at the board level cascade downward throughout the organization. By adhering to these strategies, you can help improve board performance and responsiveness, minimize exposure to D&O liability and strengthen leadership commitment to safety and quality.