

# BoardBrief

Prepared for Colorado Hospital Association Trustees

## 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.

**H**ospital board members often are 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 management employee has a personal or business interest that may be in conflict with the interests of the hospital. 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 business, 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 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.

### 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.<sup>11</sup>

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.<sup>11</sup> The board chair's understanding of the hospital's

## Conflict of Interest Policy Components

The following is a general outline of the primary components that should be included in a conflict of interest statement:

- **Statement of purpose and duties of officers and trustees** – a brief overview of senior leaders' and trustees' responsibility to the organization, and the purpose of the conflict of interest policy. The policy's purpose is to both protect the organization and board members.
- **Direct or indirect financial or other material interest** – this includes a detailed description of the types of interests that must be disclosed by individuals covered by the policy. After an individual discloses a potential conflict outlined in this section, the interest must be reviewed by the full board or an appointed committee.
- **Co-investment interest** – individuals must also declare whether they (or a relative, as defined in the policy), have personal funds invested with an investment manager providing, or expected to provide, investing services to the hospital. Similarly, individuals must declare if they have personal funds invested in an investment fund in which the organization is currently investing in or considering investing in.
- **Failure to disclose** – this section describes the action the organization will take if an individual covered under the conflict of interest policy fails to comply with the policy and does not disclose a known conflict of interest.
- **Disclosure statement** – without an annual disclosure statement, the conflict of interest policy is just words on paper. The disclosure statement puts the conflict of interest policy into action, using the policies, procedures and definitions outlined in the conflict of interest policy to help individuals declare any conflicts they may have.

Source: Kurtz, D. and Paul, S. *Managing Conflicts of Interest: A Primer for Nonprofit Boards*. Board Source. Washington D.C. 2006.

policies and his or her role is critical to ensuring conflict-free board discussions and decisions.

**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. They 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 medical staff. In observing their fiduciary duties, physician trustees must put the organization's interests ahead of their own. In *Elements of Governance: Barriers to Physicians on the*

*Board*, The Governance Institute identified the following examples of potential conflicts of interest for physicians:<sup>14</sup>

- Competitive situations between the hospital and private medical practices or ventures
- Physician compensation
- Medical staff credentialing and privileging
- Physician recruitment
- Medical staff development planning
- Managed care networks and compensation
- Capital investments in equipment, programs, service lines
- Any issues with implications for the physician and his or her colleagues and referral partners

**Recruit Outsiders.** 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. 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

## Questions Boards Should Consider When Creating a Conflict of Interest Policy

- Is there a conflict of interest if a board member volunteers his or her skills and advice in his or her field of expertise to the organization he or she serves?
- Are conflicts inevitable when board members are paid for providing legal or other professional services to the hospital?
- What if a board member is affiliated with the only vendor available to provide certain goods or services to the hospital?
- May a board member or officer accept for himself an opportunity that could benefit the organization that he serves?
- Should the chief executive serve on the board of directors? What role may the chief executive play on the board?
- Does it present a conflict for a board member to serve on the board of another not-for-profit hospital that competes for the same sources of funding?
- Is there a conflict of interest if the organization's auditors provide other services to the hospital?
- Is there a conflict of interest if a hospital's patients serve on the board?

Source: Kurtz, D. and Paul, S. *Managing Conflicts of Interest: A Primer for Nonprofit Boards*. Board Source. Washington D.C. 2006.

of potential candidates' strengths, and discussion about how those strengths best complement existing board members' talent, knowledge and experience. Compiling a list of potential candidates and assigning a score to each candidate, based on their fit with the hospital's needs, is one way to prioritize the candidate pool.<sup>13</sup>

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.

### 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.

The 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) Either 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, based on the definitions developed by the organization.<sup>1</sup> 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.<sup>7</sup> 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.<sup>11</sup>

**Unknown Conflicts.** The situation becomes more complicated if a conflict becomes apparent that has not been previously disclosed. According to Board Source, there are several steps that may be taken.<sup>1</sup>

If either the individual board member recognizes a potentially new conflict that has not been declared, or another board member perceives a conflict that has not been declared, a

discussion should take place between the board member with the potential conflict and the individual or committee charged with monitoring conflicts of interest. Ideally, all participants in this discussion would be “disinterested” individuals, or individuals that can evaluate the situation objectively. If an agreement is reached about how to address the conflict, no further discussion is necessary. However, if the board member in question does not recognize the potential conflict, the issue should be brought before the full board for discussion.

If a problem arises during a board meeting discussion, it should be addressed at that time. If the conflict is related to the meeting progress and/or a decision to be made, the board must decide how to proceed and indicate that decision in the meeting minutes. If necessary, a re-vote may be taken at the next meeting.

## Sources and More Information

1. Kurtz, D. and Paul, S. Managing Conflicts of Interest: A Primer for Nonprofit Boards. *Board Source*. Washington D.C. 2006.
2. Lauer, C. Beware of Conflicts of Interest. *Modern Healthcare*. June 2004.
3. Kazemek, E. and Bader, B. Turning Up the Heat on Institutional Integrity. *Trustee*. February 2007.
4. Jaklevic, M. Conflict Resolution. *Modern Healthcare*. July 2004.
5. Evans, M. Oversight Shortfall. *Modern Healthcare*. December 2005.
6. How do We Safeguard Against Conflict of Interest? *Board Source*. [www.boardsource.org](http://www.boardsource.org).
7. Robinson, M. (2007). Declaration of Independence. *Board Source*. March/April 2007.
8. Larson, L. How Many Hats Are Too Many? *Trustee*. February 2001.
9. Lister, E. Conflict of Interest: Questions and Answers for Trustees. *Trustee*. July/August 2003.
10. Tyler, L. Conflict of Interest: Strategies for Remaining ‘Purer Than Caesar’s Wife.’ *Trustee*. March 2004.
11. Sandrick, K. Avoiding Conflict of Interest. *Trustee*. July/August 2003.
12. Orlikoff, J. and Totten, M. Conflict of Interest and Governance: New Approaches for a New Environment. *Trustee Workbook*. *Trustee*. April 2004.
13. Mitchell, G. Rural Hospitals: A Different Take on Conflict of Interest. *Trustee*. March 2008.
14. Elements of Governance: Barriers to Having Physicians on the Board. The Governance Institute. Fall 2012. [www.GovernanceInstitute.com](http://www.GovernanceInstitute.com).
15. Walker, Larry. Conflict-Free Governance. *Trustee*. January 2014.