

# Navigating the Challenges of Physician Board Membership

*The Advisory Board Company* :: August 17, 2011

Due in large part to the increased affiliation between hospitals and physicians, some hospital boards are seeking additional physician representation. Many hospitals have determined that having physician board members is an effective physician-alignment strategy and gives the board a different, but much needed, perspective on clinical issues.



While increasing the number of physician board members can offer benefits because of their unique skills and perspective, the move is not without potential risk. Every board member has significant duties and obligations to the hospital, such as the loyalty, care, and good faith imposed on board members by applicable state corporate laws. Physician board members must understand the implications of these duties, and the fiduciary obligation each board member has to the hospital.

This means that a physician board member must always act in the best interest of the hospital. Oftentimes, these physicians are approached by other physicians to promote or represent the interests of the medical staff on various issues, creating a potential problem if the physician board member is not aware of their duties and obligations to the hospital.

## Setting policies and training

Hospitals that include physicians on the board need to provide initial and ongoing training and education to these members, as many may be unaware of these serious obligations.

One major area of focus for physician board members should be conflicts of interest, which arise when a member has a relationship that may compromise his duty of loyalty to the hospital. A physician board member cannot put a relationship with his partners, medical group, vendor, another hospital, department or medical staff ahead of his duty to the hospital.

Almost every hospital has a conflict of interest policy that requires board members to disclose any relationship that the member has with the hospital, its related entities, its vendors, or in some cases, with a competitor of the hospital.

Since physicians are uniquely interconnected with hospital operations, physician board members are at risk for having a conflict of interest that poses a challenge to their duty of loyalty. Hospitals should devote adequate time, energy and resources into making the conflict of interest process effective. Conflict of interest policies do not always define conflicts, but should create a process for identifying them using a committee of the Board made up of independent directors.

Meanwhile, the hospital industry is under pressure from Congress, the IRS and other sources to have more transparency and accountability in their operations. Having an independent board that makes decisions without the taint of potential conflicts of interest is important to demonstrate transparency and accountability.

The IRS has a model conflict of interest policy that lays out how conflicts should be identified and addressed. The IRS has also raised issues about how many physicians should be on a hospital board, which stems from the concern that physicians might be considered “insiders” who are not truly independent board members.

Boards also should diligently examine physician members’ relationships to ensure that a conflict of interest does not exist. In the case of a conflict, the affected physician board member should recuse herself from the meeting and should not participate in any votes or matters related to the conflicted relationship. This process should be documented in the board minutes.

Failure of a physician member to disclose potential conflict relationships and adequately fulfill the duty of loyalty could lead to potential civil liability on the part of the physician, as well as compromise actions taken by the board. Failure by hospitals to use a reasonable process to identify and track relationships that could be conflicts could raise questions about the board’s effectiveness and integrity.

## **New challenges with employed physicians**

As the hospital industry adapts to significant increases in employment and formal affiliations with physicians, boards will deal with the issue of the hospital-employed physician acting as a board member of the hospital.

Many hospitals have policies that restrict hospital employees (physician or otherwise) from serving on the board. Having a physician member who is employed by or who formally contracts with the hospital clearly creates conflicts of interest that will need to be addressed and monitored on an ongoing basis. These conflicts of interest could prevent physician members from participating on matters pertaining to executive-level compensation, affiliations with other physicians, and certain peer review and credentialing decisions.

The prospect of physician board membership also raises potential federal Stark and anti-kickback law issues, as board membership could create a financial relationship. For example, the board could be provided with certain benefits, such as travel reimbursement to a meeting or conference or some other type of remuneration. In these cases, hospitals must work with legal counsel to ensure that any Stark or anti-kickback issues are dealt with through compliant written agreements with physician board members that meet applicable Stark exceptions or anti-kickback safe harbors.

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