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HEALTH CARE | GENERAL COUNSEL INSTITUTE

Good Governance for General Counsel: What Your Board Needs to Know *Now*

May 15, 2013

Welcome

- Housekeeping
- Today's speakers
- Overview of the topic
- Discussion
- Questions

Welcome

- Download the slides for today's program by clicking the PDF link in the upper left corner of your screen.

- Also on the left is a Q&A box where you may type your questions. We'll look at those questions at the end of the program and answer as many as we can.

- At the end of the program, you'll receive an email with a link to a survey. Please take a moment to fill that out and give us your feedback.

Meet Today's Speakers

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Coming Soon

Watch your inbox for details on the next Ober|Kaler Health Care General Counsel Institute webinar.

Golden Rule

- The Board of Trustees/Directors of a hospital or health care system is ultimately responsible for everything that happens in the facility
- There must be an effective governing body that is legally responsible for the conduct of the hospital (Medicare CoPs, 42 CFR 482.12)

Implementation of Golden Rule

- The Board establishes policies for the CEO and his or her employees to use in order to conduct the operations of the facility
- Structure is a hierarchy
  - Board hires the CEO, who reports to the Board
  - CEO hires other employees and they report to him/her
- The "Buck" stops with the Board

Duties of the Board of Trustees

- Two primary duties for trustees of an entity
  - Duty to exercise "due care"
  - Duty of loyalty
- All of the specific duties and actions of a trustee stem from one of these duties

Duty of Due Care

- Requires that the trustee perform his or her duties in good faith and with the care that an ordinarily prudent person *in a like position* would use under similar circumstances
- "*in a like position*"
  - The duty of a trustee is not stagnant, it moves as the status and position of the entity itself moves
  - E.g., decisions for an entity in good vs. poor financial condition

Duty of Due Care

- Duty for a trustee of an entity in any situation is the same, i.e., acting in good faith and with the care that an ordinarily prudent person in a like position would use under similar circumstances
- What is different is the factual circumstance in which each trustee finds him- or herself
- It is that difference that requires different levels of inquiry and involvement

Duty of Due Care

- A Board oversees the management and operation of the entity but does not manage and operate it
- The Board delegates the responsibility to manage the corporation to a chief executive and others that he or she hires
- The Board must adopt policies and procedures that provide for effective oversight of management

Duty of Due Care

- How is this duty to oversee the operations of an entity implemented?
- Information
  - Trustees have an obligation to be adequately and reasonably informed about the matters on which they make decisions on behalf of the entity
  - Attendance at Board and Committee meetings
  - The Board has authority as a body – not as individuals

Duty of Due Care

- Management provides the Board with the quantity and quality of information that it needs in order to make reasonably informed decisions
- The duty of due care recognizes that a trustee is entitled to rely upon information, opinions and other reports prepared by certain persons so long as the director reasonably believes the person or committee generating the report or information is competent to do so
- Examples – Officers or employees of the entity; lawyers; CPAs; or a Board committee on which the director does not serve, as to matters within its authority if the director reasonably believes the committee or person merits confidence

Duty of Due Care

- Right to rely on others
  - Acting in "good faith"
  - Requires that one be informed in order to reasonably rely on others
  - Failure to attend meetings raises question of how a trustee could have a reasonable basis on which to rely on others

Duty of Due Care

- Being "adequately informed"
  - Requires asking questions
  - Failure to raise an issue or dissent is taken by the law as assent to the action taken
  - Trustees are there for a reason and should not just accept everything provided by management without raising questions
  - The only bad question is one that is not asked

Duty of Due Care

- Trustees are required to understand the mission and purposes of the entity
- All actions approved should relate to and further the mission of the entity
- Need to be familiar with the mission statement and organizational documents for the entity

Duty of Due Care

- Business Judgment Rule – A court will not re-examine the actions of a trustee in authorizing or permitting a corporate action, provided such trustee's action was undertaken in good faith, in a manner reasonably believed to be in the best interests of the corporation, and based on the trustee's independent and informed judgment

Duty of Loyalty

- Trustee must always act in the best interest of the entity
- Not to act in interest of oneself or others
- Cannot usurp opportunities presented to the entity
- Refrain from conflicts of interest

Duty of Loyalty

- Competing interests may include the individual's own, those of political or business allies or, in certain cases, those of the body that appointed the individual to the position of trustee
- Fiduciary duty to act solely in the best interest of the entity

Duty of Loyalty

- Requirement of loyalty leads to the need for a policy on conflicts of interest
- Key elements of a conflicts-of-interest policy:
  - Identify persons who are in significant positions of authority that are subject to the policy
  - Identify the interests held by those persons that pose a potential conflict of interest
  - Require the disclosure of the actual or potential conflict to the Board
  - Provide a process by which a determination is made as to whether a conflict exists
  - Provide a process to handle violations of the policy

Duty of Loyalty

- Purpose of a conflicts-of-interest policy is to ensure that the best interests of the corporation are being served
- Requires disclosure of potential conflicts
- Board may decide that the best interests of the entity are consistent with the involvement of a trustee
- Decision cannot be made without disclosure
- Failure to disclose leads to abuse

Strategic Planning Overview

- Affordable Care Act
- Trends in Integration
- The Intersection with Telemedicine
- ACOs
- CMS Innovation Center
- Transferring Skills

Programs and Goals

- Affordable Care Act
  - –ACOs
  - –CMS Innovation Center
  - –Bundled Payments
  - –Insurance Exchanges
  - –Fraud and Abuse and Waste
- Three aims
  - –Better care for individuals
  - –Better care for populations
  - –Lower growth of expenses

Trends in Integration

- You have to know where we have been to know where we are going . . .
  - Consolidation and movement in the marketing
  - Focus on primary care as gatekeepers
- We do not want to make the same mistakes we made in the past

Trends in Integration

- What is different this time around
  - Increased focus on quality
  - The need for IT solutions
  - Shifting of care settings away from the hospital to lower cost settings
  - Focus on primary but now also on specialists
  - Both private and public payors
  - Care coordination and population health

Common Themes

Opportunities

- Improved outcomes
- Cost efficiency
- Patient satisfaction
- Market advantage
- Affiliation rather than consolidation

Potential Pitfalls

- Connectivity issues
- Fraud and abuse issues
- Reimbursement
- Remedial measures and credentialing
- HIPAA privacy and security

Do You Want To Be an ACO?

Accountable Care Organization (ACO)

- Participate in Medicare
- ACO Participants
- 5,000 beneficiaries
- Tax identification number (TIN)
- Legal entity and governance
- Shared savings/losses
- Quality measures
- Application and CMS Agreement for three years

Key ACO Deadlines for 2013

• Applications posted on CMS Web site	• June 2013
• NOIs accepted	• May 1, 2013 - May 31, 2013
• CMS User ID forms accepted	• May 3, 2013 - June 10, 2013
• Applications accepted	• July 1, 2013 - July 31, 2013
• Application approval or denial decision	• Fall 2013
• Reconsideration review deadline	• Fall 2013

CMS Innovation Center

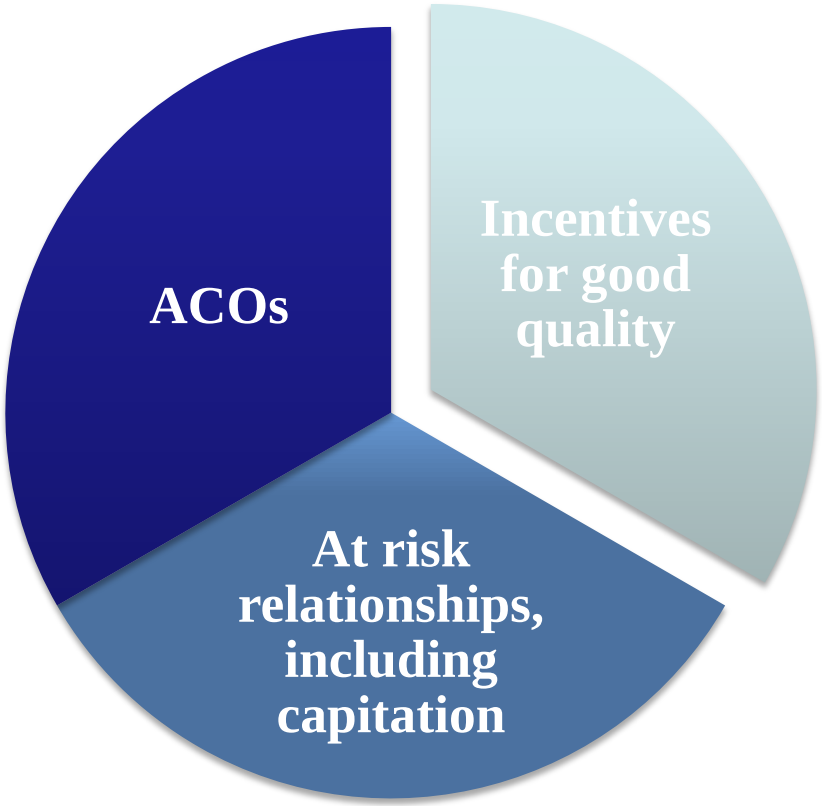
- Established under the Affordable Care Act
- Test innovative payment and service delivery models to reduce program expenditures, while preserving or enhancing the quality of care
- Programs, grants and they even take suggestions
- Physician led with a growing staff
- Started off with $10 Billion in funding for FYs 2011-2019

CMS Innovation Center

- Pioneer ACO Program
- Advanced Payment Initiative
- Bundled Payments
- Comprehensive Primary Care
- Health Care Innovation Challenge
- Independence at Home Demonstration

Note: No double dipping (in certain cases)

Commercial Market



Commercial Market

- Some start with the MSSP ACO Program and move into commercial while others start with commercial
- Some "affiliate" by way of contractual arrangements
- Can set up for independence or acquisition
- Skill set can be transferred
  - Number crunching for cost savings
  - Population management and quality assurance
  - Leverage existing resources
  - Shifting care settings
  - Movement toward point of care solutions

Medical Staff Issues

- Ultimate authority and responsibility for credentialing of physicians lies with the Board of Trustees
- Extension of the duty of due care
- How to implement? Acting in good faith requires information

Medical Staff Issues

- The Board must determine, in accordance with state law, which categories of practitioners are eligible candidates for appointment to the medical staff (Medicare CoPs, 42 CFR 482.12 (a)(1))

Medical Staff Issues

- The Board acts on the recommendations of the medical staff in determining credentials and privileging matters
- Not a rubber stamp process
- The Board should make a reasoned decision but has the right to rely on recommendations that it has a reason to believe are credible

Medical Staff Issues

- Potential areas of concern
  - Competition between medical staff members with attempts to deny competitors rights
  - Medical staff politics
  - Conflicts of interest
- When something does not look right then question it

Medical Staff Issues

- Liability concerns
  - Improper denial of privileges
    - This decision potentially impairs the right of a person to earn a living
    - Adhere to the process required by the fair hearing provisions of the medical staff bylaws
    - Ensure the existence of D&O insurance for the Board
    - HCQIA immunity

Trends in Quality Care Discussions

- Population management
- The role of mid-level practitioners
- Readmissions
- Pay for performance
- Hospital acquired conditions
- Transparency
- Freedom of choice
- IT Solutions
- Promotion of evidence based medicine

The Link Between Quality and Cost

- Goals of health care reform are high quality while at the same time reducing costs
- Understanding the concept of fraud and abuse, but also defining what is waste
- Infrastructure costs are higher because of IT solutions and human resources such as care coordinators which are not billable

ACOs: A Case Study

- ACO must maintain a separate, identifiable governing body with authority to execute the functions of the ACO
  - Defined process to promote evidenced-based medicine, including patient engagement
  - Report on quality and cost measures
    - Starting with physician office measures
    - Moving toward readmissions and chronic illnesses

ACOs: A Case Study

- Governing bodies must have the following characteristics:
  - Oversight
  - Transparency
  - Fiduciary Duty
  - Conflict of Interest Policy
  - Composition and Control

ACOs: A Case Study

- Quality Assurance Program
  - Committee not required
  - Still physician led
  - Include method in application
- Must meet the Quality Performance Standards to be eligible for shared savings program
- Must completely and accurately report data on all program measures
- Possible sanctions or termination for failure to comply
- Quality at the governing body level but also operational committees

Remedial Actions and Quality

- Quality data often is separate from the peer review process but also can be included into that process
- A discussion of outliers and the steps to be taken

Compliance Issues

- This is another extension of the duties of due care and loyalty
- Due care because the Board is responsible for what happens in the hospital
- Loyalty because many of the problems of compliance occur through conflicts of interest

Compliance Issues

- Compliance Plan required of hospitals as "providers" under the Affordable Care Act (Section 6401)
- As a practical matter, compliance programs have been the standard for hospitals for many years
- HHS guidance for hospital compliance plans at 63 Fed. Reg. 8987 (February 23, 1998) and 70 Fed. Reg. 4858 (January 31, 2005)

Compliance Issues

- The Board is responsible for ensuring the hospital is operated in compliance with the law
- The Board should have a compliance committee that meets regularly and ensures that the work of compliance is being done
- The Board needs education about compliance risks in hospitals

Compliance Issues

- Risks include
  - False Claims Act liability for failure to prevent or identify improper federal health care program claims and payments
  - Anti-kickback statute
  - Civil monetary penalties
  - Stark and state self-referral laws
  - Antitrust
  - Tax exempt status
  - Privacy matters

Compliance Issues

- What can go wrong?
  - Physician contracting and relationships
    - Stark Law
    - Anti-kickback statute
    - Civil monetary penalties
  - Human resources
    - Hiring/firing
    - Discrimination
    - Sexual harassment
    - Fair Labor Standards Act (proper pay policies)
    - Labor issues

Compliance Issues

- What can go wrong?
  - Medical Records
    - Privacy violations
    - Incomplete or insufficient
    - Forged records
    - False records for care not provided
  - Billing Records
    - Improper coding for documented services provided
    - Accuracy of claims
    - Billing for medically unnecessary services
    - Billing for services not provided

Compliance Issues

- What can go wrong?
  - Materials management/purchasing
    - Bribes and gifts from vendors to use their services
    - Inadequate or inferior materials and supplies
  - Emergency Department
    - EMTALA violations
      - Rejection of patients
      - Inadequate call coverage
      - Improper screening exam or stabilizing treatment

Compliance Issues

- The Board is supposed to oversee the activities of the operators of the hospital
- Cannot effectively oversee activity that it does not have an understanding of
- Education is key

Compliance Issues

- Education sources for the Board
  - "Corporate Responsibility and Health Care Quality: A Resource for Health Care Boards of Directors," Joint document of the OIG and AHLA, Sept. 2007
  - "An Integrated Approach to Corporate Compliance: A Resource for Health Care Boards of Directors," Joint document of the OIG and AHLA, July 2004
  - "Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors," Joint document of the OIG and AHLA, April 2003

Compliance Issues

- 7 elements of an effective compliance plan
  - Written standards of conduct
    - Risk areas
    - Evaluation of performance
  - Compliance Officer, committees, to operate and monitor compliance
    - Reporting relationship of Compliance Officer?
    - Committee composition

Compliance Issues

- Education and training
- Communications process, e.g., hotline
- Disciplinary system for violations
- Auditing and monitoring
- Investigation/remediation of problems and non-employment of sanctioned persons

Hot Topics in Tax Exemption

- Tax exempt 501(c)(3) hospital must meet four requirements on a facility-by-facility basis under the Affordable Care Act under 501(r)
- Revised 990 and Schedule H
- IRS's stated goals in revising the forms:
  - Allow hospitals to clearly describe their activities and policies
  - Minimize burden to the extent possible
  - Capture compliance information as required for adherence with the statute

Four Requirements under the ACA

- Establish written financial assistance and emergency medical care policies
- Limit amounts charged for emergency or other medically necessary care to individuals eligible for assistance under the hospital's financial assistance policy
- Make reasonable efforts to determine whether an individual is eligible for assistance under the hospital's financial assistance policy before engaging in extraordinary collection actions against the individual
- Conduct a community health needs assessment (CHNA) and adopt an implementation strategy at least once every three years. (Effective for tax years beginning after March 23, 2012)

Proposed Rules on CHNA

- Community health needs assessment (CHNA) proposed rule
- Comments due **July 5, 2013**
- Look at *significant health needs* of the community
  - Identify the significant health needs
  - Prioritize such needs
    - Burden, scope, severity or urgency of the health need
    - Estimated feasibility and effectiveness of possible interventions
    - Health disparities associated with the need;
    - Importance placed by the community on addressing the need
  - Identify potential measures and resources available to address the needs

Proposed Rule on CHNA

- Mandatory input on CHNA:
  - A government health department with knowledge or expertise regarding the health needs of the community
  - Members of medically underserved, low income and minority populations, or representatives of organizations that serve their needs
  - Written comments that the facility receives pursuant to the publication of its CHNA and implementation plan

Proposed Rule on CHNA

- Documentation
  - Definition of the community served by the facility and an explanation of the criteria used to determine
  - Processes and methods used to conduct the CHNA, including a description of the data used in the assessment and any parties that collaborated or contracted with the facility
  - Description of the community input
  - Prioritized list of significant community health needs, including the process and criteria used to identify such needs
  - Description of potential resources and measures identified through the CHNA to address the significant community health needs

Conflict of Interest

- Conflict of interest part of Schedule C of the 990
- Sample conflict of interest form: www.irs.gov/instructions/i1023/ar03.html
- Becomes a more difficult issue related to integration through affiliation rather than consolidation
  - For example, required as part of the final rule of ACOs

Questions?

Please type them in the Q&A box.

More Questions? Contact Us.

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