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Emerging Issues in Productive and Effective Governance

September 27, 2017

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Sandy Johnson, Shareholder – Schwabe, Williamson & Wyatt

Today's Presenters



Paul Holden has over 12 years experience providing reimbursement consulting and business assurance services to health care providers in acute and post-acute settings throughout the western United States.

He is well-versed in Medicare and Medicaid cost report preparation, assisting clients during third party audits, formulating appeals of audit issues in connection with cost reports, and assisting hospitals/health systems, sole community hospitals, critical access hospitals, rural health clinics, and federally qualified health centers with billing and reimbursement issues. He continually explores the role of the Medicare cost report and claims data in the DRG and APC rate setting processes and Medicare cost report data-mining and benchmarking.

Paul is a frequent presenter for health care trade and lobbying groups. His topics range from federal and state regulatory updates to facilitating discussions between hospital leadership and directors on strategic financial and reimbursement related issues.



Today's Presenters



Sandy Johnson focuses her practice on state and federal health care law as applied in transactional, operational, compliance and other matters. She brings a unique perspective to her health law practice, having significant management experience in the health care industry prior to beginning her legal career. The former CEO of a hospital system, she has also served in senior management positions with long-term care, home health and assisted living providers.

As a member of Schwabe, Williamson & Wyatt's health care practice, Johnson's experience includes state and federal and state regulatory compliance matters, including the Stark Law and Anti-Kickback Statute, HIPAA and EMTALA, as well as Medicare/Medicaid and other public and private payor reimbursement issues.

Her extensive experience also includes providing operational counsel on issues ranging from physician compensation, medical staff credentialing and risk management to physician-hospital relationships, including provider recruitment and joint ventures. Additionally, Sandy assists tax-exempt health care organizations with governance and day-to-day operational matters.



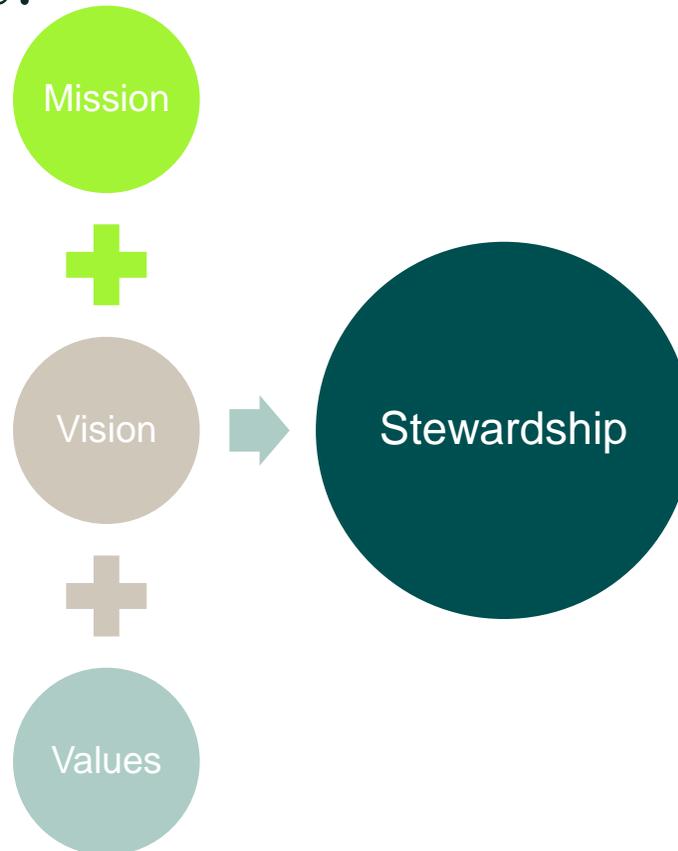
Topics

- **Setting the Stage**
- **Obligations**
- **Legal & Regulatory Considerations**
- **Core Competencies**
- **Financial Considerations**
- **Mitigating Communication Difficulties**
- **Key Takeaways**



Setting the Stage

What Is the Board's Role?



Effective Governance

- Mission, Vision, Direction and Oversight
- Clear role definitions: “Stay in your own lane”
- “Tone at the Top” (culture & actions)
- Competency of each member
- Constantly improving
- Each board meeting yields results



Individual Directors – Parts of the Whole

- No individual power
- Much individual responsibility
- Requires intimate understanding of Strategic Plan
- Action results from thoughtful, respectful collaboration



Obligations

- **Duty of Care (Duty of Diligence)**

- *“A director shall discharge the duties of the position of director in good faith, in a manner the director reasonably believes to be in the best interests of the corporation, and with the care an ordinarily prudent person in a like position would exercise under similar circumstances. A person who so performs those duties is not liable by reason of being or having been a director of the corporation.” N.D.C.C. § 10-33-45*

- **Duty of Loyalty**

- Conflicts of Interest
- Fiduciary duty



Obligations

Board's Role is to Protect the Organization and Safeguard its Assets

Violations carry penalties of potentially catastrophic proportions; therefore:

COMPLIANCE

=

FISCAL RESPONSIBILITY



Legal & Regulatory Considerations

- CMS, OIG, and the U.S. Attorney's Office are viewing failed compliance practices like criminal behavior
- There is no such thing as an “error” or “mistake” in the enforcement world.
- They use words like:
 - Fraud
 - Criminal
 - Unethical
 - Abuse
 - Search Warrant
 - Prosecution



Legal & Regulatory Considerations

- IRS
- OIG Guidance on Governing Bodies
- False Claims Act
- Anti-Kickback Statute
- Stark Law (“Physician-Self Referral Law”)
- Civil Monetary Penalties Law



Legal & Regulatory Considerations

High-Risk Areas:

- Board issues – conflicts of interest, private benefit, private inurement, appropriate oversight of care and quality
- Transactions – commercial reasonableness
- Physician Contracts – employment, independent contractor
- Physician Compensation Methodology and Amounts
- Physician Coding – supporting documentation
- Hospital Coding – bundling and coordination of benefit rules
- Required Contracts
- Sub-standard Care
- Excluded Provider and Licensure Status
- Value for Referrals



Legal & Regulatory Considerations

Yates Memo:

- Increased federal scrutiny for **individuals** involved in healthcare fraud and abuse
 - Specifically includes governing body members, others “responsible” for the improper conduct
- Government lawyers actively seeking to investigate individuals when they become aware of potential corporate wrongdoing



Legal & Regulatory Considerations

Enforcement Tools:

- *Qui tam*/Whistleblower provisions
- Substantial fines
- Exclusion from Medicare/Medicaid
- Criminal sanctions, including imprisonment
- Corporate Integrity Agreements

These penalties can apply both to organizations and to individuals



Legal & Regulatory Considerations

Recent Penalties:

- **Tenet Health System Medical, Inc. (Kickback scheme)**
 - Combined civil and criminal settlement of \$513 million; \$84 million directly to whistleblower
 - Corporate Integrity Agreement
- **Tuomey Health System (Physician employment)**
 - \$237 million judgment, settled for \$72 million; health system sold as part of settlement
 - CEO settled for \$1 million in personal liability
- **North American Health Care, Inc. (Medically unnecessary services)**
 - \$30 million settlement
 - \$1 million individual settlement for board chairman
 - \$500,000 settlement for vice president
- **Columbus Regional Healthcare System (Physician employment)**
 - \$26 million settlement, Corporate Integrity Agreement
 - \$425,000 settlement for overpaid physician



Legal & Regulatory Considerations

Scary Nuances:

- Penalties can stack – same conduct can violate all three laws.
- Can't retain payment that you realize you're not entitled to
- 60-day limit
- Can't bury your head in the sand: reckless disregard about whether you are entitled to keep payments is a violation
- Government has a profit motive: for every \$1 spent on enforcement, government collects about \$8 (as of 2014)



Core Competencies

- Culture and Communication
- Continuous Improvement
- Leadership / Stewardship
- Visibility in the Community



Not every board member needs to exhibit all necessary competencies upon joining the board

Core Competencies – Continuous Improvement

- Ongoing Board Retreats
- Capital Expansions
- External Observers*
- Succession Planning
- Developing / Updating Strategic Plans
 - Short Term Strategic Planning 1-3 years
 - Long Term Strategic Planning 5-10 years



Core Competencies – Leadership / Stewardship

- Ensuring hospital executives are performing their duties appropriately
- Compliance concerns expressed by hospital employees of all levels are documented and addressed appropriately
- Issues raised by the public are addressed in the **appropriate** setting
- Physician complaints are addressed through the medical staff and hospital management using processes of the Medical Staff Bylaws



Succession Planning

- Should be an integral part of each board's strategic plan
- Don't wait until it's too late
- Healthcare is on the cusp of a colossal generational shift
- Succession planning is not just for C-Suite personnel
 - In many communities, this process should apply to all department managers – patient care and administrative



Financial Considerations

- Annual Budgeting / Planning Processes
- Benchmarking Information
- Hospital's Payer Mix
- Capital Expansions / Managing Debt Load
- Service Line Evaluation / Community Health Needs



Financial Considerations - Benchmarking

- **Federal and State Governments gather massive amounts of info on hospitals**
 - Every report sent out contains a 'story' about the hospital – Are you telling the correct / optimal story
 - Many hospital rates are set based on outdated information
 - System conversions are creating unintended disparities in data requests
- **Benchmarking can be used in multiple areas:**
 - Outmigration of patients – Lack of access / Shortage of physicians
 - Financial metrics
 - Payment disparity / Charging practices



Financial Considerations – Reimbursement

- **Government Reimbursement Changes**
 - Should be an ongoing agenda line item for each board meeting
- **Critical Access Hospitals – Cost Based Reimbursement**
 - Medicare Part C enrollment outpacing Part A
 - Federal criteria could threaten many CAH Designations
 - Many areas of opportunity overlooked due to capacity constraints
- **Commercial payer contracts should be reviewed/negotiated annually**



Mitigating Communication Difficulties

- Openly exchange ideas and commit to listening
- Commitment to professional / transparent interaction
- Listening to hear – Not listening to respond
- Addressing concerns in the appropriate settings
- Truly delegating the day-to-day operations of the hospital to management
- Clear understanding of expectations
- No surprises by the board or management



Key Takeaways

Top 10 Best Practices:

1. Governing Body Education

- Understand your role
- Actively participate in oversight

2. Strong Compliance Program

- Board Reporting Mechanism
- Training and Education
- Audits and Investigations
- Appropriate Responses



Key Takeaways – Continued

3. Culture

- Strong “Tone at the Top”
- Actions mirror intention

4. Core Competencies

- Board works in unison to build & improve their skills
- Continually seeking qualified candidates

5. Communication

- Listening to listen
- Commitment to professional interaction

6. Financial Acumen

- Test management with good questions
- Active involvement in budgeting/planning



Key Takeaways – Continued

7. Awareness of Health Policy

- Consideration of federal and state legislation

8. Community Visibility

- Addressing community concerns in the appropriate setting
- Opportunities to receive input from the public

9. Delegation

- Day-to-day operations are management's responsibility
- Maintain and utilize input from specialty board sub-committees

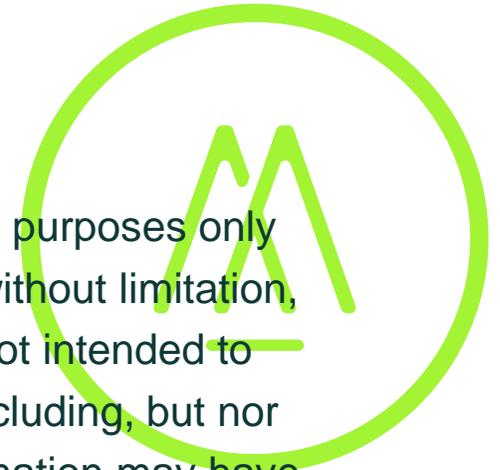
10. Continuous Improvement / Vision

- Where the real results materialize



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