



# **The New Role of Hospital Boards in the Face of Increased Compliance Risks**

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# What Will Be Covered

- Historical Role of Boards
- Emergence of Increasing Compliance Risks
- Changes in Health Care that are Contemporaneous with Increase in Compliance Risks
- Potential Impact of Compliance Risks on a Board
- Best Practices for a Hospital Board



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# State Law Duties

## Duties of Directors:

- Duty of good faith
- Duty of care
- Duty of loyalty

## Not just the right thing to do:

- Provides liability protection
- Protections under state laws

# State v. Custard

NC Business Court Case – March 2010

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- Good faith is a component of Duty of Loyalty and Duty of Care
- Context plays a role in the Director's duties
- Duty of Loyalty can require action
- Business Judgment Rule is held to “gross negligence” standard
- Directors are entitled to rely on third-party advice



# Duty of Loyalty

- The standard for determining whether a director acted in a way that was believed to be in the best interests of the corporation is both subjective and objective
- A transaction in which self-dealing was involved may be voidable by the corporation and may expose the director to personal liability for breach of the duty of loyalty

# Potential Challenges Involving Physician Board Members

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- **Conflict of Interest Policy Questions**
  - Does the Board have a policy?
  - If so, does it follow it with regard to physician board members?
- **Disqualified Person Standard under IRS Rules**
  - Those in a position to exercise substantial influence over the affairs of the organization, during the five years before the excess compensation was made

# Duties of Board Members of a Hospital

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1. Compliance
2. Quality of care
3. Financial performance
4. Mission/Purpose of hospital



# Compliance

- In today's environment, Hospitals boards must be educated on compliance risks and ways to mitigate them
- Hospitals must clearly create a “culture of compliance” and that starts with the Board



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# Health Care Compliance

- Provider self-referral law (Stark)
- Anti-kickback law
- Civil Monetary Penalties
- False claims
- State self-referral laws
- Tax exempt status (if applicable)
- Antitrust

## False Claims Act Whistleblower/ Qui Tam Cases on the Rise – Fiscal Year 2010:

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- \$25.9 billion in reported expected recoveries
- 3,340 individuals and entities excluded from federal health care programs
- 647 criminal actions against individuals or entities
- 378 civil actions against individuals or entities

# How Are You Most Likely To Develop Compliance Problems

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- Competitors
- Disgruntled employee (or former employee) = whistleblower
  - Be wary of disruptive physician. The number of physician relators is on the rise.
- Government audit
  - Recovery Audit Contractors (RAC)
  - Zone Program Integrity Contractors



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# Increased Physician/ Hospital Integration

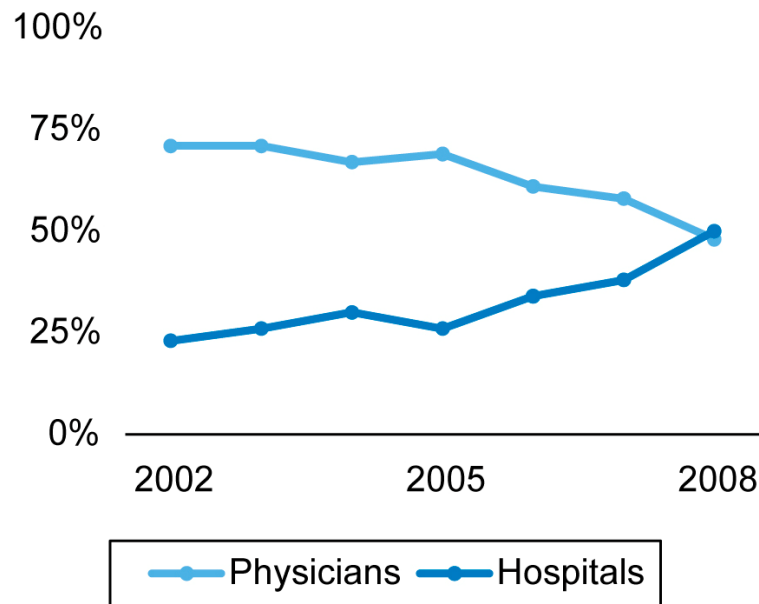
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- Federal Government encouraging hospitals and physicians to work together and become more integrated
- Hospitals across the nation are now employing physicians or affiliating with physicians or physician groups

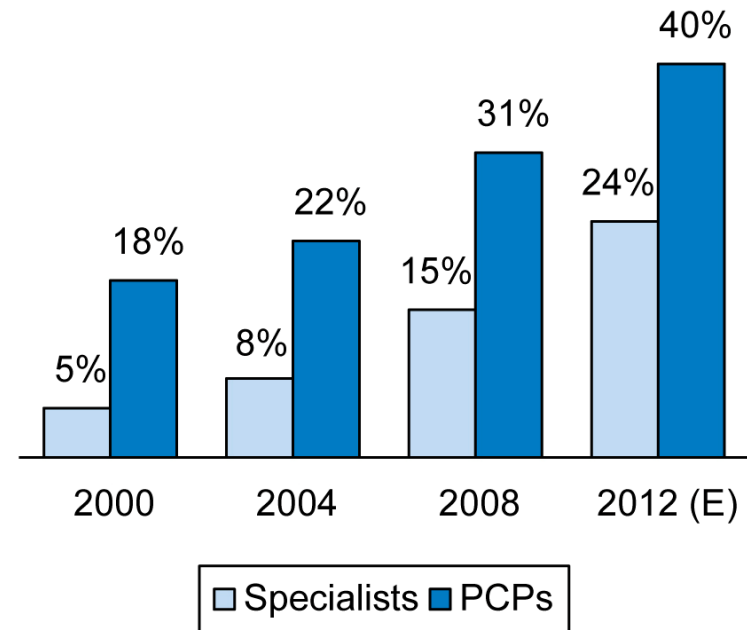
# Increased Physician/ Hospital Integration

## Physician Practice Ownership

2002-2008



## Percentage of "Active" Physicians Employed by Hospital



Source: Harris G, "More Doctors Giving Up Private Practices," New York Times, March 25, 2010; Health Care Advisory Board 2008 Survey on Physician Employment; Advisory Board interviews and analysis.

# Physician Hospital Integration

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- Since 2006 60% of experienced physicians have been placed in hospital owned practices (source: MGMA)
- Impact on physicians?
  - More stable income, less business risk, less perceived autonomy
- Impact on those who do business with physicians

# Refocused Priorities with Health Care Reform

- Quality
- Cost
  - These goals are not achievable without collaboration between hospitals and physicians



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# Liability

- States impose duties on Boards of for-profit or nonprofit corporations
- If major compliance violation occurs, government could look to Management or Board
- Possible Targets of Government Investigations
  - DOJ and OIG have begun focusing more on individuals, which could include board members in the future

# Government Focus on Individuals

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- Department of Justice and Office of Inspector General prosecution tactics
- Increased focus by Government on Board and Executives for accountability
  - OIG Daniel Levinson’s speech HCCA Compliance Institute Apr. 2010
- Use of “Responsible Corporate Officer Doctrine” by the government



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# Establishing a New Way of Governing Hospitals from Board Perspective

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- Board must be engaged in, and knowledgeable of, compliance issues
- Boards should have a defensive mindset and be proactive in the mitigation of compliance risks
- Passivity will increase potential risk

# How Can Board be Proactive Regarding Compliance Issues

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- Make a commitment to compliance
- Establish and use a Compliance Committee
  - Compliance Committee is becoming as important as the Finance Committee
  - Comprised of Board members and administrators
  - Board must be comfortable using Compliance Committee to evaluate compliance issues and make key compliance decisions

# Use of Internal Auditors

- Track coding/billing
- Identify problems before they are identified by others
- Employees need to understand the reason for audits

# Compliance Policies and Procedures

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- Policies and Procedures are not a cure all for compliance problems
  - Too many policies and Board runs risk of not knowing what a policy does or even following an applicable policy
  - Only thing worse than not having a policy is having one and not following it
- Fewer policies with broader coverage

# Role of Compliance Officer

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- Critical Component:
  - Compliance officer must have sufficient authority to serve this role
  - Must have direct access to Board and CEO
  - Board members should know compliance officer and have ongoing contact with the members of the executive team
  - If this is not happening at your hospital, you have a potential problem

# Physician Contracts: Key Risk Areas

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- Review of Physician Contracts by Board
- Receive periodic updates on physician contracts
- Does the Board have a “compensation philosophy” for physician compensation?
- Use Contract Manager to track physician contracts

# A Note About Physician Contracts

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- Board should adopt a uniform policy for physician contracts
- Use template agreements
- Try to follow consistent process for all physician agreements

# Physician Contracts

- Board needs to know what questions to ask regarding physician contracts
  - Has a Stark/Anti-kickback analysis been performed?
  - Has FMV been documented?

# Recent Enforcement Actions Dealing with Physician Arrangements

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- Detroit Medical Center (December 2010)
  - \$30 million settlement for false claims, Stark and anti-kickback
  - Basis of settlement certain leases and other financial relationships with physicians not memorialized in writing
- Christ Hospital Cincinnati (May 2010)
  - \$108 million settlement for false claims, anti-kickback
  - Alleged to have limited opportunity to work at outpatient cardiology testing unit (The Heart Station) to cardiologists referring patients to hospital
  - Unassigned patients were given to physicians spending the most time working at the Heart Center
- Tuomey Healthcare System (Currently on Appeal)
  - Government initially demanded \$300 million in damages
  - Jury awarded \$0 in damages, but following post-trial motion, Judge awarded damages based on interrogatory findings
  - Case pending in 4<sup>th</sup> Circuit Court of Appeals

# Fair Market Value: Why It Is Important

- Rely on FMV consultants for physician contracts
- Always check references for consultant
  - Evaluate his/her ability as a potential expert
- Read and review the FMV report
- Consider use of IRS Rebuttable presumption process
  - Advance approval by board
  - Reliance on appropriate data
  - Adequate/contemporaneous documentation of Board's decision
- Be aware of latest trends in FMV

# Role of Legal Counsel

- Government is now focused on the interaction between hospitals and their counsel
- Reliance on advice of counsel defense: strong defense
  - How does it work?
  - Attorney must have all material facts
  - Attorney gave advice based on material facts
  - Party relied on this advice
  - A reasonable person would have relied on this advice
  - Party relied on advice in a reasonable manner

# Explore Ways to Mitigate Risk

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- Are there compliance insurance products available to insure hospitals in the event of a law suit stemming from alleged compliance violations?
- Has the Board evaluated these products?

# Mitigation of Risk – What to do when the Board discovers a problem

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- DOJ/OIG Self-Disclosure Protocol
- Stark Self-Disclosure Protocol
- Strengths/Weaknesses of self-disclosure

# Indemnification of Board/Executives

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- Indemnification Policy “Permissive v. Mandatory”
- “Safe Harbors” under state law
  - Directors enjoy **immunity** from suit under state law; immunity lost when director’s conduct amounts to willful, wanton, or gross negligence
  - **Business Judgment Rule** is a common law defense to breach of the duty of care by ordinary negligence when there has been a good faith, informed business decision

# Dealing with the Physician Board Member

- Physician board members present unique challenge in health care
- There are compliance issues, conflict of interest issues and operational issues

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- Conflict of Interest Policy
  - Does Board have one?
  - If so, does it follow it with regard to physician board member
- Disqualified Person Standard under IRS rules:
  - are those who are in a position to exercise substantial influence over the affairs of the organization, during the five years before the excess compensation was made

# Best Practices for Hospital Board

- Create a culture of compliance
- Establish and Use a Compliance Committee
- Effectively Use of Internal Auditors
- Develop and Evaluate Policies and Procedures
- Clarify Role of Compliance Officer
- Reduce Risk in Physician Contracts
- Recognize the Importance of Fair Market Value
- Rely on Legal Counsel
- Explore ways to mitigate risk
- Understand the Indemnification Policy
- Prepare to address Physician Board Member Issues

# HOSPITAL

## Speakers



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Matthew Roberts, a healthcare attorney with Nexsen Pruet, represents hospitals, physicians and other healthcare providers. He frequently advises hospitals regarding relationships with physicians ranging from single service agreements to development of integrated physician networks and other collaborative arrangements. He also has experience with strategic planning and implementation for hospitals and other healthcare clients. He advises on issues related to Board governance matters including executive compensation, conflict of interest policies and Board involvement in compliance and quality related issues.



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Questions?