



CONFLICTS OF INTEREST: A PRIMER FOR HEALTHCARE TRUSTEES

WHAT ARE CONFLICTS OF INTEREST AND HOW DO THEY IMPACT YOU AS A TRUSTEE?

Conflicts of interest, also known as a duality of interest, are situations in which trustees may have competing interests, personal or financial, which do or could impede their ability to participate without compromise on a board.


With the demands of board governance constantly changing, the importance of the trustee's role in reflecting the community's needs and the increasing regulatory focus upon trustees, it is imperative that all trustees understand and actively participate in identifying and addressing potential, perceived and/or actual conflicts of interest.

THE NEW YORK STATE PERSPECTIVE

In New York state, the Nonprofit Revitalization Act of 2013 established many changes to the way nonprofit organizations operate.¹ The NPRA amended New York’s Not-for-Profit Corporation Law for the first time in decades to provide additional transparency and enforce better governance models.² Included in the NPRA and its 2015 amendments is the requirement that nonprofit boards adopt and oversee the implementation of and compliance with a conflict of interest policy.³

The groundwork for the Act began in 2011 with the convening of a Leadership Committee on Nonprofit Revitalization,

which provided 38 recommendations for amending the NFPC Law.⁴ The committee was comprised of 32 diverse members representing organizations of different sizes across the geographic regions of the state.⁵ The goal was to develop “proposals for reducing burdens on the nonprofit sector while strengthening governance and accountability.”⁶ The committee stressed the impact that nonprofit boards have on community perception and enforced the need for boards to operate with transparency and strong governance principles to maintain public trust.⁷



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THE FEDERAL PERSPECTIVE

Healthcare trustees seeking to better understand their responsibilities should also be aware of federal conflicts of interest requirements. For example, federal forms such as the IRS Form 990 require additional information beyond whether an organization has a written conflicts of interest policy.⁸ The IRS asks for additional information about the process a board takes to manage conflicts of interest and how these conflicts are identified among board members.⁹

In addition, hospital and health system boards must be aware of and comply with conflicts of interest rules and requirements associated with federal grant programs.¹⁰ If their organization is a contractor or sub-contractor under a federal grant, trustees must disclose potential, perceived and/or actual conflicts of interest not only involving themselves, but also their relatives and individuals residing in their household.¹¹

It is important to keep in mind that a hospital or health system may be subject to multiple state laws, which may require the inclusion of additional provisions in conflicts of interest policies. For example, New York not only requires nonprofits to have a conflicts of interest policy, but it also identifies specific elements that must be included. The policy must state that directors, officers and key employees are to act in the “best interest of the nonprofit.”¹² Board members are required to revisit these policies annually to disclose any potential, perceived and/or actual conflicts of interest.¹³

If you or your fellow board members have specific questions about government requirements regarding conflicts of interest, we encourage you to open a line of communication with your organization’s compliance officer and/or legal counsel.



CASE STUDY

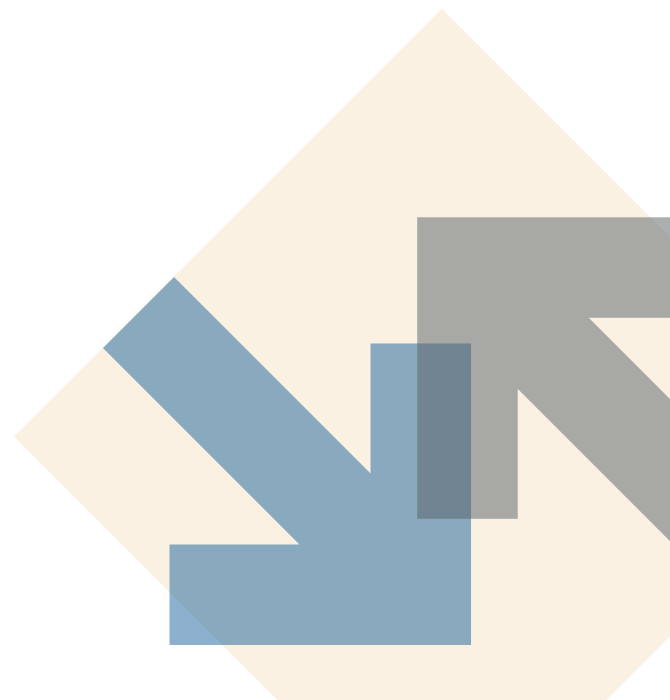
Public trust and conflicts of interest are inherently connected. Hospitals and health systems can ensure that their trustees act in good faith and use proper governance discretion by having a board that operates under defined regulations and encourages trustees to routinely disclose actual or potential conflicts or dualities of interest.

A California investigation into a hospital trustee provides an example of the nuances and scope of potential conflicts of interest. In 2012, a board member of the Sequoia Healthcare District was investigated for potentially violating that state's conflicts of interest laws. The board member voted to approve a \$60,000 grant to a nonprofit where his wife was employed part time as a nurse manager. The board member's action caught the attention of California's Fair Political Practices Commission, an independent, non-partisan body that is responsible for administering the state's Political Reform Act, which regulates campaign financing, conflicts of interest, lobbying and governmental ethics.

The Commission sent a warning letter to the board member, documenting its findings and potential penalties. Among the findings was that the board member received a financial benefit through the approval of this grant in the form of his wife's salary and that the financial benefit was reasonably foreseeable.

Though this letter was one of warning and mitigating factors relieved the severity of the consequences, this example shows how complicated conflicts of interest can be, how relationships outside the boardroom can come under scrutiny and the high level of accountability for trustees. Hospitals and health systems have a wide-reaching impact on the communities they serve and accountability ultimately rests with the trustee board. Trustees may believe they are making the right decision, but because of limited due diligence, they may be perceived as having potentially biased interests.

This case also illustrates how conflicts or dualities of interest can be more nuanced than simply business interests inside the boardroom.



BREAKING DOWN THE DETAILS

Conflicts or dualities are not just actual, documented issues, but also encompass the perception of a conflict. This perception can be determined by a third party, who, through observation, believes that a situation causes a trustee to have a conflict of interest.

Examples of potential, perceived or actual conflicts of interest include:

- A trustee has direct financial or personal ties to an outside organization that seeks to enter into a business arrangement with the hospital or health system.
- A trustee has a family member who publicly advocates for legislation which the hospital or health system is taking an advocacy position.
- A trustee holds a public office while maintaining a voting position on a hospital or health system board.

By having a conflicts of interest policy that is created in collaboration with the board and hospital or health system leadership, examples such as these listed can be easily identified and appropriately handled.

When board members have a clear understanding of their roles and the potential conflicts that may arise, they are able to best fulfill their three legal duties: the duty of care, the duty of loyalty and the duty of obedience.

The duty of loyalty is a standard of faithfulness and calls upon trustees to ensure that their personal needs or interests do not supersede those of the organization.¹⁴ Trustees must fully and timely disclose any possible, perceived and/or actual conflicts to their hospital or health system and the community they represent. By understanding and abiding by the duty of loyalty, trustees are affirming that their position on the board does not lead to personal or financial gain as a direct or indirect result of their service.

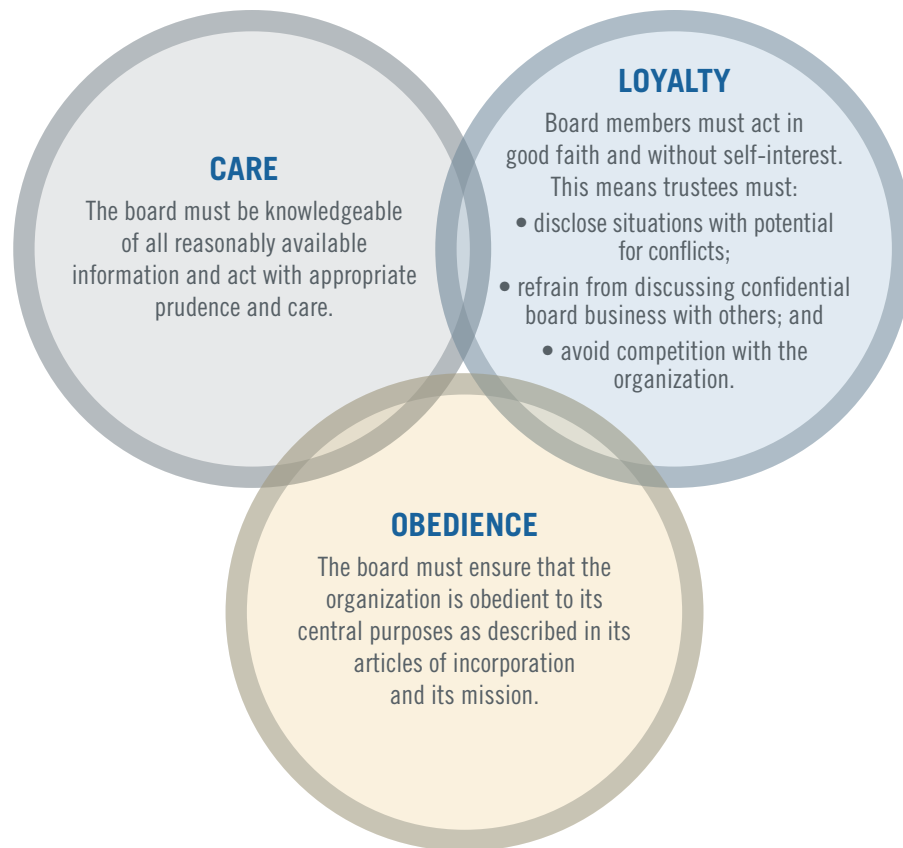
“As the healthcare industry continues to consolidate and form new industry partnerships at an accelerated pace, organizations are likely to see an increase in potential conflicts of interest issues. It is important for the organization’s applicable board committee(s) to oversee a robust process to evaluate and mitigate potential conflicts of interest that could impact the organization and its reputation.”

GREG RADINSKY

SENIOR VICE PRESIDENT AND CHIEF CORPORATE COMPLIANCE OFFICER, NORTHWELL HEALTH

FIGURE 1.

NONPROFIT BOARD: FIDUCIARY DUTIES



Trustees must understand their hospital or health system’s conflict of interest policy. If they need to make a disclosure, trustees must also understand the appropriate next steps they should take after making the disclosure. Often, an appropriate next step could be in the form of trustees recusing themselves from voting on issues in which they may have an actual or perceived interest. By clearly understanding and distributing a conflicts of interest policy and disclosure statement, trustees can strive for clear, effective governance that continues to maintain the public’s trust and best interest.

Trustees should understand that a conflict of interest policy is not implemented to disqualify a trustee from participating on a board, but rather serves as a governance guideline for how a hospital or health system and its trustees should address these conflicts. Often, trustees with conflicts of interest are able to fulfill their roles by disclosing conflicts early on and addressing questionable situations directly with their board chair and CEO.

WHAT CAN TRUSTEES DO?

As trustees, it is important to take an active role in discussing and enforcing your hospital or health system's conflicts of interest policies. By engaging in open and direct discussions, you can create a culture of effective governance that continues to have the support of the public and foster an environment of trust among trustees.

You can help promote transparency and unbiased governance decision-making by taking these steps:

- Understand your board's current conflicts of interest policy and actively revisit this policy to address the changing governance challenges that boards face.
- Continuously evaluate your own potential conflicts and seek guidance from your board chair, hospital or health system CEO or general counsel to ensure transparency and compliance.
- Discuss and understand what you are personally liable for both during and after your service on a board.
- Encourage your board to engage in regular conversation regarding conflicts of interest policies. By creating an environment of open dialogue, trustees can express concerns openly and address any potential conflicts before they occur or progress.
- Recuse yourself from any vote that directly or potentially aligns with a conflict of interest that you may have. Often, it is best to address potential conflicts of interest before the start of a board meeting by reviewing the agenda in advance and bringing concerns directly to the board chair and CEO. By doing so, you and your fellow trustees can comfortably navigate difficult situations while upholding strong governance best practices.
- Redistribute your organization's conflicts of interest policy to all board members annually for signature and work collaboratively with your hospital or health system to make changes as needed.
- Emphasize the importance of perceived conflicts and actual conflicts. By helping trustees understand that perceived conflicts of interest impact board culture just as much as actual conflicts of interest, boards can work toward compliance.

Use this primer to help orient new board members who may not have previous experience in healthcare governance.

ENDNOTES

¹ NY NOT-FOR-PROFIT-CORP. LAW §715-a

² Ibid.

³ NY NOT-FOR-PROFIT CORP. LAW FP-C. L. §715-a

⁴ LEADERSHIP COMMISSION FOR NONPROFIT REVITALIZATION, REPORT TO ATTORNEY GENERAL ERIC T. SCHNEIDERMAN (2012)

⁵ Ibid.

⁶ Ibid.

⁷ Ibid at 3-4, 23-32.

⁸ DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE FORM 990

⁹ Ibid.

¹⁰ Title 45 Code of Federal Regulations 75.113 (2019)

¹¹ Ibid.

¹² NY NOT-FOR-PROFIT CORP. LAW §715-a

¹³ Ibid at §715-a(6)(c).

¹⁴ See S.H. and Helen Scheuer Family Foundation, Inc., et al. v. 61 Associates, 179 N.Y.S. 2d 662, 644 (1st. Dept. 1992) (“Moreover, it is well established that, as fiduciaries, board members bear a duty of loyalty to the corporation and ‘may not profit improperly at the expense of their corporation.’”)

For additional information or copies of this document, please contact HTNYS at (518) 431-7717 or email [Elizabeth Maze](mailto:emaze@hanys.org), HTNYS project specialist, at emaze@hanys.org.

RESOURCES FOR FURTHER INFORMATION

Links to these resources are available in the online version of this document on htnys.org.

HTNYS Resources

Becoming a Community-centered Board

Governance Strategies for Building Trust through Transparency

American Hospital Association

Fiduciary Duties, Conflicts of Interest and Independence Refresher

Compliance Under Control

Board Source

The Nonprofit Policy Sampler

Legal Responsibilities of Nonprofit Boards

The Board's Role in Reviewing Form 990

Additional Resources

- *Becker's Hospital Review*: California Investigates Public Hospital Board Members for Conflicts of Interest
- Board Effect: Conflict of Interest Policy for Nonprofit Boards
- Board Effect: New Changes to the Nonprofit Revitalization Act
- Board Effect: The History and Scope of the Nonprofit Revitalization Act
- Board Effect: The Fiduciary Responsibilities of a Nonprofit Board of Directors
- California Fair Political Practices Commission: Warning Letter

- California Fair Political Practices Commission: Website
- Center for Healthcare Governance: The Board's Fiduciary Role: Legal Responsibilities of Health Care Governing Boards
- Community Action Program Legal Services, Inc. (CAPLAW): Sample Conflict of Interest Policy for Board of Directors of CAA with Head Start
- Foundation Group: Avoiding Conflict of Interest on a Nonprofit Board of Directors
- Healthcare Association of New York State: Website
- HTNYS and governWell website: Essential Topic 6: Ensuring Conflict-free Governance
- IMD: The four tiers of conflict of interest faced by board directors
- KQED: State Watchdog to Investigate Another Health District Official
- KQED: Millions in Health Care District Deals Involve Firms with Ties to Officials
- Leadership Committee for Nonprofit Revitalization: Report to Attorney General Eric T. Schneiderman (2012)
- National Council of Nonprofits: Conflicts of Interest tools and resources website (2019)
- New York State Department of State, Division of Corporations, State Records and Uniform Commercial Code: Not-for-Profit Incorporation Guide
- New York State Not-for-profit Corporation Law, Section 175-a, Conflict of Interest Policy

Materials used for research and context purposes have been sourced as accurately as possible at the time of publication. If you believe something has been cited incorrectly, please contact Healthcare Trustees of New York State at (518) 431-7717.



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