Q: What is the board's fiduciary responsibility?

In any venue, fiduciary responsibilities have to do with issues of trust and confidence. In the realm of hospital governance, it is imperative that hospital governing boards understand their particular fiduciary role as it pertains to accountability, financial responsibility, confidentiality and integrity.

Fiduciary: (1) of, relating to, or involving a confidence or trust; (2) held or founded in trust or confidence.

For hospital governing boards, fiduciary responsibilities and their related issues of accountability and trust are complex. Boards have a two-way responsibility: they must act in the best interests of both the hospital and the communities their hospital serves.

In these days of economic insecurity, it is particularly important for hospital governing boards to earn and keep the public trust. In the handling of hospital finances, the oversight of hospital quality, patient care and safety, and the assessment of hospital programs and services, governing boards can and must be held accountable to the people of the communities they serve. There can be no room for question of integrity or credibility of board members. Especially now, trust is an asset no board can do without.

What are "Fiduciary Responsibilities?"

Legally, board members must take particular care to become thoroughly informed before making a business decision; they must put the needs of the hospital first when taking responsibility for its operations; and they must abide by laws, regulations and standards of hospital operations.

These three main responsibilities are usually referred to as the Duty of Care, the Duty of Loyalty, and the Duty of Obedience. Each may be applied in a court of law to determine whether or not a trustee has acted improperly. They are to be taken seriously by every person accepting a position on a hospital board.

Duty of Care. When engaging in hospital business, trustees must use the same level of judgment they would use in their own personal business activities. The tenets are mostly common sense:

- Obtain necessary and adequate information before making any decisions;
- Act in good faith;
- Make decisions in the best interest of the hospital; and
- Set aside personal interests in favor of those of the hospital.

Individual state courts often further define board members' fiduciary duties, as does the U.S. Internal Revenue Service (IRS). The IRS, in recommendations for trustees, encourages putting policies and procedures in place to ensure that each trustee is totally familiar with the hospital's activities, that every activity promotes the mission of the hospital and helps it achieve its goals, and that each trustee should be fully informed about the organization's financial status.

Duty of Loyalty. The duty of loyalty bars trustees from using their board positions to serve themselves or their businesses. It requires that when acting in their fiduciary capacity, trustees place the interest of the hospital before all else. It demands that board members be:

- Objective and unbiased in their thinking and decision-making;
- Free from external control and without ulterior motives;
- Free of any conflict of interest when discussing issues and making decisions; and
- Able to observe total confidentiality when dealing with hospital matters.

To identify potential conflicts of interest, trustees and staff should annually disclose, in writing, any known financial interest with any business entity that transacts business with the hospital or its subsidiary businesses.

The IRS recommends creating written procedures for determining whether a relationship, financial interest or business affiliation results in a conflict of interest, and outlining a course of action in the event that a conflict of interest is identified.

Duty of Obedience. The duty of obedience requires board members to be faithful to the hospital's mission, and to follow all state and national laws, corporate bylaws, rules and regulations when representing the interests of the hospital.

Board members, in carrying out their duty of obedience, will protect the limited resources of the hospital to ensure optimal services and benefit to the community. They will ensure legal compliance with all applicable laws and regulations.

The IRS recommends several board actions to promote good governance practices related to the board's duty of obedience:

- Develop both a code of ethics and whistleblower policies;
- Adopt and monitor specific fundraising policies;
- Carefully outline and determine compensation practices; and
- Develop and strictly adhere to document retention policies.

Two Roadblocks to Fiduciary Effectiveness

Strong boards are independent-minded, curious, and able to focus on what matters most. Their members are willing to challenge status-quo thinking and stretch themselves intellectually. Weak boards are complacent and submissive. Their members do not ensure that all sides of issues are considered, or that "conventional wisdom" is challenged. Such weak boards are not likely to successfully carry out their fiduciary responsibilities.

There are two true roadblocks to any board's ability to maintain fiduciary effectiveness. These are 1) a tendency toward "rubber stamping;" and 2) a tendency toward micromanagement. Both are most likely to occur when a majority of members lack interest, drive or the ability to speak from the shadow of one or more overbearing board members.

Carrying Out the Board's Fiduciary Duties

The Duty of Care is fulfilled by...

- Consistent attendance at board and committee meetings
- Attentive and introspective preparation for board meetings
- Obtaining and reviewing relevant data and information before voting to ensure evidence-based decisions
- Exercising independent judgment
- Periodic examination of the performance of the executives and trustees who lead the organization
- Meaningful review of the organization's finances and policies

The Duty of Loyalty is carried out by...

- Full disclosure of potential conflicts of interest
- Compliance with the organization's conflict of interest policy
- Avoidance of the use of corporate opportunities for personal gain or benefit
- Maintaining confidentiality when required

The Duty of Obedience is carried out by...

- Strict adherence to the by-laws of the board and the mission of the hospital
- Compliance with all regulatory and reporting requirements
- Understanding of all documents governing the board and its operation (by-laws, articles of incorporation, board and committee job descriptions, charters, etc.)
- Ensuring that decisions further the organization's mission and comply with the scope of its governing documents

Rubber Stamping. Members of rubber-stamping boards fail to ask pertinent questions or engage in deliberative dialogue on solutions to challenges, and do not work successfully together to arrive at independent-minded decisions. They accept recommendations with little questioning or debate, and fail to explore alternatives and scenarios that may reveal the weaknesses of arguments or positions.

Rubber-stamping boards are often a result of overly dominant individuals and weak board chair leadership. A strong board chair will ensure that every board member is meaningfully engaged in constructive thinking and deliberation on the important issues that come before the board.

From a legal standpoint, individual members of a rubber-stamping board may be considered negligent and liable for their actions or inactions, and may be held personally liable for a lack of adequate oversight.

Micromanagement. It's often a challenge for board members to see the fine line between management and governance. Board members must understand that they are expected to be leaders and overseers, not managers and implementers. They should be concerned with the "what," not the "how." Micromanagement is a term generally applied to boards that pay too much attention to details, and not enough attention to the "big picture" strategic issues and implications.

It's up to everyone on the board to guard against micromanagement. The board chair should ensure that its members understand their roles, and consistently adhere to them. In addition, the CEO needs to be willing to candidly discuss problems of micromanagement with the board chair to work out board-driven solutions to this problem.

Maintaining the Public Trust

Whether a board member is serving for the first time or has been in the role for a number of years, it behooves the organization to have each trustee review these fiduciary responsibilities. This is a time in our nation when demonstrated personal accountability and acceptance of responsibility are key. No board can afford to lose the public trust.

The bottom line is that board members must act in such a manner that protects both hospital operations and the community's trust. There is no other way to success.

Sources and Additional Information

1. The Excellent Board: Practical Solutions for Health Care Trustees and CEOs, edited by Karen Gardner. AHA Press. 2003.
2. Knowledge Center. BoardSource. www.boardsource.org
3. Vicki Z. Lauter. Preparing for the Future. Hospitals and Health Networks. November 14, 2006.
4. Horikawa, Saori and Hempill, John. Serving on a Nonprofit Board in the Post-Enron World. Morrison & Foerster, LLP. San Francisco, CA.
5. IRS Publication 4221, *Compliance Guidelines for 501(c)(3) Tax-Exempt Organizations,* available at www.irs.gov.