E-Briefings

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Welcome to The Governance Institute's E-Briefings!

This newsletter is designed to inform you about new research and expert opinions in the area of hospital and health system governance, as well as to update you on services and events at The Governance Institute.

In this issue:

The Use of Board Seats as Currency in M&A Transactions

By Michael W. Peregrine, McDermott Will & Emery LLP

As the merger and acquisition (M&A) activity in non-profit healthcare remains unabated, continued focus is on considerations for such transactions. For transactions between non-profit organizations, the "change of membership" and M&A models remain highly popular structural options. And, with these models, "cash" is rarely the preferred or required method of consideration or benefit. More often than not, it is an amalgam of financial incentives (e.g., capital commitments), service line support, and governance opportunities that provide the bulk of the material terms and conditions.

Of these, the extent to which the combining parties agree to share or consolidate governance can be the most immediate manifestation of the transaction. The use of board seats as "currency" in these transactions is thus a very popular negotiation term. However, it should not be relied upon without careful consideration of its advantages and disadvantages, the highlights of which include the following.

Potential Advantages

1. **Recognized option:** The use of board seats/"legacy representation" as consideration in non-profit M&A transactions—especially change of membership arrangements—is a commonly accepted practice. It is typically used in conjunction with other benefits/inducements to the party transferring control or membership. With powers effectively balanced, it can prove to create a meaningful governance partnership between the legacy representatives.
2. **Flexibility in structuring:** There is no set number of board (or committee) seats that must be applied in extending governance input to the other party. The general concept is a number that is sufficient to guarantee a "voice" in board and committee processes. To that extent, 49 percent or similarly high (but less than 50 percent) levels are not usually necessary to provide the necessary vehicle for input. Smaller percentages are often buttressed by the addition of special powers (e.g., supermajority voting rights, with respect to certain agenda items).
3. **Transitional assurance:** Oftentimes, the use of board currency is structured in a manner to assure proper transition to a "unified" (i.e., community-based or non-constituency) arrangement. This is most often made through the use of gradually reduced term limits and other service limitations that provide a sensitive evolution away from reliance on legacy representation. This is often done for the terms of officers, directors, and committee members.
4. **Preservation of culture:** Apart from governance authority, one of the more recognized advantages of legacy board seats is to assure the extension of an organization's particular culture for a significant period of time past the closing date. The expectation is that through its representatives on the governing board of the combined entity, and their participation in the work of the board/committees, the elements of culture and values of the system that transferred control can be continued and perhaps embedded in the new organization.
5. **Use of shared leadership options:** Legacy considerations can also be reflected in the

sharing, for at least limited periods of time, of board and committee officer positions. This is often accomplished through two different means. One is the concept of "co-officers" (e.g., co-board or committee chairs). The other is the concept of staggered officer positions (e.g., the position of board or committee chairs alternates per term between representatives of the controlling organization and the legacy organization).

Potential Disadvantages

1. **Constituency concerns:** The primary disadvantage of board seats as currency is the potential it establishes for duty of loyalty concerns (i.e., that it memorializes constituent representation at the board level). Individuals appointed to board or committee service as "representatives of" a particular constituency (e.g., the legacy health system) can often act as if their fiduciary duties are owed to the legacy organization and its (now-past) mission, as opposed to being owed to the mission of the successor organization. This becomes especially complex when the legacy directors are charged with the enforcement of post-closing rights.
2. **Culture clashes:** Another disadvantage is the extent to which legacy representation on boards and committees actually serves to heighten differences in corporate and organizational cultures. This is often the case when there are substantial differences in the size and scope of the merging parties (e.g., one is a large system and the other is more of a conglomeration of smaller hospitals). It is also often the case when the organizations reflect different approaches to governance style, or to the board–management dynamic. Unless these differences are carefully discussed and resolved in advance, they can have a jarring and perhaps adversarial effect once the combined board begins to meet.
3. **Integration delays:** Along the same lines, legacy representation on boards can provide a significant hurdle to integration of the combining systems' operating and governance styles. In many instances, the continuing preservation of legacy governance roles (especially beyond initial terms) can greatly reduce the incentive to pursue the necessary integration of operations. Legacy board leaders sometimes seek to preserve, for various reasons, elements of the prior organization's presence and operations (as well as leaders) instead of working towards system commonality. This can also lead to delays in achieving the intended goals of operating as a combined system.
4. **Size of board:** Significant legacy representation can also limit board effectiveness. Merger terms that require substantial numbers of legacy directors be added to the combined post-merger board can often create boards of potentially unmanageable size. These very large post-merger boards can lead to difficulties in achieving quorum, unproductive meetings, attenuated decision-making processes, unproductive committee processes, and an unfortunate reliance on the executive committee to maintain the process of governance. Of course, boards of even size and constituency are highly prone to dispute, dysfunction, and disability.
5. **Competency/diversity concerns:** The application of legacy representation has the potential for limiting the ability of the combined board to achieve necessary elements of competencies and diversity across all recognized elements. While the legacy representatives to the new board are usually selected through a thoughtful, deliberative process, it is by nature an internal process; the pool of candidates is limited to existing board members. This reduces the ability of the combined board to identify and appoint directors with particularly needed competencies and particularly attractive diversity. It can serve to delay, for years, the introduction of "new blood" into the board of the combined system.

The use of board and committee seats, as well as officer positions, can be valued—and valuable—bargaining "chips" in hospital merger and acquisition transactions. They can, in many circumstances, provide a clear and demonstrable means of confirming a partnership between hospitals and health systems. But this practice has both its advantages and disadvantages, which should be carefully considered by both negotiating parties before committing to an approach based on board seats as deal currency.

The Governance Institute thanks Michael W. Peregrine, a partner at McDermott Will & Emery LLP, for contributing this article. He advises corporations, officers, and directors on matters relating to corporate governance, fiduciary duties, and officer-director liability. His views do not necessarily represent the views of McDermott Will & Emery or its clients. He can be reached at mperegrine@mwe.com.

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Culture Alignment, High-Performing Healthcare Organizations, and the Role of the Governing Board

Part One: Culture and Culture Alignment—The Foundation of a Board's Culture Game Plan

By Daniel K. Zismer, Ph.D., and Ben Utecht, Keystone Culture Group

Culture is a reliable predictor of performance in organizations. Evidence from the field demonstrates that when culture is misaligned across key stakeholders, organizational performance is at risk.[1] So why is this observation important to boards of healthcare organizations? The answer is boards "own" the culture of the organization they govern. The reflexive response from boards may be, "but wait, isn't culture the responsibility of management?" Management is hired and directed by the governing board. Affiliated professionals and employees within organizations will reasonably and logically presume that the state of the culture must be what the board desires, directs, or permits it to be. Boards are encouraged here to take an active role in the culture and alignment of the culture within the organizations they govern, with conviction that culture is a strong and primary predictor of all aspects of performance and the board holds final accountability for organizational performance.

Part one of this two-part series answers three questions:

1. What is culture and culture alignment?
2. What role does the governing board play in culture alignment?
3. What does culture alignment have to do with achieving high performance in healthcare organizations?

It's useful to begin with a definition of "culture" since it is an often-used term for a concept that remains ill-defined and ethereal in many organizations, including at the governance level. Here we define "culture" as "the foundation of intrinsic beliefs that bind and inspire the behaviors of people in communities to pursue a mission with unity and purpose."

Culture is an active and irrepressible force that works within an organization as an invisible hand for good or ill. Culture is the sum total of the human condition at work. It is in constant motion. Culture affects behaviors, emotions, attitudes, self-perceptions, self-value, personal productivity, and organizational performance. All organizations have a culture by design or default.

[1] Alina Dizik, "The Relationship Between Corporate Culture and Performance," *The Wall Street Journal*, February 21, 2016.

"Alignment" is technically defined as "an arrangement of groups or forces in relation to one another." Alignment of culture within healthcare organizations happens when the key groups that govern, lead, manage, and care for patients share a unified definition of culture that is then operationalized through a shared system of beliefs, mission, foundation of values, and expectations of culture that guide and direct the behaviors of the organization.

The path to culture alignment starts with the governing board. Board members of hospitals and health systems can and must understand and take an active role in the culture of the organization they govern—what it is and what it should be. When the culture is "right" high performance on all important metrics typically follows; high-performing organizations have high-performing cultures.

Let's take a short side trip into the world of the NFL. Super Bowl champion Ben Utecht was quoted as saying, "The reason the Colts won the Super Bowl in 2006 was the culture of the organization and the culture was led from the top and was lived by the leaders. There was a 'Colts way' and that 'way' was decided, designed, deployed, and directed by the head coach, Tony Dungy. The operationalization of the culture was detailed down to the blue stripe on top of the helmets, which was there to demonstrate that all eyes and ears in the huddle were directed to Peyton Manning; 'active listening' was a cornerstone of our culture and it was practiced daily." Culture was important to leadership because of the nature of the business of professional football: elite athletes operating under intense competitive pressure within highly specialized environments subject to high turnover of players and leaders—sounds a little like healthcare in the U.S.

Now let's return to board members' responsibilities and accountabilities for creating culture alignment in their healthcare organizations. It's useful to repeat here that the board owns the culture of the organization. The board, together with senior leadership, is accountable for deciding, designing, deploying, and directing the culture. The game plan for culture creates a tangible and "humanizing" connection between the governing board and the people carrying out the work of the organization. Boards are provided a useful perspective when they

examine organizational performance through the lens of culture.

Building the Framework for Culture Alignment

If culture is the keystone to high-performing healthcare organizations, the cornerstones of culture are:

- The mission statement
- The values statement
- The belief system statement
- The culture statement

The first two are conventional and may be obvious to board members. The third and fourth of these statements are not typically commonplace with boards, but are critical to achieving culture alignment.

Boards are responsible for the "belief system" of the organization, which is composed of statements that reflect the board's belief regarding the foundations of a high-performing healthcare organization. Examples of statements that define a coherent belief system are:

1. "We believe that an integrated system of care provides the highest quality; integration also creates the potential for high performance, overall."
2. "We believe patients benefit when care is delivered by high-performing teams."
3. "We believe that high-quality care coordinated well over time will produce the best health status of those served."
4. "We believe in a holistic approach to the healing process."
5. "We believe that the organization has the responsibility to effectively manage total cost of care and overall value delivered to patients served."

The statement of beliefs integrates with the others, including the culture statement. Examples of culture statements include:

1. "The culture of the organization operates from principles that align with organizational values."
2. "The culture strives to provide those who serve a place to belong, grow, and develop personally and professionally."
3. "The culture will provide a fair, equitable, and just work environment."
4. "The culture respects and values the contributions of all as essential and important to the work that serves the mission."
5. "The culture encourages the organization to reach high levels of performance and performance accountability."

By adding these two cornerstones to those of mission and values, directors have laid the foundation for a culture game plan. The culture plan and alignment of culture then becomes the work of the senior leadership team working together with the governing board.

The board's culture game plan includes its own four cornerstones:

1. Definition of the performance metrics that matter to the board and, thereby, senior leadership.
2. Having a current and ongoing evaluation of the culture of the organization and how it relates to key areas of performance; a constant and consistent finger on the pulse of the culture.
3. A plan that directs senior leaders to be active in culture development as a priority for their performance and performance evaluations.
4. Dedicated time to address progress on the plan at each board meeting in collaboration with senior leadership.

Board leadership may wish to facilitate a conversation among board members and senior leadership regarding the value of developing the belief system for the organization together with the culture statement. The process of such effort has as much value as the final product. The belief statement and the culture statement creates the basis of the culture alignment game plan.

It's useful to revisit the basics of the message delivered above:

1. It's crucial that hospital and health system directors get their arms around the culture of the organization they serve.
2. A principal goal of the practice of culture is "alignment"; here the board owns the responsibility and accountability for the internal alignment of culture.
3. Experience shows that the board's connection with the culture of the organization can be enhanced by the development of statements that define a belief system and principles of culture in practice for the organization.
4. The board is accountable for the connection of culture with performance in the organization. This requirement provides a fruitful opportunity to connect the work of the board with that of senior leadership; together they own the performance of the organization and the culture that drives it.

Board members should move culture and culture alignment to the top of their list of priorities. Board leadership is responsible for directing the full board in the development of the culture game plan. Senior leadership partners with the board to develop, deploy, and direct the plan. All are accountable together for the results. Culture is a shared responsibility and accountability.

Part two of this series, which will be in the May E-Briefings, will address the governing board's role in creating a culture of high performance.

The Governance Institute thanks Daniel K. Zismer, Ph.D., Managing Director and Co-founder of Keystone Culture Group, and Ben Utecht, former NFL player, public speaker, and Co-founder of Keystone Culture Group, for contributing this article. They can be reached at dan@keystoneculturegroup.com and ben@keystoneculturegroup.com.

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Governance Institute Advisor Spotlight: Brian J. Silverstein, M.D.

In this series, we are spotlighting each of The Governance Institute advisors to give you a look into their roles, expertise, and experience in the industry. The advisors are healthcare experts, each with their own areas of focus, who work with members to help them solve their governance challenges—everything from developing leadership skills to building a competency-based board to assuring best-fit strategic plans and partnerships. Our advisory services include:

- Board education and development retreats
- Independent governance review and redesign processes
- BoardCompass® consultation and self-assessment retreats
- Phone and email consultations
- Specialized consultations

In this article, we highlight Brian J. Silverstein, M.D., Managing Director of BDC Advisors. See past issues of E-Briefings to view other articles in this series and learn more about each of our advisors.

Industry Expertise

Brian Silverstein, M.D., is a national healthcare thought leader with extensive leadership, operations, and consulting experience in the payer and provider healthcare market. Over his 20-year career, Brian has been a leader in the development of value-based healthcare and population health business strategies that produce results.

Brian has operational experience in developing and leading one of the countries earliest and largest value-based programs with CareFirst, a regional Blue Cross plan that operates in Maryland, D.C., and Virginia. Brian also worked for Geisinger Health System and helped spin out its independent population health management company. Most recently, Brian has focused on helping provider systems and medical groups successfully and sustainably navigate the transition to value-based care. Recent engagements have included assignments for a range of provider systems from prominent academic medical health centers to community-based health systems. Brian is nationally known for his work at The Governance Institute in board education and leadership retreat facilitation. He is also a system board member and ACO board member for OSF Healthcare, a midwestern healthcare system that has been active in advancing population health with their Pioneer and Next Generation Medicare ACOs as well as other commercial ACO products.

Brian's specific expertise includes:

- Population health strategy and business organization
- Accountable care organization design and development
- Clinical network design and development
- Health system and academic medical center strategy and governance
- Health plan strategy and product development
- Value-based reimbursement and clinical program design
- Board education and leadership retreat facilitation

During retreats, educational sessions, and consulting engagements he assists boards and senior leadership of hospitals and health systems with many challenges, including:

- Value-based care delivery:
  - Understanding their market opportunities

    - Designing a short-term and long-term strategy that is right for the organization
    - Developing a realistic operational plan
    - Assisting in the implementation of the plan
- Provider planning/physician alignment:
    - Looking at organizational design and leadership required to create engagement
    - Flushing out the clinical issues and strategies
    - Designing and developing the operational models to achieve goals
    - Implementing and refining the plan
- Governance design and development:
    - Developing organizational mission and vision
    - Reviewing board structure and committees to support the mission and vision
    - Clarifying committee charters and meeting plans
    - Thinking through business transactions and market opportunities

Work with The Governance Institute

Brian regularly writes for The Governance Institute's publications. His most recent articles have covered topics such as secrets to success for population health management, knowing when to migrate from volume to value, and how local markets drive the adoption of value-based care delivery. He also wrote a white paper, *Moving Forward: Building Authentic Population Management through Innovative Payer Relationships*, which provides insights and facts to help organizations make decisions around population health, and addresses how to balance the contradicting strategies of building the bridge to value while at the same time maximizing contract and partnering opportunities in fee-for-service service lines.

He also frequently speaks at Leadership Conferences. This year, he is presenting "Population Health: Strategies to Implement Now for Future Success," where he discusses the elements of a successful population health strategy, the impact of current market trends of delivery system business models, and the timetable needed to achieve measurable results. Brian also has an upcoming session on "Value-Based Insurance: A Collaborative Approach to Healthcare Transformation."

For more information or to schedule an advisory service, contact The Governance Institute at info@governanceinstitute.com or call (877) 712-8778. A detailed list of our advisory services can also be found on our Web site at www.governanceinstitute.com/AdvisoryServices.

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Upcoming Events

Governance Support Forum
The Westin St. Francis San Francisco on Union Square
San Francisco, California
August 5–7, 2018

Leadership Conference
Encore at Wynn Las Vegas
Las Vegas, Nevada
September 23–26, 2018

Leadership Conference
The Broadmoor
Colorado Springs, Colorado
October 7–10, 2018

Click here to view the complete programs and register for these and other conferences.

Upcoming Webinar: Board Oversight of Credentialing: More Challenging Than Ever!

April 24, 2018
2:00–3:00 p.m. Eastern Time/11:00 a.m.–12:00 p.m. Pacific Time
Presented by Todd Sagin, M.D., J.D., Sagin Healthcare Consulting, LLC

The healthcare board is responsible for assuring that only competent practitioners are granted privileges to work clinically in its facilities. While the board may rely heavily on medical staff input to assess practitioner suitability for privileges, only the board can appoint to the medical staff. This is one of the most important patient safety activities a healthcare organization can undertake. This Webinar will address how a board can carry out this role effectively without simply being a "rubber-stamp" to medical staff recommendations. It will also look at tactics to assure it performs appropriate oversight of credentialing processes and procedures.

Registration will open soon.

Important update regarding continuing education credits: Starting in 2018, each person who wishes to receive a CE certificate for participating in this Webinar must register individually rather than as part of a group, must log in to the Webinar using their name, and must remain logged into the Webinar for the entire duration of the one-hour program.

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New Publications and Resources

Governance Notes (Governance Support Newsletter, March 2018)

Living the Mission at ProMedica: Innovative Approaches to Improving Community Health (Case Study, March 2018)

Top Trends and Issues for Boards to Consider from the 2017 Biennial Survey of Hospitals and Healthcare Systems (Executive Briefing, March 2018)

BoardRoom Press: Volume 29, No. 1 (*BoardRoom Press*, February 2018)

Healthcare Forecast 2018: 10 Trends Board Leaders Need to Know (Webinar, February 2018)

Resource Catalog: Winter/Spring 2018

To see more Governance Institute resources and publications, visit our Web site.