Stepping Over the Line
Governance vs. Management

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Agenda

1. Overview of Board Governance Responsibilities
2. Governance vs Management
3. Case Studies of Blurring the Line
Governance Responsibilities

Generative
Framing questions; Shifting the cognitive paradigm

Strategic
Prospective and Reactive

Fiduciary
Oversight and Policy
Governance Responsibilities

Sources of Directors’ Duties and Responsibilities:

- Common law governing corporations
- Ontario Corporations Act/Not-for-Profit Corporations Act
- Public Hospitals Act and Regulation 965
- Articles and by-laws of Corporation
- Any general legislation that applies to all Directors (e.g. Employment Standards, OHSA, etc.)
Rules of Fiduciary Conduct

- Act in best interest of the Corporation
- Act with honesty and good faith
- Confidentiality
- Obedience – Board solidarity (respect the decision of majority)
- Avoidance of Conflict of Interest
Fiduciary Relationship

• Duty owed to the Corporation (not to any one group or interest)
• All directors owe same duty
Standard of Care

• No standard of care in Corporations Act, so common law standard of care applies

• Standard of care and other responsibilities addressed in the Not-for-Profit Corporations Act

• A Director must exercise the level of care, skill, and judgment that may reasonably be expected of a person with their knowledge and experience

• Subjective standard (depends on personal knowledge and experience)
“Due Diligence” Defence

- Applies if Director can show he or she took reasonable care in carrying out responsibilities to Corporation
- “Balance of probabilities”
Governance Responsibilities

• Every organization shall be governed and managed by a Board
• Can’t delegate ultimate responsibility for risk
• The Board shall monitor activities in the organization for compliance with the legislation and the By-laws
• Board take measures considered necessary to ensure that relevant legislation and By-laws are being complied with
Role of By-Laws and Board Policies

- By-laws create operational authority and accountability
- Board policies define roles, responsibilities of Board, management, staff
  - Support and operationalize by-laws, Rules and Regs, Board decisions
  - Demonstrate fulfillment of obligations under statute and common law
Governance vs Management

- Directors are responsible for establishing policies and procedures.
- Management is responsible for implementing the policies and procedures established by the Board.
- Directors must measure management’s implementation.
Governance vs Management

- Board delegation of operational decision-making to Management
- Align Management’s responsibility to risk manage operational risk and the Board’s responsibility to ensure risk oversight
Governance vs Management

- In the health and social services sector, the distinction between governance and management is being blurred and at times confused as more direct operational responsibilities are being assumed by the Boards.
Governance vs Management

- A highly regulated and prescriptive environment
- Direct links to the Board for key areas of operational performance
- Fiduciary obligations extend beyond the corporate walls
- Total dependency for funding
- Product quality has direct consumer impact
- An environment of absolute transparency
Governance vs Management

• Directors who exceed governance role assume risk of personal liability - Directors and Officers insurance may not cover “management” activities

• Keep roles/responsibilities of Board and Management separate
Case Study #1 - Interference with Employment

- Small/ mid-size community
- Board and CEO decided to sever employment relationship with VP
- A member of the Board knew the VP and felt that he could assist in resolving issue
- Issues were not resolved, VP was terminated
- VP sued the Hospital for wrongful dismissal and the Director for interference with his employment opportunity
- Hospital was covered by insurance, Director was not
Case Study #2 - Conflict of Interest

• Hospital By-laws provided for Municipality to nominate an appointee to the Board; Municipality put forward a city councilor

• Following the coming into force of the *Commitment to the Future of Medicare Act, 2004*, Hospital was required to go through significant downsizing to balance its budget

• Director had a competing interest – many of those being downsized were his electorate, began challenging the downsizing and whether there should be cuts to management and capital costs, went as far as making speeches highlighting what he was doing to save jobs

• Issues:
  – Breach of Confidentiality
  – Interference
  – Systemic conflict of interest
QUESTIONS & DISCUSSION
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