# Nonprofit Survival Strategies

## Eight tactics can help hospital boards manage finances, liability

By John C. Tishler and Ryan K. Cochran

Hospital boards are charged with protecting the viability of one of the community's most important assets. During times of unprecedented financial turbulence, the best boards will assess the organization's financial situation and, if necessary, restructure operations to remain independent or position it to form a mutually beneficial partnership with another organization. At the same time, boards must be careful to minimize their exposure to individual liability.

Eight tactics can help nonprofit boards to shepherd their organizations through these challenges, take control of their future and protect trustees from individual liability.

### T SNAPSHOT

Stand-alone, nonprofit hospitals seem to bear the brunt of an unfavorable financial climate. These tactics, which include assessing services, sizing up leaders and improving documentation, can protect hospitals and shield trustees from individual liability.

**1 Take a close look at services and revenue.** Determine whether your organization's new reimbursement reality supports the service lines and ancillary services it provides. If they are not profitable, closing certain service lines and ancillary services may generate significant savings. Conversely, ancillary services also represent an opportunity to generate additional revenue. For example, can additional revenue be generated by offering home health, hospice, skilled nursing or rehabilitation care, and behavioral health care? Can you transition otherwise empty beds and dedicate resources to diversify? Proactive boards may change the hospital's profitability by adding ancillary services.

To facilitate this review, consider supplementing the existing finance department's abilities with an outside turnaround professional or a financial expert who has specialized experience in projecting a hospital's financial performance. He or she can provide an unbiased opinion on what services the hospital revenue can support, and can project how changes in the service model will impact expenses and revenues. An outside professional also can help the board and management in working with the community's physicians to structure a financially viable service model. Many in-house hospital financial professionals have never had to face such difficult financial projections or such rapid change in reimbursement. An assessment by an experienced turnaround expert in concert with the board will give trustees the information they need to make strategic decisions.

**2 Assess the strength of the hospital's management team.** The American College of Healthcare Executives in March reported an 18 percent turnover rate in hospital CEOs in 2014. High turnover is a sign of difficult times in the industry. Determine whether your management team has the right skills for today's environment — skills that go beyond operational acumen. Does your management team have the skills and capacity to manage and address:

- changes wrought by shrinking reimbursement, particularly in states that refused Medicaid expansion dollars?
- the growing use of electronic health records, its impact on physicians and staff, and the accompanying expenses?
- the likelihood that the more sophisticated — and better reimbursed procedures — are going to regional hospitals?
- the loss of tax subsidies or declining population?

Board members should be asking hard questions about these and other changes and the current management team's strategies for responding to them. At the same time, the management team needs resources to address these strategic concerns. Insist that funds be spent on hiring people with these strategic skills as opposed to giving raises or buying new equipment. Investing in human resources may serve the hos-

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pital and the community more effectively than investing in the plant or equipment.

**3 Make sure the board is trained on legal and business issues.** Assess whether your board is up-to-speed on what the law requires to avoid personal liability. As the competencies and expertise needed for board leadership expand, boards need training on the legal and business issues facing the hospital. In addition, they need to be current on the corporate governance responsibilities that state and federal laws place on them. If the hospital is in financial distress, state and federal laws may charge board members with a heightened duty to consider the impact of its actions on hospital creditors. Without this training, board members may be unaware of what is required of them to avoid personal liability. Serving on a hospital board is an important role, but trustees shouldn't put their personal assets at risk. On Jan. 26, the U.S. Court of Appeals for the Third Circuit sitting in Philadelphia issued a ruling recognizing the individual liability of officers and directors of the nonprofit nursing home Lemington Home for the Aged. The court was critical of and held the directors individually liable for their failure to oversee management whose conduct the court determined had hurt the value and financial viability of the nursing home. If this decision is followed widely, it could result in personal monetary damage awards against board members for the tort of "deepening insolvency." In some instances, directors' and officers' insurance may cover these acts, subject to the terms and exclusions of each policy.

To avoid this personal liability, trustees must be prepared to press the management team on its plans to confront financial challenges and develop plans to address them. If trustees don't feel prepared, the board should consider obtaining the needed expertise. Boards also should be able to assess the hospital's 13-week cash flow, days of cash on hand, days in accounts receivable, adjusted cost per case and capital cost per adjusted patient day. If a lawsuit is brought against the board or individual board members, this financial knowledge will be helpful to trustees in their depositions and in establishing compliance with their fiduciary duties.

Boards also should know if appropriate levels of director and officer insurance are in place in the event the board's decisions are ever called into question. Request a meeting with the hospital's insurance broker to discuss the level of coverage and the actions covered by the policy. If trustees don't know the extent of the immunity or if the immunity has limits, they might consider obtaining insurance to cover any acts that potentially may fall outside the immunity coverage provided by state law. If the hospital is in distress and facing closure, a sale or bankruptcy, consider the policy provisions that allow for negotiating the later purchase of a so-called tail policy that extends the existing coverage for a year or more after the hospital is closed or is in other hands.

**4 Review key metrics on a regular basis.** Is the board receiving the right financial and quality analytics? Financial essentials include: performance, projections and historical performance, including year-over-year revenues, expenses, litigation expenses and operational expenses. Ask the hospital's officers to provide the board with a review of the hospital's compliance under its loan agreements. Ask them to test and present the hospital's compliance regularly, even if the actual testing the lenders require is months away. It is always wise to insist that outside auditors review the accounting practices and make periodic recommendations directly to the board. The board should pay particular attention to the hospital's billing practices. Hospitals frequently are accused of overbilling by Medicare or Medicaid and, in some instances, board members have been sued when the hospital was found to have overbilled or otherwise violated the rules that govern reimbursement under governmental programs. Even in states with statutory protections for members of nonprofit boards, the community, the employees and the hospital's creditors will hold the board to the same level of scrutiny as that of a commercial enterprise. If expenses are going up and revenues

### *More on Financial Strategies*

"How Hospitals Should Approach Financial Planning in Changing Times" by Cynthia Hedges Greising, October 2014. http://bit.ly/1Oca1FV

"The Five Essential Elements of a Hospital Turnaround" by Todd C. Brower, August 2013. http://bit.ly/1DekmGR continue to trend down, the call for change may have to come from the boardroom.

**5 Consider independent legal counsel.** Many hospitals have a general counsel, or someone from a local law firm to advise both the hospital and the board, but the board may need separate counsel in turbulent times. One of the benefits is that the counsel can be the one to ask tough questions of management because of his or her experience on previous, similar matters. In addition, the advice of independent counsel may serve as a defense to lawsuits that may be brought against the board down the road. To minimize expenses, outside counsel can be limited to attending board meetings and giving the board advice on discrete matters.

**6 Spend wisely.** Determine what the organization can afford and what it needs to operate well. It likely will lead to the conclusion that costs must be cut or capital-intensive projects must be postponed. However, don't skimp on investing in good management with superior strategic and financial skills. In this time of unprecedented change, paying for innovative, visionary leadership trumps new buildings and equipment.

**7 Write it down.** Determine whether the board's minutes and resolutions would demonstrate to an outsider — or perhaps a juror — the prudence and thoughtful decision-making process the board has undertaken. Many boards keep more generalized, less-detailed minutes. However, keeping accurate minutes that record the facts and due consideration that trustees give to issues is a best practice — indeed, they are a board's best defense should claims be asserted against it. Lax record-keeping can be a board's undoing in litigation.

**8 Keep an eye on the clock.** Determine the window of time your organization has to voluntarily make changes, such as closing a service or forming an affiliation with another organization. Change is a slow process: It requires buy-in from other board members, management, physicians and especially the community. Financial transparency is important to building community consensus for change.

Involve financial, public relations and legal consultants early in the process. They can provide advice and transparency. Further, sometimes an outside party is the better choice to communicate the struggles and challenges facing a hospital to both the community and its referring physicians.

## Common Themes

Trustees are responsible for steering their hospital through a complex and ever-changing landscape. While some scenarios may warrant bringing in external legal, public relations or turnaround experts to provide guidance, all boards must be proactive, detail-oriented and transparent to protect themselves, their institutions and their communities. T

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