

# GOVERNANCE FOR REGULATORS

*A Handbook for Board and Committee Members*

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## Governance for Regulators

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## Governance for Regulators

### 1. Introduction

Upon joining a Board<sup>1</sup> or committee of a regulator, you will want to know what you should do and how to do it. This Handbook explains the “how” part. How do you contribute to the activities of the regulator so as to have the greatest positive impact on the organization? Consider the following scenario:

#### *Just Selected Scenario*

*Ernie Eager has just been selected to serve on the Board. Excited to get up to speed, Ernie arrives at 8:30 Monday morning with the intent of shadowing the CEO for the week to get a handle on the “nuts and bolts” of how the regulator operates. Any concerns?*

While you have to give top marks to Ernie for enthusiasm, there are a number of problems with Ernie’s proposal. Ernie is assuming that a Board member’s role involves familiarity with the day-to-day operations of the regulator. Ernie’s proper role is at a much higher level, formulating policy and direction for the organization. In fact, shadowing the CEO would likely expose Ernie to confidential personal information from which Board members should be insulated. Such knowledge could even taint Ernie in dealing with specific matters in the future (at least for regulators where Board members serve on investigative and adjudicative committees). In addition, Ernie’s presence would likely interfere with the CEO’s ability and authority to perform their functions and distract somewhat from the effective operations of the regulator.

Board and committee members have a “fiduciary” duty towards the regulator and its public interest mandate. A fiduciary duty requires undivided loyalty to the organization and its objects; there can be no conflict of interest. A fiduciary duty also includes such obligations as keeping confidential information private and always acting with integrity.

Thus it is important for Board and committee members to know how to perform their significant work. In this Handbook we will review the different aspects of how such individuals help a regulator achieve success. Where there is good governance within an organization, every part of the organization works together effectively and with a high degree of trust in each other. Governance concepts should be implicitly applied after an effective orientation to them. Organizations that are forced to spend a lot of time navigating governance disagreements are at risk of becoming dysfunctional.

No two regulator bodies are identical in their governance approaches. Circumstances such as the specific mandate of the regulators, the details of their enabling statute, the nature of the

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<sup>1</sup> The “Board” is sometimes called the “Council”. It is the group that has ultimate authority and responsibility for the regulator.

profession being regulated, the history of the organization and even the personalities of those involved all contribute to variations in their governance approaches. However, there are shared themes that are common to effective regulators as well as common governance characteristics of ineffective regulators.

#### a. **Context: What Does A Regulator Do?**

While governance is about how Board, committee members and staff perform their functions, the “how” is informed somewhat by “what” the organization does. For most regulators of professions, there are four general ways in which they regulate the profession:

- **Restrictive Regulation.** Regulators typically prevent people from doing certain things. For example, regulators typically only register individuals who are competent and ethical. People who are not registered cannot perform certain activities or cannot use protected titles.
- **Reactive Regulation.** Regulators usually respond to complaints and reports of unprofessional conduct by practitioners. Those concerns are investigated and appropriate action is taken, up to and including the discipline or removal of the practitioner from the profession.
- **Proactive Regulation.** Regulators are increasingly engaging in activities that facilitate high quality practice by practitioners. Such proactive measures can take various forms including communicating with practitioners about emerging or recurring problems, requiring continuing professional development, conducting inspections, answering questions, and encouraging continuous improvement practices.
- **Transparent Regulation.** Regulators communicate frequently with the profession and the public on their activities. In addition, most regulators operate a public register containing relevant information about the registration, complaints and discipline history of practitioners to enable informed public choice of practitioners.

All of this is done in the public interest which, in this context, primarily means doing all it can to ensure that practitioners provide safe, competent and ethical services.

The activities and public interest mandate of the regulator affects how Board and committee members perform their tasks. For example, the public interest mandate of the regulator suggests that the Board needs to focus on strategy and policy to ensure that the regulator is focussing its efforts on the right things. In addition, the public interest mandate of the regulator strongly suggests that Board and committee members need to act with the highest degree of ethics and integrity.

### Quiz on Regulatory Priorities

Rank in order from highest to lowest the following initiatives for a regulator:

- i. *Encouraging practitioners to maintain their own wellness.*
- ii. *Establishing a proposed fee schedule to ensure that practitioners receive sufficient compensation to meet minimum standards.*
- iii. *Enhancing the initial retainer process so that clients fully understand their options before using a practitioner's services.*

In all likelihood, item iii would be ranked highest because it relates to an issue that goes to the safety, competence and ethics of the services provided by practitioners to the public. Item i would likely be ranked next highest because it relates to a possible underlying cause of poor performance by practitioners. However, there is a concern that the regulator could shift focus from the possible cause of harm to clients to the interests of practitioners themselves, which should not be the focus of the regulator. Item ii would almost certainly receive the lowest ranking because, despite its wording, the issue has a strong professional self-interest component. Regulators typically leave issues related to compensation of practitioners to other organizations such as professional associations or unions.

#### **b. Context: What Does a Board Do?**

There are many ways to describe the role of the Board of a regulator. One description is that the Board of a regulator primarily ensures that the organization appropriately manages the risk of harm to the public from the actions or omissions of practitioners. A secondary role is to ensure that the organization appropriately manages risk of harm to itself.

The key word here is “ensures”. That word implies that the Board does not, itself, do the protecting. Rather, the Board is overseeing the regulator’s activities so that harm is minimized. The word “ensures” also implies that the Board is ultimately responsible for the success or failure of the regulator in achieving its risk management goals. Another key phrase is “appropriately manages the risk of harm”. This phrase implies that the regulator does not eliminate risk (which would be impossible), but is wise and prudent in reasonably addressing the important risks.

To perform this function, the Board typically does three things:

- Identifies and sets the priorities of the regulator;
- Develops the high-level policies of the regulator; and
- Oversees the performance of the regulator in achieving the goals set out in the first two activities.

We will discuss the function of the Board in more detail later when reviewing the role of the Board.

### *Quiz on What the Board Does*

*Which of the following should the Board not do? There may be more than one correct answer.*

- i. Consult the profession and the public on policy proposals being considered by the Board.*
- ii. Review individual complaints decisions.*
- iii. Conduct staff performance reviews.*
- iv. Review the quarterly financial statements of the organization.*

Consulting the profession and the public on pending policy proposals is an appropriate way for the Board to perform its policy making role. While the Board will rarely do the consulting itself, it would direct a process for consultation (e.g., circulating the proposals for comment). Reviewing individual complaints decisions is a poor way of overseeing the regulator's activities. This amounts to second-guessing by people who are less expert on complaints issues and less informed of the details of the case than the people who made the original decisions. Oversight is best done by reviewing patterns and trends. Conducting staff performance reviews is another poor way to oversee the regulator. Board members are not familiar with the day-to-day performance of additional staff and do not have the expertise in human resources management that senior staff would possess. Regulatory Boards invariably limit their performance review to that of the CEO. Reviewing the quarterly financial statements of the organization is an effective oversight strategy. It allows the Board to see patterns in the financial performance of the organization so that major course corrections can be initiated if required before the year-end.

## **2. Governance: Concept and Purpose**

Governance is an organization's choice as to how it will perform its functions. Since there is no one way of doing things, the choices will vary. For example, some organizations choose to give authority to a benevolent dictator who makes all of the decisions and tells everyone what to do. Other organizations prefer that it act only through the consensus of all participants and will discuss decisions until a consensus is reached. Many organizations operate somewhere between those two extremes. Other organizations choose not to have an established structure and decisions are made chaotically.

While there is no one way of doing things, most regulators have found that following certain principles goes a long way to ensuring that the organization is effective and respected. This Handbook will discuss those principles. Any regulator can, at their own risk, choose not to follow any or all of these principles.

There are four areas in which governance choices are made:

- How the organization sets its mission, goals, strategies and policies.
- How the organization selects its Board, committee and senior staff members.

- How the organization ensures that its representatives comply with their fiduciary obligations.
- How the organization assigns, and enforces, the roles of the people and entities within the organization.

The goals of the governance choices include the following:

- To ensure that there is as much consensus as possible as to how things are done.
- To ensure that the mission, goals, strategies and policies of the organization are well thought out.
- To ensure that the activities of the organization are focussed and effective.
- To recruit the best and the brightest to the organization. Good people do not join an organization (or they quickly leave an organization) that is chaotic or ineffective.
- To maximize the use of the available talent found in the organization.
- Ultimately, to waste as little time as possible on governance matters so that everyone can focus on their tasks.

#### *Governance Concept Scenario*

*At Ernie Eager's first Board meeting he agrees to serve on every committee within the organization. He also proposes a new initiative that he would head up, at a modest stipend, to create local chapters of practitioners so that the regulator can more effectively get its message out to the profession and to develop a pool of future Board and committee members for the regulator to draw upon. Any concerns?*

While energy and enthusiasm of Board members is valuable, Ernie may not be advancing the governance of the regulator. A radical change to the structure of the regulator made at an initial meeting without research and time for consideration may result in a lack of focus of the regulator. Also, Ernie should not be appointed to a committee simply because he is interested. Other criteria also come into play. In addition, it may not be appropriate for a brand new Board member to take the lead in organizing a structure as complicated as local chapters. This proposed role would appear to intermingle the functions of both the Board and staff. Ernie's accountability (directly to the Board? to the CEO?) is unclear. Also, there may be a conflict of interest in proposing an arrangement where Ernie would receive a financial benefit.

### **3. Setting the Mission, Goals and Strategies**

Most Boards find it important to establish the overall direction and priorities of the organization. Doing so creates the framework for all of the other decisions of the regulator. To some extent this is often set out in the enabling statute for the regulator. Typically the objective of most regulators is to ensure that practitioners act competently and ethically in order to

further the public interest. However, within that general direction, the regulator should identify priorities that set out more specific goals and describe strategies for achieving them.

For example, for many health professions, eliminating the sexual abuse of patients remains a high priority. For the legal profession, improving access to justice has gained increasing importance. Other professions have refocused on addressing conduct that causes significant financial, physical or mental harm rather than on seamliness (e.g., in advertising). For many professions, reconciliation with indigenous peoples and promoting equity, diversity and inclusion is being emphasized. With yet other professions, enhancing use of technology by both the regulator and, more importantly, practitioners is significant. There are many other illustrations.

Many regulators formally prepare a strategic plan approximately every three to five years. This can involve retaining an expert facilitator, conducting research on trends affecting the profession, evolving public expectations and general regulatory trends. Sometimes various individuals and groups are consulted for input on the relevance and effectiveness of the regulator and what changes the regulator should consider. Various tools, including risk management tools, are frequently employed. After extensive preparation, it is common for the Board and senior staff to engage in a strategic planning retreat. This is followed up with a written strategic plan and, often, a separate implementation plan including performance indicators. The Board should expect reports at each meeting from the CEO on the implementation of the strategic plan including on the performance indicators. Occasionally this will result in a modification of the strategic plan. The strategic plan should be referred to by the Board at each meeting when making decisions.

Even without a strategic plan, Boards should evaluate each decision against its statutory objects and at each meeting should measure the regulator's performance against those objects. For example, the Board could review data on complaints including:

- The number and nature of complaints;
- Changes in the number, nature of disposition, timeliness of disposition, appeal rates, and success rate of appeals;
- Characteristics of practitioners who are the subject of complaints, especially repeat complaints, such as length of practice, gender, practice type (e.g., solo, group), etc.;
- The impact of any proactive measures to address certain types of complaints (e.g., Has a mentoring initiative for solo practitioners reduced the number of complaints? Do remedial measures reduce repeat complaints?).

Perhaps the most important work a Board can do relates to clearly identifying its mission, setting priorities and developing a plan to achieve those priorities.



### *Mission, Goals and Strategy Scenario*

*Ernie Eager sits on the Registration Committee of the regulator. Ernie is excited to hear that the Committee is reviewing the success of internationally trained practitioners. Through a combination of surveys, file reviews and data analysis of the various program areas of the regulator, the Committee learns the following:*

- *About 50% of internationally trained applicants who begin the registration application process are successfully registered.*
- *International applicants are 40% more likely than Canadian-trained applicants to be the subject of complaints. However, most of those complaints are about communication issues. In fact, Canadian-trained applicants are 25% more likely to be referred to discipline than internationally-trained applicants.*
- *Except for gaps in record keeping, internationally-trained applicants score 30% higher on inspections than Canadian-trained applicants.*

*The Committee reports to the Board that it appears that the registration process is unduly stringent for international applicants. The process should be reviewed to make it more equivalent to the process for Canadian-trained applicants. However, international applicants should be encouraged to participate in a communications and record-keeping program upon registration to reduce recurring concerns in those areas.*

This scenario illustrates how a Board and its committees effectively direct and oversee the performance of a regulator.

#### **a. Developing Policies**

A primary tool for Boards to direct the regulator and to protect the public is making high-level policies. In fact, making policies is probably a major component of most regulatory Board meetings.

Policies can take various forms. For example, proposing a change to the enabling statute or regulations of the regulator is a policy decision. So is amending the regulator's by-laws. Most regulators also issue policy documents under various names including: standards of practice, directives, guidelines, practice advice, protocols, or advisory notices. Regardless of its name, such document sets out expectations of practitioners (and sometimes of the regulator itself) that enhance the protection of the public.

Typically policies address either recurring areas of challenge for practitioners (e.g., record keeping, scope of services, confidentiality and privacy) or emerging areas of priority (e.g., use of

social media, use of technology, promoting equity, diversity and inclusion). Policies are sent to practitioners and posted on the regulator's website for use by practitioners, the public, and staff and committees of the regulator.

To ensure policies are relevant and helpful they are developed through a rigorous process. The process includes:

- Identifying a topic that is sufficiently important and relevant to warrant precious Board time and energy.
- Researching the issue, including the nature and extent of the harm, the options that are available to address the harm, and the advantages and disadvantages of each option.
- Preparing a briefing note for the decision makers (i.e., the Board).
- Consulting with suitable stakeholders, where feasible.
- Making a decision.
- Implementing the decision.
- Monitoring, reviewing, revising the policy periodically and as needed.

#### *Policy Scenario*

*Ernie Eager, fresh from the success of his work on international applicants, is anxious to reduce the restrictions on how practitioners describe their areas of specialty. Currently only reference to formally recognized specialties are permitted. Through relentless advocacy he has the issue put on the agenda and gets a majority of the Board to remove the restriction for anyone who has taken post-graduate training in a particular area of practice. Within weeks hundreds of practitioners who have taken an online course are holding themselves out as specialists with exotic titles (e.g., four-leaf clover strategist). Multiple complaints are made by both clients and other practitioners. The media picks up on the confusion. Two professional associations line up on opposite sides of the issue. The Competition Bureau opens a file. The responsible Minister's office requests a copy of the data upon which the decision to remove the restrictions was made.*

Hastily made policies, except in areas of true emergency, are almost always a mistake. Carefully screening policy topics related to the strategic plan of the regulator, doing the necessary research and consultation and fully debating the policy helps ensure that wise policy choices are made.

#### 4. Selection of Board, Committees and Staff

The criteria and process for selecting Board, committee and staff members has a huge impact on how the organization operates. For example, where the vast majority of Board members are elected by the profession, they will bring the perspective of the profession to the regulator. Often they will have some sense of representing the people who elected them. They may have limited experience in participating in public interest regulation, strategic planning for a regulatory organization, risk management, policy making or organizational oversight.

Similarly, where the majority of positions on committees are filled by Board members, the pool of available candidates limits the ability to apply a merit-based selection processes. In addition, the interpersonal relationships of Board members likely have an impact on the committee selection process that might not be present if committee members are selected from outside of the Board through an objective, skills and experience-based process.

There has been a trend around the world in recent years to move away from electing Board members to appointing Board members through a recruitment process with the assistance of neutral experts in human resources hiring following a structured process of reviewing the experience, skills and aptitude of applicants. The starting point and underlying assumptions for Board members selected in this way is generally quite different from that of Board members who are elected by the profession. A similar trend is to use a similar process for selecting individuals who are not Board members to serve on regulatory committees.

The selection of Board and committee members is often prescribed by the regulator's enabling legislation. Thus while some changes can be made by the regulator on its own (e.g., inserting a structured nominating process into the Board selection or committee appointment processes), fundamental changes usually require legislative amendment.

Most regulators use a formal recruitment process, with expert assistance, in selecting the CEO of the organization. Generally the CEO and, in larger regulators, human resources staff, recruit other employees with no participation by the Board.

The following scenario illustrates the possible impact on governance of the Board selection process.

##### *Board Selection Scenario*

*The regulator for parachute clubs is transitioning from electing its Board members to selecting them through a merit-based process. The current Board has both types of Board members on it. During the strategic planning process a future trend is identified that independent local "jump clubs" are being replaced by large franchise operations that advertise heavily and operate on a transactional (per jump) fee basis rather than an annual dues basis. The elected Board members*

*encourage the regulator to resist this change because of its widespread opposition within the profession, because it will fundamentally alter the social support nature of the local clubs and because it may pose a danger by enticing “newbies” to jump without adequate training and supervision. The recruited Board members indicate that the only relevant consideration is safety. They are unwilling to accept simply based on intuition that the franchise model is inherently more dangerous. The recruited Board members also insist upon undertaking research as to whether there are safety concerns and, if there are, whether they can be adequately addressed by suitable regulatory measures rather than outright prohibition of the franchise model.*

It is essential that elected Board members do not fall into the misapprehension that they represent “constituents”. The election process is intended only to ensure that practitioners have confidence in the people regulating them. Once elected, professional Board members are required to only act in the public interest mandate of the regulator.

## **5. Fiduciary Obligations**

Board and committee members have a duty of undivided loyalty to the regulator and to its mandate (and the mandate of any committee on which they sit). This fiduciary duty includes an obligation to deal appropriately with any conflicts of interest that arise, to keep all information obtained in the course of their duty confidential and private unless an exception applies, to avoid engaging in any conduct that would bring disrepute to the organization, and to perform their duties with diligence and respect. We will examine each of these key duties.

Board and committee members generally have immunity from a lawsuit for damages (i.e., to pay money) so long as they acted in good faith. Bad faith is difficult to establish. Even a significant mistake, made honestly, is generally protected. However, a deliberate breach of a fiduciary duty by a Board or committee member might, in some circumstances, amount to bad faith. Take the following example:

### *Fiduciary Obligations Scenario*

*Two instructors at a school that educates practitioners for entry into the profession, Joy and Ivy, sit on the Board. The Board is considering creating a provincial entry-to-practice examination that must be passed for applicants for registration. Joy’s niece is completing first year at the school and will likely have to sit the examination. It does not occur to Joy that this could be a conflict of interest, so she does not declare any when discussing and voting against the proposal. Ivy works closely with the Dean of the school. The Dean is concerned that the examination will cause significant additional expense to the school to adapt its curriculum to cover all of the competencies that will be tested by the exam. The*

*Dean conspires with Ivy to quietly lobby other Board members to oppose the proposal in return for the school's influential endorsement of them for the next election to the Board. The Dean and Ivy agree not to lobby Joy because Joy would likely react negatively to such an approach. If everything is revealed, will Joy and Ivy enjoy the immunity protection?*

Joy may well have a conflict of interest. While Joy likely could be criticized for not disclosing the possible impact on Joy's niece, there is no evidence of bad faith. Joy likely would be protected by the immunity provision. Ivy, on the other hand, deliberately circumvented the conflict of interest rules for ulterior purposes unrelated to the public interest. Ivy likely would not be protected by the immunity provision.

Another general example of the duty of undivided loyalty is that Board and committee members should freely contribute to and respect the intellectual property of the regulator. For example, if a committee member made a major contribution to a record keeping tool for the regulator, they should not expect to control how the regulator uses the tool, nor should the Board member use the tool for personal benefit. For example, the committee member would not "withdraw permission" for the regulator to use the tool in a way that the committee member does not approve. Similarly, the committee member would not use the tool for a privately offered record keeping course.

#### **a. Conflicts of Interest**

One of the most fundamental fiduciary duties is that Board and committee members cannot act when in a conflict of interest. A conflict of interest arises when a Board or committee member has a competing consideration that could reasonably affect their ability to make a decision based solely on the public interest mandate of the regulator.

Acting in a conflict of interest harms the reputation of both the regulator and the individual, can nullify the decision made and, where done in bad faith, can bring legal liability to both the regulator and the individual.

Conflicts of interest can take many forms, including financial, personal relationships, affiliations with other organizations and employment. Some examples include the following:

- Holding a leadership position with an organization, such as a professional association, that has a mandate inconsistent with the public interest mandate of the regulator;
- Participating in a decision (e.g., approving a contract) where the Board or committee member or someone close to them has a financial interest;
- Applying for an employment position with the regulator while still being a Board or committee member;
- Participating in a decision, such as making a regulation or policy, that has a larger than usual impact upon one's own practice of the profession;

- Receiving gifts or hospitality (beyond the trivial such as refreshments during a meeting) because of your status as a Board or committee member or from someone who is affected by the decisions made by the regulator;
- Using one's position with the regulator for personal advantage, such as referring to one's position in the signature block used in one's own practice;
- Running for public office where one's position with the regulator is used to promote the candidacy or where statements made in the campaign can affect one's role with the regulator;
- Assisting individuals or even one's employers in their dealings with the regulator; and
- Failing to provide relevant and important information to the regulator, such as where one learns of allegations of serious misconduct even though the information was learned outside of one's duties for the regulator.

Of course, whether there is a conflict of interest depends on the circumstances. Take the example of a client disclosing to a Board member, in the course of the Board member's practice of the profession, information about the misconduct of another practitioner. The duty of confidentiality to the client may prevent the Board member from reporting the misconduct to the regulator unless a legal mandatory reporting obligation exists. Similarly, noting one's position on the Board in one's CV as a community involvement in a manner that is not promotional would likely be acceptable. Including reference to one's position on the Board in an advertisement is unacceptable.

Also, some conflicts of interest are absolute and some are relative. For example, having a leadership position in a professional association prevents a person from serving as a Board member of the regulator. However, employment with a major corporation may not preclude a person from serving on the Board, but may prevent them from participating in decisions that have an undue impact on the employer.

Because of this ambiguity, Board and committee members should respond appropriately to any circumstance that might conceivably involve a conflict of interest. One such approach is to follow the three "D's":

- **Discuss** any potential concerns with the appropriate person (e.g., the President, the chair of the committee, the staff person supporting the committee, the CEO). Talking through the concern may either provide reassurance that there is no concern or confirm that something more should be done.
- **Disclose** the potential concern to the Board or relevant committee. The Board or committee can give more definitive guidance as to whether the concern is a problem or not. In a situation where the concern obviously constitutes a conflict of interest, disclosure is preparatory to the third step.

- **Declare** the conflict of interest where one appears to exist. This formal step should be recorded in the minutes. The Board or committee member would then leave the room (even if the meeting is public) and make no effort to influence the discussion or decision on the issue.

There is nothing wrong with having a conflict of interest. Often the conflict arises simply through a confluence of circumstances beyond the Board or committee member's control (e.g., someone the Board or committee member knows is tendering for a contract with the regulator). However, failing to respond appropriately to the conflict of interest and acting while in a conflict of interest is a serious matter.

### *Conflict of Interest Scenario*

*Ernie Eager is assigned to a panel of the discipline committee hearing an allegation against a practitioner related to sexual harassment of a colleague. After making a finding against the practitioner, the practitioner files letters of good character from multiple colleagues. Ernie recognizes one of the letter writers as a close friend. Ernie had no idea that the friend knew the practitioner. What should Ernie do?*

Ernie should first discuss the situation with the independent legal counsel supporting the discipline panel. That would prevent Ernie from tainting the other panel members, for example, by commenting on the credibility of the letter writer. Approaching the President or CEO in this case is likely not appropriate since the regulator is one of the parties at the hearing presenting the case. Independent legal counsel will almost certainly advise Ernie to disclose the connection to the letter writer to both parties at the hearing itself. Independent legal counsel can assist Ernie in wording the disclosure so that it does not taint the rest of the panel. After hearing the submissions of the parties, Ernie will decide whether he should declare an appearance of bias. An appearance of bias is another name for conflicts of interest that is commonly used in adjudicative settings like discipline hearings. If Ernie declares a conflict, he will leave the room and have no part in the decision on sanction. The appearance of bias likely does not affect the finding of professional misconduct itself because that finding was made before Ernie was aware of the connection.

### **b. Confidentiality**

Board and committee members are required to keep all information obtained through the regulator confidential, unless an exception applies. This duty is not limited to personal information. For example, policy proposals in early development are to be kept confidential until they are ready to be made public. Similarly financial, human resources and other operational information must be kept confidential until made public through official channels. This approach greatly reduces the burden on Board and committee members to figure out whether any one piece of information should be kept "confidential". The rule is less difficult to apply: do not disclose any information unless an exception applies.

There are a number of reasons for this rule including:

- For most regulators, it is a statutory requirement enforced by a significant penalty (e.g., a large fine);
- Much of the information is highly sensitive, especially personal information about practitioners;
- Disclosure through proper channels of communication helps ensure that the information is presented accurately and consistently;
- Disclosure through proper channels helps avoid attempts to inappropriately influence Board and committee members as they release the information privately;
- Disclosure through proper channels helps avoid the perception of special treatment if some people receive the information before others; and
- Disclosure through proper channels helps reduce any temptation by Board and committee members to misuse the information (e.g., for their personal benefit).

The duty of confidentiality applies to disclosure within the organization, not just disclosure to persons external to the regulator. For example, a committee member disclosing information to a Board member for no regulatory reason is not only inappropriate, it could even taint the Board member in their future activities (e.g., if they sit on a discipline panel dealing with the matter). The “need-to-know” rule applies.

Of course, there are exceptions to the duty of confidentiality. Those exceptions vary slightly from regulator to regulator, so it is important to check the provisions. However, there is an almost universal exception permitting disclosure where necessary to perform regulatory functions. For example, in order to investigate a complaint, the regulator has to interview witnesses and obtain relevant documents. Doing so invariably discloses the existence of the investigation into the practitioner. A second, almost universal, exception is where the information has already been made public by the regulator. The last phrase is important. For example, if a committee member learns that a practitioner is facing criminal charges, those charges are a matter of public record. However, until the charges are made public by the regulator, say at a discipline hearing, the fact that the regulator is aware of them is not public and the committee member cannot disclose knowing of their existence. Typically the disclosure of information by the regulator is done by the staff of the regulator so as to prevent inadvertent inappropriate disclosure by Board or committee members who may not be as familiar with the rules.

It is sometimes challenging for new Board and committee members to appreciate the relationship between the high duty of confidentiality on their part and the increasing expectation of transparency by the regulator. Transparency involves the systemic disclosure of information by the regulator in order to further the public interest and to demonstrate that the regulator is acting effectively within its mandate. The information selected for disclosure under transparency principles is carefully and consistently chosen because it allows the public to make



informed choices (e.g., the discipline history of practitioners) and to observe key regulatory activities in action (e.g., public discipline hearings; published reasons for decision). Inconsistent or unilateral disclosure of regulatory information by individual Board and committee members does not well serve the transparency goals of the regulator.

Where a Board or committee member accidentally discloses confidential information, it is important that the regulator's privacy officer (often the CEO) is informed immediately. That permits the regulator to take prompt measures to reduce the risk of dissemination of the information and to warn (and apologize to) affected individuals so that they can prepare themselves for any repercussions. A Board or committee member keeping the "slip" secret aggravates the harm that can result. Undoubtedly there will be a review of the circumstances of the confidentiality breach with a resultant revision of policies and procedures.

Many regulators request that Board and committee members sign an acknowledgement and undertaking reinforcing their confidentiality obligations.

#### *Confidentiality Scenario*

*Ernie Eager frequently engages in banter with colleague practitioners. One such exchange involves sharing the most embarrassing situation in which they have found themselves. Ernie shares an anonymous story about a young practitioner who was video-conferencing with a client from his parent's home when his mother walked up behind him and kissed him on top of his head. Ernie intimated that this incident was part of a much longer complaint Ernie reviewed for the regulator. Unbeknownst to Ernie, one of the attendees knew of this incident, including the name of the practitioner. As a result, Ernie's colleagues have just learned that the now identified practitioner is the subject of a complaint. Ernie asks the colleagues to keep the information confidential, but fails to notify the privacy officer for the regulator. The disclosure gets back to the practitioner under investigation who raises an "abuse of process" defence to the complaint and insists that Ernie should be charged with the provincial offence for breaching confidentiality. Ernie is removed from the complaints committee panel dealing with the complaint.*

Board and committee members must treat all information learned through the regulator with exacting discretion.

### **c. Conduct Unbecoming**

Board and committee members representing a public interest regulator must demonstrate a high level of integrity. Appropriate conduct must be exhibited both while performing duties on behalf of the regulator and while engaging in personal activities. Unbecoming conduct can indicate that the Board or committee member is unsuitable to hold their position with the regulator.

For example, claiming even a small false expense could undermine the ability of the Board or committee member to hold practitioners to account for false billings. Similarly, even a small request that reeks of entitlement, such as asking a staff member to pick up a Board or committee member's dry cleaning, damages the credibility of the organization.

Comments on social media can also render a Board or committee member unfit to remain in office. An example might be a posting a sexist, ageist or racist comment. Another illustration could be making a comment that is insensitive towards a vulnerable group, particularly a group served by practitioners. While Board and committee members are entitled to have their own personal views on societal issues, some opinions are irreconcilable with the values of the regulator.

Criminal or regulatory charges or findings can result in a Board or committee member being unable to continue with their duties. If the concerns are unproved, the Board or committee member might still be asked to take a leave of absence from their duties, or even to resign their position if the allegations are serious or have been screened to some extent. The presumption of innocence that exists in the criminal process may not be an adequate response where the reputation of the organization is at stake. For example, it may be incompatible for a regulator whose practitioners serve vulnerable populations to have a Board member charged with intimate partner violence and that fact published by the media.

Similarly, where a professional member of the Board or committee is the subject of a complaint or investigation by the regulator itself, serious perception issues can arise. Just like for the case of criminal charges, the Board or committee member may be requested to take a leave of absence if the concerns are serious or have been screened. It is very important that there be no perception of the Board or committee member receiving special treatment or interfering in any way with the investigation. A finding of professional misconduct will generally result in the Board or committee member being removed from their position.

It is impossible to identify every type of conduct unbecoming that could cause challenges to the Board or committee member's continued service with the regulator. However, some examples are often provided in the regulator's policies. For example, most regulators have a policy dealing with discrimination, abuse and harassment of any person working for the organization. These policies should be reviewed carefully. Some regulators also have a Code of Conduct for Board and committee members that covers some of these types of concerns.

### *Conduct Unbecoming Scenario*

*A staff member reports to the CEO that Ernie Eager makes her feel uncomfortable. For example, Ernie has commented on her “outfits” a lot. Ernie has also mentioned that he has an open marriage. At the last committee meeting Ernie suggested that they have dinner together to discuss a complicated new case. What is the CEO likely to do?*

This scenario illustrates a hugely awkward governance situation. The CEO has an obligation to protect the staff member from harassment. However, Ernie Eager is a member of the Board (i.e., the CEO’s “boss”). There likely is an organizational policy that requires such concerns to be investigated. Given the power dynamic, it is probable that an external expert would be retained to conduct the investigation and make a report with recommendations. During the investigation the staff member and Ernie likely could not be scheduled to work together. One of them, likely Ernie, would have to be reassigned. The overall outcome depends on the findings of the investigation and could range from no action, to remedial action (e.g., Ernie taking gender and boundary sensitivity training), to censure or even removal.

#### **d. Diligence**

The duty of diligence is intended to ensure that the regulator is effective in achieving its mandate. The work of the regulator is so important that it cannot afford to have even one Board or committee member who signs up simply to pad their résumé. Diligence requires preparation for all meetings and other activities, ongoing knowledge and skill development, and follow-through on action items.

An early indication of diligence for a new Board or committee member is full participation in the orientation opportunities provided by regulators. Such orientation generally includes information about the activities of the regulator and the Board and committee member’s role. Orientation can also include the development of essential skills related to risk management, strategic planning and policy making for Board members. Orientation for committee members could include adjudication skills and equity, diversity and inclusion training.

Meeting preparation is another hallmark of diligence. Reviewing materials is necessary to being able to contribute knowledgeably at the meeting and to identify any possible conflicts of interest that should be discussed, disclosed or declared. If the materials appear to be missing important information, Board and committee members should inquire as to whether its absence is intentional for some reason. Conscientious Board and committee members identify the key issues to be determined and the considerations relevant to making that decision.

Attending all meetings of the Board and committee is another aspect of diligence. Where it is not possible to attend a meeting, the Board or committee member should give as much advance notice as possible so that any alternative arrangements can be made. And while there

is a cultural overlay to punctuality, diligent Board and committee members make it a priority, especially if the meeting is held in a city where traffic can be unpredictable.

At the meetings themselves Board and committee members should actively participate. It is important for the Board or the committee that all reasonable perspectives are articulated. Passionate Board and committee members should not dominate the discussion.

Where a vote is taken (and it may not be where action items are determined through consensus), abstention by the Board or committee member constitutes a process failure. Rare exceptions may exist for a brand new Board or committee member at their first or second meeting as they are still learning. However, in other circumstances, not voting indicates that a failure has occurred. Perhaps the organization failed to provide sufficient information for the Board or committee member to feel informed enough to vote. Perhaps the Board or committee member failed to prepare adequately. Perhaps the Board or committee member failed to recognize the importance of voting. Perhaps the Board or committee member is worried about the fallout in the profession from a vote on a difficult issue. Perhaps the Board member believes they have a conflict, however, abstaining from a vote is not an appropriate method of dealing with a conflict of interest; the conflict must be declared and the individual should leave the room.

Diligence also includes promptly following up on expected contributions outside of meetings. This can include drafting reasons for decision, reviewing draft minutes, completing agreed upon surveys or meeting feedback forms, or conducting any requested research or inquiries.

#### *Diligence Scenario*

*There is little doubt that Ernie Eager has brought a tremendous amount of zeal to his orientation. However, during his first meeting he realizes that he does not understand the financial statements. They have never been a big part of his professional life. At first Ernie is hesitant to reveal this gap in his knowledge. However, his keenness takes priority and he asks the President if he could receive some education in interpreting financial statements. The President has the CEO set up a couple of training sessions for Ernie.*

Diligence is an indispensable attribute for Board and committee members. Fortunately it is one that most Board and committee members bring with them.

### e. Respect

Doing the work of a regulator is a team activity. There are certain “soft skills” that are vital to being an effective Board or committee member, and the ability to respect others within the organization is probably the most critical one of them.

Courtesy and civility are the main components of respect towards one’s regulatory colleagues. This includes paying attention during the meeting, avoiding side conversations and turning mobile devices off. Active listening techniques (e.g., head nodding, eye contact) can add a lot to the discussion.

Tone is everything. Board and committee members can (and sometimes should) disagree with each other. Board and committee members should call out comments that are inconsistent with the mandate of the regulator or where inadequate information has been provided. However, this should be done with humility, sensitivity and, perhaps even on occasion, humour.

Another crucial element of respect is for a Board or committee member to bring an open mind to the meeting. Tentative views on issues are to be expected. However, Board and committee members should enter the meeting with the possibility that their views could change depending on the points made by their colleagues. Indicating how one will vote on an issue before the meeting is disrespectful to both the process and one’s colleagues.

Another form of respect, discussed in more detail [elsewhere](#), is the principle of supporting the final decision once it has been made. This is called “speaking with one voice”.

#### *Respect Scenario*

*Ernie Eager proposes on the morning of the meeting to add a late item to the Board meeting agenda. The agenda is already full and Micaela, another Board member, is concerned that the issue is a distraction. Micaela, who sits on the same committees as Ernie, is reluctant to vote against adding it to the agenda as she knows that would be disappointing to Ernie. Should Micaela abstain so as to show respect to Ernie?*

Respect does not mean agreement. If Micaela believes the added agenda item would distract from other higher priority items, she should vote against the motion. However, Micaela can do so in a manner that shows respect to Ernie. For example, she could speak to the item during the discussion of the motion (or even privately with Ernie afterwards) indicating admiration for Ernie’s fervour but indicating that the planned and prepared agenda items require the Board’s full attention and energy.

## 6. Roles

### a. Purpose of Roles

One of the most challenging aspects of governance is reaching consensus on who does what. Where individuals and groups within the organization lay claim to making the same decision, confusion and conflict can result. For example, where an urgent legal proceeding against the regulator is served simultaneously upon multiple Board members and senior staff, and all of them believe they have the authority to retain legal counsel for the regulator, enormous and expensive confusion can occur.

Similar problems can ensue where individuals and groups feel it is within their role to make public statements on behalf of the regulator. For example, where the media approach the President, the CEO and individual Board members seeking comment as to whether practitioners should be re-posting client endorsements containing unverifiable claims on social media, inconsistent responses can easily result.

Equally serious is where individuals and groups think that someone else will make a decision and no one acts. Take the urgent legal proceedings example, above. If no one retains legal counsel in time to appear for the urgent court appearance, a serious adverse result becomes likely.

While there are commonly accepted approaches to who does what amongst regulators, those approaches are not universal. In addition, the approaches generally taken by regulators are often different than the approaches taken by other types of organizations. For example, a Board member whose only exposure to not-for-profit governance is through their own condominium may be surprised at how different the roles are for a regulator. For example, in a regulatory body, Board members who happen to know the personalities involved just do not intervene in a dispute (e.g., a complaint) to try to find a resolution.

#### *Purpose of Roles Scenario*

*The professional association is quite concerned about the proposal to increase the liability insurance required by practitioners by 25%. The association Executive Director approaches the CEO of the regulator asking that the increase be delayed to allow the professional association to make further submissions on it. The CEO, after consulting with the President, says the decision is final. The Executive Director then approaches the President who, obviously, says the same thing. The Executive Director knows Ernie Eager, who is one of its past-presidents, and asks Ernie. Ernie promises to make best efforts to seek a delay. Before Ernie can act, the Executive Director of the association sends out an email blast to the entire association membership stating that Ernie*

*has agreed that a deferral of the insurance requirement is sensible and will raise that issue at the next Board meeting.*

This scenario illustrates how important it is that all participants have a clear sense of their roles, and the limits to them.

The following sections describe the most common approaches to the roles of the various components of a regulator.

#### **b. Board Role**

Subject to external overseers (e.g., government, courts), the Board of a regulator is the ultimate authority for the organization. It is also ultimately responsible for the success of the organization. However, it is important not to confuse authority for activity. The Board cannot possibly perform all the tasks of the regulator. Nor do Board members have the skills to do so well. It cannot make decisions on individual registration cases, investigate complaints, hold discipline hearings, monitor individual practitioner professional development and post precise entries on the public register. Thus the role of the Board is to find ways to ensure that these activities are performed well.

[As already noted](#), most effective Boards perform three main functions: establish priorities, make policy and oversee the performance of the regulator. Any Board that does those three things well will be too busy to do anything else. [We have already discussed](#) how a Board of a regulator sets its mission, goals and strategies and [how they develop policies](#). Another important skill for Board members to develop is how to oversee the performance of the regulator without interfering in the activities of the regulatory committees or the operations implemented by staff.

An illustration of this concept is the review of the financial performance of the organization. The Board will typically receive quarterly financial statements that compare the revenues and expenses in various categories against the Board-approved budget. The Board would not delve into individual revenue or expense items. For example, it would not be aware of and would not question the payment of individual invoices. Rather, the Board would look for major variances from the budget and would expect explanations for unexpected trends. Often there is a ready explanation for a variance. For example, revenues may be much lower than anticipated until annual renewal time. Or a single, hotly contested discipline case may have pushed legal fees to a higher than usual level. Only where the trends suggest a larger issue would the Board act e.g., to raise fees, cut less important programs, or to dip into reserves. In addition, the Board appoints an auditor to review the financial activities of the organization to ensure that they are accurate and in accordance with established policies. The Board does not examine day to day transactions, even after the fact, but rather relies on expert, external consultants.

This approach to oversight should apply to all aspects of the regulator's activities. The Board should expect reports that reassure the Board that its activities are being performed well and

that no patterns of concern are developing. For example, the Board would likely want to receive reports from the regulatory committees indicating the number of cases dealt with over the period, the number of cases falling within each category, the number of appeals, the number of successful appeals, budget compliance and the average backlog of cases. Where there is a disturbing trend (e.g., the backlog of cases is growing or not shrinking despite targeted efforts), the Board should ask the committee for an explanation and suggest corrective action. Where necessary, the Board should provide resources to address the concern (e.g., appoint a larger committee; hire a new staff person).

#### *Role of Board Scenario #1*

*Ernie Eager, along with every other Board member, receives an email from a recently discharged employee of the regulator claiming that the employee had been fired unjustly and will sue for \$25,000 if not reinstated. Ernie asks that a teleconference meeting of the Board be called to address this issue. The President advises Ernie that this is an operational issue and that the Board should not interfere. Even if the lawsuit is successful, the \$25,000 amount would not be material to the overall budget of the organization.*

#### *Role of Board Scenario #2*

*Change the scenario. Ernie Eager, along with every other Board member, receives an email from a recently discharged employee of the regulator claiming that within the last six months 25% of the employees of the regulator have either been terminated or quit. Ernie raises this concern with the President. The President agrees with Ernie that this trend, if true, is troubling. The President confirms with the CEO that there is an issue and puts this item on the agenda. The CEO reports that she has also identified this trend and has determined that the head of human resources has a polarizing personality. The head of human resources has been let go and the CEO is proposing that an independent human resources firm be retained to provide support to the remaining employees, to assist in hiring a suitable new head of human resources and to suggest operational policies that will reduce the likelihood of this kind of situation occurring again.*

These scenarios describe an appropriate level of oversight by the Board. Interfering in individual employment issues is not appropriate. But where patterns develop, the Board should approach the CEO for an explanation and expect a solution if there is a problem.

Even here, the nature of oversight should be at a policy level. For example, rather than grilling the CEO on how this could have happened and why it was not noticed sooner, “generative” questions should be asked. Examples of generative questions in this context might be:



- What measures can we take to prevent this from happening again?
- What can the Board do differently to support you better in this area?

Of course, as with most governance principles, there are exceptions. For example, where there is credible information to suggest that the CEO has engaged in a serious breach of trust, a targeted (usually external) investigation may be warranted.

As the old adage goes, the Board steers and staff rows.

### **c. Individual Board Member Role**

Individual Board members have no authority of their own. Their authority comes from the Board itself or the committees upon which they serve. For example, an individual Board member cannot direct a committee or staff person to do anything. Neither can an individual Board member require a committee or staff person to provide them with any information. For example, a Board member cannot request that the CEO provide them with a report or update on an activity or initiative in which the regulator is engaged.

Board members work through the Board or committees. For example, a Board member could suggest to the Board that it obtain a report from a complaints committee as to the number and nature of complaints about advertising by practitioners. If the Board accepts the suggestion, then the request has the authority of the Board. Similarly, a member of the registration committee could request that the staff inquire of an applicant's past employer as to the applicant's knowledge, skills and judgment. Only if the registration committee concurs in the request would staff act.

This principle implies that there are proper and improper channels of communication. Directions and requests should generally be made at a meeting of the Board or committee. Once the Board or committee agree, its chair would communicate the direction or request to the appropriate staff person to implement. For substantive matters, that will typically be the CEO for Board directions or requests and the staff support person for committee directions or requests.

However, there are common-sense exceptions to these protocols. For example, if a Board or committee member, upon reading a meeting package, is concerned that they might have a conflict of interest, that concern should be addressed prior to the upcoming meeting. Ordinarily the proper channel of communication is for the Board or committee member to raise the issue with the chair who then contacts the proper staff person for guidance. However, on occasion time constraints, or a desire to avoid tainting the chair with certain information, may make it appropriate for the Board or committee member to approach the relevant staff person directly. Similarly, where there is a minor administrative issue (e.g., a Board or committee member is having difficulty opening an email attachment), they might approach the appropriate staff person directly for assistance.

The goal is to ensure that Board and committee members do not overstep their authority and that committees or staff persons are not put in the awkward position of having to manage an inappropriate request.

#### *Individual Board Member Authority Scenario #1*

*Ernie Eager is concerned about whether the move towards telepractice by practitioners sufficiently respects client privacy. Ernie emails the President asking that this item be placed on the agenda and that staff prepare a comprehensive briefing note on the issue. The President can choose to propose that topic for the next Board meeting agenda, but might indicate that until the Board accepts that this issue is a priority for the regulator, staff will not be asked to put a lot of effort into preparing a briefing note.*

In this scenario, Ernie followed the proper channels of communication. The President was also appropriately cautious about making significant demands upon staff before the Board determined whether such efforts were warranted.

A related issue is that individual Board members are not authorized spokespeople for the regulator. Typically the President and the CEO are the spokespeople for the organization. Thus other Board members need to be highly circumspect in their communications with external parties about regulatory issues. Making a statement that is incorrect or unapproved can create significant difficulties. Such statements may also be seen as constituting pre-judgment on the issue should the Board member have to deal with the topic later. Usually the best option is for the Board member to refer the external party to the President or CEO.

Again, exceptions may be made. For example, where there is a delicate issue and a Board member who is not the President has a past relationship with an external party (for example, the government Minister), the Board member might be deputized to approach them on behalf of the regulator. Another example might be where a Board member is at a workshop where a patently incorrect statement is made about the regulator. Sitting silently might be taken by others present as indicating agreement with the statement. It might be appropriate for the Board member to say to the group that the Board member believes that the statement just made is inaccurate. However, since the Board member is not there to speak on behalf of the regulator, the Board member would encourage those present to contact the CEO for accurate, authorized information.

#### *Individual Board Member Authority Scenario #2*

*Ernie Eager is approached by a colleague, Safiyyah, who is facing a complaint from a client. The complaint appears to be about a disagreement with a client in which both sides said things they now*

*regret. Safiyyah describes difficulties in retaining legal counsel and asks Ernie whether it would be a big deal if the response to the complaint is a bit late. Ernie is on the complaints committees and knows that extensions are routinely granted to practitioners for submitting a response. Ernie assures Safiyyah that a brief delay is not likely to be an issue. In fact, the complaint is a lot more serious than described to Ernie. The other panel of the complaints committee imposes an interim suspension when Safiyyah's response is not received on time. Safiyyah seeks judicial review relying on the conversation with Ernie to justify the delay in responding. Staff for the regulator are forced to interview Ernie and file an affidavit from him about the conversation with Safiyyah.*

This scenario illustrates the kind of difficulties that can arise when an individual Board member, without authorization, communicates with persons external to the regulator about regulatory issues.

Once a final decision has been made by the Board, all individual Board members must support it despite any opposition during the discussion and vote. Once decisions are made, the Board “speaks with one voice”. If asked about the decision afterwards, the Board member should not continue to communicate their disagreement, even if that earlier disagreement is on the public record. Rather the Board member should communicate the final decision and the rationale for that decision.

### *Individual Board Member Authority Scenario #3*

*The Board has struggled with a contentious item requiring all practitioners seeing clients to have their records be reviewed once every five years. Ernie Eager vigorously opposed the initiative arguing that records reviews should be targeted at high risk practitioners (e.g., those with a history of complaints). The motion passes with a bare majority, with Ernie voting against it. After the meeting numerous colleagues contact Ernie asking how he could have let such a motion pass. Ernie tells the practitioners that the proposal was fully debated, that the decision is final, and provides the reasons why the Board enacted the requirement.*

In this scenario, Ernie is speaking with one voice.

Challenges can also arise when a Board member needs to communicate with the regulator in their capacity as a registered practitioner. For example, Board members may need to respond to a complaint against them or may wish to obtain practice advice from the regulator. It is important for the Board member to exercise careful judgment. For example, it might be appropriate for the Board member to only respond in writing to a complaint so as to avoid any perception of trying to influence the staff person supporting the complaints committee. If

seeking practice advice the Board member might first alert the President and CEO so as to ensure that the communications are appropriate. The Board member should never imply that their position entitles them to special treatment.

#### **d. President / Chair Role**

The chair of the Board, sometimes called the President of the regulator, has a crucial role in the governance of the organization. While there is some variability amongst regulators as to the duties of the President, they typically involve the following:

- *Demonstrating Leadership.* Presidents lead by example. Being diligent in preparing for meetings and other activities carries over to other Board members. Demonstrating unflinching respect and courtesy, even in difficult situations, inspires similar behaviour by others. Following the highest standards of integrity (e.g., in avoiding the personal use of the resources of the regulator) ensures that the President has the moral standing to require the same of others. Focusing entirely on the public interest and avoiding small “p” politics will encourage others to do the same.
- *Supporting Board Members.* Presidents arrange for the orientation of new Board members, mentor Board members, listen to concerns that individual Board members might have, informally address minor transgressions by Board members, coach Board members who need encouragement to fully participate, and initiate formal actions for Code of Conduct breaches where they occur. On occasion the President may need to be more direct in supporting Board members by reigning in someone who has gone “rogue” including implementing the [Role Encouragement](#) procedures discussed elsewhere.
- *Facilitating Board Activities.* Presidents often take a leadership role in the collaborative process for preparing the agenda for Board meetings, ensure that sufficient supporting materials are prepared and distributed on a timely basis, chair Board meetings (or delegate that task to others), ensure accurate minutes are prepared and follow up on the implementation of Board decisions (particularly where they involve action items by other Board members). Presidents also have a responsibility to ensure that vacancies on the Board or a committee are addressed promptly.
- *Acting as Spokesperson.* Presidents, along with the CEO of the regulator, are almost always an official spokesperson for the regulator. The President often is the face of communications with practitioners, the government and professional advocacy associations. Because it is important that the message of the regulator is consistent with the decisions and policies of the regulator and the mandate of the organization, most Presidents rely heavily on the CEO to help formulate the content of their communication efforts. Where the President does not have strong communication skills or is not fully aware of an issue, the President may delegate some of their communication duties to others, such as the CEO or a Vice-President.

- *Link between the Board and the CEO.* The President is the contact point between the Board and the CEO. Where there is uncertainty on an issue, Board members would contact the President, who would then obtain clarification from the CEO. Issues between a Board member and a staff person are communicated through the President and the CEO. The President typically leads the communication of the CEO's performance review. Where formal Board confirmation is required (e.g., for signing contracts or cheques or approving larger expenses on behalf of the Board), the President usually provides it.

Even though the President has an important leadership role, the President still has no individual authority. The President does not make decisions on behalf of the Board. The President implements only the decisions and policies made by the Board. The President's communications are consistent with the directions issued by the Board.

#### *Role of President Scenario*

*The President and CEO meet annually with the Minister responsible for overseeing the regulator. As a part of the government's push to lower red-tape and taxes, the Minister pushes the President for a commitment to loosen the rules about the ownership of practices. The Minister also pushes for the lowering of annual fees for practitioners by 20%. The Board has not taken a position on these matters. The President promises to take these issues to the Board. The Minister presses the President for a commitment that the President will personally recommend these changes to the Board. What should the President say?*

The President has, perhaps understandably, already "pushed the envelope" by committing to put these items on the Board agenda. The President typically does not set the agenda alone. However, it would be inappropriate for the President to go further and give the requested commitment to the Minister. The President's duty to the Board is to facilitate the discussion. This requires a position of neutrality or, at the very least, an openness of mind to persuasion by other Board members. The President should avoid making a commitment. A suitable response might be: "I will communicate to the Board the full force of the government's position on these two items and your interest in seeing the regulator taking these steps."

#### **e. Committee Role**

Regulators usually have two types of committees: those that serve the Board and those that make regulatory decisions.

Committees that serve the Board perform functions on behalf of the Board and usually consist of mostly Board members. An example would be a Finance and Audit Committee. Typically they do "leg work" that would take up too much Board time for the entire Board to do. They

generally do not make decisions. Rather, they gather information, report a summary of that information to the Board, and sometimes make recommendations to the Board. While the Board does not want to repeat the “committee work” that has been done, the committee is accountable solely to the Board, and the Board is free to accept or reject the recommendations of the committee.

Committees that make regulatory decisions are quite different in nature. Typically they are created by legislation and have a legal function to perform. Examples are committees that deal with registration, complaints, discipline and incapacity matters. Frequently those committees have non-Board members on them. In fact, the trend in recent years is to have fewer, or even no, Board members on those committees. The decisions are highly legal in nature and they are typically reviewed by tribunals and Courts external to the regulator. The Board has no authority to review individual decisions by the committee. At most the Board reviews the overall performance of the committee in various categories such as the number of cases dealt with over the period, the number of cases falling within each category, the number of appeals, the number of successful appeals, budget compliance and the average backlog of cases.

Committees often make policies affecting the processes and procedures of their own committee. Those policies should not usurp the role of the Board to make organization-wide or significant high level decisions. Nor should the policies interfere with operational matters handled at the staff level. An example of an appropriate policy for a committee to make would be to craft a decision tree of the principles to apply when making a decision. For example, many complaints committees have a flow chart that guide the considerations (e.g., nature and seriousness of the complaint, apparent motivation of the practitioner, remedial steps already undertaken by the practitioner) that goes into determining how to dispose of a complaint.

#### *Committee Role Quiz*

*There is a sense at all levels of the regulator that false billing is becoming a significant problem. There has been some media coverage suggesting that the penalties for such misconduct at discipline have been too light. Who has the authority to make policies to foster more severe sanctions at discipline for false billing?*

This quiz illustrates the difficult task of identifying who has the authority to make different kinds of policies. The answer depends on the details of the nature of the policy.

#### *Committee Role Quiz – Proposed Answer*

*Every component of the regulator can make some part of the policy.*

- *The Board could enact a policy stating that false billing is serious misconduct warranting serious consequences. The policy could articulate the types of harm that results from such conduct. The*

*policy could be directed to the profession and the rest of the organization.*

- *The CEO could develop a policy for staff instructing prosecuting counsel to seek the highest defensible sanction for a discipline finding of false billing.*
- *The discipline committee could conceivably develop a sanctioning guide for various types of findings to promote consistency and to recognize aggravating and mitigating factors. However, any such policy would have to emphasize that panels in individual cases are not fettered by the sanctioning guide.*

Some regulators, particularly those with large Boards, have an Executive Committee made up of a portion of the Board. An Executive Committee is sometimes a hybrid of the two types of committees: it can be both a Board committee and a committee that makes regulatory decisions. More frequently in recent years Executive Committees are becoming just a Board committee whose primary purposes are to make urgent decisions that cannot await a full Board meeting and prepare the agenda and materials for Board meetings. There is a trend in the regulatory world to reduce the size of regulatory Boards and eliminate Executive Committees.

#### *Committee Accountability Quiz*

*The Complaints Committee of a regulator rendered a highly controversial decision taking no action on a complaint that a practitioner had assaulted the practitioner's spouse. The spouse ended up in the hospital for a week with serious injuries. The Complaints Committee reasoning was that the conduct was not work related. There are numerous articles in the media about the case and the Minister has called the CEO expressing grave concerns with the decision. At the subsequent Board meeting, which of the following options is most appropriate?*

- i. Setting up a task force to review the broader issue of the scope of the complaints process and recommending any appropriate changes to it.*
- ii. Removing the members of the Complaints Committee and appointing new members who have a track record of expertise in intimate partner violence.*
- iii. Directing the Complaints Committee to reconsider its decision.*

The task force option is the most suitable because it is consistent with the Board's strategic planning and high-level policy role. Removing and replacing the members of the committee is probably not appropriate because it interferes with the independent decision-making role of the committee. It could even create an appearance of institutional bias despite the noble motivation. Unless the enabling statute permits it (which would be highly unusual), the Board does not have the legal authority to direct a decision-making committee in an individual case.

Another possible option not listed in the scenario is for the regulator to initiate a judicial review or appeal of the committee's decision. Depending on the scheme of the enabling legislation, this option might be exercised by the CEO, or failing that, the Executive Committee, rather than the Board itself. Initiating an appeal or judicial review of the decision has the benefit of not directly interfering in the operation of the committee, like options ii and iii do. Rather, the regulator would be acting as a party to the discipline hearing. Those previously involved in the matter, such as members of the complaints committee that referred the matter to discipline, may need to disqualify themselves from this discussion.

#### **f. Committee Chair Role**

The role of the chair of a committee is analogous to the role of the President to the Board. The chair leads by example, supports committee members, facilitates the activities of the committee and provides a link between the committee members and the staff supporting the committee. The chair is also the spokesperson for the committee, for example, when it reports to the Board.

Where the committee sits in panels, the chair often assigns the panels. This could be done annually or for each individual case. In assigning panels the chair looks to ensure that each panel has an appropriate mix of skills, experience and perspective to make sound decisions. Where a committee acts through panels, the chair has a role to promote consistency in decision-making. While this might not involve participating in individual decisions, particularly for adjudicative-type decisions (e.g., discipline), measures can still be taken. Measures to promote consistency include a strong orientation process, having policies and decision-trees for panels to use and perhaps even post-decision discussions involving the entire committee.

Where a committee is acting through a panel, the chair of the panel performs a similar function in respect of panel business as the chair of the committee performs for committee business.

When facilitating a meeting, the chair should encourage participation by all committee members, keep the discussion on topic and focussed on the public interest, ensure that the tone and manner of discussion is constructive, and prevent any one committee member from dominating the discussion. The chair needs to ensure that the issues under discussion are clearly identified, that the relevant considerations are covered in the discussion, that the decision is unambiguous, and that the responsibility for implementing the decision is clearly assigned.

#### *Role of Committee Chair Scenario*

*Ernie Eager has been appointed to chair the registration committee. Ernie is concerned that the three panels of the committee may not be taking consistent approaches to when applicants with a criminal record should be permitted to register. What are Ernie's options?*



This scenario requires Ernie to balance appropriate measures to promote consistency against interfering in individual decisions. For example, it would likely not be appropriate for Ernie to review draft decisions for each of the panels and intervene in the ones in which he does not agree. However, Ernie could have the entire committee, with staff assistance, develop a policy articulating the principles the panels should follow when considering such cases. Ernie could schedule a workshop on the topic where all registration committee members could discuss the concepts and work through some scenarios together. In addition, Ernie could even have different panels consider actual decisions that had already been finalized to determine if different panels would have reached a similar result. If panels would have reached a different result, the panels could meet to discuss why.

#### **g. CEO Role**

Depending on the enabling legislation, the CEO may have two roles. Under many enabling Acts the CEO has specific statutory functions such as processing applicants for registration, receiving complaints, appointing investigators or inspectors and operating the public register. Where the CEO has statutory functions, the CEO has exclusive authority to perform them. The Board cannot interfere in those activities and would only evaluate the CEO's overall performance in these areas. The type of oversight for these functions would be analogous to the type of oversight by the Board of statutory committee actions.

The CEO's second role is to run the day-to-day operations of the regulator and support the Board and the committees. This role would include:

- Ensuring staff administer the activities of the regulator such as processing applications for registration, handling complaints, supporting discipline and incapacity proceedings, administering the quality improvement and professional development programs, and maintaining the regulator's website and public register;
- Ensuring staff perform the necessary operational functions of the regulator such as managing its physical premises, communications systems, human resources activities, and bookkeeping and finances;
- Ensuring compliance with the requirements of the enabling statute and other legislation such as employment standards, occupational health and safety, and human rights along with performing risk management of hazard, operational, financial and some strategic risks;
- Supporting the Board and committees including organizing meetings, preparing information briefs and reports, and implementing the strategic plan and policy directions;

- Fostering relationships with the government, professional associations, other regulators, consumer organizations and the public generally and, together with the President, conducting external communications; and
- Performing other functions assigned by the Board such as special projects and initiatives.

The CEO is required to act within the public interest mandate of the regulator. This can result in the CEO providing advice to the Board or a committee where the CEO is concerned that a potential policy or decision does not fully take into account the public interest.

It is sometimes said that the CEO is the sole employee of the Board. This expression means that the Board works through the CEO and does not involve itself in the management and direction of other staff. It is the CEO that assigns responsibilities to staff and reviews their performance.

That expression does not necessarily mean that the CEO should be treated as an employee. A key component to the successful governance of the organization is that there be a shared view of the relationship between the Board and the CEO. For example, a common perspective is that the CEO and the Board are partners working together to fulfill the regulator's mandate. However, another perspective is that the CEO is the servant of the Board, performing assigned tasks as directed. One can imagine the issues that can arise if some components of the organization took the partnership approach and others followed the servant model. The approach taken, even if it is consistently shared, also has a significant impact on what type of person will accept, or remain as the CEO of the organization.

The Board typically conducts an annual performance review. There is a wide variety of approaches taken to this review by regulators. For some regulators, it is really a review of the performance of the regulator as a whole and is based upon the priorities set out in its strategic plan. For other regulators, the focus is on the performance of the individual CEO. The processes vary from simply collecting the impressions of Board members to a formal review process conducted with the assistance of an external consultant. The nature and process of the performance review is affected by the organization's view of the relationship between the Board and the CEO.

### *Role of CEO Scenario*

*Ernie Eager proposes the requirement for practitioners to have \$2,000,000 in professional liability insurance be replaced with a requirement that practitioners disclose to clients during the initial retainer process what amount of insurance, if any, the practitioner carried. Ernie argues that the cost of carrying such insurance is excessive and ultimately results in higher fees being charged to clients. No one at the Board seems engaged in the issue and it looks like the proposal will pass. The CEO speaks to the matter reminding the Board that, before the*

*professional liability insurance requirement was enacted, a number of clients were left without financial recourse when mistakes were made. At that time the regulator faced pressure from clients, the media and government to do something. Ernie objects to the CEO speaking on the issue because the CEO is not a member of the Board and is there to implement whatever decision the Board makes.*

This scenario illustrates the public interest duty of the CEO and how different views of the role of the CEO can have a material impact on the decisions (and repercussions) for the regulator. Most regulators do value the CEO providing relevant background information to the Board so that decisions made are fully informed.

#### **h. Role Achievement**

It takes effort for the components of a regulator to develop and maintain a shared view of their roles. A strategy for doing so would be to adopt the four “E’s”:

- *Role Explanation.* There should be a clear written description of the mandate and responsibilities of each major component within the organization. This written document could be included in the regulator’s by-laws, Board-approved governance policies or even a formal Governance Manual (or a combination of them). The document provides an authoritative resource for everyone in the organization.
- *Role Education.* Each person involved in the direction and operations of the regulator should be orientated as to their mandate and responsibilities. Each person should understand how their role relates to the other entities within the organization. In addition to written resources, an educational session complete with discussion and scenarios is helpful. Board and committee members will often be asked to sign-off on having read and understood the regulator’s formal Code of Conduct and key fiduciary policies.
- *Role Evaluation.* Each component within the organization should be accountable for their activities. They should report on what they have done and receive feedback on their performance. Even the Board, including its President and individual members, should receive some form of systematic feedback on their performance.
- *Role Encouragement.* The feedback should have a goal beyond simply providing information. Areas of strength should be recognized. Areas for enhancement should be identified and the person or component is encouraged to improve their performance. In rare cases, action may need to be taken to ensure that the person or component complies with the organization’s expectations. An organization uses a number of tools to assist those involved in its affairs to perform their role effectively. For example, an individual Board member struggling with their role can received informal coaching from

the President along with tools (e.g., further training sessions, mentorship) to help them. In more serious cases, disqualification proceedings may need to be initiated.

### *Role Achievement Scenario*

*Ernie Eager's enthusiasm to be fully informed about the regulator's operations is difficult for him to contain. Despite reading the regulator's detailed Governance Manual and attending a comprehensive orientation session, Ernie continues to pepper Board and committee members with questions about their actions. The Board has an annual, anonymous peer feedback mechanism where Board members post comments about the performance of other Board members on a confidential website page. Ernie is the only person who has access to the comments about him. Almost everyone comments that Ernie gets overly involved in the work of committees making committee members uncomfortable and distracting them from doing their work. Ernie persists. In fact the following month Ernie sends an email to the chair of the registration committee suggesting it reconsider the application of one Ernie's friend's daughter because she is a "bright cookie". This email results in the President having an informal chat with Ernie providing a stern warning and suggesting that Ernie communicate with an assigned mentor in advance of any involvement in committee activities. The following week Ernie assists a practitioner and friend in the practitioner's response to a complaint. The complaints committee learns of the assistance because the practitioner mentions it in a follow-up communication. The regulator initiates proceedings to disqualify Ernie from sitting on the Board because of persistent breach of the Code of Conduct.*

This scenario illustrates how the four E's can be implemented.

## **7. Conclusion**

Good governance for a regulator requires a shared understanding of how things should be done so as to achieve the mandate of the regulator in the most effective manner possible. Good governance requires that all Board and committee members appreciate the mandate of the organization, bring the strategic planning, policy making and oversight skills to the table, honour their fiduciary duties and agree upon the roles and responsibilities of the various individuals and components within the organization. Such a consensus enables Board and committee members to focus on the substance of their regulation of the profession in the public interest.

## Appendix

### Applying Governance Principles to Additional Scenarios

The following ten hypothetical situations engage the governance principles discussed in this document. For each scenario:

- Identify the governance issues raised
- Indicate which governance principles apply and
- Suggest the appropriate resolution.

A model answer (which may not be the only acceptable response) follows each scenario.

#### a. Social Media Post

*You are a Board member who is active on Twitter. You see a series of postings about how the regulator is not doing enough to limit the supply of internationally trained practitioners given that there is already an oversupply. Mention is made of the “Murie” case (a registration case that was in the news). You defend the regulator saying that the regulator’s only role is to ensure applicants for registration are competent and ethical and that the regulator cannot get into restricting access to the profession for economic reasons. Any concerns?*

While your defence of the regulator and educating the profession about its mandate comes from a good place, this responding post does raise some concerns:

- Governance wise, you are probably not an official spokesperson and your post is more than a private conversation; it is a public declaration of the regulator’s position.
- It is possible that you could get it wrong and misstate the regulator’s position (although in this scenario you happened to get it right).
- To the extent that conversation was about a specific Murie case, it may involve a breach of confidentiality, especially if you reveal any details that have not already been made public by the regulator.
- By commenting directly, you may be creating an appearance of bias if you later sit on a registration case dealing with international graduates.

You should advise the President and CEO of the posting and allow them to consider what response, if any, should be made.

## **b. Promoting Alternative Dispute Resolution**

*Sargon, as a professional Board member, is concerned that too many cases are going to discipline. Sargon believes that to change behaviour, a more remedial approach should be attempted. At Board meetings Sargon actively questions the chair of the complaints committee about specific cases that have been referred to discipline. On one discipline hearing Sargon was part of the majority of a split panel halting a case for an abuse of process, a ground not raised by the defence, because informal resolution had not been attempted.*

First of all, Sargon is failing to address the issue at a policy level. Such issues should be considered by the Board after a full discussion based on research and data leading to the development of an appropriate policy. It is inappropriate for Sargon to review or challenge individual decisions by a committee; committees are held accountable for overall performance. In addition, Sargon is not implementing the current policies of the Board (namely to refer cases to discipline without always attempting informal resolution) by refusing to hear the case referred to discipline.

Sargon should attempt to address the issue on a policy level only. For example, Sargon should ask the Board to discuss the enhanced use of Alternate Dispute Resolution by the regulator.

## **c. Conversations**

*Which of the following is appropriate? Why or why not?*

- i. The chair of the Advertising Committee is approached by the CEO about putting an item on the agenda.*
- ii. A Board member asks the key IT person about whether the Russians could phish their way into the regulator's data base.*
- iii. A Board member asks external legal counsel about the suitability of some pages on the practitioner's own website.*
- iv. The President asks the support person for the complaints committee about some concerns the President has with the complaints process.*

This scenario raises the issue of the proper channels of communication. The third item also raises the issue of a Board member using regulatory resources for personal benefit. Using regulatory resources for personal benefit is both a form of a conflict of interest and a type of conduct unbecoming.

The first item seems to be an appropriate channel of communication. For committee work the chair of the committee would work with the appropriate staff person on putting together the agenda for upcoming meetings.

The second item is likely inappropriate. A Board member with concerns about the operations of the regulator would communicate with the President who, if agreeable, would convey the concern to the CEO. It might be that the comment was simply humorous chit chat, which would be much less of a concern, particularly if no substantive answer is expected.

The third item is completely inappropriate. Regulatory resources, such as legal advice, are managed through the CEO to ensure that the advice is necessary and properly budgeted. In this case the Board member is trying to use regulatory resources for personal benefit, which is unethical.

The fourth item is also likely inappropriate. It is not clear that this request is coming from the Board itself. The President, like any other Board member, has no individual authority to request information from staff apart from performing the President's usual duties, such as preparing the agenda. Even then, the President would request the information through the CEO.

#### **d. Rude and Condescending**

*Some practitioners in your area approach you with a concern that they have with the regulator. They tell you that each of them has had occasion to speak with the same senior staff person at the regulator about practice issues. The senior staff person has been rude and condescending to them. They give you some examples that you find disturbing. What do you do?*

This scenario involves issues of how one communicates with external persons. It also raises the issue of how one raises specific concerns about the operations of the regulator when you, as a Board member, only have broad oversight powers exercised collectively. One of your fiduciary duties is to provide relevant and significant information you receive to the regulator.

Assuming that you are not the President and thus, not an official spokesperson, you should not offer a substantive response. However, now that you know of a significant concern that could affect the reputation and effectiveness of the regulator, you should do something. Ideally you would do the following:

- Acknowledge the seriousness of the concern without indicating a view as to its accuracy. For example, "It is important for the regulator to be courteous and respectful at all times".
- Educate the practitioners as to your role, which does not include intervening in specific instances of staff behaviour.
- Direct the practitioners to the proper person who has the authority to address the concern, in this case likely the President or the CEO.
- Document the information and report it to the President in case the practitioners do not do so.

### e. Board Meeting Package

*As is its custom, the regulator posts its Board meeting materials on its website in advance of the meeting to be transparent. One item on the agenda is quite concerning to you. The proposal is to remove the requirement for criminal reference checks by applicants for registration on the basis that the requirement has a discriminatory impact on applicants from certain demographic groups and because it is a poor predictor of future professional behaviour. You are of the view that removing the requirement will expose the profession and the public to dishonest and abusive practitioners. Could you prepare a written position statement expressing concerns about the item on the agenda to circulate publicly for comment? Also, could you notify individuals and groups that are likely to oppose the proposal so that they should prepare submissions to the regulator in advance of the Board meeting?*

This scenario does not really raise confidentiality issues because the information being disclosed has officially been put into the public domain by the regulator. However, the principle of respect is fully engaged here. It shows disrespect to not only bring a closed mind to the issues (which the position paper would do), but to try to activate individuals and groups to politically support your position.

While it is appropriate to make written notes of your concerns, it is not appropriate to make them public. Also, any notification of individuals and groups that might be interested in the agenda item should be done in a neutral and impartial manner. Providing information about the item might be acceptable; suggesting tactics for opposing the initiative is not.

### f. Police Investigation

*You sat on a discipline panel a year ago that found a practitioner had been responsible for false billings. The practitioner was suspended for three months. Yours was the lead signature on the decision and reasons posted on the regulator's website. A police officer calls you at work to discuss the case because there is a criminal investigation into the practitioner's conduct. You would like to tell the police officer that it was your impression that it was the office manager who really was the instigator behind the scheme. The practitioner took responsibility at discipline because it was their office. However, the practitioner was probably as surprised as anyone about the false billing. What should you tell the police officer?*

This scenario raises the issue of who is the proper spokesperson for an adjudicative decision of a committee of the regulator. It also raises the issue of the appropriateness of discussing the



thinking behind a decision once the reasons for decision have been rendered. It also raises the issue of the propriety of a regulator trying to influence an external investigation and how that might be perceived by the public.

As a general rule, an adjudicative committee can only comment about its decisions through its reasons. It is inappropriate to expand on those reasons afterwards. In fact, doing so could create difficulties because it could disclose the confidential and privileged deliberations of the committee. In addition, you are not the official spokesperson for the regulator even though this is your decision. Finally, attempting to influence external investigations and proceedings is inappropriate and could convey the impression that the regulator is acting in the practitioner's interests.

You should decline to discuss the case with the police officer and refer them to the CEO.

#### **g. Bad Press**

*There have been a series of negative media articles about a pattern of financial "kickbacks" paid by suppliers and apparently received by a large segment of the profession. The articles comment on how your regulator seems to overlook this unethical behaviour. You send an email to all Board members urging that the matter be considered immediately with a detailed description of your concerns and proposed plan of action. Any concerns?*

This scenario raises the issue of how to put items on the agenda. It also raises the issue of communications between Board members outside of meetings. The approach taken in this case circumvents the agenda prioritizing and approval process. It also usurps the role of the President in initiating and chairing discussions. This approach also breaches the legal requirement for many regulators to hold Board-level discussions in open, public meetings.

The best option would be to send a written request that the item be placed on the agenda to the President (and the CEO if that is a proper channel of communication for such items in your organization) with an explanation of the rationale for the request. If that is not feasible, you could, at the beginning of the next Board meeting request that the item be added to the agenda, although that option is not ideal as it does not permit preparation of materials for the discussion.

#### **h. Expressing a Personal Opinion**

*You are a public member. The government is cutting back on the amount of services it offers in French. Nothing is said about the use of French by regulators of professions. In response to a media outcry on the issue you send a letter to the editor that says, in part, "I wish the Francophone community in Ontario would assimilate better like the English do in*

*Quebec.” There is a firestorm about your letter. It does not go without notice that you sit on the Board of the regulator.*

The issue is here whether this letter to the editor is conduct unbecoming a member of the Board. While this issue is not directly related to the regulator and while you were speaking privately, not on behalf of the regulator, this opinion has raised issues about your suitability to be a member of the Board. The regulator has to make decisions all the time as to the extent to which it accommodates requests to communicate with it in other languages, particularly French.

The response will depend on the impact that the letter to the editor has on the public’s confidence on the regulator to serve the public of Ontario effectively and fairly. Responses could vary from working together with the communications team of the regulator to “clarify” your letter to the editor, to your declaring a conflict of interest on any issues related to language of service, to being asked to resign from the Board.

#### **i. Updating the Sexual Abuse Prevention Plan**

*The regulator is updating its sexual abuse prevention plan. Which of the following would be appropriate for the Board to do?*

- i. ask the CEO to provide an analysis of discipline decisions over the past ten years that are inconsistent with current societal values;*
- ii. create a detailed investigation plan to be used by the regulator in all future allegations of sexual abuse;*
- iii. ask staff to review the literature and precedents of sexual abuse prevention plans and provide a proposed plan along with a briefing note as the other options considered.*

This scenario raises the issue of how Boards conduct policy development. It also covers the difficult challenge of assigning roles to preparing policies. Finally it covers the issue of what constitutes a high level policy performed by the Board as opposed to policies that should be done at the staff or committee level.

The first option of the Board asking the CEO to do research on an issue is generally appropriate. However, it pushes the boundary to ask the CEO to comment on the appropriateness of past committee decisions or to determine “current societal values”. The second option of creating a detailed investigation plan is inappropriate because the Board would then be dictating operational activities in an area in which the Board has little expertise. In addition, investigation plans would likely vary depending on the circumstances of individual cases. At most a Board-level policy would provide general parameters encouraging thorough and sensitive investigations. For example, a Board-level policy might suggest that early on in any investigation the complainant should be informed of the process and of their options. The third option, of doing relevant background research and making suggestions is quite appropriate, particularly if staff are careful to leave the policy decisions themselves to the Board.

**j. Hidden Connection**

*For no particular reason you Google the website of the regulator's auditor. You notice that one of the other Board members was a partner in the accounting firm until two years ago. You wonder whether that is an undeclared a conflict of interest. How should you respond?*

This scenario raises the issue of when a connection to a former employer might constitute a conflict of interest. The concern would be greater if the Board member was present when the Board approved the appointment of the auditor without disclosing the connection. The concern would be greater the closer in time the Board first participated in the approval of the auditor compared to when the Board member worked at the firm. The scenario also raises the issue of the duty of Board members to disclose information that might affect the integrity or well-being of the regulator, and how such disclosure should be done.

You likely have a duty to inform the President of the information you obtained. You would do so in a factual and non-accusatory manner. The more difficult question is whether you should speak with the other Board member first. This could be seen as a courtesy and as an opportunity to obtain clarification. It might even allow the Board member to make disclosure on their own and avoid an unnecessarily confrontational approach being taken. However, any such conversation could become controversial if it suggests that you are "investigating" the concern or creates the perception that you will allow yourself to be "talked out" of making disclosure to the President where one is required.