Health CLOs Should Take The Lead In Reputation Management

By **Nir Kossovsky** (September 9, 2021)


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At a time when health care organizations should be receiving accolades for their heroic performance in the face of a historic pandemic, they continue to face an array of crises that, if handled piecemeal, could threaten the viability of entire enterprises.

It may seem as if things like engaging employees with low morale, retaining and attracting talent, mitigating the threat of professional employee unionization, improving quality of care and ethics, addressing conspiracy theories about vaccines and other health matters, ensuring physical security of staff and facilities, and litigating medical malpractice claims with exorbitant jury verdicts, are all isolated crises.

But, in reality, they are disparate symptoms of a single systemic problem: reputation.

When staff feels like decisions are being made by so-called bean counters, who don't understand what it's like to work on the floor of a hospital, they're going to be skeptical when management rations personal protective equipment and still talks about their safety-first approach.

When continuing education programs designed to improve quality and enhance careers focus instead on maximizing billing codes, how seriously are staff going to take assertions about mission, vision and values?

If a deranged patient walks into the emergency room screaming — or worse, waving a gun — how many patients, staff and members of the community are going to ask themselves: With all the money they make, why aren't they taking better care of security?

And when a jury in a malpractice case hears that a hospital has been short-staffed for months, even as the hospital continued to see its patient census increase, how is that going to color its verdict?

At the root of all these diverse crises is institutional reputation, which for too long organizations have relegated to their public relations and marketing departments. Effective reputation risk management requires much more than marketing. The ultimate strategic cure is a robust, enterprisewide reputation risk management process that creates reputational resilience.

Chief legal officers should lead the charge. They are uniquely positioned within the organization to do so, having a strategic advantage when it comes to developing risk management and governance frameworks.

Boards trust counsel to guide them. And many boards are turning to their counsel for guidance as the ever-shifting winds of cultural change increasingly put regulators, courts and politicians on their heels, scrutinizing their reputation risk oversight.

Chief legal officers are also empowered to cut across corporate silos, and they should do so to centralize enterprisewide intelligence gathering on stakeholders' expectations. That is a first and fundamentally crucial step to adapting corporate operations so that they either align with or manage those expectations. A disconnect between existing operations and stakeholder expectations is the very definition of reputation risk.

CLOs — with their cross-departmental access — are also keyed in to spot the early warning signs of reputational trouble. And they are already entrenched in the risk management process overall, particularly in relation to litigation risk. Managing war rooms, operational planning and directing multidisciplinary teams in a crisis all already fall under their expertise.

They can have candid conversations with the organization's leadership and retain outside counsel to facilitate such conversations under the protection of attorney-client privilege. Third-party consultants and underwriters can also provide subject matter expertise, insurance or financial risk transfer, while both underscoring the organizational importance of managing reputation risk and authenticating the process.

Here's the root cause of much of the problem: silos.

All health care organizations suffer from the siloing of information along both professional and service lines. This siloing is compounded by the cultural clashes often seen in health care institutional mergers, the emergence of multiple competing functional centers of mid-level authorities in professional and service lines, and the progressively greater remoteness of corporate governance and leadership. In health care, size and complexity are reputation risk hazards.

The reputation risk management framework enables the organization to understand how what may seem like an isolated issue, like unionization activity or a protest by nurses working in short-staffed situations, actually poses a broader reputational risk by failing to meet the expectations of local politicians.

This risk can lead to increased regulatory scrutiny, which in turn can have an impact on government grants, which can impact the system's competitive standing, which can impact its financial picture and bond ratings.

It allows for input from the diverse group of functional mid-level leaders from within the organization, so that, for example, the handling of a quality or safety issue is understood from the perspective of all the institution's stakeholders. Thus, while "Are we going to get sued and what's our defense?" reflects the mindset of some stakeholders, others will see both an opportunity for reputational enhancement and a strategy for mitigating the risk of reputational crises.

If a patient has a bad result, are they more likely to be willing to engage in a discussion about what went wrong and what the appropriate remedy is, or are they more likely to hire a lawyer immediately? Is a jury more likely to view a malpractice case as an isolated incident, or more likely to view it as a case of institutional malfeasance where punitive damages are appropriate? The greater institutional impact becomes the basis for the institution's reputation strategy.

Once a framework is in place, marketing and communications will have a great story to tell to key stakeholder groups — an authenticated story of sound reputation risk management. Recognition of the value of this process is what deters future crises, mollifies stakeholders, and generates the reputation premium.

As counsel use this process as a means of looping in the board of directors, they must take care to bring them actionable strategic insights, driven by clear, measurable and proven accurate metrics that would evidence dutiful oversight within the context of In re: Caremark International Inc. Derivative Litigation in the Delaware Court of Chancery in 1996, and more recently, Marchand v. Barnhill in the Delaware Supreme Court in 2019.

This should satisfy board members who currently struggle tactically with a deluge of piecemeal issues and potential threats.

Counsel should be mindful of traps and pitfalls. A prevalent trap, especially in health care, is an overreliance on marketing's perspective. The time for such narrow thinking has long passed. Today, effective reputation risk management requires a broad understanding of the possible risks and liabilities facing an institution in light of the institution's patient mix, strategic objectives and interested stakeholders.

An equivalent trap is overly relying on frameworks of regulatory compliance or classical law and economics. Regulators comprise only one of the many stakeholder groups, and the limits of U.S. v. Carroll Towing Company, decided by the U.S. Court of Appeals for the Second Circuit in 1947, have been well demonstrated.

Another major pitfall is failing to distribute the workload. Leadership requires a position of authority to spur action within boards and among upper management enterprisewide, which CLOs clearly possess. However, execution requires an integrated reputation group comprising internal owners of different stakeholders.

Finally, while marketing cannot be the driver of this process, it does have an important role that may sometimes be overlooked. Promoting effective risk management, risk financing and risk transfer to external audiences is one of the keys to realizing the sought after reputation premium.

Organizations that meet or exceed their stakeholders' expectations during times of crisis are going to come away with stronger, tighter operations and better reputations. Employees will be happier. Their care will be better, making them the preferred employers and providers. Conversely, those that fail to anticipate their stakeholder groups' expectations will be in for a bumpy road.

CLOs are in a unique position to shepherd their organizations toward reputation resilience with intelligence gathering and operational alignment that will create an authentic story for marketing, communications and investor relations to tell. Their boards, executive team and entire organizations will be rewarded for the effort.

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