MANAGING CONFLICT IN AFFILIATIONS BETWEEN NEW HAMPSHIRE HEALTHCARE CHARITABLE TRUSTS

Dispute Systems Design Clinic

Harvard Law School

WHO WE ARE

This report was prepared by a student team from Harvard Law School's Dispute Systems Design Clinic ("DSD Clinic"), which is part of the Harvard Negotiation & Mediation Clinical Program ("HNMCP"). HNMCP does innovative work in dispute systems design, negotiation, mediation, facilitation, and conflict engagement. Clients of the clinic include private corporations, non-profit organizations, government agencies, and community groups, in the United States and abroad. Our faculty support students as they develop critical problem-solving skills, apply theory to practice, and deliver tailored conflict management solutions to our clients.

The authors of this report, Tara Noble and Jason Daniels, are second-year Harvard Law School students enrolled in the DSD Clinic during Fall 2023 semester. Ms. Noble and Mr. Daniels worked under the supervision of Neil McGaraghan, a Clinical Instructor at the DSD Clinic.

Our client for this project was the Charitable Trusts Unit ("CTU") of the New Hampshire Department of Justice, whose mission is to protect the public interest in the organizations and assets committed to charitable purposes in New Hampshire. The CTU engaged the DSD Clinic to formulate guidance for board members, executives, and other key leaders of healthcare charitable trusts that are considering affiliating or are already affiliated with other healthcare charitable trusts.

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Lastly, thank you to all readers for taking the time to examine this report. It is our hope and mission that you find our data and analysis useful for preventing and navigating conflict both before and following an affiliation between healthcare charitable trusts.

EXECUTIVE SUMMARY

Recent decades have seen a national trend toward hospital consolidation. Smaller, more regional, and rural hospitals are joining larger hospital systems or combining with other regional hospitals to form their own system. For many HCTs, consolidation alleviates severe financial pressure and preserves the ability to continue offering quality care in the communities they serve. For others, it may boost purchasing power, increase reimbursements, add leverage with insurers, enhance recruiting, or provide access to state-of-the-art equipment and services.

Ideally, consolidation produces enduring, mutually beneficial affiliations. The agreements governing successful affiliations empower parties to maintain and improve quality care for their communities. Successful affiliations are characterized by trust, open and consistent communication, clear understanding of each hospital's respective powers and responsibilities, and compatible institutional missions and cultures.

In practice, affiliations often generate tension and conflict that hinder or prevent parties from attaining the benefits of affiliating. Often, conflicts arise from underlying conditions that are overlooked or not sufficiently addressed by parties at the earliest phases of their affiliation. Even after a thorough, careful negotiation process, affiliated entities sometimes find that they are unprepared to navigate conflict that arises in their partnership.

This project sought to answer the following question: how can board members and executives of healthcare charitable trusts ("HCTs") anticipate and navigate conflicts that arise before and after change of control transactions? Our assessment and investigation relied heavily on interviews with HCT board members, executives, advisors, academic / industry experts, and government officials. We also collected data through an anonymous survey of board members and executives at affiliated hospitals. We focused on symptoms and causes of conflict in HCT affiliations and the impact that conflict has on key stakeholders.

This report details our principal findings and recommends measures that affiliating HCTs might adopt to manage conflict more effectively and build enduring alliances.

Based on our assessment, we offer the following findings:

Finding 1 - Affiliating HCTs have important needs that go beyond financial considerations. When those needs are not clearly communicated and addressed in the negotiation phase, they go unmet in the implementation, which can lead to conflict. (read more at pp. 10-12)

Finding 2 – An affiliation entails changes in structure and operation. Implementing the changes creates tension that may be compounded absent strong relationships and established processes for raising and resolving conflict. (read more at pp. 12-13)

Finding 3 - Affiliating HCTs have distinct missions and cultures. Failing to reconcile them causes significant conflict and may discourage the parties from fully committing to the partnership. (read more at pp. 13-16)

Finding 4 - Boards and executives managing an affiliation have expanded and sometimes competing duties. The shift can be confusing, and the full scope of these duties is sometimes misunderstood or overlooked. (read more at pp. 16-18)

Based on these findings, we recommend that boards and executives:

Recommendation 1– Identify and communicate each organization's interests and discuss how an affiliation might meet them. (read more at pp. 26-29)

Recommendation 2 - Prioritize transparency, communication, and fair dispute resolution processes to build a foundation of trust to navigate conflict. (read more at pp. 30-34)

Recommendation 3 - Harmonize and align mission and culture, and honor unique differences in mission and culture where appropriate. (read more at pp. 35-37)

Recommendation 4 - Establish well-defined roles and responsibilities of boards and executives. (read more at pp. 38-40)

Using advice from stakeholders and other interviewees, research on best practices for hospitals, and conflict/dispute resolution theory, the Recommendations section of this report (pp. 26 – 40) details specific ideas and strategies that affiliated HCTs can employ to implement these broad recommendations.

BACKGROUND

Over the past two decades, hospital consolidation within the United States has increased.[1] From 1998 to 2021, the number of hospitals nationwide dropped from 8,000 to 6,000 as a result of 1,887 announced hospital transactions.[2] The percentage of hospitals that are part of a larger system increased from 53 in 2005 to 66 in 2017.[3] The COVID-19 pandemic increased financial pressures on smaller, independent hospitals, driving more of them to consolidate.[4] Consolidation has continued to rise in the wake of the pandemic, extending the trend.[5]

New Hampshire is no exception to the national trend. Fiscal pressures and demographic realities have resulted in most of the state's hospitals forming or joining a larger system.[6] Of the thirty-one members of the New Hampshire Hospital Association, twenty-five are current or prospective members of hospital systems.[7] This trend is most apparent in critical access hospitals ("CAH"). CAHs are smaller nonprofit entities that provide health services to rural communities that lack easy access to other medical facilities.[8] These hospitals provide affordable health

[1] *See* Brent D. Fulton, "Health Care Market Concentration Trends in the United States: Evidence and Policy Responses," 36 HEALTH AFFAIRS 9 (Sep. 2017).
[2] Hoag Levins, *Hospital Consolidation Continues to Boost Costs, Narrow Access, and Impact Care Quality*, LEONARD DAVIS INSTITUTE OF HEALTH ECONOMICS (Jan. 19, 2023), https://ldi.upenn.edu/our-work/research-updates/hospital-consolidation-continues-to-boost-costs-narrow-access-and-impact-care-quality/.
[3] Karyn Schwartz, WHAT WE KNOW ABOUT PROVIDER CONSOLIDATION, KFF (Sep. 19, 2020), https://www.kff.org/health-costs/issue-brief/what-we-know-about-provider-consolidation/.
[4] *Id.*
[5] *Id.*
[6] NH AG CTU Public Hearing, *Public Hearing on Proposed Transaction Between Valley Regional Hospital & Dartmouth-Hitchcock Health* at 16:24, YOUTUBE, https://www.youtube.com/watch?v=r2V8wgPKoM0.
[7] Hospital Members, NEW HAMPSHIRE HOSPITAL ASSOCIATION, https://www.nhha.org/hospital-members/.
[8] *See* 42 U.S.C. § 1395i-4(c).

services and employment to the communities they serve.[9] When CAHs are forced to close under financial or other pressure, it threatens the health and economic wellbeing of these communities.[10] In part to avoid these consequences, many CAHs have affiliated with larger systems. Out of thirteen CAHs in New Hampshire, three remain independent (Cottage Hospital, Speare Memorial Hospital, and Littleton Regional Hospital).[11] The remaining ten have affiliated with or formed larger systems.[12] Of those ten, two are currently seeking disaffiliation from a system with which they previously affiliated.[13]

Along with the increase in affiliations there have also been notable disaffiliations. The collapse of Optima Health in the 1990's is an early example. Faced with financial threats to their viability, in 1994 Catholic Medical Center (CMC) and Elliott Hospital affiliated to form a new entity called Optima Health.[14] While the affiliation at first appeared to be a financial success, the partnership collapsed due to the hospitals' divergent cultures, public reaction to the consolidation plan, and the transaction's alteration of the hospitals' charitable missions.[15] These and other factors led Optima Health to dissolve in June of 2000 after an arduous disaffiliation process.[16] Before disaffiliating, Elliott had nearly finished construction of a new cardiac services facility.[17] CMC's cardiac wing — a well-respected practice and the only such wing approved by the state — was to move into this facility after affiliating.[18] Following Optima's dissolution, CMC's cardiac wing remained the only cardiac unit approved by the state government, and Elliott was unable to use its newly constructed cardiac center.[19] Unravelling these two entities cost millions of dollars and sent shockwaves through the New Hampshire healthcare community.[20]

Following Optima's collapse, the New Hampshire legislature enacted RSA 7:19-b. This statute requires that all change of control transactions satisfy specific factors, including that the acquiree exercise "due diligence in selecting the acquirer, …, negotiating the terms and conditions of the proposed transactions, and in determining that the transaction is in the best interest of the healthcare charitable trust and the community or communities which it serves."[21] The CTU reviews each proposed transaction to ensure compliance with the statute.

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[9] Rural Hospital Closures Threaten Access, AMERICAN HOSPITAL ASSOCIATION, 3 (2022), https://www.aha.org/system/files/media/file/2022/09/rural-hospital-closures-threaten-access-report.pdf.
[10] *Id.*
[11] Flex Monitoring, Critical Access Hospitals Locations List, UNIVERSITIES OF MINNESOTA, NORTH CAROLINA AT CHAPEL HILL, AND SOUTHERN MAINE, https://www.flexmonitoring.org/critical-access-hospital-locations-list.
[12] *Id.*
[13] *See* GRANITE ONE HEALTH, JOINT NOTICE TO THE DIRECTOR OF CHARITABLE TRUSTS PURSUANT TO NEW HAMPSHIRE RSA 7:19-B (May 24, 2023), https://www.doj.nh.gov/charitable-trusts/documents/0-grantiteone-notice.pdf (discussing Huggins Hospital and Monadnock Community Hospital's plans to withdraw from and dissolve Granite One Health, a prior affiliation with Catholic Medical Center).
[14] NEW HAMPSHIRE CHARITABLE TRUSTS UNIT, NEW HAMPSHIRE ATTORNEY GENERAL'S REPORT ON OPTIMA HEALTH, 6 (Mar. 10, 1998).
[15] Julia L. Eberhart, "Merger Failure: A Five-Year Journey Examined," 55 HEALTHCARE FIN. MGMT. 4, 4 (Apr. 2001).
[16] *Id.*
[17] *Id.* at 3.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 4.
[21] RSA 7:19-b.

Despite these measures, HCTs undergoing change of control transactions have continued to experience challenges. In some cases, board members and executives of HCTs have encountered such conflict within and between their affiliated hospitals that they have been forced to disaffiliate. By way of example, four CAHs in Grafton and Coos Counties formed North Country Healthcare in 2014.[22] The terms of their agreement allowed any member to withdraw from the affiliation after a three year waiting period.[23] One member exercised its withdrawal right in April of 2019, three days after the waiting period expired.[24] This quick withdrawal and ensuing litigation revealed an unhealthy marriage between the North Country system and the withdrawing entity.

Hospital consolidations often occur under corporate member substitutions in which one organization becomes the sole corporate member of another.[25] Along with this status come certain powers reserved for the sole corporate member, often including the right to appoint directors, approve budgets, change by-laws, and appoint staff members.[26] And while these transactions preserve many characteristics of the local entity,[27] and the sole corporate member owes fiduciary duties to its subsidiary,[28] corporate member substitutions are still prone to conflicts that may jeopardize an affiliation.

The CTU engaged the DSD Clinic to study these transactions and the factors that may indicate an unhealthy affiliation or the potential for disaffiliation. This project focuses not only on discrete disputes or conflicts that arise between affiliated entities (or, more accurately, between their people), but also on "conflict" that entails frustration, disappointment, dissatisfaction, etc., that may eventually mature into a dispute. Conflict in many instances may benefit parties, providing an opportunity to recognize and incorporate necessary changes.[29] The aim of this project is to determine how the boards and executives of HCTs may anticipate potential conflict stemming from their affiliation, prevent conflicts from arising, and navigate conflicts that do occur before, during, and following corporate member substitutions.

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[22] NEW HAMPSHIRE CHARITABLE TRUSTS UNIT, WITHDRAWAL OF LITTLETON HOSPITAL ASSOCIATION INC., FROM NORTH COUNTRY HEALTHCARE, 1 (Sep. 13, 2019) https://www.doj.nh.gov/news/2019/documents/20191014-littleton-hospital.pdf.
[23] *Id.* at 3.
[24] *Id.*
[25] *See* Letter from Tom Donovan, Director of Charitable Trusts, to Joseph Foster, New Hampshire Attorney General, 1 (Feb. 13, 2017).
[26] *Id.*
[27] *Id.*
[28] *Id.* at 3.
[29] *See* Howard Gadlin, "Productive Disagreement," *in* 2 THE NEGOTIATOR'S DESK REFERENCE 239, at 245 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).

METHODOLOGY

We spent several weeks gathering information from primary and secondary sources. Our goals were to: (i) examine the context and background of affiliations between HCTs in New Hampshire, (ii) uncover the nature and the sources of conflict that affiliated HCTs experience, and (iii) identify steps that HCTs can take to prevent, ameliorate and navigate conflict.

Primary Research

Interviews

Much of our assessment data came from interviews with stakeholders and experts on hospital affiliations. We relied initially on a list of stakeholders suggested by the CTU. Our research led us to a much broader base of stakeholders. Interviewees fell into one or more of the following categories: hospital executives, governmental actors, academic experts, or healthcare industry experts and advisors. Although the interviewees came from various backgrounds, each had either direct experience working within New Hampshire's healthcare industry or had exposure to this state's healthcare businesses and practices through their research and work.

We advised all interviewees that the information they shared might be included in this report, and that their insights would be aggregated and shared without attribution. We did not share with the CTU, nor with any other stakeholders, the identities of anyone we interviewed. We took this approach to our primary research with the goal of encouraging transparency and open dialogue with interviewees.

Through our interviews we sought to gather first-hand accounts or general expertise and perspectives on affiliations between HCTs. Each interview was unique, of course, though in general our aim was to address the following topics:

- The interviewee's background and experience with affiliated HCTs
- Types of conflicts and major areas of disagreement that affiliated HCTs experience
- Underlying sources and causes of the conflicts that exist among parties to an affiliation
- The role of the CTU in overseeing affiliations and resolving conflicts between HCTs
- Potential solutions and methods that can be employed to prevent and resolve conflict

Interviews were led by one student as the primary interviewer, while the other took notes and recorded interviewees' responses. We shared notes of each interview with that interviewee so they could verify that we accurately captured their insights.

Survey

We also conducted a written survey of hospital executives and board members of hospital systems that had undergone affiliations. The survey asked respondents to share their perspective on the affiliations that they had experienced, and it addressed the following topics:

- Organizations' preparations for affiliation
- Decision-making ability and control of the respective parties pre- and post-affiliation
- Negotiation practices and tactics used in the affiliation
- Trust, transparency, and communication between the affiliating parties
- Dispute resolution practices for affiliated parties

Responses to the survey were collected and aggregated anonymously.

Secondary Research

We supported and expanded our data collection through investigation into secondary sources on hospital transactions and conflicts among affiliated healthcare entities. The sources of our secondary research included reports published by the CTU on affiliations and disaffiliations of healthcare charitable trusts, as well as articles and reports on trends and best practices for affiliating healthcare organizations produced by the American Hospital Association and similar entities. We also consulted academic research on negotiation and dispute resolution. These materials are directed at negotiating and executing transactions, building trustworthy and enduring relationships, and resolving disputes in an inclusive, efficient, and just manner.

The secondary research was conducted, in part, to develop a strong baseline understanding of hospital affiliations, especially in New Hampshire, prior to commencing interviews and the survey. Our goal was to ensure that our questions were well-informed and targeted at important topics. Additionally, secondary research was crucial in developing a bridge between the project's findings and recommendations. Thus, our recommendations are not only practical and directed at real problems that hospitals in New Hampshire face, but also are grounded in respected academic research.

Limitations

Although we gathered insights and perspectives from many healthcare and hospital professionals, our primary research has certain limitations. These interviews were only conducted with a pool of candidates who were willing to engage in this project and were necessarily held over the course of only one academic semester. The survey was distributed to and completed by a limited number of executives and board members of healthcare systems. Due to time restraints, we were unable to interview or survey the community members served by the HCTs that are the subject of this report. Therefore, our findings are limited to the experiences shared by the specific individuals that participated in the interviews and survey. We acknowledge that the data described in the forthcoming sections may not fully reflect the opinions of all stakeholders in the New Hampshire healthcare community.

FINDINGS

1. AFFILIATING HCTs HAVE IMPORTANT NEEDS BEYOND FINANCIAL CONSIDERATIONS. WHEN THOSE NEEDS ARE NOT CLEARLY EXPRESSED AND ADDRESSED IN THE NEGOTIATION PHASE, THEY MAY GO UNMET IN THE IMPLEMENTATION, WHICH LEADS TO CONFLICT.

There are myriad needs HCTs may be seeking to fulfill by affiliating. Financial concerns are obvious and are more likely to be the primary focus of negotiations. Other interests may be less obvious but are nevertheless important, such as preserving institutional identity or autonomy. When such interests are not explicitly made part of the negotiation, they will not be adequately addressed in the affiliation agreement. This can lead to frustration, disappointment, resentment, and even disaffiliation.

Financial and quality-of-care considerations

HCTs often affiliate with clear fiscal and quality of care considerations in mind. Benefits to larger hospital systems include access to an expanded patient population, higher reimbursements, and more revenue to put back into delivering better care and cutting-edge practices. For smaller hospitals, joining a larger system offers access to resources and expanded services: group purchasing, increased bargaining power with insurers, and access to tertiary care centers and providers. Affiliation also offers some CAHs financial security that can be the difference between continued viability and shutting down. One interviewee conveyed a reality well-known by those working in the rural healthcare context: "One small critical access hospital can be devastated by unforeseen circumstances." The COVID-19 Pandemic exacerbated this concern, leading many rural hospitals to consider affiliation to achieve financial security. As one executive phrased it, these financial pressures can lead smaller hospitals to take the "path of least resistance" towards affiliating with a larger system.

"One small critical access hospital can be devastated by unforeseen circumstances."

Preserving culture, mission, and identity

Financial health and improved care are by no means the only important goals for many HCTs. Indeed, many stakeholders noted the significance of preserving the culture, role, and identity of their hospital in the community they serve. One hospital executive noted that when affiliating with another HCT, "people only want to change enough that they can stay the same." These entities possess institutional identities linked to the workplace cultures of their staff, the communities they serve, and their history in their respective regions. That identity informs how an HCT's staff understand their institution, how physicians and staff interact, the level of scholarship generated from the hospital, and the staff's relationships with patients. Preserving that identity is a vital interest of many HCTs.

Many HCTs in New Hampshire have served their community for decades. With this history come community expectations about the services offered by the hospital, its presence in the community, and even its name. Stakeholders cited the loss of subsidiary hospitals' labor and delivery units as one example of communities being frustrated by the impact of an affiliation. On a community engagement level, if a hospital has been a sponsor of community events in the past, the community expects that these activities will continue. Where a hospital has been known by one name for decades, a name change may shift the community's perception of the hospital from a local institution to just one branch of an impersonal entity. Stakeholders reported that the people who make up community-based HCTs care deeply about preserving their ability to meet community expectations and maintain the long history of community service.

Preserving autonomy

Many stakeholders also reported a strong interest and expectation of preserving a measure of the autonomy[30] over decisions affecting their hospital that they enjoyed prior to affiliating. This expectation often does not align with reality; an executive noted that in affiliations between smaller and larger entities, "the big ship tells and does not ask the smaller hospitals what to do." And as one survey respondent noted, their organization entered an affiliation "due to lack of funding and providers," but addressing those needs came at the expense of sharply limited board and management powers.

> "[Communication] can work for you or against you, but it cannot be ignored."

The impact of forfeiting autonomy is compounded when it is not addressed during negotiations and comes as a surprise once the entities are affiliated. Some boards and executives believe they will retain a certain level of control over their organization, only to discover that this expectation cannot be met. One person familiar with the North Country breakup noted that the exiting entity seemed to discover, too late, that it lacked control over decisions affecting its operations, and lacked influence within the larger system. An expensive, bitter disaffiliation ensued.

It is worth noting that a loss of autonomy is not always a surprise: many survey respondents reported that they understood that their decision-making authority would change. Importantly, this observation was correlated in the survey results with a corresponding response that the governing affiliation agreements contained clear allocations of reserved powers.

Unmet needs and false expectations

Particularly when financial pressures and incentives are key drivers of an affiliation, the parties may rush into an agreement to satisfy obvious financial needs. This can come at the expense of taking sufficient time to communicate and address other vital, but more subtle, interests. As one executive noted, sometimes parties to an affiliation "get excited about the deal and try to minimize potential conflict because they want the deal done." Minimizing these issues during initial negotiations conceals areas of potential disagreement at the front end and postpones conflict bubbling to the surface following affiliation. By then, conflicts can be much more expensive to resolve and may cause considerably more damage to the relationship between the parties than if they had been fully disclosed and fairly addressed in the negotiations.

Invoking again the North Country disaffiliation, one interviewee noted that the exiting hospital's failure to disclose its expectations for the affiliation led the other parties to feel "sandbagged" when it withdrew. When parties fail to transparently share their expectations or needs at the negotiation phase, they risk creating false expectations that their respective needs can all be met. When they later discover conflicting expectations that could have been disclosed before affiliating, there can be a sense of betrayal and eroded trust that is exceedingly difficult to repair. As one executive observed: "we do better when there's clarity."

Failure to address thorny issues

We heard from stakeholders that when negotiating an affiliation there can be a tendency to avoid addressing particularly thorny issues, as the parties seek to minimize conflict and close a

[30] *See* below discussion of autonomy as a core emotional interest for parties in a negotiation at 22.

deal. However, when parties fail to address these thorny topics, they sow seeds of disappointment and frustration that may erupt later.

For example, a system board may be reluctant to seek the input of a subsidiary regarding a decision that will adversely affect that subsidiary, for fear of scuttling a potential agreement. One stakeholder recalled that representatives of a larger healthcare system were unwilling to communicate to a potential subsidiary that an affiliation would necessarily require closing certain services at the subsidiary hospital. Openly and honestly engaging difficult topics requires vulnerability and can evoke strong feelings such that neither is likely to initiate the subject. But failing to engage in these conversations exacerbates the problems of unrealistic expectations and resulting disappointment. As one experienced executive noted, "[communication] can work for you or against you, but it cannot be ignored." Delaying discussion of potentially painful decisions can make the conflict much more difficult to resolve when it can no longer be avoided.

2. AFFILIATION ENTAILS CHANGES IN STRUCTURE AND OPERATIONS. IMPLEMENTING THE CHANGES CAN LEAD TO CONFLICT ABSENT STRONG RELATIONSHIPS AND PROCESSES FOR RAISING AND RESOLVING CONFLICT.

Even where the affiliation agreement fairly accounts for the parties' interests, implementing necessary changes in structure and operations can cause conflict. To navigate the conflict, boards and executives in durable affiliations build a foundation of effective communication and relationships. One executive described that process as "[working] over a period of years developing a relationship." Stakeholders cited three key factors that affect the ability to build the necessary foundation: (i) clear commitment to the partnership; (ii) transparency and trust; and (iii) planning for conflict.

Buy-in and commitment from board members and executives

Several stakeholders noted that if the affiliation agreement includes an opt-out right, leadership may never really unite to build the necessary foundation. When an entity insists on an escape hatch, it signals from the outset that it is not committed to the relationship. The opt-out provision may incentivize putting off problems rather than facing them, and exiting rather than engaging in the hard work of navigating conflict. As one executive put it – agreeing to affiliate is relatively easy, "living together and making it work . . . that's the hard part." This requires clear buy-in and commitment from the board and executives.

Transparency and trust

Stakeholders also cited transparency and trust between the leadership of affiliated HCTs as crucial to the system's capacity to manage conflict. Certain stakeholders reported a perception of "secret meetings" of the boards in which the interests of other parties to the affiliation were not represented. This can undermine trust and evoke negative emotions in other board members who perceive that their input is not valued by other leaders.[31] Of course, informal meetings among a subset of leadership is sometimes necessary and may even help strengthen relationships.[32] Stakeholders noted that full transparency and reporting about the fact and substance of such meetings is essential to allay concerns about exclusion or secrecy.

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[31] *See* PATRICK LENCIONI, THE FIVE DYSFUNCTIONS OF A TEAM, 204 (2002) ("Teams that fear conflict . . . create environments where back-channel politics and personal attacks thrive.").
[32] *See* ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON, 67 (2005).

Trust and transparency play critical roles in enabling parties to adapt to unforeseen challenges both *during* the negotiation process and *following* affiliation. All survey respondents indicated that the negotiation process with other parties to the affiliation was conducted in an environment of trust and transparency. However, two respondents indicated that the systems to which their organizations belong do not operate within this same trusting environment after affiliating. This shift indicates that the challenges of affiliating in a larger system can adversely affect transparency and trust among system members.

Planning for conflict

There are many sources of potential conflict among affiliated HCTs.[33] On some level conflict is inevitable; planning for how to address it is essential. As one executive explained: "when everything is fine, nobody cares . . . when things are not fine, you need to go back to a pre-determined set of rules to resolve the conflict or have a definition of what is expected post-affiliation." Yet many stakeholders reported that their negotiations and affiliation agreements did not include plans for how to address conflict.

3. AFFILIATING HCTs HAVE DISTINCT MISSIONS AND CULTURES. FAILING TO RECONCILE THEM CAUSES SIGNIFICANT CONFLICT AND MAY DISCOURAGE THE PARTIES FROM FULLY COMMITTING TO THE PARTNERSHIP.

The mission of an HCT is, fundamentally, to act in the public interest and support the health of the community.[34] The culture of an HCT reflects the people who comprise the organization, including its leadership, its employees, and the community it serves. Both features — mission and culture — are inextricably linked to the community in which the HCT sits and are central to its identity and vision.[35]

When HCTs affiliate, their cultures and missions – molded by the unique traits and needs of the communities they serve – likely will clash to some degree. Our survey revealed that only 33% of respondents "strongly" agreed that their affiliated system has a united mission and culture, while 44% merely "somewhat" agreed, and 22% of respondents "strongly" or "somewhat" disagreed. Absent a concerted effort to address differences in mission and culture, affiliated HCTs may experience tensions that inhibit their commitment to each other and threaten the wellbeing of the partnership. We outline below the principal issues we heard from stakeholders and confirmed through secondary research.

Varied community contexts and conflicting missions

One interviewee noted that an HCT's identity is rooted in the unique history of its founding and is tied to the cultural and socio-economic development of its community over time. Interviewees stressed that giving meaning to that identity requires preserving an HCT's ability to tailor its mission to the specific needs of its community.

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[33] Sources of conflict reported by stakeholders include adapting to a new workplace culture, integrating a subsidiary into a new electronic medical records system, closure of certain practices, and recruiting key personnel.

[34] Emily Gee and Nicole Rapfogel, *How Nonprofit Hospitals Can Support Communities and Advance Public Health*, CAP20, Aug 19, 2021.

[35] *See* Jennifer L. Tomasik, *The Importance of Aligning Vision, Mission, and Strategy in Fast-Changing Healthcare Environments*, WHARTON HEALTH CARE MANAGEMENT ALUMNI ASSOCIATION.

New Hampshire law requires that all charitable nonprofits, including HCTs, formalize and memorialize their charitable purpose in their Articles of Agreement.[36] For many, we understand this to be a relatively pro forma exercise to state a legitimate charitable purpose that meets the minimum legal requirement. But the reach and significance of an HCT's charitable mission go far beyond what is written in these documents. Whereas some hospitals sit in a more populated urban environment with relatively ready access to healthcare services and providers, other hospitals are based in rural, sparsely populated areas and stand alone as the sole provider of critical, life-saving care. These differing statuses result in vastly different community needs, which in turn require vastly different means of fulfilling the charitable mission.

Given the different objectives and values inherent in hospitals' missions, combining into a larger system may have serious implications for an HCT's ability to fulfill its historical community-driven mission. As one interviewee remarked, "Joining a system is a change of purpose and a change of mission." This experience is especially relevant to small, critical access hospitals ("CAHs") that affiliate with larger healthcare systems serving diverse geographies. One problem that arises in this context is the divergence between a CAH's local, community-based mission and the system parent's population health mission. Among other things, population health emphasizes addressing the wellbeing of populations instead of individuals[37] That focus — on whole populations rather than individuals — has significant implications for the different communities that affiliated hospital systems serve. A CAH entering a larger hospital system may face pressure or directives to alter the services it offers or divert resources to serve the larger system population and better address population health objectives. As one stakeholder noted, "There are times when what's good for the system is bad for the local hospital – and that's where conflicts can arise."

"There are times when what's good for the system is bad for the local hospital – and that's where conflicts can arise."

Perceived loss of identity and purpose

As charitable missions collide following a combination, an HCT may perceive that its mission is being compromised and its community ignored. When the ability to fulfill its unique mission is infringed, leadership and employees may feel that their long-standing identity and guiding purpose are threatened. They may also internalize a threat to the larger community they serve, as they worry that they will no longer be able to fully meet its healthcare needs. As one interviewee noted, "People have given their time for years, decades maybe, in building their institution. Losing control or influence over these institutions is hard." Another interviewee suggested that, after joining a larger healthcare system, some hospitals feel that they are expected to serve the flagship hospital to the detriment of their own community. When an HCT's identity is threatened or invalidated by its partner HCT, its people perceive a threat that they will be reduced to "continued but meaningless or powerless existence."[38] This naturally elicits powerful negative emotions,[39] and causes serious conflict between affiliating hospitals.

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[36] *See* NH Rev Stat 292:2-II.
[37] Deborah Cohen, et al., *The Population Health Approach: A qualitative study of conceptual and operational definitions for leaders in Canadian healthcare*, 2 SAGE OPEN MEDICINE. (2014).
[38] *See* TERRELL A. NORTHRUP, INTRACTABLE CONFLICTS AND THEIR TRANSFORMATION, 65 (1989).
[39] *See id.*

Cultural misalignment and integration

HCTs – like any organization – are comprised of individuals who, over time, fall into patterns of behavior and interactions and develop a distinct culture. Culture is often deeply ingrained in an organization and is central to its legacy[40] – essentially an organizational DNA.[41] When HCTs affiliate, they face the challenge of integrating their cultures and uniting the diverse individuals who make up their organizations, from executives to providers to administrative staff. As one stakeholder aptly put it, "These are not [hospitals] that are merging... these are people. These are organizations made up of people." Integrating cultures can be a challenging undertaking and is an area that is rife for conflict.[42] One survey respondent noted that managing differences in organizational and workplace culture is the most difficult aspect of an affiliation.

Perhaps recognizing the challenge of merging cultures, affiliating parties tend to ignore cultural differences and instead focus on other aspects of their partnership, particularly financial considerations.[43] One interviewee noted that "folks who are managing the affiliation of healthcare systems are looking at the business side. They're not looking at the practitioners who have developed a culture in the organization that matters to them." Ignoring these cultural differences at the outset, however, will ultimately lead to larger conflicts.

"These are not [hospitals] that are merging . . . these are people. These are organizations made up of people."

Culture plays a significant role in determining whether employees will resist or adapt to their new work environment,[44] and culture sets the standard for the rules of behavior and operations of the new venture.[45] Organizations that combine without a serious effort to harmonize cultural differences may experience painful consequences: "On an organizational level, executives go into a crisis management mode while communication decreases, and … hostility can ensue. For lower-level employees, cultural leanings and management approaches for day-to-day work and processes can cause high levels of stress and trauma for those employees, indicating that larger organizational changes and cultural leanings can have even larger ripple effects."[46] Interviewees warned that cultural differences often result in turnover of senior leadership. Cultural struggles can even be severe enough to undo the affiliation.[47] As one interviewee recalls, a disaffiliation that they witnessed was primarily related to issues surrounding a clash of cultures.

One particularly challenging byproduct of cultural misalignment is the tendency of different groups to splinter into subcultures within the organization.[48] Within any specific group at an organization, people are both consciously and subconsciously bound to one another and

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[40] *See* Jon R. Katzenbach et al., *Cultural Change That Sticks*, HARVARD BUSINESS REVIEW, Jul.-Aug. 2012, https://hbr.org/2012/07/cultural-change-that-sticks ("[culture] is a legacy that remains uniquely yours").
[41] *See* Richard M. Able, *The Importance of Leadership and Culture to M&A Success*, HUMAN CAPITAL INSTITUTE, Jan. 16, 2007 at 3.
[42] *See* Katzenbach et al., *supra* note 40.
[43] Howard J. Peterson, *Lessons from Successful Hospital Consolidations*, 65 HEALTHCARE FIN. MGMT. (2011).
[44] Katinka Bijlsma-Frankema, *Cultural Integration and Cultural Change Processes and Mergers and Acquisitions*, 25 J. OF EUR. INDUS. TRAINING (2001).
[45] Able, *supra* note 41, at 3.
[46] Colin G. Chesley, *Merging organizational cultures in healthcare: Lessons from the USA in differentiation among tiers in a health system merger*, 13 INTERNATIONAL JOURNAL OF HEALTHCARE MANAGEMENT. 5447, 5448 (2020).
[47] *Id* at 5447.
[48] *See id.*

harbor loyalty toward their group.[49] As one interviewee recounted, in the wake of an affiliation, some people tend toward tribalism as they focus on their inner circles and find themselves in different positions in the journey toward integrating the two entities. Put another way, significant organizational changes, particularly in the form of new leadership, engender an "us versus them" mentality as people seek to protect their cultural in-group.[50] Interviewees who have experienced this phenomenon describe gossip and "secret meetings" among the groups or tribes that have emerged. This creates conflict as people become defensive, mistrusting, and resistant to the integration process.

4. BOARDS AND EXECUTIVES MANAGING AN AFFILIATION HAVE EXPANDED AND SOMETIMES COMPETING DUTIES. THE SHIFT CAN BE CONFUSING AND THE FULL SCOPE OF THESE DUTIES IS SOMETIMES MISUNDERSTOOD OR OVERLOOKED.

The board and executives play vital roles in the negotiation and implementation of an affiliation. The executives, and especially the CEO, drive strategy; the board is the ultimate decision-maker on essential organizational issues, including approval of the affiliation.[51] And the system as a whole is heavily influenced by the people who lead it. As one stakeholder noted, "Hospital systems are largely based on executive style and preference, how engaged and educated the boards are, and the relationship between the boards and the executives."

"Hospital systems are largely based on executive style and preference, how engaged and educated the boards are, and the relationship between the boards and the executives."

As they plan, negotiate, and implement an affiliation, a hospital's leaders carry enormous responsibility to remain informed, proactive, and focused on the interests of their staff and community. Much depends on the ability of the board and executives to guide the process skillfully and attentively. But as some stakeholders observed, navigating an affiliation is so complex that the full breadth of leadership's responsibilities is sometimes misunderstood or overlooked. This can lead to significant conflict as the HCTs seek to integrate and implement their affiliation agreement.

Board composition

One challenge stems from the fact that board members, though highly accomplished in their respective fields, have differing levels of expertise regarding medicine, healthcare systems, finance, negotiation, etc. To meet statutory requirements that aim to "encourag[e] diversity of discussion,"[52] boards have a duty to recruit new directors with a variety of career, cultural, and demographic backgrounds.[53] In this spirit, HCT board members are generally trusted community members from a variety of professions: doctors, lawyers, businesspeople, philanthropists, etc. Most are volunteers. Although the professional diversity and volunteer status bring valuable

[49] *See* Anton Shufutinsky, *Tribalism and Clone Theory In New Leaders and the Resulting Degradation of Organizational Culture*, 10 PSYCHOLOGY AND BEHAVIORAL SCIENCE INTERNATIONAL JOURNAL 1,3 (2019).
[50] *See id.*
[51] *See, e.g.*, NH Rev Stat § 7:19-b.
[52] *See* NH Rev Stat § 292:6-a
[53] Thomas J. Donovan & Diane Murphy Quinlan, *Guidebook For New Hampshire Charitable Organizations*, 3-4 (2022).

perspective and wisdom to the board, the downside is an informational and experiential gap regarding best practices for planning and executing an affiliation. According to one stakeholder, boards may focus heavily on the financial components of the agreement, to the exclusion of considering practical implications for delivery of care. This can cause critical needs to be overlooked, ranging from medical equipment, to staffing, to community benefits. This is obviously problematic, particularly if hospitals and communities perceive that their core needs are being ignored or are sacrificed in favor of a partner hospital.

Lack of communication

Another issue frequently cited by stakeholders was a lack of adequate communication – between boards and executives, with other employees of the hospital, and with the larger community.

As one stakeholder noted, board members typically receive all their information from executives, particularly the CEO. When executives are not transparent and communicative with their boards, the boards are in the dark regarding challenges arising from the affiliation and cannot fulfill their duty to make informed decisions.

Another interviewee mentioned that one hospital faced challenges post-affiliation because the plans to affiliate were kept within a very insular circle of executives. When the affiliation was announced, staff who were not "in the know" were unhappy with the changes brought about by the new partnership. We also heard that leadership sometimes has an unrealistic view of their institution because they fail to talk to staff about what is happening "on the ground."

When boards and executives fail to communicate with each other and with the broader hospital and community, they allow dissatisfaction and frustration to go unaddressed, breeding disagreement and discontent "on the ground" in their organizations.

Competing and shifting fiduciary duties

The board of an HCT owes fiduciary duties of care, loyalty, and obedience to the organization.[54] The board also has a duty to adopt policies that advance the purposes of the charity it governs and to ensure these policies are implemented.[55] Fulfilling these duties can be particularly complicated for many New Hampshire HCTs that affiliate in the form of a "member substitution" in which one HCT becomes the sole corporate member, or parent, of a subsidiary HCT.[56] This model has challenging implications for board members' fiduciary duties, as it involves a transfer of reserved powers from the subsidiary HCT to the parent, and both boards may experience a shift in their fiduciary and oversight duties.[57] As noted by one stakeholder, board members do not always understand what might change regarding their oversight role, their fiduciary duties, or what they might be giving up when they join with a new member.

The principle change to fiduciary duties through a member substitution is that the sole corporate member, or the parent organization, becomes a fiduciary toward its subsidiary.[58] Thus,

[54] Donovan & Quinlan, *supra* note 53, at 4.
[55] Restatement of Charitable Nonprofit Organizations § 2.05 (Am. Law Inst. 2019).
[56] *See* Dana Brakman Reisner, *Decision-Makers Without Duties: Defining the Duties of Parent Corporations Acting as Sole Corporate Members in Nonprofit Health Care System*, 53 RUTGERS UNIV. L. REV. 979, 979 (2001).
[57] *See id.*
[58] Restatement of Charitable Nonprofit Organizations § 2.01 cmt. a (Am. Law Inst. 2019).

in addition to its fiduciary duties to the parent, the parent board also owes a duty to advance the *subsidiary's* charitable purpose when making decisions that affect the subsidiary.[59] This can be particularly challenging if the charitable purpose of the parent and the subsidiary are not aligned. For example, as noted above, a subsidiary's mission may focus on a small rural community, while a parent may have a larger population-health focus. These differences in purpose, when combined with complicated fiduciary duties running in different directions, may create conflict or confusion in the decision-making processes for boards.

Another source of potential confusion in a member substitution is the role of subsidiary board members who also serve on the parent board. As a subsidiary appointee on a parent board, board members may continue to feel a duty to protect the interests of the subsidiary organization. But in an opinion issued by the New Hampshire Attorney General's office, the Charitable Trusts Unit suggested that subsidiaries must consider the best interests of the larger system and parent organization when they vote on the parent board, especially if their vote has a clear bearing on the outcome.[60] This is echoed by one stakeholder who recounted that when subsidiary appointees are sitting on a system board, the goal is to raise concerns of their local hospital, but when *voting* as a member on the system board, their loyalties must lie with the whole system. Another interviewee recounted that when this happens, subsidiary appointees on a system board may experience a sense of disenfranchisement.

In sum, the complicated nature of competing and shifting fiduciary duties adds to the already heavy responsibilities of an HCT board undergoing an affiliation. The American Hospital Association notes that when a board does not understand its new responsibilities and how they connect to its new system, they may experience confusion and animosity.[61] This could stem from board members grappling with newfound duties toward their affiliated partner or harboring the perception that their partner is governing in its own self-interest. If board members fail to thoroughly study and discuss how their fiduciary duties will change following an affiliation, they may struggle to adjust to their new roles and duties, and conflict is almost certain to follow.

[59] *Id.*
[60] Letter from Tom Donovan, *supra* note 25.
[61] Linda Summers et al., *How to Navigate Complex, Multitiered Governance*, AMERICAN HOSPITAL ASSOCIATION, 2022.

ANALYTICAL TOOLS FOR MANAGING CONFLICT

By applying a few key principles of conflict engagement, HCTs will be better equipped to head off conflict before it arises and navigate conflict when it surfaces. We outline some key concepts here and apply them in the Recommendations section of this report.

INTEREST-BASED NEGOTIATION & MAKING WISE AGREEMENTS

The negotiation process should 1) produce a wise agreement (if agreement is possible), 2) be efficient, and 3) improve (or at least not damage) the parties' relationship.[62] A "wise" agreement meets the parties' legitimate interests and resolves conflicting interests fairly.[63] "Interest-based" negotiation helps parties achieve these goals.[64] It is a problem-solving approach based on side-by-side collaboration and communication.[65]

Focus on interests, not positions

Negotiators often get bogged down in haggling over competing positions. As parties haggle over their positions ("I must have X!" "Never! We'll agree to Y, and no more." "Fine, X-2, nothing less!" "Ha! Y+2, and that's final." etc.), they become entrenched, making outsized demands and small concessions in a test of wills and stamina. If an agreement is reached it frequently is made in frustration and with damaged relationships and fails to satisfy either side.

Interest-based negotiation, as the name implies, focuses instead on interests: the needs, desires, fears, and concerns motivating a party to seek the benefits of an agreement.[66] An example highlights the distinction between interests and positions. Two siblings argue over a single orange, each insisting, "I need the whole thing!" Seeking a fair solution, their parent divides the orange and gives half to each. Both sulking, one eats the fruit and discards the rind while the other throws out the pulp and uses the rind for a baking recipe.[67] Had anyone asked, "Why do you want the orange?" both siblings' interests could have been fully met, without harming the relationship (or even improving it, if a wedge of fruit is swapped for a bite of cake).

Look for similar or at least non-conflicting interests

Consider a dispute over whether to close a CAH's labor and delivery ward as part of a combination. The larger entity insists that it close; the CAH says it must remain. The *positions* are irreconcilable. But if the parties are motivated by similar or non-conflicting *interests*, there may be a solution.[68] The CAH may fear the loss of jobs and the impact on women's health in the community. The larger entity may share the concern about women's health and may be planning to redeploy resources to a new L&D unit in another location. The problem is no longer whether to close or keep the practice. It is how best to meet the mutual interest in serving women and whether the non-competing interests about jobs and resources can be reconciled. With these interests on the table, the parties can seek creative solutions. If instead they dig into their positions, the parties will either fail to reach agreement, or haggle until the least unacceptable deal is struck, leaving them frustrated and their underlying interests unmet (or worse yet, one side's interests are met and the other side feels steamrolled).

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[62] ROGER FISHER ET AL., GETTING TO YES, 4 (2d ed. 1991).
[63] *Id.* at 4.
[64] *Id.* at 279.
[65] Bruce Patton, "Negotiation," in THE HANDBOOK OF DISPUTE RESOLUTION 279, 294 (2005).
[66] FISHER ET AL., *supra* note 62, at 40-41.
[67] *Id.* at 57.
[68] MNOOKIN, ET AL., BEYOND WINNING, 13-16 (2000).

Find value in differing preferences

Parties' differing interests and preferences can often be just as useful as similarities, because of the possibility of trading on those preferences.[69] Negotiators often find valuable trades can be made in of several types of differing preferences:[70]

- Different resources – in the above example the CAH may be struggling to make the economics of obstetrics work, but the parent can leverage system resources to better effect.
- Different relative valuations – if both the CAH and parent value providing obstetric care to women in the rural community *and* obstetric jobs but each values them differently relative to the other, there may be trades that leave both better off.
- Different forecasts – parties often have different predictions about the future. If the parent sees a growing need for obstetric care, and the CAH predicts declining pregnancy rates, a deal may permit them to "bet" on their different forecasts.
- Different risk preferences – even if their forecasts for an event are the same, parties' risk tolerance may differ. They can allocate risk to the more tolerant party (at a cost, of course).
- Different time preferences – if the CAH is especially reluctant to closing the obstetrics practice in the near term, and the parent envisions a five-year horizon to relocate the practice, they might agree on a phased or delayed approach that suits both preferences.

Take a problem-solving approach to generating creative options

Being able to address underlying interests of course requires that the parties first understand their own interests and then *share them with each other*. The key inquiry to understanding interests is inquiring about the "why" or "why not" underlying a party's positions.[71] As parties build trust, they gradually and reciprocally disclose their interests (in turn, building more trust).[72] As interests are known, parties should jointly brainstorm options for satisfying them.[73] The goal is to generate as many ideas as possible,[74] stipulating that proposing an idea does not signal agreement[75]. By identifying interests and collaboratively brainstorming options, parties open the door to creative solutions that meet shared and non-competing interests, trade on differing preferences, and resolve conflicting interests in situations where positional bargaining would result in inefficient, unsatisfying compromises or deadlock.

Know your BATNA – Best Alternative To a Negotiated Agreement

Parties should be clear about their best alternative to a negotiated agreement (BATNA) – the "walkaway" alternative if no deal is reached.[76] This alternative provides the standard against which any option is measured.[77] An agreement only makes sense if it is better than the BATNA.[78] A well-developed BATNA can be crucial when negotiating with a stronger party.[79]

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[69] *Id.* at 14.
[70] *Id.* at 14-15
[71] FISHER ET AL., *supra* note 62, at 44.
[72] Patton, supra note 65, at 292-93.
[73] *FISHER ET AL., supra* note 62, at 60.
[74] *See* JORDAN D. LEWIS, TRUSTED PARTNERS, 43 (1999) ("The best way to resolve a problem is to first increase the number of solutions."); see also *FISHER ET AL., supra* note 62, at 62.
[75] Patton, supra note 65, at 293.
[76] *FISHER ET AL., supra* note 62, at 100.
[77] *Id.*
[78] *Id.*
[79] *See id.*

For HCTs, this involves surveying a variety of hospital systems or potential paths forward for the organization. Combining with one hospital or system is only wise if the agreement is better than what could be achieved by joining with a different hospital (or remaining independent).

Tips for interest-based negotiators:

- Prepare for a negotiation by thoroughly understanding your own side's interests
- Consider what interests your counterpart may be trying to satisfy.
- Ask questions – "why is that important?" or, "what would be wrong with this option?"
- Share interests gradually and reciprocally
- Look for similar and non-competing interests
- Look for creative options that leverage the parties' differing preferences
- Take a problem-solving, collaborative approach to brainstorming interest-based options
- Know your BATNA (and walk to it when it is better than the best deal on the table)
- Apply these principles at the formal negotiating table **and** in everyday negotiations

ADDRESSING EMOTIONS IN NEGOTIATION

Emotions can impose either significant roadblocks or provide significant boosts to parties' ability to reach a wise agreement. Negative emotions may distract from substantive matters and damage the parties' relationship.[80] Conversely, parties can leverage positive emotions to address substantive interests as they develop trust, enhance their listening and communication, and learn more about each other's interests.[81]

Emotions play a role in all negotiations, from "formal negotiations" to structure a deal, to "informal discussions" to resolve day-to-day differences.[82] Engaging negative emotions as they erupt consumes valuable time and energy. Rather than reacting to negative emotions as they arise, preempt the problem: focus on the core relational needs of other parties which, if satisfied, engender positive, productive emotions and enable parties to reach wise agreements.[83]

The principle is straightforward. We all have certain fundamental, or "core" emotional needs in our relations with others. (We refer to these interchangeably as core relational needs, core relational interests, or core relational concerns.) To varying degrees, everyone needs to feel appreciated for their ideas and worth, to be consulted about important decisions that affect them, to receive the respect that their status deserves, to play a meaningful role in their organization, and to feel a sense of connection with others. When these needs are met, people feel enthusiastic, happy, hopeful, affectionate, proud, and calm.[84] They are motivated to cooperate, work well with others, use their creativity, and to foster mutual trust.[85] When these needs are not met, people get

[80] FISHER & SHAPIRO, *supra* note 32, at 5.
[81] *See id.* at 6.
[82] *See id.* at 11.
[83] *Id.* at 5.
[84] *Id.* at 19.
[85] *Id.*

angry, anxious, envious, ashamed, or sad. They reject solutions that would meet their interests, distance themselves from others, think rigidly, and become deceptive.[86]

These core relational needs can be implicated on several levels. As boards and executives negotiate an affiliation agreement – whether directly at the table, in side-discussions, or through lawyers – being aware of and addressing each other's core relational needs as negotiators can ensure a more collaborative, productive **process**. As they negotiate, focusing on how the **substantive** terms (e.g. terminating certain services) could implicate the core relational interests of each organization's people can help them reach wiser agreements. And striving to meet the core concerns of staff in the integration phases will help to foster better **relationships** throughout the organization. At each of these levels – process, substance, and relationship – successful negotiators pay careful attention to these core needs by:

- valuing and acknowledging people's contributions;[87]
- consulting people about decisions that affect them;[88]
- recognizing people as having status that is worthy of respect;[89]
- ensuring people have meaningful roles that serve valuable functions;[90]
- helping people feel emotionally connected to each other and to the group.[91]

These relational interests provide a lens through which to understand emotions that arise in a negotiation.[92] When preparing for a negotiation, negotiators should review these interests to identify substantive areas that should be treated with care.[93] At the table, proactively seek to meet relational concerns to evoke positive emotions and collaboration.[94] When negotiations get heated, diagnose which relational concerns are being tripped, and address them.[95]

FAIR PROCESS AND ACTIVE LISTENING

As described in Finding 4, stakeholders reported that inadequate communication can leave leadership unaware of brewing sources of discontent and conflict. We offer here two concepts to strengthen communication: structured processes and active listening.

Fair processes for raising and identifying concerns

Especially in organizations whose people are spread through diverse departments and locations, it is important to introduce structured processes designed to invite input from internal stakeholders. People want to feel that their role and their status as members of a system are valued.[96] They are more likely to feel valued if there are dedicated processes in place that seek

[86] *Id.*
[87] *See id.*
[88] *Id.*at 74.
[89] *Id.*at 95.
[90] *Id.* at 117–18.
[91] *Id.* at 55. As trivial as it may seem, having "adversaries" in a negotiation inquire about one another's personal lives and interests can have a profound effect on their ability to build faster, stronger emotional connections.
[92] *Id.* at 19–20.
[93] *Id.* at 18.
[94] *Id.*
[95] *Id.*
[96] LISA BLOMGREN AMSLER ET AL., DISPUTE SYSTEMS DESIGN 16–17 (2020); FISHER & SHAPIRO, *supra* note 32.

input and allow people to voice concerns.[97] And when people's views are sought and welcomed, leadership is more likely to be well-informed about challenges facing the organization.

It is also critical that people perceive internal processes to be fair. This means they are open to everyone and to all viewpoints, and they treat participants with dignity and respect.[98] For processes that are designed to resolve disputes, the decision-makers should be seen as neutral and trustworthy.[99] When fair processes are in place, people are more likely to feel satisfied, to accept decisions, and to form positive attitudes about the organization.[100]

Processes that foster communication might include "listening sessions" or town halls hosted by executives in which employees can air concerns; drop-in "office hours" hosted by senior executives; and regularly scheduled meetings between the executives and boards of all affiliated HCTs in which issues or challenges are discussed. Such processes not only allow stakeholders to feel that their views matter – they inform leadership of the challenges and potential conflicts that need to be addressed.

Active Listening.

In addition to offering processes through which people can voice concerns, it is essential to demonstrate that their concerns are being heard. People who feel heard within a system are more likely to believe the system is fair.[101] This perception of fairness promotes trust, empathy, and positive attitudes within the system.[102] When people commit to listening, they also reduce the effect of underlying personal issues and can address conflicts more productively.[103]

One way to make people feel heard involves a practice known as "active listening." The idea is to not only hear what a speaker is saying, but also to seek to truly understand and to actively demonstrate understanding.[104] Core techniques for active listening include:

- remaining fully present in the conversation;[105]
- asking questions and being curious about what the speaker is sharing;
- paraphrasing and reflecting back what the speaker is saying, to demonstrate listening and allow the speaker to correct any misunderstanding;
- acknowledging emotions.[106]

Active listening strengthens communication practices, builds trust and commitment among employees, and increases the perception among staff that they are supported and that their work is valued.[107]

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[97] *See id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *See* Emile G. Bruneau & Rebecca Saxe, *The Power of Being Heard: The Benefits of 'Perspective-giving' In The Context of Intergroup Conflict*, 48 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY, 855, 865 (2012).
[102] *See id.*
[103] *See* ERIK J. VAN SLYKE, LISTENING TO CONFLICT, 1999.
[104] Arlin Cuncic, *What Is Active Listening?*, VERYWELL MIND, Nov. 9, 2022, https://www.verywellmind.com/what-is-active-listening-3024343.
[105] *See* Robin Abrahams and Boris Groysberg, *How to Become a Better Listener*, HARVARD BUSINESS REVIEW, Dec. 21, 2021.
[106] DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS, 206-20 (3d ed. 2023).
[107] Vahid Kohpeima Jairomi, et al., *Active Listening, The Key of Successful Communication in Hospital Managers*, 8 ELECTRONIC PHYSICIAN 2123, 2124 (2016).

RECOMMENDATIONS

The following recommendations are meant to help HCT boards and executives address the challenges outlined in our findings. Each section begins with a summary of practices that could be employed to implement our recommendations. This is followed by discussion of how those practices address our findings. We end each section with a summary of suggested practices we heard from stakeholders based on their experience navigating HCT affiliations.

1. IDENTIFY AND COMMUNICATE EACH ORGANIZATION'S INTERESTS AND DISCUSS HOW AN AFFILIATION MIGHT MEET THEM.

Suggested practices for boards and executives

- Make a thorough inventory of all interests and expectations your organization seeks to satisfy by affiliating with another HCT or system
- Seek input from key internal stakeholder groups
- Candidly discuss, internally and with other parties to the transaction, the reasons to affiliate and the interests and expectations parties seek to satisfy.
- Practice curiosity and active listening
- Collaborate to generate creative options that leverage similar and non-competing interests and trade on differing preferences
- Consider how an affiliation will affect control over decisions and the functions of each organization and their leaders
- Play out challenging situations that might arise once the entities have combined
- Consider a variety of potential partners and weigh their relative benefits and drawbacks
- Keep a record of discussions about the benefits and drawbacks of affiliating
- Draft a statement of the benefits of affiliating with a potential partner

Stakeholders cited a wide range of interests that HCTs may seek to meet by affiliating, including: improving economic efficiency and financial security; preserving institutional identity; increasing community access to services; safeguarding jobs; or retaining control over key operational functions. We found that HCTs negotiating an affiliation agreement often lack an adequate understanding of the interests and expectations motivating each of them to join forces. When that gap exists, any agreement they reach is unlikely to adequately satisfy essential interests. This leads to surprise, frustration and conflict.

Focus on interests – yours and theirs

Each party should start with a thorough inventory and understanding of its own interests:

- seek input from key stakeholder groups throughout the organization
- consider all the interests that could be affected by an affiliation
- identify which interests matter most, and why they are important
- imagine how those interests could be affected (practice closures, staffing, future decision-making, integration of operations, etc.) [108]

[108] *See, generally*, ERTEL & GORDON, THE POINT OF THE DEAL (2007).

Inventories in hand, parties should commit to a negotiation process that encourages sharing and understanding each other's interests. Disclosing interests gradually and reciprocally builds a foundation of trust, which in turn encourages disclosure and candid discussion of more sensitive interests.[109] Parties should ask, and listen carefully to understand, *why* each interest is important to the other. The goal should be to develop a complete, accurate picture of the interests each needs to meet and what each expects to get out of the relationship.

Collaborative brainstorming and joint problem-solving

As the parties identify and communicate their interests, they should approach the negotiation as a collaborative effort to solve a shared problem: how to craft an agreement that creates as much value as possible for all parties by leveraging (i) shared and similar interests, (ii) different but non-conflicting interests, and (iii) opportunities to trade on differing preferences.

"Brainstorming" is one particularly effective method for generating creative, value-maximizing options. Guidelines for a productive brainstorming process include:

- have a well-defined purpose, choose a limited number of participants, set a location apart from regular meeting settings (preferably in an informal setting);[110]
- select a trusted facilitator to lead the discussion; [111]
- set ground rules for the session;[112]
- after an initial session, narrow in on the most promising ideas, and consider how to improve them.[113]

Brainstorming together in a joint process allows the parties to explore the full range of possible options and to identify from those the best ones to meet their organizations' interests.

Adopt an implementation mindset

Some interviewees noted a tendency to avoid addressing particularly sensitive interests, such as expectations about closing unprofitable practices or limiting authority to make critical operational decisions. This might make for an easier negotiation in the short term, but it is a recipe for conflict later. If the parties instead use their negotiation to clearly explain their preferences around challenging issues, they can devise solutions that meet their interests, or at a minimum ensure that they are not creating unrealistic expectations that cannot be fulfilled.

Experts stress the importance of avoiding a "deal-maker mentality" (a focus on making a deal) and taking instead an "implementation mentality" (a focus on what the deal will mean in practice).[114] Playing out foreseeable implementation challenges enables the parties to structure an agreement that accounts for the ways in which critical interests could be affected after the ink dries. A helpful

> "The more you anticipate what to plan for, the better off affiliating hospitals are in the long run."

[109] Patton, supra note 65, at 292-93.
[110] *See* FISHER ET AL., *supra* note 62, at 61.
[111] *Id.*
[112] *Id.* at 61–62. Ground rules could include: raise hands to offer an idea, record ideas on a white board in full view of all participants, aim for quantity of ideas, no evaluating ideas until all ideas are recorded, seat participants side by side facing the options generated, offering an idea does not apply willingness to agree to it, etc.
[113] *Id.*
[114] *See* ERTEL AND GORDAN, *supra* n. 108.

practice that interviewees identified was holding regular meetings between executives of would-be affiliates to discuss how a combination might affect their organizations. As one stakeholder observed, "the more you anticipate what to plan for, the better off the affiliating hospitals are in the long run."

Attend to core relational interests, especially autonomy and role

As board members and executives seek to communicate and understand each organization's needs and interests, they should take particular care to address how a potential affiliation will affect the core relational interests of autonomy and role.[115]

Boards and executives of HCTs have a strong interest in having a say in decisions that affect their organizations.[116] When negotiating an affiliation, the parties should clearly articulate (i) the areas in which each expects to retain decision-making authority, (ii) where they will forfeit authority, and (iii) processes for involving a party even in decisions for which it forfeits ultimate authority. Crafting an affiliation agreement that manages the autonomy interests and expectations of the various HCTs within a system reduces the risk that boards and executives feel that they lost more control over important decisions than they anticipated.

Board members, executives, and staff of HCTs also take pride in the roles they and their organization play in serving the community. As HCTs negotiate the terms of their affiliation, they should (i) clearly articulate their interests in defining and preserving particular roles and responsibilities, (ii) acknowledge and spell out where the organizational roles and responsibilities will change, and (iii) negotiate terms that seek to ensure that people continue to have meaningful roles in pursuing a mission and purpose they can be proud of.[117]

By conducting a full and honest assessment of how their affiliation will affect the core relational interests of autonomy and role, and taking steps to ensure that the affiliation meets those needs as well as possible, HCTs will build a more satisfying affiliation. And even when some loss of autonomy or change in role is unavoidable, an accurate understanding of what to expect decreases the probability of disappointment and frustration.

Understand the BATNA

Even the most collaborative, problem-solving parties may not be able to generate options that sufficiently meet their needs. If candid discussions and brainstorming reveal that important interests cannot be met, a party must decide whether a suboptimal agreement would nonetheless be better than its best alternative to that agreement, *i.e.*, the BATNA. Alternatives might include affiliating with a different partner or partners, informal partnerships with other HCTs,[118] or maintaining the status quo as an independent hospital.[119] Only by understanding how realistic alternatives stack up against the deal on the table can a party make a truly informed decision whether to proceed or walk away from a negotiation.

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[115] *See* the discussion of autonomy and role as core emotional interests at 22.
[116] *See id.*
[117] *See* the discussion of fulfilling roles at 22.
[118] While an informal partnership may offer more retained autonomy, it often does not provide the financial security of a formal affiliation. Still, interviewees reported that these agreements can provide a "trial run" for the potential parties to learn whether their cultures, missions, and values are compatible prior to committing to a formal affiliation.
[119] *See* discussion of alternatives as an element of interest-based negotiations at p. 20.

A well-developed BATNA also can boost a party's leverage in a negotiation. It is one thing to know that, in theory, one could pursue affiliation with a different partner. It is far more powerful to have studied an alternative well enough to know how attractive it would be compared to the deal on the table. This gives a party confidence to know where and how hard to push against a counterpart that may seem to be negotiating from a position of relative strength.

One interviewee reported using a framework for evaluating potential partners. The factors included: nonprofit vs. for-profit status, practice specialties and level of care offered, religious affiliation of the entity, and the degree to which affiliation would allow the HCT to retain its mission and identity.[120] To evaluate alternatives, boards and executives might consider adopting a similar framework and evaluating a larger number of alternatives over an extended period.

Practices suggested by stakeholders.

Stakeholders suggested specific practices that help HCTs identify and communicate their interests and better understand the interests of potential partners before affiliating:

- Make sure the board and executives carefully consider and discuss the reasons to affiliate with another HCT or larger system.
- Prepare a "benefits statement" listing what the HCT hopes to gain by affiliating.
- Keep a robust record of meetings discussing potential affiliations to refer to when considering how alternatives may serve key interests and concerns.
- Take the time to evaluate a variety of potential partners prior to affiliating.
- Map out the changes that a proposed affiliation would bring and compare all potential partners against that map. Outside consultants may be used in generating this framework.
- Develop an authority matrix setting out how an affiliation will address specific questions of authority to decide key issues and the role of each member in these scenarios.

[120] For an additional example of one such framework, see Letter from Kaufman, Hall & Associates, LLC to Peter Shorett, Chief Strategy Officer, Beth Israel Lahey Health C-2 (Jul. 9, 2021), https://www.doj.nh.gov/charitable-trusts/documents/exeter-hospital-attachment-2.pdf.

2. PRIORITIZE TRANSPARENCY, COMMUNICATION, AND DISPUTE RESOLUTION PROCESSES TO BUILD A FOUNDATION OF TRUST AND EFFECTIVELY NAVIGATE CONFLICT.

Potential practices for board members and executives

Pre-Affiliation:

- Identify and discuss areas where each party brings necessary value to a potential affiliation
- Create a shared list of goals for a potential affiliation with other parties' boards and executives
- Include a set of "guiding principles" in the agreement that cover primary values and goals
- Outline agreed-upon procedures for raising and addressing conflict

Post-Affiliation:

- Grant staff the option to rotate between affiliated HCTs
- Establish regular interaction between executives and boards of affiliated entities
- Provide channels for stakeholders to raise and address sources of conflict.
- Hold management accountable for implementing the affiliation

The many operational and structural changes inherent in an affiliation can be significant sources of frustration and conflict. Building a solid foundation of trust and creating channels for collaboration and candid communication can equip affiliating HCTs to navigate conflict more effectively.

Build mutual trust between parties to an affiliation

Building trust begins in the earliest stages of negotiation. Establishing a foundation of trust during the negotiation phase is essential to strengthening that foundation once the entities are affiliated. Research on building trust in organizations and the practical experience of HCT stakeholders suggest several strategies:

- Interest-based negotiation is a trust-building process. Disclosing interests to a negotiation counterpart requires vulnerability. Showing and reciprocating vulnerability and trust engenders more trust and more willingness to be disclose more interests.[121]
- As HCTs negotiate and implement the terms of their affiliation, identifying and capitalizing on areas where each party adds unique value to the combined system creates healthy interdependence, fostering trust as a result.[122]
- Developing strong interpersonal relationships across organizations builds interorganizational trust.[123] One stakeholder noted that rotating staff among member hospitals builds stronger relationships, interconnectedness, and trust.

[121] Roy J. Lewicki, "Trust and Distrust," *in* THE NEGOTIATOR'S FIELDBOOK 191, 191 (Andrea Kupfer Schneider & Chris Honeyman eds., 2006).
[122] Lewis, Trusted Partners, *supra* note 74, at 9.
[123] *Id.* at 10.

- Strong relationships should exist at the leadership level as well.[124] Interviewees cited regular meetings between the executives within a hospital system as an important way to build relationships and facilitate trust between entities.
- Affiliated HCTs should map out shared objectives for their relationship.[125] These objectives ground decisions in consistency and an agreed organizational purpose.[126]
- Clear mutual commitment is a foundational element of trust.[127] As stakeholders noted, including a withdrawal right in the affiliation agreement signals that the partnership is not rooted in commitment and trust. Just as signaling a lack of commitment hinders trust, signaling commitment to an affiliation engenders trust.

While showing trust is essential, so too is a degree of caution as trust is being built.[128] A healthy balance of trust and caution allows HCTs to strengthen ties between them, develop realistic expectations about their affiliation, and protect against hasty affiliations.[129]

Prioritize transparency and open communication.

As they seek to build trust over time, boards and executives should commit to transparent communication about how the affiliation is meeting their interests and concerns.[130] A genuine commitment to transparency creates confidence that concerns will be heard and addressed, which increases people's willingness to engage and navigate conflict.[131]

Interviewees cited lack of management accountability in carrying out the vision for an affiliation as a recurring problem. Sustained transparent communication promotes accountability between the members of an organization.[132] By engaging in transparent communication about the state of the affiliation, management builds capacity to address challenges as they arise and hold themselves and each other accountable for making necessary changes to improve the partnership.[133]

Have frank conversations about difficult topics.

Interviewees cited a lack of communication about sensitive issues as a key source of discord between member organizations. Avoiding sensitive, difficult topics is tempting, but it prevents parties from addressing sources of conflict that could undermine or derail an affiliation.[134] When parties trust each other, vigorous discussion of challenges strengthens collaboration, allows systems to make necessary changes, and deepens trust.[135] To be sure, difficult conversations can elicit strong negative emotions. But *not* having those conversations allows conflict to fester and erupt later, destroying the trust that the relationship depends on.[136]

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[124] *Id.*
[125] *Id.* at 11.
[126] *See id.*
[127] *Id.* at 12–13.
[128] Lewicki, *supra* 121, at 192.
[129] *See id.* at 193.
[130] *See* LENCIONI, *supra* note 31, at 188.
[131] *See id.*; *See also* AMSLER, *supra* note 96, at 19 (dialogue between parties aids in arriving at a just outcome).
[132] *See* LENCIONI, *supra* note 31, at 189.
[133] *See id.*
[134] *See* discussion of difficult conversations as a barrier to expressing interests in Finding 1 above.
[135] *See* Gadlin, *supra* note 29, at 245.
[136] STONE ET AL., *supra* n. 106 at 2.

Engaging in these conversations prevents internal conflicts from bubbling to the surface in an unhealthy manner.

Navigating difficult conversations is tricky but applying a few key principles can help:

- There will be multiple perspectives (many of them held with great certainty) about what happened, what is at stake, what the conversation is really about.[137]
- Sharing one's own perspective on those questions is essential, as is acknowledging that it is only one view and expressing genuine curiosity about others' perspectives.
- Curiosity requires active listening – ask questions, mirror back what is said, and acknowledge emotions.[138]
- Engage the different perspectives without attributing blame; own and acknowledge where there is mutual contribution to a problem.[139]
- The conversation need not be a competition to establish whose perspective is right. Make the underlying issues an opportunity for openness, collaboration, and problem-solving.[140]

Remember the core relational concerns

Appreciating people for their contributions, acknowledging the status they have earned, and helping them feel emotionally connected to the broader system community all are proven ways to encourage people to be cooperative, to be trustworthy, and to trust.[141] It does not need to be complicated – in many ways these are simple, common courtesies: thank people for their hard work, boost them among their peers, ask about their wellbeing, share a cup of coffee. To create a cooperative, trusting environment, attend to the basic relational needs of counterparts, colleagues, and staff by treating them with courtesy, kindness, and care.[142]

Establish processes to plan for, raise, and address conflict

One piece of advice we heard from stakeholders was to assume conflict will arise, and plan for it. We recommend below practices and processes to help HCTs plan for and engage conflict. Our recommendations incorporate principles of collaboration and candid communication that build trust and help instill a culture of healthy conflict resolution.

Guiding principles and "partnering"

When parties affiliate, it is important that they not only negotiate financial and healthcare objectives, but also establish a set of core guiding principles for their partnership. Experts counsel affiliating parties to work side by side in developing a strategy for their partnership through a concept known as "partnering."[143] The practice entails deciding on mutual goals and developing guideposts that address these goals. This process prevents parties from resorting to narrow self-interests and encourages them to form a synergistic, advantageous relationship.[144] What is perhaps most important from this exercise is that parties establish "non-adversarial

[137] *Id.* at 15–16 (distinguishing the "what happened," "feelings," and "identity" conversations.).
[138] *Id. at 206-220.*
[139] *Id.* at 98.
[140] *Id.* at 253.
[141] *See* FISHER & SHAPIRO, *supra* note 32, at 19.
[142] *Id.*
[143] James P. Groton et al., *Thinking Ahead*, *in* 2 NEGOTIATOR'S DESK REFERENCE 265, 269 (Chris Honeyman & Andrea Kupfer Schneider eds., 2017).
[144] *See id.*

processes for resolving potential problems, such as mutual agreement that it is more important to 'fix the problem' than 'fix the blame.'"[145]

Informal conflict engagement processes

Designing and implementing conflict prevention and engagement processes is important not simply to manage conflict, but also to strengthen trust within and across affiliated HCTs. We heard from stakeholders that HCTs frequently lack established channels to raise and address conflict. Without such channels, conflict escalates. Affiliating HCTs should adopt "dispute de-escalation" and "'real time' resolution tools" to empower parties to defuse conflict, resolve pending disputes, and prevent existing disputes from becoming intractable.[146]

To plan for effective de-escalation of disputes, implement processes that permit people to raise and address challenges and grievances in their initial stages. These might include

- "listening sessions" or town halls hosted by executives, where staff can voice concerns;
- drop-in "office hours" hosted by senior executives;
- regularly scheduled meetings between the executives and boards of all affiliated HCTs in which issues or challenges are discussed.

Because of the critical role that process and listening play in preventing and de-escalating conflict,[147] these processes should emphasize open communication, active listening, and clear follow-up. One survey respondent who reported feeling "comfortable voicing concerns" about their organization noted that the CEO is accessible to hear issues, listens to the concerns of others, and follows up with those that raise concerns. The respondent further noted that those conversations felt "productive." This stakeholder's experience confirms the academic research: processes that permit people to raise frustrations and feel heard are productive mechanisms for healthy conflict engagement and help to build trust in the organization and its leaders.[148]

Formal dispute resolution processes

To address specific disputes between individuals or groups (as opposed to generalized concerns or frustrations), affiliation agreements should include a defined dispute resolution process.[149] Defining the process in advance avoids the challenge and inefficiency of deciding upon a dispute resolution mechanism in the middle of an active controversy.[150]

There are many features that might define such a process; not every feature or process is suitable for every organization. At a high level, parties might consider a combination of tiered steps in a formal dispute resolution process, including one or more of the following:

- require disputants to (i) affirm that they tried to resolve the issue through discussions between them and (ii) prepare a statement detailing their efforts;
- engage a trained facilitator to help the disputants discuss the conflict constructively;
- engage a trained mediator to help the disputants attempt to resolve their dispute.

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[145] *See id.*
[146] *See* Groton et al., *supra* note 143, at 271.
[147] See above discussion of process and listening in analytical framework section at 23.
[148] *See* Bruneau & Saxe, supra n. 101 at 865.
[149] Several interviewees noted a glaring lack of dispute resolution language or processes in affiliation agreements.
[150] *See id.*

A facilitator or mediator must be someone the parties view as neutral.[151] Letting the disputants themselves jointly select the facilitator or mediator gives them even greater trust in that person's neutrality.

Practices suggested by stakeholders

Stakeholders identified specific practices that they have found to help HCTs prioritize transparency, open communication, and an appropriate degree of trust:

- Grant staff the option to rotate between member HCTs to develop personal relationships and build trust across organizations.
- Have executives of affiliated HCTs regularly interact with one another to develop personal relationships and build trust across organizations.
- Hold management accountable for implementing the vision for an affiliation.
- Develop goals and objectives guidelines:
    - Take records of meetings leading up to the affiliation, so that parties to an affiliation have a clear record to refer to when determining what goals and principles should be included in their core guidelines.
    - Decide upon core guidelines (based on overarching goals) prior to the agreement, and then host recurring executive or board meetings to check the progress of the partnership in relation to these guidelines.
- Establish dispute resolution processes:
    - Decide upon the requirements for coming to an agreement, especially on points around which boards and executives frequently disagree.
    - Require a "cooling off" period before resorting to the process of disaffiliating.
    - Spell out a detailed conflict resolution process in the affiliation agreement.
    - Mutually select and hire independent third-party conflict resolution consultant(s) during the negotiation phase, prior to officially affiliating.
    - Look at dispute resolution systems that have worked for other affiliations.

[151] *See* Groton et al., *supra* note 143, at 273.

3. HARMONIZE AND ALIGN MISSION AND CULTURE, AND HONOR UNIQUE DIFFERENCES IN MISSION AND CULTURE WHERE APPROPRIATE

Suggested practices for boards and executives

Pre-Affiliation:

- Consider the charitable mission of each individual HCT, and evaluate how an affiliation will impact each HCT's ability to fulfill its mission
- Conduct "cultural assessments" of potential partners
- Ensure that executives and board members get to know one another personally as they negotiate their agreement so that they come together on a cultural level

Post-Affiliation:

- Commit to preserving and upholding the charitable missions of each HCT after the parties have affiliated
- Approach cultural integration in a methodical, inclusive manner
- Adopt a mindset of mutual trust and open, consistent dialogue to merge different cultures

Because charitable mission and culture are central to each HCT's identity, when they clash it can cause significant conflict. To minimize such conflict, affiliating HCTs should seek to respect, reconcile, and (if possible) unite their missions and cultures through concerted discussions and efforts to build trust and personal relationships among their people.

Discuss, acknowledge, and prioritize the preservation of separate missions

By law, an affiliation between HCTs must be in the best interest of the entities and communities they serve.[152] HCTs need to clearly understand how a potential affiliation will affect their ability to fulfill the obligation to serve the interest of the community.[153] Clear understanding requires clear, open, and frank discussion – internally at each affiliating HCT, and in their negotiations with each other.

And as we heard from stakeholders, successful integration of mission and culture requires more than a discussion of the minimum legal requirements. Affiliating HCTs should be clear with each other about what their missions mean, as a practical matter, for the delivery of healthcare in their communities. For example, if there is a department or clinical service that an HCT believes is critical to its ability to fulfill its mission, it must clearly communicate this to its potential partners. By being explicit about their mission-based needs, parties can have informed discussions of what is essential to each HCT's mission, how to meet those needs, and whether the proposed affiliation will enable them to continue serving the best interest of the community.

[152] NH Rev Stat § 7:19-b.
[153] Gee & Rapfogel, *supra* note 34.

Another stakeholder noted that HCTs must consider not only what is beneficial for the larger system created by the affiliation, but also ensure that individual hospitals in the system continue to serve their unique communities. This can be especially challenging when a larger system adds a CAH that serves a smaller community. As one stakeholder put it, "[Parent organizations] must explain to subsidiary boards and organizations that they are not losing their identity, but that their energy is being refocused to fit the population health system." Although presumably meant to be soothing, the statement highlights the CAH's concern – it may be asked to "refocus" its community mission elsewhere. If the CAH perceives a threat to its mission and identity, it may fear becoming powerless or irrelevant.[154] To allay this fear, the parties should discuss not only how the CAH's mission may evolve, but also what the system will do to help preserve the CAH's community-focused mission. By showing their appreciation of each other's respective missions and contributions, HCTs reduce hostility and promote collaboration as they undergo systemic changes brought about by the affiliation.[155]

Strive to align on a cultural level.

Of all the goals to which affiliating HCTs should aspire, research shows that cultural alignment is among the most important. This is consistent with stakeholders' experience. As one interviewee shared: "way before there's a conversation that includes the word 'affiliation,' there needs to be a conversation about the culture of the organization." If parties fail to address their cultural differences, one culture may dominate or subcultures may emerge, breeding distrust.[156] Understanding the cultural differences and prioritizing cultural integration should be a key emphasis in both the negotiation and implementation phases of an affiliation.

"Way before there's a conversation that includes the word 'affiliation,' there needs to be a conversation about the culture of the organization."

When affiliating, parties should undertake a mutual effort toward acculturation.[157] The process should happen in a controlled, nondisruptive manner.[158] Even as there is understandable anxiety about culture being diluted there should be a focus on what it will take to integrate culturally with a new partner.[159]

Because organizational culture is so deeply embedded, it takes time to change. Parties to an affiliation will more effectively address the challenges of cultural alignment if they approach the endeavor strategically and deliberately. Neither party should attempt a complete, immediate overhaul of its culture.[160] Instead, affiliating HCTs should strive to harmonize a set of values that work both with and within their existing cultures.[161] This can be achieved by identifying and embracing strong aspects of the parties' respective cultures, and targeting cultural aspects that need to be changed or weeded out.[162] Combining the best of their respective cultures (and

[154] *See* Northrup, *supra* note 38, at 65.
[155] *See* FISHER & SHAPIRO, *supra* note 32, at 115.
[156] *See* Chelsey, *supra* note 46, at 5448.
[157] Able, *supra* note 41, at 2.
[158] *Id*.
[159] *Id*.
[160] *See* Katzenbach et al., *supra* note 40.
[161] *See id.*
[162] *See id.*

minimizing the weaknesses), enables the parties to evolve together and renders the many changes of any new partnership far less unsettling.[163]

When affiliated HCTs attempt to align and integrate their cultures, they will also find more success if leadership and employees alike adopt a mindset of mutual trust and open, consistent dialogue and engagement.[164] When people demonstrate their trust in one another, they are more willing to work through initial differences and embrace an environment of shared thinking.[165] When board members, executives, and employees regularly engage with each other, they will uncover shared norms and experiences. This type of positive exchange is self-reinforcing and inspires continued interaction in the future.[166] In sum, when parties commit to regular dialogue and engagement, they develop stronger relationships, understand each other better, and more organically embrace the cultural shift that flows from their affiliation.

Practices suggested by stakeholders.

We asked interviewees what specific practices might be instrumental in allowing parties to communicate their individual missions and cultures, reconcile these features, and remain focused on serving their communities. Although this list is not exhaustive, interviewees offered the following suggestions:

- In addition to hosting a public hearing, engage in extensive community outreach in regions affected by a proposed affiliation, and communicate the details of the affiliation to these communities. Through this outreach, welcome feedback from community members about the new partnership, and reflect this community input in negotiations and conversations surrounding the affiliation;
- Before merging, parties should develop a joint "community benefits plan" so that they are confident in their abilities to fulfill their charitable missions together;
- Conduct a detailed "cultural assessment" of a potential partner before affiliating;
- Prior to commencing negotiations for an affiliation, host a dinner with executives and / or board members in which no discussion of the affiliation is held. Rather, individuals at the dinner are encouraged to discuss their backgrounds and experiences so that they get to know one another as people first, business partners second.

[163] *See id.*
[164] Bijlsma-Frankema, *supra* note 44.
[165] *Id.*
[166] *Id.*

4. ESTABLISH WELL-DEFINED ROLES AND RESPONSIBILITIES FOR BOARDS AND EXECUTIVES

Potential practices for board members and executives

Pre-Affiliation:

- Establish clear roles that do not significantly overlap for each HCT and their respective boards
- Create an "Authority Matrix" outlining key governance and decision-making functions

Post-Affiliation:

- Regularly check in on the pre-determined guiding principles and authority matrix, especially in times of conflict
- Require boards to participate in continuing education programs that cover topics including fiduciary duties and best practices in healthcare

We found that an affiliation can bestow on boards and executives new, expanded, or shifting duties to the entities they serve. The shift can create confusion and misunderstanding about the full scope and implication of board and executive duties. Our recommendations, drawn largely from stakeholders' experiences, offer practical guidance for navigating changes in board and executive duties in their combined entities.

Articulate clear and specific roles and responsibilities

Affiliating HCTs should clearly articulate specific roles and responsibilities for board members and executives. One challenge most consistently identified by stakeholders is the confusion that surrounds the change in boards' and executives' roles and authority following a transaction. When they are unsure of how their authority and decision-making powers have changed, they may feel that their "core concerns" of autonomy and role are being ignored or undermined.[167] By contrast, when roles are defined and allocated clearly, healthier relationships result.[168] Indeed, our survey results indicate that stakeholders who believe that their negotiations devoted sufficient time to clarifying roles and responsibilities also report being satisfied that they retained meaningful control over the decisions that affect their organization. This counsels that boards and executives of affiliating HCTs should develop clear guidance on how their decision-making powers will be adjusted and allocated once they are affiliated. This requires the parties to explicitly identify the areas in which they believe retaining control is especially important. From

[167] *See* discussion at p. 22; *see also* FISHER & SHAPIRO, *supra* note 32, at 115.

[168] As one stakeholder put it, "good fences make good neighbors." In other words – set clear boundaries so each partner knows which territory is their responsibility. We would add, be clear also where there is shared responsibility for cross-border issues, and where fences might not serve a neighborly purpose. *See also* "Mending Wall," by Robert Frost.

that foundation they can negotiate an allocation of roles and responsibilities that accommodates those preferences where possible, and clearly specifies where it is not possible.

Prioritize training and education about key skills for boards and executives.

As discussed in Finding #4, boards and executives hold heightened responsibilities throughout the planning, negotiation, and execution of an affiliation. When board members and executives recognize and meet their heightened duties, they can more effectively advocate for their respective HCTs' interests and build a beneficial partnership. As one interviewee noted: "Well-prepared boards anticipate problems and address how things are going to work upfront in as many ways as possible."

Because of the critical role that boards and executives play in guiding an affiliation, it is extremely important that they are aware of their responsibilities and that they remain committed to these responsibilities throughout the process of affiliating. Some core skills that board members and executives should develop include: "best practices" for negotiating, knowledge of key healthcare or medical concepts and trends, awareness of fiduciary duties and how those duties shift in an affiliation, and ability to effectively communicate the about issues and challenges arising from the affiliation.

Practices suggested by stakeholders

We asked stakeholders to offer concrete, tangible solutions for determining guidelines and roles and encouraging strong performance by board members and executives during affiliations. These recommendations are not all-encompassing, and some may not be suitable or feasible for all organizations. Nonetheless, the following list reflects some of the suggestions that stakeholders shared with us:

- Determining Roles
    - Develop a checklist of the decision-making authority that is important to your organization pre-affiliation. Be clear about the authority and controls you will be giving up post-affiliation and assess whether your organization would still be able to meet its obligation to serve the interest of the community.
    - While negotiating and planning the affiliation, engage in a scenario-based exercise on authority delegation. In this exercise, parties choose a specific decision (i.e., the decision to shut down a clinical practice), determine which board or executive team makes that decision, and then walk through the process of how the decision is made and implemented.
    - Create an Authority Matrix. According to the American Hospital Association, an authority matrix "outlines key governance functions in such areas as mission, vision, and values, legal structure, strategy, budget and operations and governance effectiveness for the levels of governance and executive management (e.g., system, regional, local). The authority should be described in plain language and written so that the boards can understand how to operationalize exactly what they are charged with accomplishing."[169]

[169] Summers et al., *supra* note 61.

- Board Member Education and Training
    - Create a subcommittee within a board that is dedicated to tracking, analyzing, and leading the affiliation (that then reports back to the board).
    - Require boards to participate in continuing education programs.
    - Host a comprehensive discussion of fiduciary duties prior to affiliating.
    - Require attendance at yearly hospital association or medical association conferences.
    - Create communication channels between and among boards and executives to discuss the progress of integration.
    - Consult outside software and services for board member and executive communication.

CONCLUSION

As the trend toward hospital consolidations continues into the foreseeable future, the corresponding challenges that stem from these affiliations will continue to surface throughout New Hampshire and the United States. We hope this report helps boards, executives, and advisors of HCTs plan and navigate change of control transactions to build healthy partnerships that serve community needs and withstand whatever challenges the future brings.