

**Poring over Your Foundation:**  
Making Sure Your Nonprofit's Directors and Officers Insurance  
Coverage Matches Your Expectations  
(and Vice-Versa)

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**Moderator:**

Amy Pena, Esq.  
Senior Attorney, Lions Club International

**Presenters:**

Jeffrey S. Tenenbaum, Esq.  
David (D.S.) Gray, Esq.  
Venable LLP

How likely are you to be sued  
(a) in your personal capacity  
and (b) for an act or an alleged  
failure to act as a director or  
officer of your nonprofit  
organization?

More than 80% of those recently surveyed  
as part of a study focused on corporate  
executives and officers said:

**“Not likely”**

Insurer’s description of the data:

**“Disconcerting”**

## “Why Should I Care?”

- Suing you is not an alternative to suing your nonprofit organization.
- You may be another pocket.
- Suing you may offer a strategic advantage to the plaintiffs.
- Assume you are correct. Who’s going to pay for the outside counsel necessary to show that you are?

## “Why (Else) Should I Care?”

- Every bit of “common sense” we cover today
  - Was learned the hard way by very sophisticated nonprofit organizations;
  - Raised the (sometimes realized) potential of thousands, if not millions, in liabilities and legal fees; ***and***
  - Could have been readily prevented.

## **Our (Expected) Journey**

- I. Understanding How D&O Insurance Fits
- II. Matching Potential Risks with D&O Coverage
- III. Surveying Your Foundation: The Matchmakers
- IV. Identifying Cracks in Your Foundation
- V. Leaning on Your Foundation: Satisfying Your D&O Obligations
- VI. Conclusion/Question and Answer Session

# Understanding a Nonprofit's Need for D&O Insurance

## What D&O Insurance IS

**Purpose:** To protect directors, officers, and other representatives of “insured organizations” against certain third-party losses arising from “wrongful acts” in their official capacities

**Sides:** A, B, and C

**Policy Periods:** Often in terms of years, with defined start dates, that typically concern the timing of claims

# Understanding a Nonprofit's Need for D&O Insurance

## What D&O Insurance IS NOT

- Errors & Omissions Insurance
- Automobile Insurance
- Commercial General Liability Insurance
- ERISA/Fiduciary Insurance

# Understanding a Nonprofit's Need for D&O Insurance

## What D&O Insurance IS NOT

- Employee Dishonesty/Fidelity Insurance
- Property Damage Insurance
- Umbrella Insurance
- Workers' Compensation Insurance

# Understanding a Nonprofit's Need for D&O Insurance

## Specialty Policies

- “Blanket” Policies
- “All Risk” Policies
- “Nonprofit Organization” Policies

**One size does not fit all. Policies should be relatively, but realistically, custom-fitted.**

## Matching Potential Risks with D&O Coverage: Who Are You?

**You should be the insured.**

- Use the legal name of your nonprofit organization.
  - If you use a trade name, a street name, or some other identifier, your policies also should reflect that name.
  - If your nonprofit organization changes its name, be sure that your applications and your policies reflect that change.

## Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who “you” are.**
  - Subsidiary organizations
  - Parent organizations
  - Affiliated organizations
  - Member organizations
  - Committees
  - Branches

## Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who your “directors and officers” are.**
  - Boards of directors
  - Boards of trustees
  - Those with dual responsibilities
  - Shareholders
  - Managers
  - Officers
  - Spouses

## Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know who your other insured persons are.**
  - Employees
  - Volunteers
  - Students Earning Credit
  - Interns

## Matching Potential Risks with D&O Coverage: Who Are You?

- **Do not assume that your insurers know what your insured persons expect.**
  - Right to retain (and duty to pay) counsel
  - Conflicts of interest
  - Personal indemnification
  - Intersection with articles of incorporation, bylaws, and other issues of corporate governance

## Matching Potential Risks with D&O Coverage: What Do You Do?

- Define the scope of your activities.
  - Be clear.
  - Be comprehensive.
  - Don't be shy.
  
- Redefine your activities as your organization changes.

## Matching Potential Risks with D&O Coverage: Where Do You Do What You Do?

- Where have your activities been?
- Where are your activities now?
- Where will your activities be during the policy period?  
In the foreseeable future?

## **Surveying Your Foundation: The Matchmakers**

**YOU** need to be involved  
in determining the scope  
of your organization's  
D&O coverage.

## **Surveying Your Foundation: The Matchmakers**

**Your qualified insurance broker needs to be involved in that determination.**

- Understanding your organization
- Understanding your goals
- Understanding your claims history
- Understanding your competitors
- Understanding threats from potential plaintiffs

## **Surveying Your Foundation: The Matchmakers**

**Your qualified insurance broker needs to be involved in that determination.**

- Frankly assessing your potential liabilities
- Helping you address potential liabilities, to the extent possible
- Helping you achieve an optimal level of coverage

## Surveying Your Foundation: The Matchmakers

- Your insurance carriers should be involved in that determination.
- Coverage counsel also can help address your concerns about various issues.
  - Scope of the coverage provided
  - Who may be an insured
  - What potential liabilities may be excluded

# Identifying Cracks in Your Foundation

**Your organization's D&O needs are not set in stone.**

- Ongoing, continuous, thoughtful self-evaluations
- Reconsidering risks as activities (and potential liabilities) expand
- Learning from your own claim history

## Identifying Cracks in Your Foundation

**Your organization's D&O coverage is not set in stone.**

- You must keep track of your “policy periods.”
- Be sure to include sufficient time to reassess your risks, needs, people, and goals before time runs out on a policy.
- Closely review a “renewed” D&O policy to assess how it matches your risks and how it changes the coverage provided.

## **Leaning on Your Foundation: Satisfying Your D&O Obligations**

You should consider D&O coverage  
(and all other insurance policies) to be  
**part** of a risk management program,  
not **the** risk management program.

# Leaning on Your Foundation: Satisfying Your D&O Obligations

## Outside the Four Corners of Your Policy

- Identifying and addressing risks that you can and/or should eliminate
- Identifying and addressing risks that you can and/or should limit
- Raising awareness about your risks

# **Leaning on Your Foundation: Satisfying Your D&O Obligations**

## **Inside the Four Corners of Your Policy**

- Read your D&O policy.
- Understand your D&O policy.
- Keep your D&O policy.

## Leaning on Your Foundation: Satisfying Your D&O Obligations

- **Exclusions** explicitly preclude insurance coverage for losses arising from certain conduct, activities, or circumstances
  - “We will defend against and indemnify you against certain kinds of losses, but...”
  - The effect that any given exclusion will have on your organization depends on, among other things, the risks that your organization faces

# **Leaning on Your Foundation: Satisfying Your D&O Obligations**

## **Safe Harbors**

- Sometimes insurers provide a respite from broad exclusions—sometimes with, sometimes without an additional premium.
- Safe harbors can mean the difference between no coverage for certain risks and conditional coverage for certain risks.

# Leaning on Your Foundation: Satisfying Your D&O Obligations

## Safe Harbors

### Dishonesty exclusion

Example: “This policy excludes coverage for loss arising from an insured’s dishonest, fraudulent or criminal acts or omissions. If a claim would invoke the insurer’s duty to defend but for the allegations, then the insurer will defend the claim until there is a final adjudication by a factfinder, or admission by the insured...”

# Leaning on Your Foundation: Satisfying Your D&O Obligations

## Safe Harbors

### Intentional acts exclusion

Example: “This policy excludes coverage for loss arising from acts expected or intended to cause property damage or bodily harm, except that this exclusion does not pertain to any Wrongful Acts as defined by this policy.”

# **Leaning on Your Foundation: Satisfying Your D&O Obligations Conditions**

Even if a “covered event” occurs and even if no exclusions apply, the insurer’s assistance can be lost.

- Duty to report potentially covered event promptly and/or within a certain number of days
- Duty to cooperate with the insurance company

## Questions?

Venable LLP  
575 7th Street, NW  
Washington, DC 20004  
202.344.4000

Jeffrey S. Tenenbaum, Esq.  
[jstenenbaum@Venable.com](mailto:jstenenbaum@Venable.com)  
t 202.344.8138

D.S. Gray, Esq.  
[dsgrey@Venable.com](mailto:dsgrey@Venable.com)  
t 410.244.7682

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