

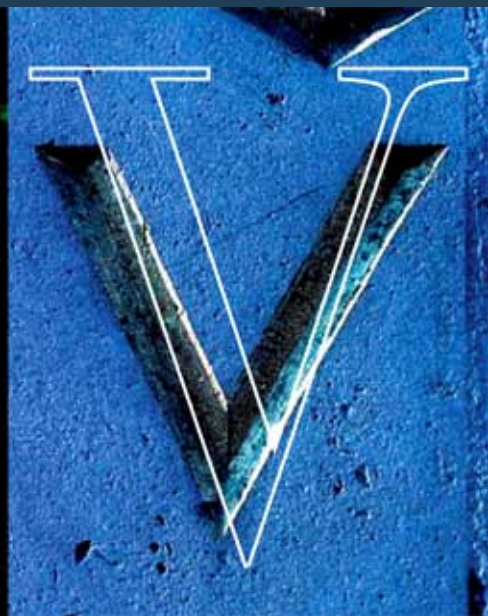
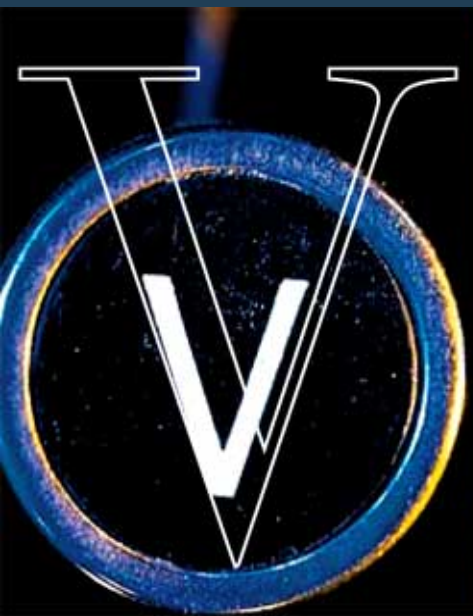
## You're Not Covered for Everything: Making Sure Your Nonprofit's Directors and Officers Insurance Coverage Matches Your Expectations

Tuesday, October 16, 2012  
12:30 p.m. – 2:00 p.m. EDT

Venable LLP  
Nonprofit Organizations Practice  
Washington, DC

Moderator:  
Jeffrey S. Tenenbaum, Esq.

Panelists:  
David S. Gray, Esq., Venable LLP  
Louis Novick, President, Novick Group, Inc.



## Upcoming Venable Nonprofit Legal Events

November 13, 2012 – [Office Leasing for Nonprofits: Mastering the Key Issues](#)

December 11, 2012 – Exchanges under Health Care Reform and “Private” Exchanges: What Does My Nonprofit Need to Know?

January 8, 2012 – [Exempt or Non-Exempt? The Ten Most Common Employee Classification Pitfalls Faced by Nonprofits](#)



# You're Not Covered for Everything: Making the Most of What You Have

October 16, 2012  
12:30 p.m. – 2:00 p.m. EDT

**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”**



“Associations and nonprofits should expect their annual premiums to increase for the next few years. But nonprofit organizations are still recovering from the Great Recession and money is tight. Many have already reduced their insurance costs by lowering policy limits, increasing deductibles, and/or eliminating coverages. How much lower can they go?”

**Source:** How Much Insurance is Enough? Risk Financing Decisions, <http://riskychronicles.wordpress.com/2012/05/22/how-much-insurance-is-enough-risk-financing-decisions/> (May 22, 2012, 11:59 am)



# “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 correctly conclude that you are not liable and/or judgment-proof. Who’s going to pay for the outside counsel necessary to show that you are right?



# “Why (Else) Should I Care?”

- Every bit of “common sense” covered 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. The Matchmakers
- IV. Identifying Potential Gaps in D&O Coverage
- V. Satisfying Your D&O Obligations



# Understanding How D&O Insurance Fits

## 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

**Claims made**



# Understanding How D&O Insurance Fits

## What D&O Insurance IS NOT

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



# Understanding How D&O Insurance Fits

## What D&O Insurance IS NOT

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



# Understanding How D&O Insurance Fits

## 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?



## The Matchmakers

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



# 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



# 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



# 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 Potential Gaps in Your D&O Coverage

**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 Potential Gaps in Your D&O Coverage

**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.



# 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.



# 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



# 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.



# 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



# 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.



# 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 fact finder, or admission by the insured...”





# 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.”



# 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



# **Nonprofit Directors & Officers Liability You're Not Covered for Everything... Get Over It**

October 16, 2012  
12:30 p.m. – 2:00 p.m. EDT

**Louis Novick, President  
Novick Group, Inc.**



# Who Is Covered?

- **Just about everyone**  
(acting within the scope of their authority)
  - The Nonprofit Organization
  - Directors
  - Officers
  - Committee Members
  - Volunteers
  - Employees



# What Is (May Be) Covered?

	Frequency	Severity
Employment Practice Liability	High	Low
Personal Injury (e.g., libel & slander)	Low	Low-Moderate
Publishers Liability (e.g., plagiarism, Copyright infringement)	Low	Low
Accreditation/Certification/Standard Setting	Low	Moderate-High
Breach of Contract (defense costs only)	Low	Low
Antitrust	Low	High



## When is \$1M More than \$2M?

How much coverage is of **FAR** less importance than how good the underlying terms and conditions of coverage.



# Top Five Policy Provisions You Probably Don't Read

- Defense
- Severability
- Cancellation
- Fraud Exclusion
- Coverage Territory
- Notice



# Can We Get It for Less?

Remember you're not talking about which brand of AA batteries to buy.





# Takeaway

The application is more important than you think. Make certain responses are candid and complete. If you're new to the position, review the prior year(s) application.



## Questions

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

Louis Novick, President  
Novick Group, Inc.  
[lou@novickgroup.com](mailto:lou@novickgroup.com)  
t 301.795.6600

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