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# Top Ten Hot-Button Insurance Issues Facing Nonprofits

Thursday, January 12, 2017, 12:30 pm – 2:00 pm ET  
Venable LLP, Washington, DC

**Moderator**

**Jeffrey S. Tenenbaum, Esq.**

Partner and Chair of the Nonprofit  
Organizations Practice,  
Venable LLP

**Speakers**

**Lou Novick**

Principal, Novick Group

**Thomasina E. Poirot, Esq.**

Associate, Product Liability and  
Mass Torts Practice,  
Venable LLP



# Presentation

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Associate, Product Liability and Mass Torts Practice,  
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- **March 30, 2017: Dealing with Nonprofit Donors – Risks, Restrictions, and When to Say “No Thanks”**  
*(details and registration available soon)*



## What Do You Need to Do to Be an Effective Risk Management Advocate for Your Organization?

- ***It begins from within:***
  - Evaluate your liabilities and your risks
  - Understand your current activities and future goals
  - Understand your organizational structure
  - Know your contracts and when you have assumed liability
  - Don't assume that brokers know who you are
    - Directors/Officers/Employees/Volunteers

## Corporate Orientation toward Risk



- Reflects organizational culture, not individual preferences
- Must be balanced with financial strength:
  - Ability to pay more/less premium
  - Ability to retain more/less risk on balance sheet
- Should inform decision making beyond insurance

## What Do You Need to Do to Be an Effective Risk Management Advocate for Your Organization?

- Stay out of the fine print
- Be able to articulate the corporate culture toward risk
- Tell the broker what s/he can't see for themselves
- Broker doesn't make the decision – insured does



## What Types of Policies Should You Have?

- **Legal requirement**
  - Workers' Compensation
  - ERISA Bond
  - Automobile Liability
  - Pollution
- **Contractual requirement**
  - General Liability
  - Property
- **Risk tolerance**
  - Directors & Officers
  - Workplace Violence
  - Foreign
  - Fiduciary Liability
  - Errors & Omissions
  - Specialty Policies
  - Cyber
  - Employee Dishonesty
  - Property
  - Travel Accident
  - Umbrella
  - Event Cancellation

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## How Much Insurance Is Enough?

- **Objective Selection Criteria:**
  - Property:
    - Make sure to include all types
    - Add it up
    - Current replacement cost – not book value
  - Liability:
    - No single right answer – typically a range of limits
    - Consider reasonably foreseeable claim scenarios
    - Peer group limits are of little value – peer group “loss” experience is of great value
    - Defense costs – inside or outside the limits
    - Corporate orientation to and tolerance for risk

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## Workplace Violence (WPV)

- What is WPV?

The Occupational Health and Safety Administration (OSHA) defines workplace violence as "any physical assault, threatening behavior or verbal abuse occurring in the work setting."

- Where is your workplace?

- Office
- Offsite Meeting
- Fundraising Dinner
- Warehouse
- Shelter

- Contractual assumption of risk

...indemnify from and against any and all liability arising from or in connection with...use and occupancy of the premises.

- Are we insured?

Yes – No – Maybe



## Workplace Violence (WPV)

- Are we insured?

**Yes**

Defense provided if nonprofit is accused of negligence that caused or contributed to the harm.

**No**

Absent an assertion of negligence, carrier owes neither a duty to defend nor a duty to pay sums nonprofit is legally obligated to pay (e.g., risk assumed under contract).

**Yes and No**

Carrier duty of defense is broader than duty to pay settlements and judgments. Possibility that carrier has a duty to defend but not indemnify.



## Cyber Breach = \$\$\$\$

- One of the biggest risks today
  - JP Morgan, Target, Sony, Ashley Madison, etc.
- Technology is *everywhere*, and you are liable for personal/financial information breaches.
- You are one of the following organizations:
  - You've been hit and are working through it;
  - You've been hit and don't know it; or
  - You have the potential to be hit



## Top Five Biggest Cyber Risks

1. Contracts
  - An insured contract is not what you think it is
2. Late claim notice
  - If you think it won't cost you, think again
3. Application errors
  - They live forever
4. We're covered for everything
5. Objective decision criteria
  - Informed decisions





## Volunteer Coverage

- Who are your volunteers?
- Are they covered?
- Are they eroding your policy limits?
- Should you have separate coverage for volunteers/interns?



## Questions?

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To view Venable's Government Grants Resource Library, see [www.grantslibrary.com](http://www.grantslibrary.com).

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# Speaker Biographies

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## Jeffrey S. Tenenbaum

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### AREAS OF PRACTICE

Tax and Wealth Planning  
 Antitrust  
 Political Law  
 Tax Controversies and Litigation  
 Tax Policy  
 Tax-Exempt Organizations  
 Regulatory

### INDUSTRIES

Nonprofit Organizations

### GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

### EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

### MEMBERSHIPS

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last five years (2012-16). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

### ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of *Aspen's Nonprofit Tax & Financial Strategies* newsletter.

## REPRESENTATIVE CLIENTS

AARP  
Academy of Television Arts & Sciences  
Air Conditioning Contractors of America  
Air Force Association  
Airlines for America  
American Academy of Physician Assistants  
American Alliance of Museums  
American Association for the Advancement of Science  
American Bar Association  
American Cancer Society  
American College of Cardiology  
American College of Radiology  
American Council of Education  
American Institute of Architects  
American Nurses Association  
American Red Cross  
American Society for Microbiology  
American Society of Anesthesiologists  
American Society of Association Executives  
America's Health Insurance Plans  
Anti-Defamation League  
Association for Healthcare Philanthropy  
Association for Talent Development  
Association of Clinical Research Professionals  
Association of Corporate Counsel  
Association of Fundraising Professionals  
Association of Global Automakers  
Association of Private Sector Colleges and Universities  
Auto Care Association  
Better Business Bureau Institute for Marketplace Trust  
Biotechnology Innovation Organization  
Brookings Institution  
Carbon War Room  
Catholic Relief Services  
CFA Institute  
The College Board  
CompTIA  
Council on Foundations  
CropLife America  
Cruise Lines International Association  
Cystic Fibrosis Foundation  
Democratic Attorneys General Association  
Design-Build Institute of America  
Entertainment Industry Foundation  
Erin Brockovich Foundation  
Ethics Resource Center  
Foundation for the Malcolm Baldrige National Quality Award  
Gerontological Society of America  
Global Impact  
Good360  
Goodwill Industries International  
Graduate Management Admission Council  
Habitat for Humanity International  
Homeownership Preservation Foundation  
Human Rights Campaign  
Independent Insurance Agents and Brokers of America  
InsideNGO  
Institute of Management Accountants  
International Association of Fire Chiefs  
International Rescue Committee  
International Sleep Products Association  
Jazz at Lincoln Center  
LeadingAge  
The Leukemia & Lymphoma Society

Lincoln Center for the Performing Arts  
Lions Club International  
March of Dimes  
ment'or BKB Foundation  
National Air Traffic Controllers Association  
National Association for the Education of Young Children  
National Association of Chain Drug Stores  
National Association of College and University Attorneys  
National Association of College Auxiliary Services  
National Association of County and City Health Officials  
National Association of Manufacturers  
National Association of Music Merchants  
National Athletic Trainers' Association  
National Board of Medical Examiners  
National Coalition for Cancer Survivorship  
National Coffee Association  
National Council of Architectural Registration Boards  
National Council of La Raza  
National Fallen Firefighters Foundation  
National Fish and Wildlife Foundation  
National Propane Gas Association  
National Quality Forum  
National Retail Federation  
National Student Clearinghouse  
The Nature Conservancy  
NeighborWorks America  
New Venture Fund  
NTCA - The Rural Broadband Association  
Nuclear Energy Institute  
Peterson Institute for International Economics  
Professional Liability Underwriting Society  
Project Management Institute  
Public Health Accreditation Board  
Public Relations Society of America  
Romance Writers of America  
Telecommunications Industry Association  
The Tyra Banks TZONE Foundation  
U.S. Chamber of Commerce  
United States Tennis Association  
Volunteers of America  
Water Environment Federation  
Water For People  
WestEd  
Whitman-Walker Health

## HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-16

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

## PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 1,000 articles.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times*, *Politico*, *Bloomberg Business*, *Bloomberg BNA*, *EO Tax Journal*, and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.



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### BAR ADMISSIONS

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### COURT ADMISSIONS

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### EDUCATION

J.D., University of Baltimore School of Law, 2010

B.A., Villanova University, 2005

### MEMBERSHIPS

DRI

Maryland Defense Counsel

Thomasina Poirot is a member of Venable's Product Liability and Mass Torts Practice Group. Her practice concentrates on complex pharmaceutical litigation and insurance coverage matters.

Prior to and during law school, Ms. Poirot worked as a Senior Account Executive for a large insurance company. In this capacity, she performed complex coverage and liability analyses as well as litigation management for asbestos, lead, hazardous waste, and pharmaceutical matters. She worked with attorneys, agents, risk managers, and in-house counsel to evaluate the risks of litigation and settlements in toxic tort claims.

Ms. Poirot also has a strong presence in the Baltimore community. She is the Chair of the Advisory Board of Business Volunteers Unlimited's GIVE program for young professionals, and serves on the Board of Directors of Friends of Great Kids Farm, and the Baltimore Tree Trust. She also serves as the Defense Research Institute Young Lawyer's Liaison for Maryland Defense Counsel.

Ms. Poirot was named one of the *Daily Record's* 20 in their Twenties, and was also a recipient of Baltimore's "Spirited Women Rising" award.

### HONORS

Selected for inclusion in *Maryland Super Lawyers* Rising Star Edition, 2016 - 2017

Named to *Daily Record's* list of "20 in Their Twenties," 2013

Recipient of Baltimore's "Spirited Women Rising" Award, 2013

### PUBLICATIONS

- October 2012, The First Amendment and "Off-Label" Promotion, *For the Defense*

### SPEAKING ENGAGEMENTS

- January 12, 2017, Top Ten Hot-Button Insurance Issues Facing Nonprofits
- December 9, 2015, "Staying Current on Insurance Issues Confronting Nonprofit Organizations," Lorman Live Webinar



## **Lou Novick**

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Lou Novick is President of the Novick Group, Inc., a commercial property & casualty broker located in Rockville, MD, a suburb of Washington, DC. The firm, which is licensed to operate in all fifty states, celebrated its twenty-fifth anniversary in January 2012. Prior to starting the firm, Lou worked for Marsh & McLennan in the Washington, DC office of Smith-Sternau (now Mercer Health & Benefits Insurance Services, LLC).

Lou writes extensively and speaks regularly on topics related to insurance and risk management to a diverse range of nonprofit organizations and industry groups. For more than thirty years, he has been actively involved in the exempt/nonprofit insurance market with special emphasis in the D&O, Publisher's, Fiduciary, and Miscellaneous Errors & Omissions lines. Lou has served on the boards of a number of nonprofit organizations including the Greater Washington Society of Association Executives, the ASAE Center for Association Leadership and the Finance and Administration Roundtable, serving as its chair in 2007-2008.





# Additional Information

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## AUTHORS

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David S. Gray  
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## RELATED PRACTICES

Insurance

## RELATED INDUSTRIES

Nonprofit Organizations

## ARCHIVES

2017 2013 2009  
2016 2012 2008  
2015 2011 2007  
2014 2010

## ARTICLES

November 8, 2012

### MAXIMIZING A NONPROFIT'S INSURANCE COVERAGE

#### Overview

Matching the potential risks faced by a nonprofit organization with its insurance policies can be a challenge for even seasoned executives and in-house counsel. Policies often use confusing language, and the diversity of nonprofit organizations means that no one insurance policy works for all. This QuickCounsel will identify some best practices to help nonprofits select the insurance coverage they need and increase the effectiveness of those policies.

#### Knowing the Options

Choosing which policies to purchase requires a careful examination of a nonprofit's programs and activities, its environment, the governing law, the size of a nonprofit's potential liabilities, and the willingness of a nonprofit to weather certain potential liabilities without insurance coverage. Some common policies include:

- *Automobile*: Even a nonprofit that does not own its own automobiles can purchase an automobile liability policy, which may provide better coverage at better rates for rental cars than rental car companies.
- *Commercial General Liability*: Often called the "CGL," this policy ordinarily provides broad, but not unlimited, coverage for unexpected accidents that injure people who are not associated with the nonprofit, such as attendees, customers, and visitors.
- *Directors & Officers*: Commonly referred to as "D&O," this policy protects directors, officers, and employees when they are sued in their personal capacities for alleged wrongful acts that occurred within the scope of their work and resulted in financial losses. It also protects the nonprofit itself for certain claims.
- *Errors & Omissions*: This policy focuses on negligence that occurs as part of a nonprofit's usual activities. Since this coverage can intersect with D&O insurance, a nonprofit must take care to understand what specifically is covered by each policy to determine the potential risks that may be left uninsured if it chooses not to use an "E&O" policy.
- *Employee Dishonesty/Fidelity*: This policy can cover the losses that may result from an employee misusing a nonprofit's property or assets for personal use.
- *ERISA/Fiduciary*: This policy generally protects a nonprofit from certain liabilities related to retirement, profit-sharing, and health insurance plans.
- *Property Damage*: This policy can cover physical damage to a nonprofit's office space, equipment, supplies, and employee property.
- *Special Events*: This hybrid policy generally provides coverage focused on risks associated with conventions and meetings.
- *Umbrella*: This type of policy is triggered once catastrophic events exhaust the limits of underlying policies, such as a CGL.
- *Workers' Compensation*: This policy may protect a nonprofit from litigation involving workplace injuries to its employees.

In addition, insurance companies offer specialty policies and endorsements to cover unique risks. The terms in these specialty policies may not be as well-known as those in traditional policies. The nonprofit organization should make detailed inquiries into the types of claims made under those policies and the risks that they do (and do not) cover, in order to determine whether these policies are worth the extra investment.

#### Understanding the Selected Policies

A nonprofit should be aware of the scope of its insurance coverage, particularly if it has what some insurers call "association professional liability" or a "nonprofit organization" policy. These policies often

combine aspects of D&O coverage, E&O coverage, and coverage against some liabilities related to employment. They do not insure against all risks a nonprofit could potentially face. For example, they typically do not cover a personal injury suit arising from an automobile accident or property damage to a nonprofit's offices from a natural disaster.

Choosing policies also should involve a discussion of the part that the insurer will play when a potentially covered claim arises. An insurance company can play a large role in the event any litigation arises, and it is important to think about these issues beforehand. For instance, some policies allow nonprofit organizations to choose their own defense attorneys, but others allow the insurance company to choose for the insured. Further, some policies will reimburse for expenses like any lost time for an employee who is responding to a subpoena, whereas others will not.

Understanding the options also involves acknowledging that some risks cannot be insured. State statutes and case law can limit the circumstances in which any person or any organization can receive insurance coverage for certain activities, such as specific illegal conduct or actions resulting in punitive damage awards.

### **Clarifying Who Will Benefit**

A nonprofit should ensure that its policy properly identifies the "insured persons." The nonprofit itself should be the insured, and the policy should use the nonprofit's legal name, as well as its common or street name if it has one, and state the correct address for the nonprofit. In addition, the coverage should extend to all of the chapters, subsidiaries, and other affiliated organizations of the nonprofit. An insurer could find that because some types of subsidiaries are specifically covered in the policy and others are not, those other groups are not protected. These details can therefore be critical in the event of a dispute over insurance coverage.

A nonprofit also must carefully review which people are covered by its policies. This issue most commonly arises with volunteers, who are not always covered by insurance policies but can be a major part of how the nonprofit accomplishes its work. State laws sometimes protect volunteers for nonprofits against personal injury claims, but extending coverage to volunteers can still be beneficial. These state law protections do not extend to all types of nonprofits or to all types of volunteers. In addition, if the volunteer is being sued, proving that the volunteer is immune will require an attorney, and an insurer would pay for or provide those legal services.

### **Protecting What Has Been Purchased**

Making effective use of an insurance policy involves more than just purchasing the policy. During the policy period, there are several steps to be taken and practices that can be avoided to guarantee coverage. Having the policies themselves available and accessible is critical; some nonprofits do not keep copies of their policies on hand, which can cause delays in determining whether and how to submit a claim.

A nonprofit also can run into the problem of not keeping its insurers up to date on new developments in its structure or activities. For example, a D&O insurance policy that was previously designed to cover only certain activities for the nonprofit may not be effective when the nonprofit has taken up other functions. Where the insurer can argue that it would have issued a materially different policy had it known about these other activities, it may be able to avoid its obligations because of this unintentional misrepresentation. Keeping the nonprofit's insurers advised of any changes in location, structure, or activities, and providing notice as part of any due diligence process, help to ensure that the insurance policy remains effective.

Similarly, when an insurer does not receive prompt notice of a claim, it also may be able to avoid its obligations in some instances. Policies themselves provide information on when a claim must be received. Some states will excuse the insurer from its obligations if the insurer can show it was prejudiced due to the delay in filing the claim. Even if the insurer cannot show prejudice, submitting claims on time will avoid this kind of dispute entirely.

### **Communicating with Brokers**

Insurance brokers are a critical part of maintaining an effective insurance policy. A nonprofit can and should rely on the broker for help in choosing which policies to purchase. It can be especially helpful to have a qualified insurance broker who understands and has experience with the unique needs of nonprofits.

Relying on an insurance broker alone is not enough. Having an active role in the maintenance and application of the policy is also important for nonprofits. For instance, even if the broker will be reporting

the claim, it is helpful to ask that the report be in writing and that the nonprofit receive a copy, and to conduct a follow-up to make sure the claim has been properly filed. Keeping track of the end dates for all policy periods is another way to stay on top of communication with the broker; reminders in advance of the end date of the policy can help make sure the broker and the nonprofit are both ready to discuss renewals or new terms and conditions.

Renewing policies presents another opportunity for the nonprofit to be active in understanding its insurance coverage. A renewal can sometimes include new exclusions or new limitations. A broker may find these changes unimportant and not bring them to the attention of the nonprofit, but a change that would not affect one nonprofit could be significant for another. Asking questions about the details of the policy or the proposed changes can help ensure that the policy is appropriate for the nonprofit.

### **Conclusion**

When facing a serious accident or large lawsuit, an additional dispute with the insurance company can be another source of concern and a drain on resources. Focusing on understanding the insurance policies, on diligent recordkeeping, and on communicating effectively with the insurer can help a nonprofit be in a better position to make efficient use of its insurance coverage, should the need arise.

Additional Resources

**You're Not Covered for Everything: Making Sure that Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations**, by **Jeffrey S. Tenenbaum**, Esq. and **David S. Gray**, Esq.

**Top Ten Legal Risks Facing Nonprofit Boards**, by Jeffrey S. Tenenbaum, Esq.

**Baby Steps, Big Consequences: How Minimal Efforts Can Maximize Nonprofits' Insurance Coverage**, by David S. Gray, Esq. (American Society of Association Executives presentation, 2012)

**Poring Over Your Foundation: Making Sure Your Nonprofit's Directors & Officers Insurance Coverage Matches Your Expectations** (ACC Webcast, 2012)

**Who Needs an Insurance Broker?**, Nonprofit Risk Management Center

\* \* \* \* \*

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*This QuickCounsel is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*

## ARTICLES

September 28, 2012

### FIVE STEPS TO MAXIMIZING A NONPROFIT'S INSURANCE COVERAGE

#### AUTHORS

David S. Gray  
Jeffrey S. Tenenbaum

#### RELATED PRACTICES

Insurance

#### RELATED INDUSTRIES

Nonprofit Organizations

#### ARCHIVES

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2014 2010

Matching the potential risks faced by a nonprofit organization with its insurance policies can challenge even seasoned executives. Policies often employ arcane, confusing language. The diversity of nonprofit organizations defies a one-size-fits-all mentality. Significant shifts in priorities, as well as new programs and activities, may require shifts in insurance coverage. And let's be honest—few people start or go to work for a nonprofit because they yearn to monitor insurance issues.

Based on our experience counseling nonprofit organizations, we have identified the following five fundamental steps that can maximize the effectiveness of insurance policies without diverting too many resources. If missed, however, these steps can result in uncertainty and uninsured risk.

#### Step 1: Understand the Options That a Nonprofit Has.

Although every insurance policy is different, there are some principal types of policies from which a nonprofit can choose:

- **Automobile** – Even a nonprofit that does not own its own automobiles can sometimes purchase an automobile liability policy that provides better coverage at better rates for rental cars than the coverage purchased at a car rental desk.
- **Commercial General Liability** – Known colloquially as the “CGL,” this policy remains something of a blanket policy for unexpected accidents that injure attendees, customers, visitors, and others generally unaffiliated with the nonprofit.
- **Directors & Officers** – Often described as the “D&O,” this policy typically protects directors, officers, and employees facing personal liability for alleged wrongdoing that occurs within the scope of their work and results in financial losses (including employment-related liabilities), as well as protects the nonprofit itself for such claims.
- **Errors & Omissions** – This policy focuses more on negligence that occurs as part of a nonprofit's activities. As errors & omissions coverage may intersect with D&O coverage, a nonprofit must take care to understand the potential risks that may be left uninsured if it forgoes an “E&O” policy.
- **Employee Dishonesty/Fidelity** – This policy can cover the losses that may result from an employee misusing a nonprofit's property or assets for personal use.
- **ERISA/Fiduciary** – This policy generally protects a nonprofit from certain liabilities related to retirement, profit-sharing, and health insurance plans.
- **Property Damage** – This policy can cover physical damage to a nonprofit's office space and employee property.
- **Special Events** – This hybrid policy generally provides coverage focused on risks associated with conventions, meetings, and the like.
- **Umbrella** – This policy is triggered once catastrophic events exhaust the limits of underlying policies, such as a CGL.
- **Workers' Compensation** – This policy may protect a nonprofit from litigation involving workplace injuries to its employees.

Selecting which policies to purchase requires a careful examination of a nonprofit's programs and activities, its environment, governing law, the size of a nonprofit's potential liabilities, and the ability and willingness of a nonprofit to weather those liabilities without insurance coverage.

By no means is this a complete list, as insurance companies offer specialty policies and endorsements to cover unique risks. While they may result from outside-the-box thinking, the terms in specialty policies may not be as well known as those in traditional policies. Pointed inquiries about claims made under those policies, the risks that they do (and do not) cover, and additional resources for guidance are necessary to make sure that these policies warrant the investment.

#### Step 2: Understand the Options that a Nonprofit Has Chosen.

A nonprofit can encounter problems if it tries to use traditional policies to cover unique risks or risks typically covered by other policies. Some insurers offer “association professional liability” or “nonprofit organization” policies, which sometimes combine certain aspects of D&O coverage, E&O coverage, and coverage against certain employment-related liabilities. Such policies do not insure all of a nonprofit’s expected risks. For instance, they generally do not protect a nonprofit sued by unhappy customers for personal injury damages. Nor do they generally cover personal injuries from automobile accidents, damage to the lobby caused by a flood, or breach of contract claims.

Policy decisions also should follow from critical thinking about the role that insurers will play. Some policies permit organizations to select their own defense attorneys; others give that choice, in whole or in part, to the insurer. Some insurance policies will reimburse certain expenses, such as certain lost employee time and expenses incurred by responding to subpoenas or investigative requests, whereas other policies will not. If organizations start thinking about these issues after a subpoena or claim has been served, it is often too late to do anything about them.

Those decisions also should acknowledge the fact that some risks cannot be insured. Even to the extent not excluded by insurance policies, state law can limit the circumstances in which anyone or any organization can receive insurance benefits for certain activities, such as intentional misconduct, certain illegal conduct, or actions resulting in punitive damage awards.

### **Step 3: Make Clear Who Will Benefit from the Policies.**

Not identifying the right “insured persons”—those who should benefit from any coverage purchased—can lead to unwanted surprises. Insurance policies often misidentify the nonprofit that purchased them, include the wrong address for the nonprofit, or fail to extend coverage to all of the organizations that should receive insurance benefits, such as subsidiary or affiliated organizations. These are easily correctable issues that, if left uncorrected, can have potentially serious repercussions.

Nonprofits sometimes overlook the importance of ensuring that their policies extend coverage to all of the people who perform their work. This issue frequently arises with regard to volunteers, who are not always among the classes of people to whom coverage is extended. Even in states that protect volunteers for certain nonprofits against personal lawsuits, extending coverage to volunteers may benefit the organization; proving that a volunteer is immune from suit may require an attorney retained and paid by an insurer. Moreover, state volunteer protection statutes generally do not extend to all types of nonprofits.

### **Step 4: Protect What the Nonprofit Has Purchased.**

Simply purchasing policies does not guarantee coverage, even during the policy period. Some nonprofits do not even keep copies of their policies—a practice that can impede determinations of whether they should submit a claim and the insurers to which a claim should be submitted.

A nonprofit also can encounter problems if it does not report new locations or activities that impact the risks insured by their policies. If an insurer prices its D&O coverage based on an understanding that a nonprofit engages in certain activities, but would have issued a materially different policy had it known that the nonprofit engages in other activities, it may be able to avoid its coverage obligations. Such unintentional misrepresentations can occur when, during a policy period, a nonprofit enters a new line of activity without advising its insurance companies. Adding a nonprofit’s insurers and broker to the list of those that must be advised of such developments or making that notice part of any due diligence process may protect the insurance coverage purchased.

Similar problems can occur if an insurer does not receive prompt notice of a potential claim. Policies often require that insurers receive notice about a claim promptly or within a certain number of days. If a claim falls through the cracks, some states will not excuse an insurer’s obligations unless it can prove prejudice resulting from the delayed claim. Avoiding that argument altogether by submitting a timely claim is the preferred course.

### **Step 5: Insist on Ongoing, Effective Communication.**

To some extent, a nonprofit can (and should) rely on its insurance broker to identify the right policies to purchase and advise insurers about material developments. Identifying the appropriate times, manners, and messages to send is one of many reasons why a nonprofit should maintain an active relationship with a qualified insurance broker, particularly one who understands the unique challenges of securing adequate insurance for a nonprofit. The critical importance of this relationship cannot be overstated.

A nonprofit’s emphasis nonetheless should be on delegation, not abdication. Even if a broker will report a claim or other significant development to an insurer, the nonprofit should insist that the

communication be in writing, receive a copy, and follow up to make sure that the message was delivered. Calendaring the end of all policy periods, including six-week to one-month reminders, so that new terms and conditions can be negotiated, is another way to make sure that the nonprofit and broker are on the same page.

This participation cannot be passive. A nonprofit that fails to understand and ask its insurers, broker, and/or insurance coverage counsel about materials related to its policies is ill positioned to complain about a missed development. A nonprofit should remain diligent even when “renewing” insurance policies, which sometimes include new exclusions and new limitations. These developments also may escape notice because many insureds and brokers may find them inconsequential; inserting a new endorsement that precludes coverage for lobbying activities may not affect most insureds, but it would radically affect the desirability of a policy if a nonprofit has an active federal or state lobbying program.

### **Conclusion**

When faced with a multi-million-dollar claim, the aftermath of a natural disaster, or other potential catastrophe, adding a dispute with its insurance company is hardly the way to protect a nonprofit. Although no silver bullets exist, these steps are intended to help protect nonprofits and their leadership from the misunderstandings that can result in such disputes. Taking these small steps should help put the nonprofit in a favorable position; not taking them may just add to the worries that it hoped to avoid by purchasing insurance in the first place.

\* \* \* \* \*

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*This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to a specific fact situation.*



# NONPROFIT RISK MANAGEMENT

## Occurrence vs. Claims Made Claim Trigger • Effective Date • Prior Acts

There are two types of “triggers” in a liability policy: Claims Made (CM) and Occurrence (O). All liability policies fall into one or the other of these two categories. Regardless of which type, a coverage trigger establishes which policy or policies in a series of policies applies to a specific loss.

Examples of the two types of coverage trigger include:

### Claims Made/Reported

D&O  
E&O/ Professional Liability  
Fiduciary Liability

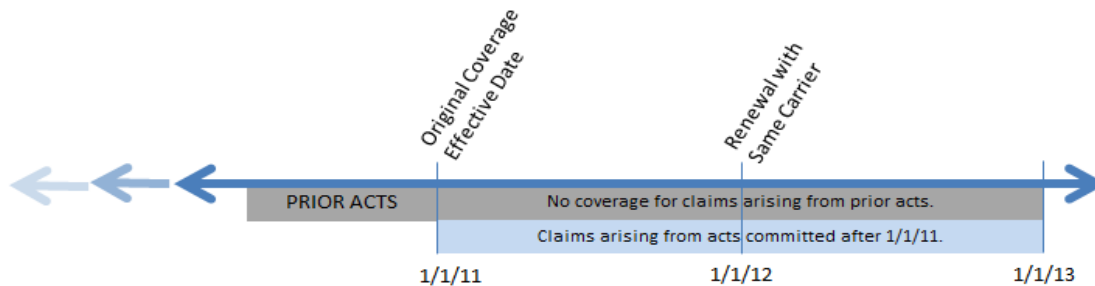
### Occurrence

General Liability<sup>2</sup> (including Umbrella)  
Publisher’s Liability<sup>3</sup>  
Automobile Liability

Coverage under an Occurrence form is triggered when an event defined as an Occurrence results in harm and a suit seeking damages is brought. The policy in force *when the injury occurred*<sup>1</sup> will be triggered. Under a CM form, the making of a claim is what triggers coverage under the policy in force at that time. In other words, the policy in force on the date the claim is made provides coverage.

### Effective Date & Prior Acts

The original coverage effective date of a CM policy is sometimes referred to as the *prior acts date*. All operations that took place prior to the original effective date are referred to as *prior acts*. Particularly in the first few years of coverage under a CM policy, it is typical for the underwriter to issue coverage with a *prior acts exclusion*. Without the prior acts exclusion, a carrier would be insuring all of the historic operations of the nonprofit’s for a single year’s premium.

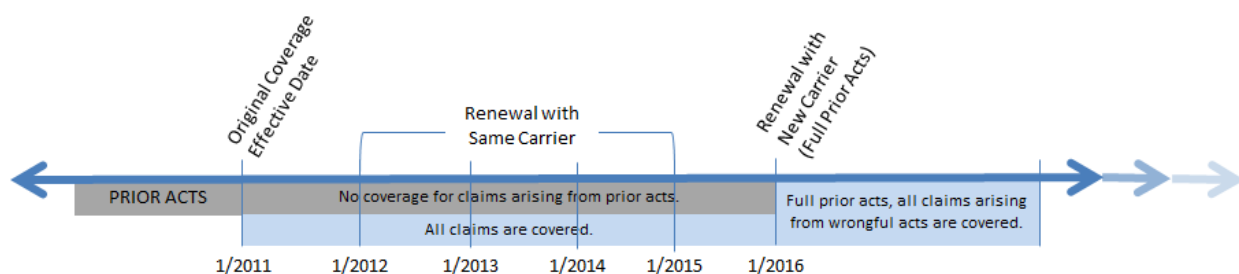


The gray shaded cell to the left of the first vertical line reflects all the actions, i.e., prior acts (including potential errors & omissions) that precede the original coverage effective date. Each of the shaded cells to the right of the first vertical line reflects claims arising from prior acts which are not covered under a CM policy. On day one of a CM policy, the insured nonprofit is



likely covered for little or nothing. Only those insured activities that take place subsequent to the original coverage effective date will be covered by the policy.

The image below indicates coverage has remained with the same carrier for five consecutive policy years. At the 1/2016 renewal, the insured moves to a new carrier who agrees to provide full prior acts coverage. The argument in support of such an important expansion of coverage is that any reasonably foreseeable claims arising from prior acts would be known by this time. An enhancement such as this may be expected after time with a D&O policy. Due to the long tail nature of the perils insured, E&O and Professional Liability policies generally are subject to the original prior acts date for many years.



Now and for as long as the CM policy is continuously renewed (or a replacement with another carrier is renewed without interruption)<sup>4</sup> all covered acts of the insured will be entitled to coverage.

<sup>1</sup> GL can be but is rarely written on a claims made basis.

<sup>2</sup> A pure Publishers Liability form will be written on an Occurrence form; the copyright date of insured content establishes the occurrence or trigger date. When Publisher's Liability is a covered peril in a either a D&O or E&O policy coverage is provided on a CM basis.

<sup>3</sup> The definition of Occurrence in a General Liability, "...means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." While the date and time of an accident may be precisely determined the occurrence date associated with continuous exposure to asbestos may be more difficult to establish.

<sup>4</sup> The continuous renewal even with another carrier is known as continuity. Any gap in coverage may result in a new prior acts date and a loss of coverage for all prior acts.



# NONPROFIT RISK MANAGEMENT

## COMMERCIAL GENERAL LIABILITY

### Summary Introduction

Commercial General Liability insurance (CGL) is intended to protect insureds against claims involving bodily injury or property damage. For most nonprofit organizations, the scope of coverage is largely a function of their use and occupancy of space (e.g., an office, hotel or convention center). CGL policies are written on an *occurrence* basis. This means that the policy in force at the time of an occurrence\* will provide coverage even though the claim and demand for damages may not be asserted until after that policy has expired.

\*(defined as an accident including continuous or repeated exposure to the same generally harmful conditions)

### Who is Insured?

The nonprofit is referred to as the first named insured (FNI). Certain rights and responsibilities, such as payment of premium and giving and receiving notice, are reserved exclusively to the FNI. Generally speaking, directors, officers, committee members, employees and volunteers, acting within the scope of their authority on behalf of the nonprofit, are insured against covered claims that they are legally obligated to pay.

### What Perils are Insured?

The CGL policy provides extremely broad coverage. Section I of the CGL provides coverage for bodily injury or property damage. The most common need for such coverage involves the lease or license of space. Typically the lessor/licensor seeks evidence of public liability insurance in the form of a Certificate of Insurance. It is not uncommon for the lessor/licensor to require that they be included as an additional insured on the nonprofit's CGL policy. Section II of the CGL provides coverage for Personal Injury perils such as libel, slander, defamation, invasion of privacy and wrongful eviction.

### Defense

In addition to covering expenses for settlements and judgments, defense costs are also provided. The defense obligation of a CGL carrier is known as a Duty to Defend. Under a Duty to Defend policy it is the duty of the carrier to tender a defense on behalf of the insured(s) and to pay for the related costs of defense. The carrier has the responsibility to appoint capable counsel to represent the interests of the insured(s). Defense expenses under a CGL policy are known as supplementary payments; unlike Errors & Omissions and some D&O policies, defense expenses in a CGL do not reduce the limit of liability.



## **Significant Exclusions**

Intended or expected harm is excluded under all types of liability insurance. Coverage provided by other policies such as Worker Compensation and Automobile Liability are also excluded. While Liquor Liability is excluded, coverage is provided for Host Liquor Liability (essentially the incidental service of alcohol). While third parties may be granted status as an additional insured for liability arising from operations of the organization, liability of a third party assumed under contract is excluded. Additional exclusions are typically added by endorsement based on the operations and risk characteristics of the applicant. These might include, for example, exclusions relating to accreditation, certification, standard setting medical malpractice and publishing as well as the rendering (or failure to render) professional services.

**DISCLAIMER: Actual policy wording and coverage scope will vary among policies. Final determination of coverage is exclusively reserved to the carrier.**



# NONPROFIT RISK MANAGEMENT

## INSURANCE & CONTRACTUAL CONSIDERATIONS

### Indemnification, Hold Harmless and Additional Insured Provisions

In most contracts, you will find a section containing risk allocation provisions relating to the indemnification and hold harmless obligations of the parties. The risk management event is either an assignment or assumption of risk. In those contracts where you are undertaking the indemnification obligation (assumption of risk), you should be cautious about not agreeing to assume liability that is not realistically within the scope of your control. An example of this would be a hotel contract which required you to indemnify and hold the hotel harmless **for any** liability other than that caused by their (the hotel's) sole gross negligence or willful misconduct that occurs during your use and occupancy of their facility. This could leave the nonprofit responsible for liability it had nothing to do with and over which it had little or no control.

At other times the nonprofit may assign risk to a contract partner. Your nonprofit is well served to obtain contractual assurances from third parties (including exhibitors) that they agree to protect your nonprofit from liability that arises in connection with services provided under the contract. Ideally, the obligation should save, indemnify and hold harmless the nonprofit, its directors, officers, agents, assigns, etc, from and against any and all liability, including reasonable attorney's fees, for liability arising in connection with the products or services (or in the case of exhibitors use and occupancy of booth space) which are the subject of the contract. Where the nonprofit has undertaken a similar risk assumption, as in the case of a convention center lease, the indemnitee in that agreement (the convention center) should also be included for indemnification purposes in the nonprofit's contract with the exhibitor.

It's important to keep in mind that the contractual obligation to indemnify and hold harmless presumes that the other party has the necessary financial strength to perform pursuant to the terms of the agreement. Often this is not the case. It is always in your best interests to incorporate a requirement that your nonprofit be included as an "additional insured" on the appropriate insurance policies of the contracting party. By doing so, the nonprofit has obtained both the contractual obligation to indemnify and, in most circumstances, the presumptive means of funding that obligation (the insurance policy).



It is just as important to understand the limitations of coverage in these circumstances. The inclusion of a third party as additional insured on the nonprofit's insurance policy (or the inclusion of the nonprofit on the policy of one of its vendors) is no assurance that the contractual assumption of risk by the nonprofit is covered by insurance. As a general rule, the nonprofit policy covers only the loss associated with nonprofit operations. Very often agreements with hotels, convention centers and landlords allocate responsibility to the nonprofit for all claims except those involving willful misconduct or gross negligence on the part of the other party (e.g. the landlord). The nonprofit's contractual assumption of risk does not alter the terms of their insurance policy.

The specific insurance requirements to seek from vendors (or exhibitors) will vary based on the nature and scale of services provided under contract. In all cases we recommend that the nonprofit obtain evidence in the form of a certificate of insurance of the following types of coverage (minimum):

*Worker Compensation* – as may be statutorily required in the jurisdiction where services are to be provided or performed and employer's liability of \$1,000,000 each accident/\$1,000,000 disease/\$1,000,000 per employee

*Automobile Liability* – including hired and non-owned vehicles with minimum limits of \$1,000,000 CSL (combined single limit)

*Commercial General Liability (CGL)* – \$1,000,000 per occurrence/\$2,000,000 aggregate to include bodily injury, property damage, personal injury & contractual liability

All coverage should be written with carriers that are admitted in the jurisdiction where services are to be provided and have at least a rating of A VIII or better in the current AM Best guide. The nonprofit (including its directors, officers, employees, agents and assigns) must be named as additional insured for all operations provided under the agreement, coverage to apply as primary and without regard to other sources of insurance. The contractor or exhibitors policy must also contain a waiver of subrogation provision. A certificate of insurance reflecting these terms and including the nonprofit as additional insured must be provided to the nonprofit. The convention center or hotel should also be included as additional insured.

In all circumstances we encourage you to have the input of counsel in drafting and reviewing the actual contractual terms.



# NONPROFIT RISK MANAGEMENT

## PARTICIPANT TRAVEL

Participation by non-employees in travel sponsored by or on behalf of the nonprofit requires special attention. The use of informed signed consent, disclaimer and waiver forms serve as a valuable risk management tool. The information provided below is offered only as a matter of risk management planning. It is not intended and should not be relied as exhaustive in scope nor in any manner as constituting legal advice. Preparation of a document containing some or all (or more) of the elements below requires the input of counsel.

### Acknowledgement

The participant acknowledges their understanding of the hazards associated with travel of any kind. Foreign travel in particular may present unexpected and unfamiliar hazards. Such risk may include but is not limited to transportation, lodging, diet and personal safety (i.e., kidnap) as well as environmental considerations such as climate and elevation. Accessibility to health care may be limited and standards of care may be less than the participant is accustomed to.

### Fitness

The participant should represent that they are fit to participate in all dimensions of the trip and that there is no known medical condition which would prevent their full and safe participation.

### Authorization

The participant should be required to authorize – or not, the nonprofit and its agents to engage emergency medical care as may be required and available throughout the trip. Include the name and telephone number of emergency contacts.

### Disclaimer

The nonprofit should state that appropriate care was exercised in the selection of service providers (i.e., travel agent, transportation, lodging, entertainment, etc.) however the nonprofit makes no warranty of fitness and is not responsible for service deficiency or other loss of any kind.

### Waiver & Release

The participant should release and hold harmless the nonprofit from any and all liability costs or expense arising in connection with the trip. The release should be binding on the heirs and estate of the participant.

### Minors

A separate signature space should be provided for parents or guardians of participating minors.



# NONPROFIT RISK MANAGEMENT

## HOW MUCH LIABILITY INSURANCE IS ENOUGH?

Answering the following questions won't lead you to an answer but should be useful in guiding your risk management analysis.

### **Risk Averse or Risk Tolerant?**

As a general matter and from an organizational perspective (as opposed to that of any individual) is it the culture of the nonprofit to accept more risk or less risk?

### **What types of claims?**

Thinking about the nature, scale and scope of your nonprofit's operations, what are the reasonably foreseeable loss scenarios that come to mind?

#### *Nature of Operations*

The phrase "nature of operations" means what you do. Chances are you do lots of things but the focus here is on those operations where there is a reasonable possibility that they may result in liability. If your nonprofit hosts a large trade show or is involved in standard setting, publishing, accreditation or certification these are the operations that will probably be most relevant to the question, what types of claims do we face?

#### *Scale of Operations*

Every nonprofit that has employees, for example, will face employment practice perils. The more employees your nonprofit employs the more likely you are to face employment practice liability claims. So too with other hazards your nonprofit faces.

#### *Scope of Operations*

Is your organization local, regional, national or international? The broader the scope of your operation, the greater the number of people or businesses that are affected by your operation. Not only does this increase the likelihood of a claim, it also increases the likelihood that more people/businesses will be affected by the same claim circumstances (as in a class action). This is true for both scale and scope of operations.

### **What is the expected claim severity?**

Now that you've considered the types of claims your nonprofit is faced with, think about the potential severity of those claims. Employment practice liability claims tend to be relatively low



severity events (most nonprofits settle these for less than \$100,000 including defense and indemnity to plaintiff). On the other end of the severity scale are standard setting, certification and accreditation type claims owing in part to the significant defense costs that are often associated with these.

Keep in mind that the two most likely sources of **severity claims** among nonprofits of all types and sizes involve automobile use and liability assumed under contract.

### ***Auto Liability***

Whether or not your nonprofit owns a vehicle, chances are there is an exposure arising from hired auto (rental cars, tour bus, taxi cab, etc.) or non-owned auto (use of a personal passenger auto that isn't one of the above by someone at your direction and on your behalf).

### ***Liability Assumed Under Contract***

The biggest exposure facing most nonprofits involves liability assumed under contract, typically for a lease of premises, such as an office or convention center. In many cases the agreement transfers to the nonprofit the responsibility for loss to the lesser without limitation!

### ***Additional Insureds***

Nonprofits are routinely well served or required to include other organizations as an additional insured on their policy. Sometimes these are subsidiaries, chapters or joint venture partners. Often the additional insured is included as required under contract (as in the case of a lesser of premises). Nonprofits must be aware that the result of including one or more additional insured individuals or organizations on their insurance policy (ies) is to dilute the limit of liability that remains for the needs of nonprofit. It is not uncommon that an additional insured organization enjoys an unqualified right to the entire policy limit of liability.





# NONPROFIT RISK MANAGEMENT

## LIABILITY INSURANCE DEFENSE OPTIONS

There are two types of liability policies as they relate to the selection of defense counsel: (i) Duty To Pay (Indemnification) or (ii) Duty To Defend. For certain types of liability insurance, the insured has no option. Commercial General Liability policies, for example, are all written on a Duty To Defend basis. With some policies, the carrier will offer either option (depending on policy terms, the selected option may need to be made at the time coverage is bound or at the time a claim is tendered to the carrier). Even when coverage is provided under a Duty To Defend form, some carriers will consider use of the insured's attorney to serve as defense counsel.

### **Indemnification**

Insured selects their own counsel, subject to the carrier's approval, such approval not to be reasonably withheld.

Under an indemnification policy, the carrier pays only those defense costs which are attributable to covered elements of the complaint. As an example, if there are ten allegations of wrongdoing and two are covered by the policy, the carrier would pay 20% of defense costs (assuming time was spent equally defending each allegation - which is never the case) subject, of course, to the retention.

### **Duty To Defend**

Carrier has the duty to both pay for and tender the defense on the insured's behalf. This means the carrier reserves the right to appoint defense counsel from a list of carrier approved panel counsel firms. Under Duty To Defend policies and subject to certain other applicable policy provisions, the carrier is obligated to pay all defense costs (beyond the deductible or retention) if any one element of the complaint is covered.

This is an enormous advantage to many insured nonprofits. In the context of routine matters of litigation (e.g., adverse employment actions), there is little that disadvantages the nonprofit by use of carrier appointed panel counsel. In the above example where the indemnification carrier pays only 20% of the defense cost, the Duty To Defend carrier would be obligated to pay 100%.



# NONPROFIT RISK MANAGEMENT

## COMMERCIAL GENERAL LIABILITY VS PROFESSIONAL LIABILITY

Commercial General Liability (CGL) provides insured nonprofits with coverage for claims resulting in bodily injury or property damage that arise from the operations of the business. The policy also includes coverage for Personal and Advertising Injury (e.g., libel, slander, invasion of privacy, etc). For an organization such as a nonprofit, CGL insurance is largely a “prem ops” cover against claims arising from the use and occupancy of an office, hotel, convention center or other such premise of the operation as opposed to the technical, professional or legal services that may be provided.

Professional Liability (sometimes referred to as Errors & Omissions) on the other hand is a type of insurance that addresses the professional nature of the business operation. Novick Group, for example, has a CGL policy in case someone slips and falls in our lobby and a PL policy in case we provide defective advice that results in loss to a client.

Although they are designed to cover different perils (i.e. causes of loss), the policies are not wholly exclusive of one another. A claim triggering one could conceivably trigger the other.

Aside from the different perils that are insured against, the two principal differences involve defense and negligence. Under a CGL policy, an insurance company has a duty to defend the insured and as part of that obligation, to pay the cost of defense in a manner that does not reduce the limit of liability (known as supplementary payments). Historically under a PL policy, the insured is responsible for selecting counsel and conducting the defense with defense costs reducing the available limit of liability. Many contemporary PL policies provide for a duty to defend by the carrier.

The second principal difference involves negligence. In a CGL claim involving bodily injury or property damage, negligence by the insured is an essential condition\* to trigger coverage. The insured accused of negligence in connection with a covered cause of loss is entitled to a defense. In order for the insurance company to pay a judgment amount there would need to be a finding of negligence. In a PL policy, it is often in the best interests of the nonprofit that the policy be triggered on the basis of “...any act, error, omission, or neglect...”. The significance here is that negligence, while covered, is **not** required to trigger coverage. In some policies, the insured nonprofit is entitled to coverage whether the act that gives rise to the claim was negligent or intentional (an intentional act may lead to harm even though the harm was not an intended result of the intentional act). For nonprofits providing professional services this is a very important distinction.

\*certain claims, those involving vicarious liability for example, may not be subject to the negligence standard

