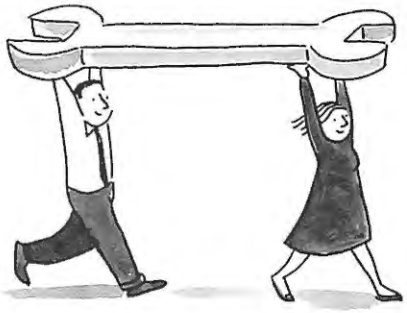
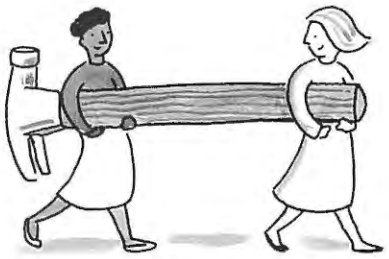
Workshop



Risk Management

Experts Tell How To Ease Your Worries

In this issue of *Leadership,* Workshop looks at a topic of interest to virtually all volunteer-involving organizations—risk management. In a society that's increasingly litigious, it's critical that the leadership of a nonprofit organization know how to protect both the organization and its volunteers. Each of our five guest editors is an expert in a specific area of risk management including: avoiding risk; volunteer protection laws; screening volunteers; understanding liability waivers; insurance for directors and officers.



Workshop, a standing feature in *Leadership,* offers how-to tips and valuable insights on selected topics. If you'd like to be a guest editor or want to suggest topics for future coverage, write to Leadership Workshop, The Points of Light Foundation, 1737 H Street, NW, Washington, DC 20006. ■

A Look at the Heart of Risk Management

By Charles Tremper and Pam Rypkema

Risk management improves performance by acknowledging and controlling risks. It's about finding solutions, not just looking for trouble. At its heart, risk management not only reduces the likelihood of losses, it also maximizes the benefits of volunteer programs.

The heart of risk management beats with three Cs: commitment, communication and consistency. You can enjoy the benefits of risk management if you *commit* to respecting the rights and safety of everyone your program touches; *communicate* that commitment to everyone in your organization; and *consistently* act in accord with that commitment.

Acknowledging Risks. Bad things happen. Even good ideas have drawbacks. The best that you can hope for is to anticipate—and try to avoid—the things that may go wrong. The simple risk management suggestions provided here can help you to do that. To get started, encourage the staff to look actively for, and report, dangerous conditions and actions that may infringe on someone's rights. The risks identified in the trenches can either be addressed on the spot or communicated to an individual with the power to do so.

Controlling Risks. Once you have identified the trouble spots, risk management empowers you to choose deliberately how to respond. You have four primary options: avoidance, modification, transfer and retention. These strategies can be used individually or in combination to maintain control over risks.

■ **Avoidance.** Some risks must be avoided. If an activity cannot be performed safely, due to lack of expertise, training, equipment, practice or any other reason, it generally should not be undertaken at all. If insurance coverage for what you do cannot be obtained, the financial risks may be unacceptable even though the activity is reasonably safe. Avoidance is an extreme measure and almost always is painful. Cancellation of a soccer game at a lightning flash disappoints children. Closing a child care center because the insurance is too expensive frustrates parents and leaves necessary child care needs unmet. That's the reason commitment to risk management is so important. It may take a lot to say no.

■ **Modification.** Some risks can be eliminated or reduced with proper precautions, many of which rest on simple common sense. Limit access to valuables. Lock buildings and install alarms. Train and educate your staff. Require regular rest periods. Make sure service recipients understand the limits of your program so that they don't place inappropriate demands on staff. Creative modifications may enable you to improve the quality of the service you provide at the same time you reduce the risks.

■ **Transfer.** Someone else may accept a risk on your behalf. A bus company's contract may agree to transport your people to an event and to accept any liability for accidents in route. Insurance companies routinely exchange the risk of financial loss for a premium. Transfer cannot totally insulate you from a risk, however. Some elements, such as bad publicity, always remain. Therefore, transfer alone is an inadequate risk management strategy.

■ **Retention.** This can be an appropriate tool if you think about the risk first. Retaining a risk by default is a very common, though rarely advisable, practice. As a deliberate risk management choice, retention makes sense if the risk is small enough that the organization can sustain the loss, or when it is combined with other risk management tools. For example, an insurance policy with a large deductible might be combined with a loss prevention program.

In general, the better an organization can modify its activities to reduce risk, the less risk it will have to retain; the better record it can show insurers, the less likelihood popular programs will be discontinued.

Implement and Monitor the Plan. Clearly and consistently communicate your commitment to the risk management strategies you choose and watch for consistent compliance with your policies. If something goes wrong, let another "C" become your risk management watchword. Show your compassion. Angry people who feel that "nobody cares" are more likely to sue. Your compassion can defuse that anger and prevent a lawsuit.

Risk management protects people and property. It prevents against financial losses and lawsuits that distract you from your mission. By reducing those threats, it also encourages volunteers to give generously of their time and resources. For volunteer programs to succeed, the heart of risk management must heat strongly. ■

Charles Tremper is executive director of the Nonprofit Risk Management Center in Washington, D.C. Pam Rypkema is the Center's legal director.

Volunteer Protection Varies State to State

By Charles Tremper and Jennifer Perry

As a result of several high-profile lawsuits against volunteers in the last 10 years, every state has passed a volunteer protection law. These laws are intended to reduce the deterrent effect of lawsuits on potential volunteers. However, the laws leave many gaps. Congress has not passed a federal volunteer protection act, and the state laws are widely disparate. Thus, to advise volunteers correctly about their potential liability, nonprofits need to understand the protection provided by their state law and its possible limitations.

State volunteer protection laws differ depending on the type of volunteer and the nature of the organization the volunteer serves. In general, if a volunteer's conduct is protected by the law, the volunteer cannot be held personally liable, although the volunteer might still be named in a lawsuit.

A wide variety of activities and types of volunteers is protected by statute. Most commonly protected are directors and officers of charitable organizations. In addition, each of the following categories of volunteers enjoys some protection from liability in at least one state: sports volunteers, volunteer fire fighters, volunteer medical service providers, good samaritans, blood donors, food donors, civil defense volunteers and property owners who permit public access.

Protection from a lawsuit varies when volunteers are rendering their services spontaneously, rather than through a formal organization. Good samaritan laws generally apply in an emergency regardless of whether the individual is acting on behalf of a charitable organization. Absent an emergency, however, only a few of the laws protect volunteers who are not working as part of a formal organization. Some states even limit protection to only those volunteers working with tax-exempt charitable organizations. Some of the laws are limited by conditions or have specific exceptions. For example, in Kansas, organizations must carry a general liability insurance policy to qualify their volunteers for the law's protection. The most common exception is for claims resulting from motor vehicle accidents.

Even with volunteer protection laws, insurance and risk management remain the best strategies for keeping volunteers out of legal trouble. Preventing an incident is far better than trying to escape liability for it.

The level of protection a volunteer enjoys varies as much as other aspects of the laws. All of the laws protect against claims for the types of simple mistakes and errors the law regards as being negligent. Liability is not imposed unless a volunteer's conduct meets a standard of gross negligence, recklessness or willful and wanton misconduct. If the standard is willful and wanton misconduct, volunteers are well-insulated from claims arising from accidents and board of directors judgments. However, if the standard is recklessness or gross negligence, the volunteers are afforded less protection.

In addition, some of these laws are confusing, vague, complicated and otherwise problematic. An important hole in the coverage for directors is that state laws cannot bar federal claims. Thus, directors are still vulnerable to discrimination and employment suits based on federal law. Even the very best laws require careful analysis to determine which volunteers they cover and what exceptions they contain. For example, in Wisconsin, a director was found personally liable in a contract action because he did not clearly indicate he was acting as a board member.

Despite their limitations, volunteer protection laws do appear to have largely achieved the principal objective of their proponents: reducing the deterrent effect of liability on volunteer service. Anecdotal reports indicate that fear of being sued is not currently a major barrier to volunteer recruitment. Indeed, many volunteers may now assume that they have more protection than the law actually provides.

Even with volunteer protection laws, insurance and risk management remain the best strategies for keeping volunteers out of legal trouble. Preventing an incident is far better than trying to escape liability for it. Moreover, volunteer protection laws do not eliminate the need for insurance. They do not stop lawsuits from being filed or provide complete immunity. Although a volunteer may be vindicated at trial, the volunteer would still be responsible for substantial defense costs. If the volunteer is insured, insurance would pay all of these costs. ■

Jennifer Perry is a third year law student at Wake Forest University School of Law and a former intern at The Points of Light Foundation.

Interview Sets Tone in Screening Volunteers

By Eileen Cackowski

Interrogate...interview...check references...check criminal background ...process...sign contracts...review policies and procedures....Are these buzz words or are they practices of your agency?

Are we out to intimidate or to welcome prospective volunteers into our fold? By following a few non-threatening guidelines, the screening of volunteers is not as intimidating as

To me, the interview is the window on the world of volunteer placement. This is the time that the interviewer must not be shy.

it may sound. The old adage, "An ounce of prevention is worth a pound of cure," is a very apt one. Prospective volunteers want to know they will be working in safe, professionally caring surroundings. Your clients have the right to be assisted by safe, professionally caring volunteers. The part of the process that brings the two together is called screening.

A good screening practice encompasses several parts: an application that asks only what is necessary for the agency; a job description that clearly states the primary functions of the job; a written policies and procedures guide; contracts for confidentiality of service when necessary; permission slips for hiring underage volunteers for specific opportunities and, of course, that all-important interview.

To me, the interview is the window on the world of volunteer placement. This is the time that the interviewer must not be shy. To "not be shy" does not translate into "do all the talking." If the interviewer is talking more than 35 percent of the time something is wrong. This is the time to listen. As you listen, you will be focusing on what you hear, beginning to think about this person with respect to an appropriate placement, as well as have an idea of future recognition.

Prospective volunteers generally will fall into three categories. They will talk about wanting to work with others, being alone and in need of company; or perhaps they will talk about the certificates they have earned as a volunteer and the plaques on their walls; or they will even talk about whom they know and the great connections they have. It is important that they have the opportunity to talk about themselves while in your agency.

During your interview note-taking, never write anything that you would not want seen in a court of law. Rarely will it happen, but once in a very great while something can happen in the life of the volunteer in your agency that the file is requested by a court. That file should contain only factual information. You may say, for example, "Individual could not focus on questions and asked that they be repeated three or four times." That's a fact. You do not want to say, "Individual was spaced out on something and acted weird." Who defines weird?

Ask open-ended questions. Find out what kinds of information the individual may want to know about your agency. Clearly discuss the population you serve. If you have a period of probation or intensive supervision, this is the time to talk about it.

Agency policies and procedures should be clear, succinct, read and signed by all paid and volunteer staff. Some of the items your agency may want to indicate are a maximum and minimum time a direct-service volunteer may work with a client. There should be a policy that states what a direct-service volunteer may and may not do with a client. For example if the position is to drive an elderly person to the grocery store or to the doctor, a picnic in the park is not permitted. This may seem

The interview is the time to listen. As you listen, you will be focusing on what you hear, beginning to think about this person with respect to an appropriate placement.

unreasonable, but the liability issue of falling, getting stung by a bee or of exacerbating (unknown to the volunteer) an allergy, may cause an agency problems it does not need.

A criminal background check, along with specialized training for screening volunteers who work with vulnerable populations, a reference check and the flexibility to adapt a job to a specific person all make the process of screening an exciting challenge rather than a problem. ■

Eileen Cackowski is program services director of the Governor's Office on Volunteerism in Baltimore, Maryland. She is also a private consultant and trainer for volunteer management, cultural diversity and media relations.

Understanding Liability Waivers

By Peter C. Wolk, Esq.

As liability concerns are increasing, organizations seek to limit their exposure. One means is the proper use of written liability waivers. Called "hold harmless and assumption of the risk agreements," "exculpation clauses," "informed consent," "covenants not to sue," "releases" and "waivers," they are a means by which someone releases another party from liability for specified risks and injuries. The precise content of releases can vary from state to state. Because they involve the surrender of a right, waivers are subject to close scrutiny and should always be drafted by legal counsel.

Generally speaking, liability waivers are appropriate and effective when the waiver does not seek to excuse negligence for routine service to the public; the participant has legal capacity and understands the waiver; the participant voluntarily assumes specifically described known risks; the participant expressly and clearly agrees to surrender specific legal rights to sue with a result that does not violate public policy.

■ **Negligence for routine service.** Courts disagree whether to enforce releases for injuries caused by negligence in activities that are not inherently dangerous. The law seeks to compensate for injuries and to discourage negligence, so judges do not favor routinely excusing people from injuries caused by their negligence. Thus, an agency that routinely asks everyone who visits to release it from liability in the event of injury caused by the agency's negligence would probably gain little liability protection. However, where an activity is not routine and has inherent danger (e.g., skydiving) releases can be effective.

■ **Participant must have legal capacity and understand the waiver.** If the participant is a minor or is incompetent (e.g., mentally disabled), you must get the parent or guardian (and should try to get the participant) to sign the waiver. The release must be understandable, ideally with the waiver provision highlighted (e.g., capitalized or underlined), written in plain language and presented with enough time for the person to read it before signing.

■ **Release must be voluntary.** Waivers must be voluntary to be valid. If the participant is required to take part in an activity, the waiver will likely be invalid. For example, a nursing student's release for a field trip granting academic credit was invalid as being involuntarily obtained. Similarly, some states require the person signing the release to receive something of value in return (i.e., "consideration"), but the value may simply be the opportunity to participate in the activity.

■ **Must specifically identify the risks.** Waivers must identify the specific risks posed by the activity and may be invalid beyond those risks. For example, one court ruled that a bicycle racer's waiver was valid as to the named risks but invalid as to the unforeseen risk of a car on the race course that bit him. Waivers should thoroughly describe the type and gravity of the risks involved.

■ **Must expressly surrender specific legal rights.** The waiver must clearly identify the legal rights being forfeited (e.g., "any and all liability for any harm, injury, damage or loss to me or my property, including suffering and death, in the event of negligence or carelessness by Good Deeds concerning [specific activities and risks])." They should state who is waiving rights (e.g., "my family, heirs, estate, and I") and who is being released (e.g., "Good Deed Charities, its officers, directors, employees, and agents").

■ **In a manner that does not violate public policy.** Courts will usually not enforce a liability waiver where to do so would violate public policy, such as:
—if the injuring person's actions were grossly negligent, or willful, wanton, or reckless (e.g., injury by agency employee's drunk driving to an event);
—if there is a public interest at stake (e.g., conditioning participation in public school interscholastic athletics; employers' duty of care to their employees);
—if there is a statutory duty of care such as with licensed medical professionals (e.g., doctor not able to get a blanket liability waiver for negligent service);
—if the parties have unequal bargaining power so the release is a "take it or leave it" proposition, (e.g., release invalid where a camp conditioned enrollment on parental release for any negligence).

Releases can be a fair and efficient means of shifting certain risks from your organization to the participants. Asking others to sign waivers, however, can have an emotional and political price in your relationship with them, and so should be done with forethought. But waivers like insurance are a good liability management tool to be used with legal counsel upon review of your agency's activities under your state's laws. ■

Peter C. Wolk, Esq., is executive director of the National Center for Nonprofit Law, a nonprofit membership organization with a clearinghouse of nonprofit legal documents and educational materials located in Washington, D.C.

Directors and Officers Liability Insurance

By Bijan Khosrowshahi

It is a common misperception that directors and officers (D&O), including trustees of a nonprofit organization, do not have a meaningful exposure to personal liability. The fact is that damages recoverable from D&Os of even a relatively small nonprofit can easily exceed the net worth of many individuals.

The primary role of nonprofit D&Os is to maintain financial stability and provide the necessary resources and environment to accomplish its goals and objectives. Nonprofit D&Os generally are subject to the same standard of conduct that applies to their for-profit counterparts—often with fewer resources. Because of this exposure, it is incumbent upon those D&Os to maximize the financial protection available to them in the event that a claim is asserted.

There are two methods by which a nonprofit can provide financial protection to its D&Os: indemnification and insurance. These protections usually go hand in hand.

■ **Indemnification:** Every statute permits nonprofit corporations to indemnify their D&Os against loss incurred from certain types of claims. However, such indemnification does not provide protection in all instances. For example, it may not be available to the director and officer if the organization becomes insolvent or has insufficient resources to pay the losses and expenses incurred by the D&Os. Furthermore, state statutes may not provide any protection against claims made under federal law, a major source of liability of nonprofits and their D&Os.

The composition or attitude of the board of directors may change so that the board is no longer sympathetic to the prior officer or director and thus does not make the necessary determinations to authorize the indemnification. Or as a matter of policy, the organization may deem it inappropriate to use contributed funds for such indemnification. The defense of directors' and officers' claims can be a significant and continuing drain on an organization's cash flow, and those claims for which the organization cannot indemnify its members or officers could result in catastrophic personal consequences for the individuals involved.

Reliance upon state statutes limiting liability can also prove a costly mistake, since these laws may not provide complete protection. These statutory protections often only apply to non-compensated directors, leaving officers, employees and volunteers unprotected against the cost of defending themselves.

■ **Insurance:** D&O insurance can provide essential protection to the directors, officers and trustees for all of the above nonindemnifiable exposures, thus offering them more comprehensive financial protection. In addition, D&O insurance transfers to the insurer the organization's financial risk of funding its indemnification obligation by reimbursing the nonprofit for the indemnification.

D&O insurance thus provides financial protection for both the nonprofit as well as its directors, officers and trustees. D&O insurance generally provides coverage against claims brought against directors, officers and trustees for alleged or actual breach of duty, neglect, misstatements, errors and omissions. This coverage will cover defense, judgments and settlements arising out of such claims. In many instances, it can be amended to include other employees and volunteers.

To protect the nonprofit and its cash flow, the entity also can be covered by the D&O insurance policy as an additional insured party. In many cases, the D&O policy will include advancement of defense costs on all covered claims.

The degree of specialization among many nonprofits has required D&O policies to address specific needs of these entities by providing special packages such as hospitals, colleges, universities and various group programs. These packages provide basic D&O liability protection and enhance the terms and conditions of the D&O policy to tailor coverage for the specific and unique nature of D&O exposure for such entities.

As an alternative or supplement, directors who are serving the nonprofit at the request of another corporation may obtain insurance coverage through the D&O insurance policy purchased by the requesting or sponsoring corporation. This coverage provides protection for the person who has been requested to serve the nonprofit organization.

D&O insurance is somewhat unique in nature and creates complex legal underwriting and management issues which are difficult to identify and analyze without the assistance of knowledgeable experts. This important product should be obtained from insurers who have significant nonprofit underwriting and claims experience and who are likely to remain a viable D&O insurer into the foreseeable future. ■

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