

# Professional Liability and Governance Exposures: A Closer Look



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Of the myriad of exposures encountered by nonprofit organizations, two are frequently unappreciated and confused: exposures resulting from the consequences of corporate governance and exposures resulting from errors and omissions associated with the delivery of professional and paraprofessional services. The coverage forms that have evolved to protect against such exposures often have similar or even identical names, although they are designed to cover strikingly different exposures. This article examines the diverse exposures presented by corporate governance and professional service delivery, and explores the variety of coverage forms that have emerged to address such exposures.

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## Where the Problems Start

Commercial general liability, commercial auto, and commercial property products are the basic coverages purchased by most nonprofits. Insurance brokers and risk managers operate fairly comfortably when working with these types of policies. In stark contrast, specialized coverages for the activities of counselors, paraprofessionals, teachers, and volunteers, including volunteer board members, are another matter. Such policies are often manuscript forms that include in their titles the words “professional” or “miscellaneous professional” to describe coverage provided for the errors or omissions of professionals or paraprofessionals. Many brokers and nonprofit managers incorrectly assume that this type of policy is necessarily the same as an “association professional liability” policy that might well include coverage for the actions of directors and officers. Assuming that “miscellaneous professional” and “association professional” policies provide even remotely the same coverage is a big mistake. The label attached to the coverage form provides little insight into the covered exposures.

## Understand the Basics

To sort out the issues surrounding Directors’ and Officers’, Association Professional, and Miscellaneous

Professional policies, it is important to clearly understand the differences between two exposures: corporate governance, and the delivery of professional and/or paraprofessional services. These brief descriptions should help.

### **Corporate Governance**

This refers to the decisions and actions of the nonprofit's board of directors during the course of providing leadership for the organization.

### **Professional and/or Paraprofessional Service Delivery**

This refers to services that a nonprofit provides to its clients. Professional service occupations have traditionally referred to medicine or law, although the term is now used to describe other professions that require less extensive education or credentialing such as teaching, social work and counseling.

Paraprofessionals, with few or no formal credentials, such as peer counselors, may also be included here.

Although the policies covering these exposures often overlap, the exposures themselves are quite different. A more in-depth discussion and the case studies below provide clarification.

### **Covering Exposures from Professional and Paraprofessional Services**

If an injury is allegedly caused by an error or omission while providing skilled or semi-skilled assistance, the nonprofit may face claims for professional negligence. In general, policies covering these types of exposures fall into two broad categories: those that enumerate the covered activities, and those that cover all professional/paraprofessional services of an organization except specifically listed non-covered services. The first type affords coverage only for defined risks. If the service provided by the nonprofit does not fall into one of the enumerated categories, there is no coverage for that particular activity. In cases where the nonprofit offers a broad range of services, this type of coverage may result in a significant gap in protection.

In contrast, the second type of policy form offers broad coverage for the professional and quasi-professional services provided by the nonprofit. The scope of coverage generally is defined by what is excluded.

Broadly speaking, most forms covering the errors and omissions of nonprofit professional and paraprofessional service providers do not cover medical malpractice exposures. Nevertheless, certain gray areas require careful analysis. For example, many such forms will not cover prescribing medication, but will cover administering medication.

### **Subtle Coverage Gaps**

In addition to providing coverage for these professional and quasi-professional activities, some policies also cover the organization for supervision of the covered professionals and paraprofessionals. Since supervising or overseeing professionals is a separate activity, lawsuits based on professional liability typically allege negligent hiring or supervision of the professional or paraprofessional. Many nonprofit health clinics use the services of a part-time or volunteer physician to conduct weekly reviews of client charts. These organizations may wrongly assume that if the physician is covered for medical malpractice, the nonprofit is also protected in the event a claim is filed alleging negligent supervision.

The following case studies help demonstrate instances where nonprofits have been sued for allegedly committing errors and omissions in the course of providing professional and paraprofessional services.

### **Example: When referrals go bad**

Adult Daycare Referral (ADR) operates much like any telephone number information service, disseminating the phone numbers of adult daycare facilities that are licensed to do business in the state and locale. ADR does not investigate or visit the facilities, nor does it have authority to pass judgment on any referrals. No representation is made by any ADR telephone operator that the providers have been investigated or approved by ADR.

A daycare facility referred by ADR was alleged to have given improper emergency care that resulted in the

death of an elderly participant. ADR was sued for professional negligence for failing to adequately screen the daycare providers it offers on its telephone service. In this case, the general liability carrier provided coverage because of the general negligence allegations and the lack of any clear professional involvement. This case was ultimately won by the nonprofit based on lack of legal duty, since the nonprofit was a referral service only, with no responsibility to screen or monitor the agencies on its referral list. However, the defense costs were substantial.

## **Example: Friends and lovers**

Janice was attending professional counseling at a local nonprofit to help her with the difficulties she was experiencing from abuse as a child. In addition to this professional counseling, Janice was invited to attend free group meetings once a week. Volunteer counselors from the community took turns facilitating these groups in the presence of a staff member from the nonprofit.

One of the regular volunteer counselors, Joe, befriended Janice by taking her out for coffee after several of the evening sessions. Joe soon became Janice's regular counselor in his own private practice. He subsequently breached his professional obligation to her by beginning an affair with her. Janice sued the nonprofit for professional negligence for allowing Joe to be a volunteer counselor. Although the nonprofit did not realize it, the organization was assuming obligations by involving community professionals in a volunteer capacity. Even though the volunteer was properly supervised during the actual evening meeting, the behavior of its volunteer counselor after hours was imputed to it.

In this case, the miscellaneous professional coverage responded. Would all miscellaneous professional coverage forms extend to volunteer relationships of this nature? The only way to know for certain is to examine the language in a particular policy.

## **Policies Covering Governance Decisions**

Previously enjoying a sense of invulnerability because their services were associated with a nonprofit, directors and officers must now realize that each is an attractive target in litigation. In particular, directors and officers of nonprofits are facing lawsuits alleging wrongful termination, sexual harassment, and discrimination.

Typically, D&O policies for nonprofits cover the "wrongful acts" that occur in the insured's capacity as an officer or director. The term "wrongful acts" usually means "any breach of duty, error, neglect, omission or act committed solely in the course of the activities" of the organization. The following case studies illustrate some of the lawsuits that have been filed against nonprofits in California.

## **Example: Double trouble**

When Elisa, one of Joe's managers, complained to him that Roger was sexually harassing her, he told her he would look into it; but Joe was overwhelmed with work and delayed investigating. Elisa complained again, this time in writing. Once again, Joe did not take action. Elisa quit and threatened to sue. Faced with a possible lawsuit, Joe investigated the allegations and determined that they were true. He fired Roger. But, that is not the end of the story.

Elisa sued Joe and the nonprofit organization and its board of directors for allowing sexual harassment in the workplace and failing to investigate in a timely manner. She argued that she was constructively terminated. To add to the misery, Roger also sued for wrongful termination. He alleged that his behavior had been tolerated for many years, and that he was given no warning that his behavior was no longer appropriate.

## **Example: Misrepresentation or market forces?**

A small nonprofit housing advocacy group helped a group of twenty low-income families obtain government-subsidized loans to purchase a group of low-income condominiums. Not long after the purchases were completed, the real estate market took a serious downturn. Many of the condos were worth less than the outstanding amount of the loans. Several of the homeowners sued the nonprofit and its board of directors for

misrepresenting the benefits of home ownership and failing to warn them of the possible loss in home value.

## **Example: Disability or inconvenience?**

Sarah worked as a counselor at a group home for teens. She took insulin regularly for diabetes, but from time to time fainted while on duty. The nonprofit for which she worked accommodated her schedule so that she could take her insulin shots on a regular basis.

However, Sarah was also a part-time student and during the second semester of the year her class schedule dramatically changed. She was not able to work the hours previously arranged, and the nonprofit was not able to accommodate her new hours. She was terminated. Sarah sued the nonprofit organization and its board of directors for discrimination under the ADA alleging that the real reason for her termination was her diabetes.

## **D&O Coverage Forms: Cutting Through the Confusion**

Unlike general liability insurance, where there is a standardized policy language that is amended by specific endorsements, each insurance company writes its own specialized D&O policy. This can make determining which coverage is provided a very difficult process. This is further complicated for nonprofits because many nonprofit D&O forms are “cut and paste” versions that were initially designed for for-profit organizations.

There are a wide variety of policies available on the market today—far too many to adequately evaluate the many differences in an article of this nature. However, there are some important distinctions that make the coverage provided by some of these policies far superior to others.

The most desirable provisions of D&O coverage for nonprofits include:

### **Requirement to advance defense costs**

With this provision, the insurer must advance the costs of defense as opposed to reimbursing the insured when the claim is settled. Reimbursement language requires the insured to pay all costs and attorney fees out of pocket and wait for repayment by the insurer. Since D&O cases are often expensive and lengthy, reimbursement policies can be disastrous for nonprofits.

### **Broad definition of insured**

With a broad definition, the named insured includes any natural person who was, is or becomes a director, trustee, officer, employee, committee member, or volunteer — as well as the nonprofit organization itself. If the organization is not a named insured, and its only coverage from the policy is for reimbursement of moneys paid to indemnify directors and officers for claims made against them, there are serious unaddressed exposures.

### **Broad coverage employment practices liability**

Employment practices liability coverage is an important coverage in a nonprofit directors’ and officers’ policy. There should be coverage for all employment related actions, including wrongful termination, harassment, and discrimination, including cases arising under state law and federal laws such as Title VII and the Americans with Disabilities Act (ADA).

## **Conclusion**

Professional forms may blend coverages from miscellaneous professional, directors’ and officers’ and employment practices liability policies. At other times, a professional form may provide coverages only for errors and omissions of professional or quasi-professional services and leave the actions of directors and officers completely uncovered. A separate directors’ and officers’ liability policy may be necessary to cover those exposures.

For these reasons, it is advisable for nonprofits, and the insurance professionals who assist them, to begin the insurance buying process by looking carefully at a nonprofit’s exposures. Once the exposures are defined, one can undertake an educated review of the available coverage forms.

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