Managing Legal Risks in a Nonprofit Organization:
A Risk Management Webinar - January 4, 2006

Liability Basics

- Tort

- Categories of tortious conduct:
  - intentional conduct
  - negligence
  - strict liability

Important Terms

- Negligence
  - inadvertence, inattention, thoughtlessness, incompetence

- Gross Negligence
  - more than ordinary negligence but less than recklessness
Additional Terms

- Direct liability
- Vicarious liability
- Duty of care
- Misfeasance
- Nonfeasance

Purpose of Tort Law

- Three goals:
  - To ensure that persons who suffer a loss or harm resulting from another’s conduct receive appropriate compensation
  - To make certain that the cost of harm is borne by persons who cause it
  - To encourage members of our society to exercise care

Proving Negligence

- Duty - duty to exercise care
- Negligence - violation of duty
- Causation - connection between action or inaction and resulting harm
- Damages - loss or damage
Negligence Nuances

- **Contributory Negligence**
  - Alabama, Maryland, North Carolina and Virginia

- **Comparative Negligence**
  - the rest

How Far Must You Go?

- Weighing gravity of potential harm against cost of preventive measures of alternative conduct

- The law doesn’t require that a nonprofit:
  - take every possible precaution to prevent foreseeable harm
  - curtail every activity in which harm could result
  - exhaust resources to prevent harm

How Far Must You Go?

- Factors to consider:
  - Social value of activity
  - Appropriateness of conduct in question
  - Feasibility of risk-minimizing activity, cost and safety of alternative course of action
  - Whether providing a warning would be sufficient to avoid harm
Board Liability

- Duty of care
- Duty of loyalty
- Duty of obedience

What's required?

- Participation
- Tough questions
- Review materials
- Avoid conflicts of interest

- Know what protection is available...
  volunteer protection laws

Why do people sue nonprofits?
Claims Against Nonprofits

- Who is suing?
- How common are lawsuits against nonprofits?

- What allegations?
  - Employment Actions
  - Negligent Supervision
  - Abuse (client on client versus caregiver on client)

What can your nonprofit do to avoid being sued?

- **Step #1:** Carefully consider *all* commitments
  - contracts you sign - have you read them?
  - promises to employees
  - funding agreements

What can your nonprofit do to avoid being sued?

- **Step #2:** Adopt reasonable (practical) policies and procedures, and enforce them consistently
What can your nonprofit do to avoid being sued?

- **Step #3:** Teach your personnel to look for and address obvious hazards
  - loose carpeting
  - manhole cover
  - your premises / premises being used by your nonprofit

What can your nonprofit do to avoid being sued?

- **Step #4:** Obtain legal advice sooner than later…
  - Employment issues
  - Contracts
  - Accidents, injuries

What are the areas of vulnerability?

- Contracts
- Partnerships
- Employment Relationship
- Participant injury
- Automobile
Claims Against Nonprofits

- **Frequency:** Auto, slips and falls
- **Severity:** Abuse
- **Both:** Employment-related claims

What can a nonprofit do to prepare for litigation?

Step 1

Respond with compassion

- express concern
- use common courtesy
- offer reasonable assistance
- don’t promise to pay
Step 1 (continued)
- Take care of your organization
  - record information on the injured person(s)
  - document the incident - use an accident form
    - witnesses
    - description
    - photographs

Step 2
Understand the process
- plaintiffs and defendants
- summons
- complaint

Step 2 (continued)
- Answer
- Discovery
- Interrogatories
- Requests for production
- Requests for admissions
- Depositions
Litigation & Alternatives

- Jury trial
- Bench trial
- Mediation
- Arbitration

Statutes of Limitation

- Generally 1-7 years
- Special rules for minors

Which court?

- Amount in controversy
- Nature of the claims
- Location of the parties
- Candidates for federal court:
  - out-of-state parties and over $75,000
  - alleged violation of federal law
Service of Process

- Designate person to accept service of process
- Should you try to avoid service?

Step 3
Establish a file

- Symbolic reason
  - mental preparation
- Practical reason
  - keep materials organized

Step 4
Convene your defense team

- Retained counsel
- Appointed counsel
- Small is best
Step 5
Communicate with constituencies

- Keep the staff informed
- Keep the board and key volunteers up to date
- Inform donors and supporters as necessary

Step 6
Cooperate with your insurance company, broker and counsel

- Send materials to the insurer
- What is a reservation of rights letter?
- Retained counsel

Step 7
Mind the clock

- Answer due in 20-30 days
- Extensions may be granted
- Note time and date of service
- Default judgments
  - proof of service + deadline
  - limited time to set aside judgment
  - possibility that coverage will be voided
Step 8
Answer the media
- Designate a media spokesperson
- Make sure everyone knows who is and isn’t authorized to speak
- Do not admit wrongdoing
- Never say, “no comment”
- Stay calm and “on message”
- Deliver a positive message
- Show concern and compassion

Step 9
Pursue the best outcome
- Is a “happy ending” possible?
- Consider settlement options and implications
- Monitor the case

Step 10
Incorporate lessons learned
- Take advantage of expert help
- Stay organized
- Remember common sense
- Keep your mission at the forefront
Nonprofit Risk Management Center

- Free technical assistance to nonprofits on risk management, liability and insurance issues
- www.nonprofitrisk.org
- Melanie@nonprofitrisk.org
- MyRiskManagementPlan.org
- RiskManagementClassroom.org
- Nonprofit CARES.org