

arts

LAW MEMO

Risk Management & Insurance

Presenting or producing art means facing risks that could threaten your organization's operations and its reputation. Assigning a dollar value to some assets, such as a sound system, is easy. But putting a price tag on intangible assets, such as public trust, is impossible.

Buying insurance is just one of many strategies used to protect nonprofit organizations and the people they serve. This issue of *Arts Law Memo* includes examples of insurable risks and eight insurance tips provided by Melanie Herman, executive director of the Nonprofit Risk Management Center.

Herman's advice is especially welcome because the continued threat of terrorism and the slow economic recovery are contributing to a prolonged "hard" insurance market. Some organizations have seen premiums rise as much as 30 percent.

While seeking bids is a wise business practice, switching insurance carriers each year to save a few dollars may be a mistake. A long-term relationship can be advantageous when your organization files a claim or when the market shifts.

Nonprofit arts organizations can limit exposure and avoid causing harm by anticipating and avoiding accidents or improper action, so this issue of *Arts Law Memo* begins with a description of the risk management process.

WHAT'S AT RISK?

The Nonprofit Risk Management Center describes four categories of assets that are generally at risk while operating a nonprofit:

- *People*. Board members, volunteers, employees, donors and the general public
- *Property*. Buildings, equipment, materials, copyrights and trademarks
- *Income*. Sales, grants, investment earnings and contributions
- *Goodwill*. Reputation and stature in the community

The goal of risk management is to prevent problems by creating a plan that protects property, provides a safe

environment for all involved, ensures compliance with applicable laws and reduces the likelihood of being sued.

RISK ASSESSMENT

The risk management process starts by rejecting the common tactic of denial and openly acknowledging the reality of risk.

The next step is risk identification. This process can be accomplished with a piece of paper and a pencil. It might include consultation with employees and volunteers, a review of your organization's procedure manuals and a tour of your facility.

Checklists available from insurance companies and the Occupational Safety and Health Administration (OSHA) can help identify risks that are not immediately obvious.

Another useful tool is Nonprofit Cares™, a CD-ROM developed by the Nonprofit Risk Management Center. It will help you examine your organization's management and operational practices and offer recommendations on how to make your organization safer and more secure.

The CD-ROM begins with an introduction to risk management and continues with modules focusing on different categories, including employment practices, special events and contracts. It sells for \$89 and can be ordered by calling 202/785-3891 or by going online (nonprofitrisk.org).

When you have identified what could go wrong, try to assess the probable frequency of each risk and the potential severity of the loss, should it occur, from a financial and reputation perspective. For example, an organization that sends actors into the schools faces a high-frequency/low-severity of minor damage to its van. On the other hand, the organization faces a low-frequency/high-severity risk that the driver will cause a fatal accident.

According to Charles Tremper, former executive director of the Nonprofit Risk Management Center, "the purpose of evaluating risks in this fashion is to make

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VLAA helps artists and arts organizations solve and avoid legal and accounting problems by:

- Making referrals to lawyers and accountants;
- Mediating arts-related disputes;
- Publishing *Arts Law Memo* and concise how-to guides;
- Sponsoring seminars and public forums;
- Arranging for guest speakers;
- Maintaining a reference library;
- Operating an arts space clearinghouse;
- Supplying model contracts and other arts law and business materials;
- Facilitating meetings;
- Conducting and disseminating research on issues affecting the arts;
- Contributing articles to publications;
- Collaborating on arts advocacy initiatives;
- Matching volunteers with arts organizations seeking board members; and
- Providing access to the national VLA network.

This issue was written by Sue Greenberg, VLAA's executive director.

This publication is distributed with the understanding that VLAA is not engaged in rendering legal or accounting counsel. We urge you to seek professional services to address your specific needs.

St. Louis Volunteer Lawyers and Accountants for the Arts

3540 Washington
St. Louis, MO 63103
314/652-2410
FAX 314/652-0011
vlaa@stlrac.org
www.vlaa.org



Examples of Insurable Risks

Claims made against nonprofit organizations fall into three general categories: claims and lawsuits filed against the nonprofit and its staff and board; claims for injuries of staff or volunteers; and claims to repair or replace property that the nonprofit owns or controls. Here are some of types of insurance that are available to cover these claims:

1. Claims and lawsuits filed against the nonprofit and its staff and board

- commercial general liability (CGL)
- directors' and officers' liability (D&O)
- host liquor liability
- automobile insurance (business auto)
- umbrella or excess insurance
- employment practices liability (EPLI)
- special events

2. Claims for injuries to staff and volunteers

- workers compensation (employees and sometimes volunteers)
- accident and injury coverage (volunteers)

3. Claims for property

- general property coverage (including property of others)
- crime coverage (including employee dishonesty)
- boiler and machinery (heating, air conditioning and ventilating equipment)
- computer equipment and software
- property in transit and off premises

conscious decisions about which risks can be tolerated by the organization, which require the purchase of insurance, which can be reduced or controlled without sacrificing the benefit of the program, and which are simply too great to bear. High-exposure activities that may be peripheral to the organizational mission are best forgone, like bungee jumping at a fundraiser.”

FOUR TOOLS

Surprisingly, avoidance is an underutilized risk management tool. While no one enjoys stifling creativity, art organizations should not engage in activities that cannot be performed safely because of lack of expertise or proper equipment.

The most popular risk management tool is known as modification, which simply involves using common sense to ensure safety. Modification strategies include providing training, using written guidelines and conducting safety programs. Keeping abreast of

government regulations, such as OSHA and local health regulations for food preparation, is another way to control risk.

Retention, a third strategy, involves accepting all or part of the risk. Examples include increasing an insurance policy deductible or paying for losses from operating funds.

Finally, nonprofits can share risks with other parties by entering into contracts, such as hold harmless agreements, or by purchasing insurance. Understanding the scope of your organization's coverage is especially important in the current pricey market.

TECHNOLOGY RISKS

How can the above strategies—avoidance, modification, retention and sharing—be put to use to manage technology risks, an area that is especially challenging for arts organizations?

The Nonprofit Risk Management Center offers this advice:

- *Focus risk management efforts on accidents*, which account for 80 percent of problems.

- *Understand your equipment insurance coverage and make sure it is up-to-date*. Store a copy of your asset inventory off-site along with copies of your insurance policies and software license numbers.

- *Create and maintain a security blanket*. Steps may include changing passwords periodically, moving e-commerce to a secure server, updating virus protection software and registering domain names that are similar to yours.

- *Get help*. Most nonprofits cannot afford to hire an in-house technology guru. But most have someone on staff who is willing to learn and help others. Invest in training that person. Establish a relationship with an outside contractor, so help will be available when major problems occur.

- *Plan for obsolescence*. If possible, budget to replace one-third of your organization's computers every year. For guidance, visit Techsoup (techsoup.org), which offers nonprofits one-stop shopping for technology needs, including discounts on hardware and software, product reviews and technology planning tips.

- *Respect copyrights*. Install legal copies of software on all computers.

- *Save. Save. Save*. Institute and maintain reliable procedures for backing up hard drives.

- *Guard against theft and destruction*. Make sure your insurance covers replacement of hardware and software. Keep an up-to-date inventory. Secure laptops in locked cabinets.

- *Establish an office technology policy*. While one school of thought says employment policies should be broad and unspecific to give management latitude in interpretation, the Nonprofit Risk Management Center subscribes to the other school, which believes employees and volunteers should know what is prohibited and the consequences of not abiding by your organization's policies. For a sample policy, contact VLAA.

WHAT YOU NEED TO DO ABOUT INSURANCE

by Melanie Herman, Nonprofit Risk Management Center

Not every nonprofit needs every type of insurance. But every nonprofit board should consider its insurance needs and the resources needed to protect the good health and mission of the organization. We offer eight tips on insurance issues to get you started.

1. Examine exposures first. Rather than start with looking at the current insurance policies, begin by looking at how your nonprofit is exposed to possible lawsuits and losses. While lawsuits against nonprofits are relatively uncommon, the most common types of suits against nonprofit boards are ones that allege wrongful employment practices (such as wrongful termination), sexual harassment, or retaliation. Which of your activities are more likely to lead to lawsuits, damage to reputation, finances or property?

2. Make sure your organization is working with an expert it can trust. An insurance agent, broker or consultant can provide valuable advice and practical help on coverage for your nonprofit. Seek someone experienced with nonprofits, and familiar with the work you do (or committed to learning about it). Your advisor should live up to the promises he or she makes, give prompt and credible answers to your questions, take the time to understand your organization and seem genuinely interested in helping you. To avoid awkward situations, and to prevent a potentially dangerous conflict of interest, choose someone unaffiliated with your nonprofit.

3. Have an annual report to the board on insurance and risk. If you don't have a board Insurance or Risk Management Committee, be sure that insurance review is assigned to another committee, such as the Finance Committee or to an individual board member. Though insurance policy language can be hard to swallow, and even harder to understand, it's important that someone from the staff or board read the policy from beginning to end, including the policy exclusions, endorsements and definitions.

4. Read the laws. Ask the Risk Management or Finance Committee to look at the language in your state volunteer protection laws as well as the federal Volunteer Protection Acts. Remember that none of these laws provides absolute protection against suits alleging wrongdoing on the part of nonprofit board members. For more information about the federal Volunteer Protection Act, see www.eriskcenter.org/docs/protection.cfm. State laws differ and some states do a better job than others of informing the public; find the link to your state's laws at www.eriskcenter.org/docs/s_state.shtml.

5. Reduce risk as well as buy insurance. Just as car insurance isn't a reason to drive recklessly, nonprofit insurance is only one element in risk management. The board should consider conducting a risk management audit, or simply identifying ways to reduce risk. There may be simple ways to increase building safety, to improve personnel policies, strengthen compliance with personnel policies, improve performance evaluations, or to screen staff and volunteers more thoroughly.

6. Talk over the various types of insurance and do what you can, when you can. No single insurance policy covers all exposures and some are more important than others, depending on an organization's circumstances. For some, a property policy covering buildings and personal property against accidental loss is most important. In another organization, a policy providing protection for volunteer injuries may be of first import. If you can't afford all of the coverages you'd like your nonprofit to have, start with the policy you consider most important and add others when you can.

7. Consider Directors & Officers (D&O) liability insurance. While many suits against nonprofits are brought against the nonprofit corporation as well as individual managers and board members, in a few cases suits are brought solely against board members themselves. Many small nonprofits don't buy D&O insurance simply because they can't afford it. In other cases, the board may decide that the risk of a lawsuit is too unlikely, or that there may be other ways to finance defending the board and the organization. Whether or not you have D&O insurance, there are board practices that reduce the likelihood of a suit, such as preventing conflicts of interest, recording "no" votes in the minutes, and ensuring that the organization's employment policies are consistently applied. For more about D&O insurance, see www.genie.org and click on "Insurance" in the FAQ section.

8. Test the market. Every three to five years consider "shopping" your insurance program. Invite several brokers or agents to submit proposals, or ask the broker to obtain bids from several insurance carriers. Doing so will give the board a basis for comparison and a sense about whether you're paying a fair price. Experts are predicting that insurance will become more difficult to buy, premiums will become more expensive and new exclusions and restrictions are likely to appear. This might be a good time to consider changing to a different carrier or to review your overall insurance program.

This article first appeared in the December 2001 issue of Board Cafe, a free Web-based newsletter published by CompassPoint Nonprofit Services (boardcafe.org). It is reprinted here with permission.

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RESOURCES

Emergency Planning

In response to the Sept. 11 attacks, BoardSource, formerly the National Center for Nonprofit Boards, has posted a 5-page disaster recovery checklist on its web site (boardsource.org). The checklist addresses finances, information technology, communications, governance, administrative and other issues designed to help nonprofit board members, executives and staff prepare for the uncertainty of natural and manmade disasters. Later this year, BoardSource will publish a booklet on the broader topic of the board's role in crisis situations.

Nonprofit Risk Management Center (nonprofitrisk.org)

This service organization does great work. Its publications are clear, concise and affordable. New books include *Full Speed Ahead: Managing Technology Risk in the Nonprofit World* (\$25.00) and *Vital Signs: Anticipating, Preventing and Surviving a Crisis in a Nonprofit* (\$20.00).

These books and many others on arts law and business practices are available at the **St. Louis Volunteer Lawyers and Accountants for the Arts library** located within the Regional Arts Commission office, 3540 Washington, in Grand Center.

Insurance Help

VLAA frequently receives calls from arts organizations seeking referrals to insurance companies. If you work with a broker or agent who you would recommend to your peers, please let us know: 314/652-2410; vlaa@stlrac.org.