

No Good Deed Goes Unpunished—Risk Management for Nonprofits

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CAUTION

- Don't ask questions that reveal specific legal problems.
- There is no attorney-client relationship and therefore no confidentiality.

**"Never was anything great
achieved without danger."**

Niccolo Machiavelli (1469-1527)

Defining Risk

What is risk?

ISO 31000 defines risk as *the effect of uncertainty on objectives, whether positive or negative.*

Defining Risk

What are the risks for your non-profit?

Risk depends on **context**:

- what is your non-profit's **mission**?
- what does it **do**?
- how does it **operate**?

Defining Risk

- uncertainty in operations
- legal compliance
- legal liabilities
- accidents
- natural causes and disasters
- deliberate attacks
- uncertain or unpredictable events

What is Risk Management?

Risk management is a process:

- identifying the **risks**
- assessing the **seriousness** of the risks
(**consequences**)
- methods to **reduce or control the impact** of the risks

Identifying Risks

Conduct a “360°” or “**global**” review” of your nonprofit:

- People
- Property
- Actions
- Legal environment
- Information
- Agreements

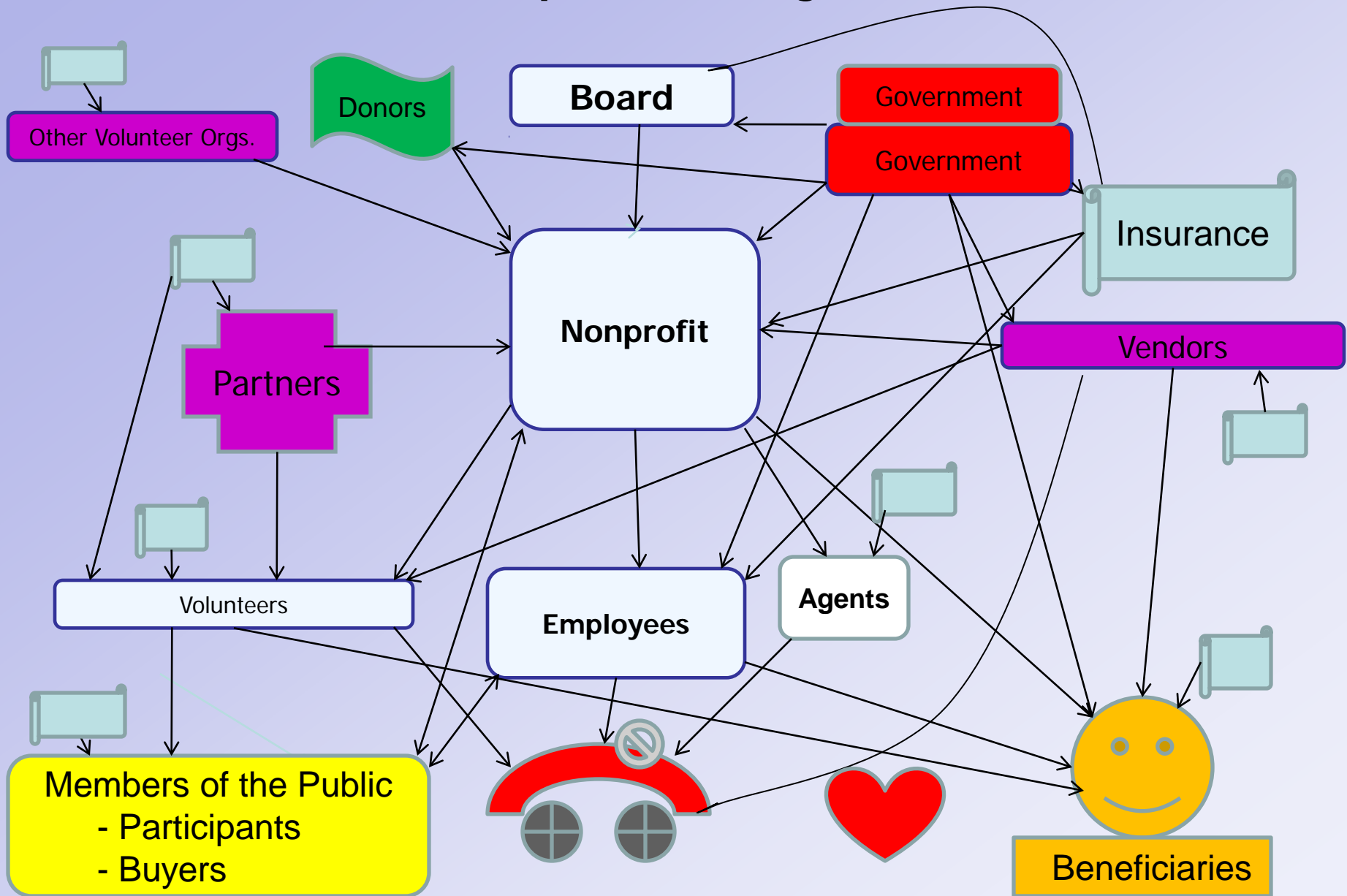
Identifying Risks

Every **person**,
every **thing**,
every **action** (or **inaction**),
every **law**,
every piece of **information**,
every **agreement**,
That your nonprofit “touches” needs to be
examined for risk.

Identifying Risks

- Brainstorm
- Make lists of people, things, actions, laws, information and agreements
- Make diagrams, charts, maps

Sample Risk Diagram



Managing Risk

Strategies to manage risk:

- avoiding the risk
- reducing the risk
- reducing the consequences
- accepting some or all of the of a risk
- accepting some or all of the consequences
- transferring the risk to another party

Transferring Risk

There are **two primary ways** to transfer risk:

- By **insurance**
- By **contract**

Insurance

- Insurance does not mitigate or eliminate risk.
- Insurance **transfers the responsibility of paying for a covered** loss to the insurance company.

Insurance

- Insurance coverage is based on a written contract of insurance.
- Gaps in coverage:
 - gaps between policies
 - definition of “insured”
 - limits and sublimits
 - exclusions

Insurance

Role of independent broker:

- Assess risks
- Determine necessary coverages
- Identify appropriate insurance carriers
- Obtain quotes
- Obtain special terms
- Answer questions
- Provide certificates

Insurance

- Worker's Compensation *employees*
- Commercial General Liability . . . *third parties*
- Automobile Liability *auto accidents*
- Umbrella/Excess Liability *large claims*
- Director's and Officers* *third parties*
- Professional Liability* *professional errors*
- Property Insurance *property*

Insurance

➤ Occurrence Policies:

Worker's Compensation

Commercial General Liability

Automobile

Umbrella

➤ Claims Made:

Directors and Officers

Professional Liability

Insurance

Who is an insured?

- **Named** insured
- **Additional** insured

Insurance

Directors and Officers Insurance Coverage

- Directors and officers are covered
- Criminal, administrative, civil, and regulatory proceedings
- Actual or alleged acts, errors, omissions, miss-statements, neglect, or breach of duty

Insurance

Directors and Officers **Exclusions:**

- Fraud, crimes and intentional misconduct
- Bodily injury, property damage, death (CGL)
- Insured v. Insured
- Catastrophes

Insurance

Policy administrative provisions:

- **Notice** of claim
- **Authorization** for expenses
- **Cooperation** with insurance company

Contracts

Risk shifting may be accomplished by a written contract under which one party agrees to bear a risk or the consequences of a risk.

Risk shifting contract clauses are routinely enforced by the courts in Georgia.

Contracts

For most nonprofits, risk shifting occurs in

- “waiver” forms and
- almost any other type of written agreement

Risk shifting clauses commonly used by nonprofits:

- release
- assumption of risk
- indemnification

Contracts

Terminology used:

- waive
- release
- covenant not to sue
- hold harmless
- assume the risk
- discharge
- acquit
- Indemnify
- defend

Release

Waiver and Release. Volunteer **covenants not to sue** and does hereby **release, forever discharge, defend and hold harmless** the **Released Parties** from any and all liability, claims, demands and causes of action **of whatever kind or nature**, either in law or in equity, **arising out of or relating to Volunteer's work or services** for the Nonprofit, [Participating Organization] or Recipient.

Assumption or Risk

Assumption of the Risk. The Volunteer understands that work or services for the Nonprofit as a volunteer may include activities that **involve inherently dangerous risks, including but not limited to _____**. Volunteer hereby expressly and specifically **assumes the risk of damage, injury, harm or death** in connection with such work or services for the Nonprofit as a volunteer.

Indemnification

Contractor assumes all liability for and shall **defend, indemnify and hold harmless Nonprofit** and its affiliates and their respective officers, directors, agents and employees from and against **any and all claims**, demands, causes of action, costs and expenses, including attorneys fees, **arising out of or resulting from** (i) the **performance** of the Services; (ii) a **breach** of this Agreement by Contractor; (iii) **bodily injury, including disease and death and damage to or loss of property** caused in whole or in part by the **negligent act or omission** of Contractor or its subcontractors, agents, employees or others for whom Contractor is responsible, **provided that Contractor is not obligated to indemnify any party for that party's sole negligence.**

Release/Indemnification

Important questions:

- Who is being released/indemnified?
- Who is doing the releasing/indemnifying?
Identity? Age? Corporate name?
- What risks are assumed?
- Procedure for obtaining releases?
- Procedure for retaining releases?

Contracts and Insurance

Indemnification without money is . . .

“Real good, no good indemnification”

Contracts and Insurance

To make sure there is money to back up an indemnification provision in a contract, there are three separate contract provisions:

- Contractor must **indemnify** nonprofit
- Contractor must **carry liability insurance**
- Contractor's insurance must **name nonprofit as an additional insured**

Contracts and Insurance

To protect the indemnified party's insurance, contracts require that the indemnitor's liability insurance be **primary** and **non-contributory**.

Contracts and Insurance

The Commercial General Liability policy shall be endorsed to include Nonprofit and its officers, directors, agents and employees as **additional insureds** and to contain **cross-liability and severability of interest** endorsements, state that this insurance is **primary insurance and non-contributory** as regards any other insurance carried by the Indemnitees

Contracts and Insurance

Caution:

- Under Georgia law, a contract indemnification obligation is limited to the same dollar amount as stated in the limit of insurance required under the contract.
- The parties can waive this law in a contract provision.

Insurance

- | | |
|--------------------------------|--|
| ➤ Worker's Compensation | Statutory Limits |
| ➤ Employer's Liability | \$500,000 |
| ➤ Commercial General Liability | \$1,000,000/occurrence \$2,000,000 annual aggregate |
| ➤ Professional Liability | \$1,000,000 per occurrence \$2,000,000 annual aggregate |
| ➤ Umbrella/Excess | \$1,000,000 per occurrence \$2,000,000 aggregate |

“Risk comes from not knowing what you're doing.”

Warren Buffet (1930-)

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