

No Good Deed Goes Unpunished

Risk Management for
Nonprofits



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Mission of Pro Bono Partnership of Atlanta

To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

Client Criteria

In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

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This webinar presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

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Agenda

The topics for this presentation are:

- Defining & Identifying Risk
- Managing & Transferring Risk
- Insurance
- Contracts

Defining Risk

What is risk?

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

Defining Risk

Stuff happens.

Deal with it.

Defining Risk

What are the risks for your nonprofit?

Risk depends on context:

- **what** does your nonprofit do?
- **how** does it operate?
- **where** does it operate?
- **who** does its work?

Defining Risk

- Examples of areas of risk:
 - uncertainty in operations
 - uncertain or unpredictable events
 - accidents
 - natural causes and disasters
 - legal compliance
 - legal liabilities
 - deliberate attacks

What is Risk Management?

Risk management is a process:

- **identify** the risks
- assess the **seriousness** of the risks
(**consequences**)
- adopt methods to **reduce or control the impact** of the risks

Identifying Risks

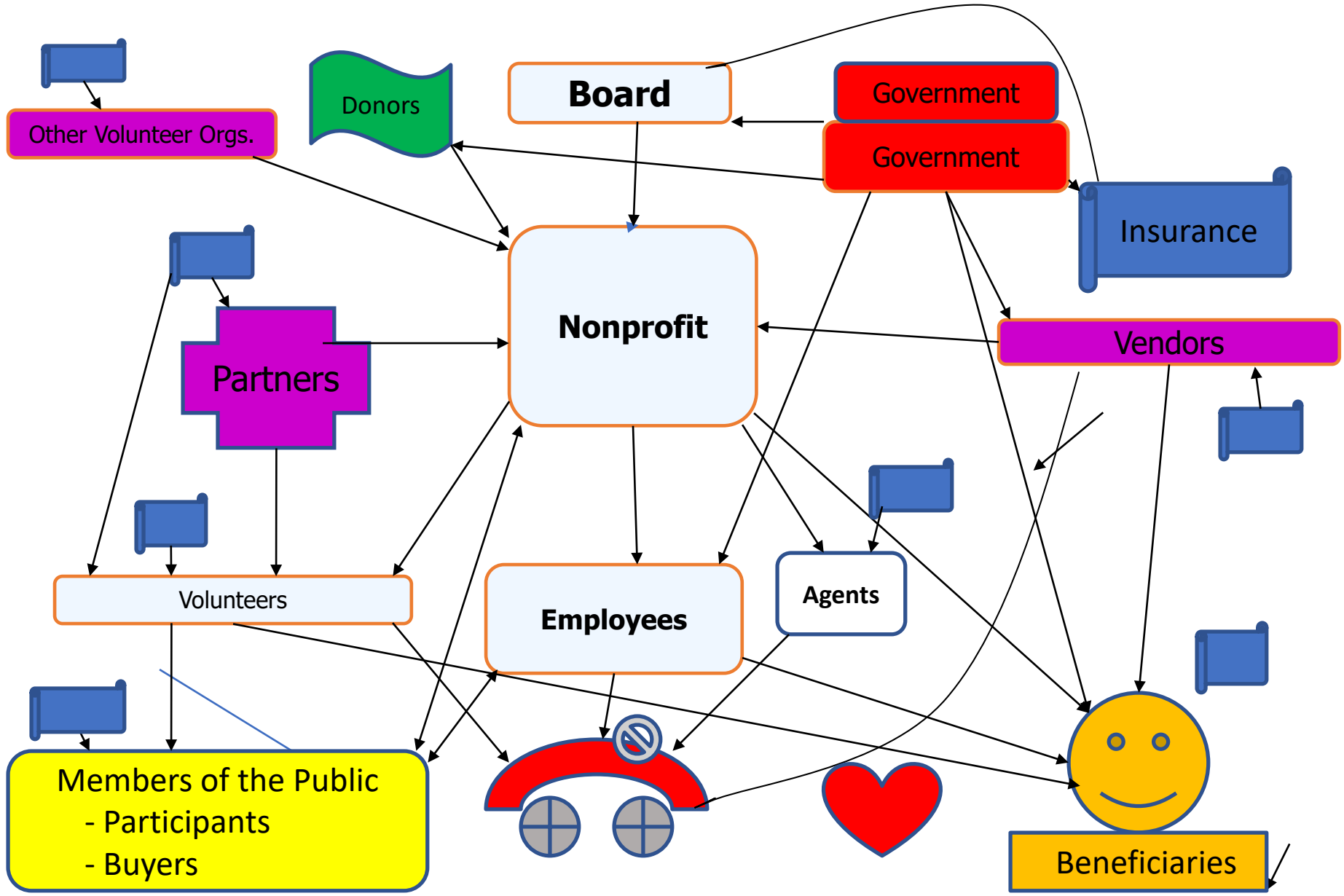
Conduct a “360°” or “**global review**” of your nonprofit:

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

Identifying Risks

- Brainstorm.
- Make lists of people, things, actions, laws, information and agreements.
- Make diagrams, charts, maps.
- **Annually** or whenever operations changes.

Sample Risk Diagram



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.

Managing Risk

Strategies for managing risk:

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

Transferring Risk

Two primary ways to **transfer risk**:

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

Insurance

- Insurance does **not** mitigate or eliminate risk.
- Insurance **transfers some--not all--of the responsibility for payment** to an 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 from coverage

Insurance

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

Insurance

Occurrence policies:

- Worker's Compensation
- Commercial General Liability
- Automobile
- Umbrella

What is covered ?

An **occurrence** that happens during the policy period.

Insurance

Claims Made policies:

- Directors and Officers
- Professional Liability

What is insured ?

A **claim** made during the policy period
(Professional, D&O)

Insurance

Who is insured?

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

Insurance

Policy administrative provisions:

- **notice** of claim
- authorization for payment of **expenses**
- **cooperation** with insurance company
- **settlement** of claim

Contracts

Shifting risk 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 and release” 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
- discharge
- acquit
- assume the risk
- indemnify
- hold harmless
- defend

Release

“Volunteer **covenants not to sue** and does hereby **release** and forever discharge 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

“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; or (iii) 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.”

Indemnification

Georgia law **prohibits** indemnification, hold harmless or defense of a party's **sole negligence** in a contract relating to repair, maintenance or construction of a building.

Release / Indemnification

Important questions:

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

Limitation of Liability

Liability may be excluded by contract:

“Neither Party shall be liable to the other Party under any circumstances for any claim or cause of action whatsoever for indirect, special, punitive or consequential damages.”

Limitation of Liability

Liability may be limited by contract:

“Consultant’s **total liability** to Nonprofit for any claim or cause of action whatsoever, whether in contract, tort, strict liability or otherwise, **shall not exceed** the amount of compensation paid to Consultant under this Agreement.”

Contracts and Insurance

An indemnification obligation without money to back up the obligation is . . .

Real good, no good indemnification.

Contracts and Insurance

Three separate contract provisions address the issue of money being available to back up an indemnification provision in a contract:

- 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 nonprofit's insurance, the contracts should require that the indemnifying party'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, volunteers and employees as **additional insureds** and to contain **cross-liability and severability of interest** endorsements and state that this insurance is **primary insurance and non-contributory** as regards any other insurance carried by Nonprofit.”

Contracts and Insurance

Caution:

- Under Georgia law, a contract indemnification obligation may be limited to the dollar amount as stated in the limit of insurance required under the contract.
- The parties may 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 aggregate/yr |
| • Professional Liability | \$1,000,000 per occurrence
\$2,000,000 aggregate/yr |
| • Umbrella/Excess | \$1,000,000 per occurrence
\$2,000,000 aggregate |

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

Warren Buffet (1930-)

Questions?

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