LEGAL COMPLIANCE AND LIABILITY ISSUES FOR CATHOLIC NONPROFITS

Brought to you by
The National Leadership Roundtable on Church Management

The National Leadership Roundtable on Church Management
1350 Connecticut Avenue, NW, Suite 825
Washington, DC 20036
Phone: 202-223-8962
Fax: 202-296-9295
Web: www.TheLeadershipRoundtable.org
Email: Standards@nlrcm.org

© 1998-2011 Maryland Association of Nonprofit Organizations dba Standards for Excellence Institute®, offered under licensing agreement through the National Leadership Roundtable on Church Management. No part of these materials may be reproduced or transmitted in any form, or by any means, electronic or mechanical, including photocopying, recording, or by any other information storage retrieval system without written permission of the Standards for Excellence Institute® of the Maryland Association of Nonprofit Organizations and the National Leadership Roundtable on Church Management. Catholic organizations should contact the Leadership Roundtable at 1350 Connecticut Avenue, NW, Suite 825, Washington, DC 20036, Phone: 202-223-8962, Fax: 202-296-9295, Web: www.TheLeadershipRoundtable.org, Email: Standards@nlrcm.org. Other organizations should contact the Standards for Excellence Institute® at 190 West Ostend Street, Suite 201, Baltimore, MD 21230, phone: 410-727-1726, www.standardsforexcellenceinstitute.org.
ABOUT THE STANDARDS FOR EXCELLENCE®

The National Leadership Roundtable on Church Management is committed to raising the level of ethical and accountable practices in Catholic nonprofit organizations. Therefore, the Leadership Roundtable has released these Standards for Excellence to serve as a model for Catholic nonprofit organizations to implement in their operations and governance. Based on fundamental values - such as honesty, integrity, fairness, respect, trust, compassion, responsibility, and accountability - these Standards for Excellence describe how Catholic nonprofits should act to be ethical and accountable in their program operations, governance, human resources, financial management and fundraising. Eight (8) Guiding Principles are provided, along with fifty-five (55) standards - more detailed performance benchmarks that will enable Catholic organizations to strengthen their operations.

The Standards for Excellence are intended to describe how the most well managed and responsibly governed Catholic nonprofits operate. They provide benchmarks related to temporal affairs to determine how well a Catholic nonprofit is fulfilling its obligations to those who benefit from its ministry programs, to contributors, and to the public both inside and outside the Church.

STANDARDS FOR EXCELLENCE – 8 GUIDING PRINCIPLES

1. MISSION STATEMENT AND MINISTRY PROGRAM – Catholic nonprofits are established to continue the mission of the Catholic Church and carry out this mission through specific ministry program activities. Catholic nonprofits should have well-defined mission statements, and their ministry programs should effectively and efficiently work toward achieving these mission statements. All Catholic nonprofits have an obligation to ensure program effectiveness and to devote their resources to achieving its stated purpose.

2. GOVERNING BODY – Effective nonprofit boards of directors should serve to further the mission of the organization, establish management policies and procedures, ensure that adequate human resources (volunteer and/or paid staff) and financial resources (earned income, grants, and charitable contributions) are available, and actively monitor the organization’s financial and programmatic performance.

3. CONFLICT OF INTEREST – Both laity and clergy who serve on nonprofit boards or staff, either in paid positions or as volunteers, should act in the best interest of the organization, rather than in furtherance of personal interests or the interests of third parties. Nonprofits should have policies in place, and routinely and systematically implement those policies, to prevent actual, potential, or perceived conflicts of interest.

4. HUMAN RESOURCES – A Catholic nonprofit’s relationship to its personnel, both clergy and lay, both paid and volunteer, is fundamental to its ability to achieve its mission. The roles and responsibilities for bishops and priests are contained within canon law. Volunteers occupy a special place in Catholic nonprofits, serving in governance, administrative and programmatic capacities. Nonprofit human resource policies should address both clergy and laity, paid staff and volunteers, and should be fair, establish clear expectations, and provide for meaningful and effective performance evaluation.

5. FINANCIAL AND LEGAL – Catholic nonprofits must practice sound financial management and comply with a diverse array of legal and regulatory requirements, including those of canon law. Financial systems should assure that accurate financial records are kept and that the organization’s financial resources are used in furtherance of its mission. Nonprofits should conduct periodic reviews to address regulatory and liability concerns.

6. OPENNESS – Although Catholic nonprofits are private entities, they operate in the name of the Church in service to members and the community at large with support from the faithful and the general public. As such, all Catholic organizations should provide the faithful and the public with information about their mission, program activities, and finances. They should also be accessible and responsive to members of the faithful and members of the general public who express interest in their affairs.

7. FUNDRAISING – Catholic nonprofits depend on charitable fundraising for the support of their work. All fundraising activities should be conducted on a foundation of truthfulness and responsible stewardship. A nonprofit’s fundraising policies should be consistent with its mission, compatible with its organizational capacity, respectful of the interests and intentions of donors and prospective donors, and in compliance with applicable canon law.

8. PUBLIC LIFE AND PUBLIC POLICY – Catholic nonprofits provide an important vehicle through which individuals may choose to organize and work together to improve their communities. Therefore they should represent Catholic Social Teaching and the interests of the people they serve through public education and public policy advocacy, as well as by encouraging clergy, staff, volunteers and the faithful to participate in the public life of the community.
LEGAL COMPLIANCE AND LIABILITY ISSUES

As the Leadership Roundtable’s Standards for Excellence: An Ethics and Accountability Code for Catholic Nonprofits® states:

(35) Catholic organizations should periodically assess the need for insurance coverage, in light of the nature and extent of the organization’s activities and its financial capacity. A decision to forego general liability insurance coverage or Directors and Officers liability insurance coverage, shall only be made by the board of directors and shall be reflected in the minutes for the meeting at which the decision was made.

RISK MANAGEMENT

Catholic nonprofits need to do all that they can to manage risk to the organization and protect the individuals and families who may be harmed by their activities. Additionally, nonprofits must work diligently to protect itself from losses to its operation. In addition to a robust risk management program, the decision to obtain general liability insurance coverage and directors and officers insurance are critical steps in managing a nonprofit’s risk. Because the potential financial risk to program participants, board members, and staff is so substantial in the event of a legal claim, board members must participate in decisions regarding insurance coverage. Some organizations assume that the existence of immunity laws like the Federal Volunteer Protection Act eliminates the liability of individual board members and employees of the nonprofit, as well as the liability of the nonprofit itself. This could not be further from the truth.

Catholic nonprofits should carefully consider various insurance options to protect themselves. First, the organization should assess the existing risks to its continuing operations. Then, it should work to prevent such risks. Insurance is only one part of an organization’s risk management efforts. Other risk management efforts include:

Internal Controls. Internal controls systems are designed to detect and correct all sorts of human error—errors of commission and omission. In addition to traditional segregation of responsibility, internal controls comprise the organization’s plans to:

- Safeguard its assets;
- Check the accuracy and reliability of its accounting data;
- Promote operational efficiency; and
- Encourage adherence to prescribed managerial policies.

Request a copy of the Standards for Excellence educational resource packet on Financial Policies for assistance in this area.

Adequate Screening and Reference Checks. Many liability problems can be prevented if staff and volunteers are adequately screened during the selection process. Criminal background

---

Immunity for Nonprofits

Federal Law. The Volunteer Protection Act (VPA) of 1997 was developed to “provide certain protections from liability abuses related to volunteers serving nonprofit organizations [501(c)(3)’s] and governmental entities.” The Act grants immunity from personal liability for volunteers of nonprofit organizations. However, the act does not prohibit claims against volunteers. Anyone can bring a lawsuit against a volunteer despite the VPA. Furthermore, immunity laws, including the VPA, generally do not protect against willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights and safety of the claimants. Volunteers operating motor vehicles are also not covered under the VPA.

In addition, the Act is limited because it only offers immunity to those who volunteer for nonprofits. The nonprofit organizations and their employees are not covered under this Act. Thus, as suggested by Jerald Jacobs, General Counsel for the American Society of Association Executives, this federal immunity law “increases and enhances . . . risk management, but it does not replace other risk management techniques, such as insurance.”

Worker Safety Programs. A safety program works to ensure the highest level of safety and security for employees, volunteers, and program participants. Safety programs often include: designation of a safety coordinator, implementing a scheduled program of inspections, emphasizing and offering safety training, and investigating and recording accidents and incidents.

Employee Handbooks. Employee handbooks and personnel policy manuals provide summaries of benefits, work rules, and policies. Employee handbooks typically cover areas such as: workplace practices, workplace expectations, leave benefits, career development, compensation and accounting procedures, building procedures, and codes of ethics. Request a copy of the National Leadership Roundtable on Church Management Standards for Excellence Model Employee Handbook for assistance in this area. It is also imperative that the employee handbook be reviewed periodically by a competent employment lawyer in the state or states where the nonprofit has employees, as state laws do change from time to time.

Fleet Safety Programs. For organizations with a fleet of vehicles, a fleet safety program should be implemented. Such a program may include the following activities: maintaining records on vehicles, informing drivers of safety concerns, introducing rewards programs based on driver safety records, accident/incident reporting procedures, etc.

Whistleblower Policies. Catholic nonprofits should also adopt a whistleblower policy, which is a policy to encourage employees and volunteers to report good faith concerns of a violation of law by any other employee or volunteer associated with the organization. The purpose of a whistleblower policy is to promote the detection and reporting of fraudulent or other illegal activities, and to protect individuals who do make such reports from retaliation by supervisors. Good faith compliance with a whistleblower policy will also help to protect the organization and senior staff from checks may also be needed for nonprofits serving certain populations, such as disabled adults or children. Consult with an attorney for more details.

(Jerald A. Jacobs, “How the New Law will Affect Associations.” Association Management, August 1997.)
Criminal liability under Sarbanes-Oxley. See www.chuchepedia.org/fn/sarbanesoxley.swf

**Conflict of Interest Policies.** All nonprofits should also have in place a conflict of interest policy that establishes procedures for reporting and approving compensation arrangements—whether as an employee or by contract—between the nonprofit and its directors and officers. See www.churchepedia.org/fn/conflictsofinterestpolicies.swf

**Document Retention Policies.** A robust risk management program for a nonprofit also includes policies and procedures for the retention of documents (both paper and electronic) for the length of time that the organization may reasonably need them, the regular destruction of obsolete records, and a mechanism for halting the destruction protocol and preserving records in the event of a claim or investigation of the organization. Consult with a competent local attorney for guidance on appropriate retention policies and protocols. See www.churchepedia.org/fn/sarbanesoxley.swf

Perhaps two of the most important commercial insurance products nonprofits use to protect against risk are general liability insurance and Directors and Officers Insurance. Insurance products are generally sold through agents or brokers. Different types of coverage products available to nonprofits include:

- Automobile Insurance;
- Professional Liability Insurance;
- Umbrella or Excess Insurance;
- Employment Practices Liability Insurance;
- Employee Benefits Insurance;
- Workers Compensation and Employer’s Liability Insurance;
- Fidelity Bond;
- General Property Insurance;
- Environmental Liability Insurance;
- Aviation or Watercraft Insurance;
- International Insurance;
- Crime Insurance;
- Boiler and Machinery Insurance;
- Flood and Earthquake Insurance;
- Valuable/Movable Property Insurance;
- Electronic Data Processing Insurance;
- Weather Insurance; and
- Special Event Insurance (e.g., Hole in One

**State Immunity Laws.** In many cases, individual states will have immunity laws provide protection from liability for volunteers as part of their state code. This protection often goes above and beyond the protection provided by the Federal Volunteer Protection Act of 1997. These laws may provide coverage to “agents” of an organization; defined as volunteers, directors, officers, or employees of a qualifying organization (charitable nonprofits are one type of qualifying organization). Such agents are generally immune from civil liability for ordinary negligence. For example, Colorado, Delaware, Massachusetts, Minnesota, New York, Ohio and Rhode Island have laws which may provide immunity from liability for ordinary negligence.

It should be noted that state immunity laws protecting staff, board members, and volunteers may only do so if the organization has insurance coverage. For example, the Kansas statute only provides immunity for a volunteer of a nonprofit organization if the organization carries general liability insurance coverage. In Maryland, California and the District of Columbia, the insurance coverage must meet certain thresholds.
DIRECTORS AND OFFICERS INSURANCE
Directors and officers who act in good faith and in the best interests of an organization may have a legal defense if an action by the organization harms another person. However, even the most conscientious board can be sued for mismanagement or breach of the duty of care, and the legal expense of establishing the facts and defending against the claim can be devastating. Organizations should protect their directors and officers by adopting prudent risk management policies, and by maintaining adequate insurance coverage.

Directors and Officers insurance (D&O) provides liability coverage for individual directors and officers, including the cost to defend against the allegations. Very few nonprofit organizations or board members have the financial resources to absorb the cost of defending a lawsuit. Many nonprofits purchase D&O insurance to finance these defense costs and potential settlements or awards. Every D&O policy is different, so the staff should consult with their insurance representatives or brokers, in light of the specific activities of the nonprofit, to be sure that the policies provide the desired amount of coverage for the activities engaged in by the organization.

OTHER TYPES OF INSURANCE
Commercial general liability insurance usually provides coverage for bodily injury, property damage, personal injury (libel, slander, defamation, etc.) and advertising injury. Coverage can vary depending upon the type of service the nonprofit provides and its other activities. As with a D&O policy, the staff should consult with their insurance representatives or brokers, in light of the specific activities of the nonprofit, to be sure that the policy provides the desired amount of coverage for the activities engaged in by the organization.

Typical liability coverage includes:
• Premises and Operations liability;
• Products/Completed Operations;
• Contractual liability, subject to policy limitations;
• Personal and Advertising Injury;
• Medical Expenses;
• Fire damage liability;
• Limited Worldwide coverage;
• Employees as Insureds; and
• Automatic coverage for 90 days for newly acquired organizations.
Selected Resources for Legal Compliance and Liability Issues

Attachments

- Attachment A: Questions and Answers about D&O Coverage

Books and Articles


Special thanks to Magdalena Camillo and Howard Jacobson of Akin Gump Strauss Hauer & Feld LLP, Leslie White and the Maryland Nonprofits Ethics, Cynthia Rowland, Millie and Veronica Jaeger, and the Accountability Initiative Nonprofit Sector Education Work Group for their assistance in developing this Standards for Excellence educational resource packet.
ATTACHMENT A
QUESTIONS AND ANSWERS ABOUT D & O COVERAGE

Q: I've heard that charities are immune from liability in the state where our organization is incorporated—does our organization still need D&O insurance?
A: Charities are often immune from many types of liability under individual state laws. Many states have enacted legislation to protect volunteers, board members, and staff. However, court decisions and statutes provide only limited protection. For several reasons, it still makes sense for your organization to get D & O coverage.

1) Immunity from liability doesn't mean that someone can't sue you and force you to incur expenses defending your organization and its directors, employees, and volunteers. One of the principal reasons for buying D&O coverage is that it will pay for the costs of defense. The costs of defending a D&O suit can be very high and, unless your organization has sizable cash reserves, you may not have the funds to pay an attorney to defend you.

2) While state immunity laws may be good, they may not protect your organization and board members, staff, and volunteers from all potential liabilities. Many cases brought against nonprofit organization boards and staff are based on federal laws such as ERISA, labor, tax, and environmental laws that may be unaffected by your state immunity.

3) State laws that provide immunity for your staff, board members, and volunteers may only do so if your organization has insurance coverage. Some state laws specify that your coverage must meet certain thresholds.

The most significant impact of state immunity provisions is that they enable you to get a better deal on the insurance you do buy. In addition, the amount of insurance coverage you have provides limits beyond which your organization, its employees, and volunteers can't be held liable if the liability is capped at the amount of insurance you have in place. A good insurance broker will be able to guide your organization through the analysis so that the organization can purchase cost effective coverage for the activities it carries out.

Q: Most of our board members have personal umbrella policies—isn't that good enough?
A: No. It is not fair to ask your board members to put their personal insurance policy on the line for the volunteer work they do in your organization. Many board members rightfully feel that they want their personal insurance policy to cover their personal needs. They expect you to protect them for the volunteer work they do for your organization. Furthermore, an individual's personal policy provides no protection for your organization, its staff, or other board members and volunteers.
Q: My organization already has general liability insurance—isn't that enough?
A: No. To put it simply, general liability coverage is extremely limited. It doesn't provide protection for many of the people you want to protect. Nor does it cover many of the situations that are most likely to occur. For example, if someone slips and falls in your office and sues your organization for her injuries, that claim is likely to be covered by your general liability policy. If the same person sues your officers and directors, alleging they were negligent in managing the organization by allowing a dangerous condition to exist, that claim would not be covered under most general liability policies, but would be covered as a D&O claim. In another example, a staff member sues the organization, its executive director, and all the board members, alleging that he was the victim of sexual harassment by the director and that the board was negligent in supervising the director. This claim would not be covered by most general liability policies. Be sure that your insurance includes employment practices coverage if you have any employees.