

NABE Annual Meeting
Wednesday, August 6, 2003 3:00pm – 4:00pm
Marriot Hotel, San Francisco
Presenters: Susan Waters, CAE & Jim Seely, Esq.

Risk Management

1. **Risk Management:** Identifying potential or actual risks of liability and addressing them with effective strategies.

Other Risks:

Failure to develop and monitor a viable risk management program may be risky to your employment status.

2. **Corporate Structure:** The CSO is responsible for risk management by virtue of delegation by Board of the responsibility for the management of the affairs of the association/corporation. However, that authority must be exercised within the limitations of the Articles of Incorporation, Bylaws, and policies—all of which must be observed to avoid challenges on the legal validity of any action.

Example: Who has the authority to enter into hotel contract?

3. **How can you identify risks of legal liability?** The CSO must have adequate resources to do so.

Best Practice:

The CSO should not be required to identify risks and manage them all alone. The CSO should be authorized to get appropriate help. These are ***legal*** risks. Legal counsel should be engaged to work in concert with the CSO. Together they can review and report on legal risks arising out of association activities, and make useful recommendations to the Board as to effective strategies.

Issues to Consider:

- a. Have you arranged to have access to legal counsel who is qualified to address the legal issues common to association management?
- b. Is the legal counsel familiar with the organization and activities of your association so that responses from counsel are adequate for the purpose of developing a viable risk management strategy for your association?

Important Note: By properly involving legal counsel in the process you will have met your duty of due diligence.

- A. **Apparent Authority.** If you place a person in a position where it appears to a reasonable person that that person has the authority to act on behalf of the association then the association may be liable for the actions of that person.

Example: Hydrolevel

4. **How do you identify risks of legal liability to you and your association?** Here are some of the risks commonly encountered by associations and questions you should ask about each:

A. **Governance.**

1. Are your basic governance documents adequate for your current needs?
 - a. Articles of Incorporation, Bylaws (Do they include a proper position description for the CSO?)
2. Do you have the proper tax-exemption?
 - a. Is 501(c)(3) the correct exemption for your association?
3. Are all the necessary basic documents filed with the proper state authorities?
 - a. Special attention should be given to lobbying and PAC's
4. Are your trademarks registrations in order?
 - a. Re-registration is due between 6th and 7th years.

B. **Policies and Procedures.**

1. These are very powerful risk management tools.
 - a. You should implement your bylaws in a specific and flexible way to allow for easier changes to your Policies and Procedures.
 - b. Ensure that Policies and Procedures are consistent with your bylaws.
2. Do your policies make it very clear who has the authority to set policies and to speak on behalf of the association and its members?

Example: Hydrolevel and apparent authority?

C. **Authority to Engage Qualified Professional Help.**

1. Do you have express authority to engage professionals to assist you in identifying and addressing risks of legal liability?
 - a. Adequate authority exists when you are authorized to do so whenever you determine it is in the best interests of the

association; otherwise, the Board should not be able to hold you properly accountable, because it has not provided you access to appropriate resources.

D. Tax-exemption.

1. Is the association organized and operated to maintain its tax exemption?

E. Unrelated Business Income Tax.

1. Do you feel comfortable in spotting an actual or potential UBIT issue?

Example: NYU Law – Spaghetti Factory

2. Do you have ready access to professionals to address UBIT issues as they arise?

F. Insurance.

1. Insurance is used to transfer those risks which your association is not equipped to assume by itself.

2. Do you have appropriate insurance?

- a. Do you utilize a measured approach to identifying risks?
- b. Do you use an RFP to list your needs and to obtain a qualified broker?
- c. Do you ensure that responses given to your RFP are responsive to your RFP?

3. Do you have an adequate services contract with your broker?

- a. The services contract should define the exact services the broker will provide.

Example: Your broker should process your claim against the carrier

- b. The broker should, in the contract, warranty that each policy covers the particular risks you have identified (with necessary caveats).

4. Do you have in place a procedure for identifying new activities for insurance coverage?

5. Do you have in place a procedure for adding contractors as additional insured?

6. Are your contractors adequately insured for their contractual obligations to you, such as indemnification?

G. Contracts.

1. Do you have policies and procedures which specify the authority to enter in a particular contracts, such as website designers, website maintenance, hardware, software, real estate, meeting and event contracts (hotels, convention centers, exhibitors, sponsors)?
2. Should your policy include a purchase order process for large purchases?
3. Do you require that all significant contracts be reviewed by legal counsel?

H. Copyright.

1. Do you own your website?
2. Are you sure?

I. Copyright Issues.

1. Do you have a policy directed to your staff that advises them to honor the intellectual property rights of others as well as their confidentiality?
2. Do you know who owns the copyright rights in articles published by the association and written by staff members?
 - a. Written by third parties?
 - b. Written by Committee members?
 - c. Do you have a policy that covers these copyright rights?

J. Employment practices.

Important Note: This area is responsible for the largest percentage of D&O claims.

1. Do you routinely consult with legal counsel respecting issues involving potential or actual significant discipline or termination?
2. Have you had your policies reviewed by qualified counsel?
3. Are you up to speed on ADA and sexual harassment requirements?

4. Are you also up to speed on payment of overtime, classification of employees and comp time issues?
5. Do you have access to adequate resources when an issue under these laws arises?

K. Antitrust.

1. Do you have an adequate basic antitrust policy in place?
2. Is it properly disseminated to members and staff at least annually?
3. Is it updated to include new developments such as the Internet, esp. email, listserv?
4. Is it reviewed with each board member and staff member?

L. Internet.

1. Have you reviewed your potential liability regarding hyperlinks and banners to a member's or sponsor's website (endorsement)?
2. Have you reviewed your potential liability for defamation on your listserv?

M. Listserv.

1. Do you have a Board policy on the use of listserv?
2. Do you have proper listserv terms and conditions which each member user must agree to, and which address legal risks such as antitrust and defamation?
3. Do you send regular reminders of the terms of use to each user?
 - a. *[See handout of comprehensive policy of terms and conditions of listserv use.]*
4. Do you monitor your listserv?
 - a. Are you aware of the legal issues involved in monitoring or not monitoring your listserv?

N. Audit & Audit Committee.

1. Do you have an annual audit?
2. Do you have an audit committee?
 - a. Does the audit committee meet with the auditor without management present?
3. If you have a compilation or review in lieu of an audit, does the accountant meet with a committee of members without management?

O. Referrals.

1. Suppose your neighbor asks you for a referral in your association's profession or industry. What is the major risk here? (Your president will find out that her firm was not recommended.)
 - a. Be aware that if anything goes wrong both you and the association may be liable.
 2. Do you have a policy on referrals?
 3. If you have a referral service, do you have an adequate disclaimer?
 - a. *[See association disclaimer handout.]*
5. **Conclusion:** You are not expected to be omniscient or omnipotent and you are entitled to enlist and use good help. You are expected to use due diligence to construct a viable risk management strategy and you are entitled to enlist and use good help in doing so.

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