

Non-Profit Boards and Personal Liability

Serving on a non-profit board is a great way to contribute to our community and society. With service comes responsibility for the oversight of the organization. This responsibility should not be taken lightly. In fact, directors can and have been sued personally for decisions or lack of decisions made while serving on non-profit, church and civic boards. Some examples include:

- The parents of a group of adult disabled children sued an organization providing housing for the disabled alleging breach of fiduciary duty. After a jury trial and an appeal, the plaintiff parents won a judgment in excess of \$3,000,000.
- A former employee sued a library for wrongful termination. The library board cited many negative reviews by supervisors. The plaintiff alleged retaliation for reporting that a supervisor had unlawfully removed library property. The plaintiff was awarded \$350,000.
- A trade association membership applicant sued the association for anti-trust law violations after the association rejected the applicant's membership bid. Defense costs totaled \$175,000.
- A country club was sued by a group of its members. The directors and officers failed to renew an option to extend the rent-free lease of the land used as their golf course. As a result of this omission, the lessor required the club to either purchase the land for more than \$10 million or to lease the land for a substantial price. The suit was settled for \$2,000,000.
- Two employees of a non-profit organization alleged sexual harassment by their supervisor. The suit was settled for \$125,000.

Many board members assume that they are somehow protected from lawsuits. A Missouri statute provides some limited protection to uncompensated directors and officers of non-profit organizations recognized for exemption under any of the twenty (20) plus classifications of 501(c). If a director or officer of a 501(c) organization does not receive a salary or equivalent compensation (expenses may be reimbursed), he or she will "be immune from personal liability for any civil damages arising from acts performed in his official capacity." The immunity does not extend to "intentional conduct, wanton or willful conduct, or gross negligence." Most lawyers working with non-profit organizations interpret the provision as extending protection to acts and omissions that are merely negligent.

This statute may or may not protect board members, depending on the circumstances. In addition, employment practices liabilities such as wrongful termination, sexual harassment and discrimination are being litigated more frequently. In many cases, the cost of defense is the most expensive part of a suit, regardless of whether a judgment is awarded.

Non-profit organizations may want to consider the purchase of Directors and Officers Insurance and board members may ask for evidence of this coverage. Let's face it, when a director's personal assets are at risk, they have the right to ask to be protected.

Here are a few things to look for when purchasing a Directors and Officers Insurance policy:

- Coverage for directors, officers, employees, volunteers and committee members, including past members.
- A marital estate extension that covers spouses that may be enjoined in a suit or an estate after death.

- Employment Practices Liability (EPL) that provides coverage for discrimination, sexual harassment, wrongful termination and other employment related issues. This coverage can normally be added to a non-profit D&O policy fairly inexpensively.
- Defense costs can be inside or outside the limit of liability listed on the policy. Since defense can be a substantial part of the expense of a suit, having that cost outside the limit of liability won't erode the limit of liability purchased. Some insurance companies offer this option and some don't.
- Entity coverage to protect the entity in addition to the people in the organization.

In addition or in lieu of insurance coverage, Missouri allows non-profit organizations to provide indemnification to their directors and officers. Simply stated, a director, officer or employee of a non-profit corporation can be defended and indemnified (compensated for loss) at the corporation's expense when he or she is acting in good faith. Typically, indemnification provisions are contained in an organization's articles of incorporation or bylaws. If Directors and Officers Insurance is purchased, directors may be indemnified for deductibles and other expenses.

Other methods to protect you include the purchase of personal umbrella liability coverage. It's important to review the policy closely to determine if it covers religious, charitable, civic and non-profit board service (some do, some don't). If so, it normally covers bodily injury and property damage. This does not eliminate the need for decision making coverage, normally covered by Directors and Officers. Some offer other limited coverages as well.

Serving on boards can be a rewarding, stimulating and enjoyable experience. It makes a big difference in our community. Understanding the liability associated with board service and how to protect you eliminates potential legal surprises if something unforeseen happens.

(Richard Ollis is President/CEO of Ollis and Company, an employee-owned insurance agency.)