



609:Insuring the Not-for-Profit

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Faculty Biographies

Sheri V.G. Fanaroff

Sheri V.G. Fanaroff is general counsel for the Columbia Association, a non-profit community services corporation and property owners association in Columbia, Maryland, a planned community of 96,000 residents located between Baltimore and Washington, DC. The Columbia Association maintains the community's 3,400 acres of open space, including 3 lakes, 165 playgrounds, and 89 miles of pathways, operates 23 outdoor pools, three athletic clubs, and a host of other sports facilities, provides before and after school care, runs summer camps, and offers cultural events. Given this array of corporate activities, Ms. Fanaroff's responsibilities are highly varied, and include providing legal counsel to management and the board of directors, negotiation and drafting of contracts, leases, licenses and easements, handling and advising on human resources matters, and oversight of all litigation involving diverse issues such as general liability, employment, real property, zoning, environmental issues, childcare, sports and fitness, financing, insurance, and contracts.

Before joining the Columbia Association, Ms. Fanaroff served as general counsel for Academy Life Insurance Company, a niche market insurer. Prior to becoming a general counsel, Ms. Fanaroff worked as in-house counsel managing litigation throughout the United States for Alexander & Alexander Services and Sedgwick James, Inc., both worldwide commercial insurance brokers. Ms. Fanaroff spent the first nine years of her career in private practice as a commercial litigator in New York.

Ms. Fanaroff earned her AB from Brown University and was awarded a JD with Honors from the University of North Carolina School of Law in Chapel Hill.

Peter M. Marchel

Peter M. Marchel is a broker in the executive liability department and general counsel for Alexander, Morford & Woo's home office in Redmond, Washington. He specializes in the placement of directors' and officers' (D&O) liability insurance for publicly traded companies. With his legal background, Mr. Marchel offers insight on litigation management and securities issues pertinent to today's CEO. He has addressed these and other topics during ACCA conferences.

Working in various capacities during his tenure in the insurance industry, Mr. Marchel's experience runs the gamut from acting as in-house counsel and handling litigation for a national insurance carrier to running the legal division for a multi-national brokerage firm. Having honed his skills in negotiating complex claims, crafting policy language, and developing financial risk solutions for past clients, his expertise allows retail agents to compete against firms with in-house D&O specialists.

Mr. Marchel holds numerous insurance designations, including CPCU, AIM, and AIS. He earned a Certificate in Total Quality Management from the University of Washington.

Mr. Marchel received his BA from the University of Washington. He received a JD, MBA for business and government and not-for-profit management, and a Certificate in Dispute Resolution from Willamette University.

John L. Miller, III

John L. Miller, III is the general counsel and a manager for government affairs for the Carpet and Rug Institute ("CRI") in Dalton, Georgia, the trade association for U.S. carpet manufacturers. He is responsible for the daily legal activities of CRI which include support of the various CRI communication vehicles, review of CRI certification programs, following international issues that affect the carpet industry, managing intellectual property registrations, interaction with the board of directors, and various other routine matters. Mr. Miller is active in the CRI government affairs arena, monitoring state legislative activities in the southeast, especially Georgia, Texas, and Florida.

He is a member of the industry sector advisory committee 15 of the U.S. Department of Commerce which reviews U.S. trade policies affecting the textile and apparel industries.

Prior to joining CRI, Mr. Miller served as assistant general counsel for Shaw Industries, the world's largest carpet manufacturer, in Dalton, Georgia. His responsibilities included litigation management, merger and acquisition processing, and intellectual property registration.

He is a member of the Dalton Rotary Club, a board member of the regional chapter of the American Cancer Society, a member of the legislative action committee of the Dalton Whitfield Chamber of Commerce and a trustee of the Whitfield County Health Care Foundation.

Mr. Miller attended The Citadel in Charleston, South Carolina and received a BA from Auburn University. He is a graduate of the Mississippi College School of Law in Jackson, Mississippi.

Raoul A. Renaud

Raoul A. Renaud is senior counsel for Vision Service Plan ("VSP") in Rancho Cordova, California. As part of a four-attorney legal staff, he provides counsel to the company on antitrust, nonprofit issues, ERISA, HIPAA, e-commerce, litigation, and bankruptcy matters. He also manages the contracts section, which is responsible for review of the vision care plan contracts the company sells to employers nationwide.

Prior to joining VSP, Mr. Renaud was senior counsel for the California Dental Association. At CDA, he provided legal guidance to the board and staff on matters affecting the dental profession and nonprofit associations.

He is a member of the California Bar, the Sacramento County Bar Association, and is on the board of directors of ACCA's Sacramento Chapter.

Mr. Renaud received his BA from the University of California, Los Angeles and his JD from Santa Clara University School of Law.



**AMERICAN CORPORATE COUNSEL ASSOCIATION
ANNUAL MEETING**

INSURING THE NON-PROFIT

October 9, 2003

I am the general counsel for the Columbia Association, a non-profit community service corporation in Columbia, Maryland.

I'd like to start with some background on Columbia and our current operations, to help us understand how the risk management issues that face the Columbia Association today may have evolved.

Visionary developer James Rouse founded Columbia, Maryland as a planned community 37 years ago. It occupies an area about the size of Manhattan, or approximately 14,700 acres in Maryland between Baltimore and Washington, D.C. Approximately 96,000 people now live in Columbia.

The Columbia Association, formed in 1965 as a private, non-profit corporation, serves this planned community by providing a wide range of cultural, recreational and community service programs. We have a revenue budget of over \$50 million, total assets of approximately \$112 million and 1,100 to 1,600 employees depending on the season.

What are CA's programs, and what kinds of risks do they pose? We provide the following services and programs:

- 23 outdoor swimming pools, including baby pools, lessons, swim teams, special water features, with 625,000 admissions this year, potentially 625,000 “slips and falls”!
- An indoor swim center with three pools and a 4-story, 660-foot indoor water slide, with about 84,000 admissions this year.
- A year-round indoor ice rink, offering open session, hockey leagues and lessons to 114,000 skaters.
- Three tennis clubs, including a year-round tennis bubble, with 98,000 visits this year.
- Three, full-service athletic clubs, with combined admissions of 1.3 million in 2002.
- An 88-acre horse center, providing lessons, boarding and shows through a leased operator.
- A sports complex with batting cages, miniature golf and a skateboard park.
- Two 18-hole championship golf courses, on which a combined 90,000 rounds were played in 2002.
- Over 3,400 acres of land reserved for natural open space areas for parks, 92 miles of pathways, and pedestrian bridges.
- 165 playgrounds.
- Three large lakes, 19 ponds and 34 miles of stream valleys.
- Twenty-two before and after school programs serving 3,700 children throughout the school year.
- Dozens of summer camps providing experiences in sports, art, computers, fitness, sailing and nature for over 4,900 children last summer.
- Two teen centers that served 22,000 young people last year through social events, sports, trips and other activities.
- Twenty-four community services buildings.

Many of the risks are very clearly evident just in the description of the activities, but we also have issues with:

- ADA access
- Babysitting in the athletic clubs
- Festivals and special events open to the public
- Field trips for children and teens
- Fireworks – we allow fireworks displays on our property, and we contribute to the cost
- Lifeguard training
- Money collection, including making night deposits
- Outside agencies using our facilities
- Roller rinks and skateboard ramps and pipes
- Sexual molestation potential at all facilities

Our employees operate backhoes, forklifts, earth-moving equipment and boats. They use computers, lifesaving equipment, power tools, and hazardous materials and other agents with potential environmental risks. We construct buildings, pedestrian bridges over roads, pathways and playground equipment. We remove snow, trash and storm debris (never quite promptly enough for some residents!). We administer employee benefit plans; enter into contracts; handle cash, credit cards and investments; store and maintain confidential data; interact with the media; publish materials; and comply with federal, state and local laws, regulations, permits and licenses.

We are exposed - - as are you!

How does CA analyze its risk? At the start of any activity, program and facility, CA conducts a thorough examination to identify the related exposures by asking the following questions:

- What can go wrong, and how can “it” go wrong?
- How often can “it” go wrong?

- Who is responsible for “it”?
- Who will pay for “it”?
- How will “it” be paid for?
- What else will go wrong, if “it” goes wrong?

Prior to starting any new activity, program or facility/operation, CA usually walks through the activity with a risk management consultant to ensure that all risks associated with that particular operation are identified. These risk exposures are then analyzed and evaluated by our CFO and myself, as general counsel, to determine:

- What steps CA must take for loss prevention and loss control; and,
- Whether or not CA should undertake this risk, or avoid it by not engaging in the activity.

If CA decides to assume the risk, then we must decide whether or not the risk should be transferred out of the organization through contract insurance requirements, hold harmless agreements or the purchase of an insurance policy. If CA decides not to transfer out all or part of the risk through one of these methods, then we must decide if CA should fully or partially retain the risk through self-insurance, large retentions and deductibles, or pooling with similar organizations.

CA uses the standard rule that evaluates the nature of the exposure as to frequency of claims or losses and the severity of those losses. If the exposure is of high frequency and low severity, we self-insure the risk. If the exposure is of low frequency and high severity, we purchase an insurance policy from an A+-rated insurance company. If the exposure is of high frequency and high severity, then we avoid the risk completely. For example, we used to have tanning beds in our athletic clubs, but when the health risks of tanning beds were publicized, we took them out of our clubs, exiting that business entirely.

Frequency/Severity Matrix

Frequency	High	<i>Self-insure</i>	<i>Avoid risk</i>
	Low	<i>Retain risk</i>	<i>Transfer risk by purchasing insurance</i>
		Low	High
		Severity	

For existing operations, we analyze our risk by periodic inspections and claims reviews.

Our policies mandate obtaining certificates of insurance from all independent contractors. Whenever outside parties use our facilities or buildings, we require hold harmless agreements (although their protection may be minimal). We allocate insurance premium costs and claims losses to the department or facility incurring the cost, which is an internal risk transfer that we feel is a tremendous motivator in risk avoidance and prevention.

In addition, CA's liability is uniquely limited. A number of years ago, we were successful in our lobbying effort to have our state legislature amend the Local Government Tort Claims Act to include CA, so that CA's liability exposure is limited to \$200,000.

At CA, we also work to limit our risk exposure by investing heavily in employee training via CA University, which provides a comprehensive new employee orientation; extensive training for supervisors in employment-related matters; safety training for operations staff in equipment and hazardous materials use; certification-based training for childcare workers and lifeguards, and so on. We also have several risk management and safety committees comprised of

employees and risk management consultants. These committees meet regularly to review policies and procedures and inspect our facilities.

We self-insure on two levels – through large deductibles or retention and through true self-insurance. Last year, we received approval from the State of Maryland Workers' Compensation Commission to be self-insured for workers' compensation. We will self-insure for workers' compensation after the expiration of the current policy.

The Columbia Association has been self-insured for general liability for the first \$750,000 since 1986. We established a trust, a rigorous risk management program for our employees and a risk management committee of our Board of Directors to administer that program. The trust fund arrangement provides for funding as actuarially determined by independent actuaries. The trust fund has grown to \$6.4 million in 2002 from its initial funding of approximately \$300,000 in 1986. We funded the trust annually for the first ten years, based on the actuarial determination of premium costs. CA's self-insurance program has been so successful that we have not had to fund the trust in nearly eight years. Even though we purchase excess coverage up to \$10,000,000, we estimate that this general liability self-insurance trust has saved us over \$1.5 million per year in premiums. Perhaps the savings have been even greater, given today's insurance market.

What risks do we at CA see in the future?

- Environmental risks – hazardous materials, pollutants, storm water runoff attributed to our facilities or activities.
- Terrorism-related risks – because the Columbia Association is viewed by many as a governmental or quasi-governmental unit, and because of our close proximity to Washington, DC.
- Enforcement of property owners' covenants may expose CA to legal action related to First Amendment rights.

- Continued employment risks – harassment, issues with employee benefits trusts, workplace violence, new classes and interpretations of employment-related discrimination.
- Malpractice claims for professional staff members who are not directors or officers.
- Even greater difficulty and expense in obtaining meaningful coverage as the insurance industry continues to incur investment losses, costly judgments from court cases and increasing claims payouts.
- On the positive side, more creative risk-sharing (retention, pooling, self-insurance) strategies as our organizations as consumers look for cost-effective ways to manage risk.

The risks from the corporate governance perspective have always been a concern but have become even more significant in the aftermath of the Enron, Tyco and other corporate scandals of the past few years. Granted, these incidents have occurred in for-profit corporations, but the non-profit is not without corporate governance risks, especially related to the use of donated assets or tax or lien revenues, breach of contracts, wrongful termination and other employment-related issues.

Corporate governance risks can indeed be transferred, at least to some extent, through the purchase of directors and officers liability insurance. However, there are gaps in that risk transfer, and I expect those gaps to widen as the insurance industry reacts to the corporate scandals and scales back coverage through exclusions and increased deductibles, just as the industry did with mold exclusions after a series of costly court cases. Self-insurance would not be CA's first choice for corporate governance risks, because those risks appear in the low frequency-high severity box of the risk transfer decision matrix.

At CA, we have instituted a new director's orientation program that includes extensive background materials and in-person presentations about the

organization and, even more importantly, about their role as directors – who they now represent, what their responsibilities are to the organization, etc. Much of the same orientation material and program is used for new officers and senior-level executives when they are hired. Also, a significant component of our risk management program is the Board's risk management committee. All significant claims, potential losses and policy decisions are reviewed with the committee at least quarterly, and any catastrophic claims or concerns are brought to the attention of the entire Board of Directors.

Balancing the needs of our non-profit organization with the egos and agenda of the directors is difficult, much more difficult in our case than striking that same balance with the officers. Our board members are Columbia residents elected by other residents to represent their village. They serve one- or two-year terms, so that by the time they understand the organization, they are often out of office. There are no requirements other than residency for the board members. Few of the board members have any prior training or expertise in corporate governance, finance, risk management, recreational facility operations, etc. CA's officers and senior management work constantly to attempt to meet the needs of our organization through the individual director's agenda, without damaging their egos. We put considerable time and effort into educating the board members as to the structure and operations of and issues confronting the organization. We feel that open, respectful communication and responsiveness from the staff is essential in striking that balance.

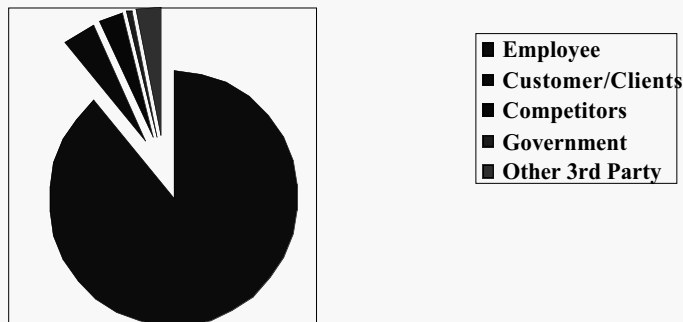
I hope I have provided some useful insights to you today on how one non-profit organization, the Columbia Association, approaches risk management. I am happy to answer your questions, so please feel free to call me at the Columbia Association or email me.

Non-Profit Directors' & Officers' Liability

Insurance Issues to Consider

Claim Distribution for Non-profit Organization

Tillinghast-Powers Perrin 2002 D&O Liability Study



Claim Statistics

~ 16% encountered one claim in 2002

~ Claimants:

Employees – 89%

Customers / Clients – 7%

Government – 1%

Other Third Parties – 3%

Tillinghast-Towers Perrin 2002 Directors and Officers Liability Survey

D&O Claim Allegations from Employee Claimants

Discrimination	49%
Wrongful Termination	21%
Harassment / Humiliation	9%
Retaliation / Whistleblower	7%
Breach of Employment Contract	5%
Failure to Hire or Promote	1%
Defamation	1%
Other	6%

*Exposures for Non-Profit
Organizations*

- ~ Mismanagement of funds
- ~ Failure to deliver services
- ~ Acts beyond granted authority
- ~ Discrimination
- ~ Harassment
- ~ Antitrust violations
- ~ Crime

*Convincing your Client they need
D&O Insurance*

Don't go far enough:

- 1 – Indemnification Provisions in Bylaws
- 2 – Immunity and Volunteer Statutes

Why buy D&O Insurance?

- ~ Personal assets
- ~ Organization's financial stability
- ~ Attract board members
- ~ Employment Practices Liability

EPLI under a Non-Profit D&O policy form

- ~ Cheap
- ~ Low SIRs
- ~ Basic covered perils
- ~ Pitfalls

Limits – How much?

Things to Consider

- ~ Asset size
- ~ Exposure
- ~ Who

Pricing

- ~ **Minimum Premiums** for a \$1,000,000 limit:
 - ~ \$1,300 Monoline D&O
 - \$1,500 D&O w/ EPL coverage
- ~ **Minimum Retentions:**
 - \$1,000 or \$2,500
 - **Special Classes** with higher minimums

Marketing the Risk

~ Benefit of multiple markets:

- Varying appetites
- Policy form differences

~ Submissions:

- Application
- Financial statements
- (By-Laws)
- (Articles of Incorporation)

Why Do Non-Profit Organizations Need D&O?

- ~ Duties
- ~ Exposures
- ~ Organization's financial limitations
- ~ Immunity/Volunteer Statutes not all encompassing
- ~ Attracting qualified board members
- ~ Cost effective EPLI

Questions & Answers

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The Carpet and Rug Institute

**AMERICAN CORPORATE COUNSEL ASSOCIATION
ANNUAL MEETING**

INSURING THE NON-PROFIT

October 9, 2003

I am the Counsel and Manager of Government Affairs for the Carpet and Rug Institute (CRI), a trade association for the U.S. carpet and rug manufacturers located in Dalton, Georgia.

Following is some background information on CRI that will be helpful in understanding the types of risks that are encountered each day by an Association such as ours.

CRI was founded in 1968 as the successor to the merger of the Tufted Textile Manufacturers Association and the American Carpet Institute.

Policy is determined by a Board of Directors composed of chief executive officers from member companies and is implemented by a full time professional staff of 20 people. Additional member company personnel provide time and expertise to more than 40 committees and subcommittees. The general fields of interest are technical services, government affairs, and communications/public relations.

CRI is a source of information for its members and also for consumers, writers, interior designers, specifiers, facilities managers, architects, builders, installation contractors, and retailers.

CRI administers its "Green Label Program" for both broadloom carpet and vacuum cleaners. This program provides indoor air quality testing and certification for participating carpet manufacturers and vacuum cleaner manufacturers. The program has proven to be a valuable marketing asset for these manufacturers of carpet and vacuum cleaners.

CRI communicates the good news of carpet in all media forms utilizing information generated from CRI itself and other relevant sources. Outside source floorcovering studies that include carpet are made available and/or actively distributed to the public.

Government affairs activities occupy an important portion of CRI's time. Legislative activity at the State and Federal levels is monitored on an ongoing basis. Trade and international matters are handled additionally as the carpet industry continually adapts to the global economy. CRI occupies a seat on the U.S. Commerce Department Industry Sector Advisory Committee for Textiles and Apparel.

CRI maintains an open, two story facility on approximately four acres within the City of Dalton. It maintains an office in the Washington, D.C. area which houses one employee and serves as a base for its Federal Government activities. There are no CRI vehicles and the testing programs are conducted off-site by third party contractors. Maintenance of the building and grounds is handled by independent contractors.

CRI conducts its day-to-day operations and affairs in much the same way as any business. An overall and underlying philosophy of CRI is that the organization should, in fact, be run like a business. As such, many of its exposures and liabilities are ones that are all too familiar to any type of business operation.

Areas of risks and liabilities faced include:

- Employee issues including benefit administration
- Third party contracts
- Transactions with cash and credit cards for member dues and services

- Maintenance of sensitive and confidential information
- Publication of hard copy and electronic materials
- Interaction with all forms of media
- Premise liability
- Anti-trust considerations
- Administration of CRI certification programs
- Protection of intellectual property rights
- Contact with government officials at all levels
- Corporate governance

Although I joined CRI in 2002 and occasionally handled some routine legal matters, my position as General Counsel did not become official until the beginning of 2003. Prior to that time, CRI relied on outside counsel to provide advice and address any risk related issues. A part of my day-to-day responsibilities as General Counsel now is to be aware of risks and liabilities and to assist with assessment and evaluation of those risks. I review most third party contracts and retain originals and related correspondence in my files. Likewise, I try to review all brochures and/or electronic communications going into the public: ex, reports to Allergists with regard to recent studies about carpet and its relationship to allergies. Through my office, we try to protect our intellectual property rights by registering copyrightable materials and trademarks such as the insignia for our Green Label program. I have also recently drafted computer and internet guidelines to protect against those risks associated with unauthorized use of these association resources.

As with most not for profit associations, resources both financially and in terms of personnel are limited. CRI has become a more pro-active association which tries to continually communicate with and through its members to the public. We do not typically have time to review and assess the risk of every activity that is conducted. The larger projects or activities that pose the greater risks, demand an assessment and we do make every effort to address those matters. This is typically done by a called meeting of the CRI Staff Directors which includes the General Counsel. A recent

example of this was a consideration of expanding our Green Label testing program to China for use by the Chinese equivalent of CRI. After a review and assessment of this proposal, including consultation with outside counsel in this instance, it was determined that the risk outweighed the benefit. The proposal was denied.

CRI's member companies are the various carpet manufacturers and suppliers within the U.S. Meetings of all types bring together representatives of these member companies. That kind of setting is ripe for potential anti-trust violations. Before each meeting, whether in person or by teleconference, that includes two or more company representatives, anti-trust guidelines are distributed and reviewed to be sure that everyone is aware of the critical nature of this issue. It is a subject that each staff member takes very seriously. The risk is always present; however, we believe that we have addressed that risk in every situation that we can control.

CRI faces many of the typical, day-to-day risks and liabilities which businesses face:

- Premise liability for both employees and public or member visitors
- Liabilities associated with meetings held off site. For example, injury to a visitor of a CRI booth in a trade show
- Employee related matters – sexual harassment
- Damage to the facility or contents and equipment within the facility
- Exposure to injury and liability for employees or members while traveling on CRI business
- Director and Officer liability

These more obvious and “traditional” liabilities are evaluated and addressed by CRI in two general ways: 1) CRI has outsourced many of its human resources functions and as such, coverage of risks under workers compensation and for matters involving employee related issues is transferred to and provided by and through a third party administrator. 2) Premises related liabilities (those related to the building and grounds) are covered under comprehensive insurance policies obtained by CRI directly through the insurer. In our case, this coverage includes both general liability and umbrella

insurance. These policies contain various provisions and limits typically contained in policies of this type. The insurer representative has recommended these coverages and we have relied on that advice in securing these policies.

Future Risks

When companies begin to consider liabilities and risks in the future, environmental and terrorism concerns are typically discussed. CRI does not believe that it is faced with particular risks given that it does not produce any product and that it carries on no activity that would give rise to environmental concerns. Our rather isolated physical location does not realistically present a potential target for terrorist activities. We do look for future risks in the following areas:

- Employment matters as new interpretations and classes give rise to claims
- Computer, email, and electronic issues that give rise to privacy and other related claims
- Protection of intellectual property rights to protect programs now in place from third parties that may wish to start the same or similar programs
- Claims related to standards and certifications established through CRI administered programs

Corporate governance has become an increasingly significant area of concern in light of the recent misdeeds of numerous, previously revered corporations. CRI is entrusted with significant amounts of funds generated through member dues. It is also a collection and clearing house for sensitive and confidential business information submitted by member companies to be used to produce industry reports and guidelines. The general and umbrella insurance coverages provide some relief from potential risks in this area; however, there are limits to that coverage. Through my office, outside counsel and outside auditors, we attempt to monitor these areas and insure proper compliance with general corporate governance, though no specific rules or guidelines are in place.

I trust that the foregoing information is useful in describing how CRI, as a specific industry trade association, assesses and handles its risks and liabilities. It is a work in progress and it must constantly change to meet the ever developing challenge of risks and liabilities in the future.

**AMERICAN CORPORATE COUNSEL ASSOCIATION
2003 ANNUAL MEETING
SESSION 609--INSURING THE NOT-FOR-PROFIT**

**Raoul A. Renaud
Senior Counsel
VSP**

I. ASSESSING RISK MEANS KNOWING YOUR CLIENT'S BUSINESS

In order to determine what risks your client may face, you need to know what your client does! List the organization's activities; try to lump them into categories. Then use your imagination! Think up worst case scenarios of what could happen should everything go wrong while your client is going about its business. Then weigh the factors:

- likelihood of occurrence
- potential cost of occurrence
- steps that could be taken to minimize that likelihood
- availability and cost of insurance, including deductibles

II. RISKS PECULIAR TO MEMBERSHIP ORGANIZATIONS IN THE HEALTHCARE FIELD

As counsel to two healthcare organizations that have membership criteria for doctors—the California Dental Association (1992-99) and VSP (1999-present)—I have seen what liability exposures these types of organizations can face, for example:

Liability for Making Membership Determinations

Such organizations can incur liability exposure from determining which doctors may join and which may not, and which doctors need to be removed from membership due to violations of the organization's rules.

Liability for Facilitating a Conspiracy in Restraint of Trade

Such organizations may also be subject to scrutiny by antitrust regulators because they represent aggregations of doctors who are also competitors. Anytime competitors form a group to represent their common interests, there is concern that their activities could stifle competition for their services in the marketplace.

Liability for the Actions of Member Doctors

Such organizations usually represent to the public that their member doctors are selected, screened, or in some other way a better choice than

a non-member doctor. In the event of a liability claim against the doctor, the organization could face a claim that it was negligent in allowing the doctor to be a member.

Liability for Peer Review Activities

Professional membership organizations often take it upon themselves to monitor complaints against member doctors and make determinations as to whether or not the complaint is valid. In severe cases, the organization may decide to terminate the doctor's membership. Such peer review activities can lead to claims by doctors for defamation, breach of contract, etc. which can, in effect, mean trying the peer review case as if it were a malpractice case in a court of law.

Liability for Standard Setting

Does the organization hold itself out as the expert in its area of healthcare? Does it set standards against which healthcare activities are measured? If so, the organization could face liability exposure based on claims that the standards are wrong—and that someone was injured as a result.

Privacy and HIPAA

Unique to healthcare organizations is the obligation to keep patients' health information secure and confidential. The industry was doing a pretty good job of this pre-HIPAA—after all, existing state laws and ethical codes for the healthcare professions require that confidentiality be maintained—but now HIPAA has imposed a huge layer of standards and procedures that must be documented and followed. HIPAA violations can lead to action by regulators, possible loss of licensure, and can be evidence against the organization in a privacy lawsuit brought by the patient.

III. MANAGING RISK BY MINIMIZING EXPOSURE AND INSURING FOR THE REST

The Role of Corporate Counsel in Risk Management

Assessing and minimizing risk is a team effort. The team must include people who know what the organization's activities consist of—and whether or not they are essential to the organization's existence. The team must also include people who have a good idea of what risks are real, i.e. could actually happen, vs. those which are so far-fetched as to be virtually impossible.

The lawyer's role is to provide the team with information about what legal responsibilities and liabilities the organization faces in connection with its activities. For example, counsel should be prepared to explain how a seemingly innocent gathering of doctors, facilitated by the organization, to

“vent” about low payment by managed care companies, could form the basis for an antitrust conspiracy claim from the US Department of Justice.

Counsel must also be prepared to advise the team on how to avoid or minimize those liabilities—for example, by making sure that organization-sponsored or facilitated meetings of doctors are monitored by someone knowledgeable enough about antitrust law to know when the discussion is in danger of crossing the line from harmless griping to an illegal conspiracy or a group boycott.

Counsel needs to know the client well, be aware of what is going on, and keep thinking about what legal issues or concerns may be raised by the activities of the organization. In-house counsel are in a particularly good position to do this—one of the strongest arguments against outsourcing legal services.

Insuring Against Unavoidable Risk

All activities entail some risk. After doing whatever can be done to minimize risk, some risk will remain. Risk is inherent. Thus we have insurance.

Someone in the organization needs to be responsible for procuring and maintaining insurance. Often this is handled in the CFO/finance office. Wherever it is handled, it is important that those in charge:

- have a thorough understanding of the organization's activities
- have a clear understanding with management as to how much financial loss the organization is willing to bear before insurance kicks in
- engage in a risk/benefit analysis where appropriate: should we discontinue peer review activities because insurance is a)very expensive? b)unobtainable? Can the organization afford to go uninsured? Would an indemnity provision be an acceptable substitute for insurance?
- have a good working relationship with an insurance agent or broker familiar with that type of organization
- submit insurance policies to counsel for review
- consult with counsel when making decisions about first dollar defense, wasting limits, exclusions, choice of counsel, and other coverage issues that will impact the legal defense the organization will receive for its premium dollar

Counsel should be a part of the process of procuring and maintaining Insurance for the organization. Counsel should:

- provide guidance on the meaning and impact of policy provisions that bear on selection of defense counsel, whether defense costs are covered irrespective of deductible, whether defense costs act

- to reduce policy limits, settlement authority
- provide guidance on the availability and effectiveness of legal protection from liability, e.g. do statutes affording immunity for peer review activities offer enough protection?
- know what risks the organization has decided to accept (e.g. high deductible or self-insurance) and adjust vigilance accordingly
- know limitations/exclusions on policies, so that counsel can help the organization make sure it does not act in a manner that will trigger an exclusion
- where, when and how to tender defense of lawsuits

IV. SUMMARY

1. Know your client's mission, methods and goals
2. Know what your client is doing and plans to do
3. Accept that some risk is unavoidable
4. Help your client minimize its financial exposure by showing how risk can be reduced and the rest insured