Risk Management for Legal Services Leaders: Six Ground Rules That Will Help Your Agency Go the Distance

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Managers of legal services programs today face myriad challenges. Some of these challenges continue from a bygone era — doubt about federal funding levels and restrictions, the difficulty of sustaining morale by an overworked and underpaid workforce, and providing competitive compensation and benefits necessary to prevent skilled advocates from defecting to the private sector — while other challenges are relatively new or rapidly changing. Some rapidly changing challenges include understanding and addressing the risks associated with an agency's dependence on technology in the workplace, the risks of organizational liability for off-duty conduct by staff, and preparing for an incident of workplace violence or a community-wide emergency.

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Given this environment, who has time for risk management? If you take a traditional view about risk management — focusing on what should be done to minimize the likelihood of accidental, insurable losses — it may be appropriate to put risk management at a low spot on your "things to do" list for this year. But if you embrace a more expansive, strategic view of risk management — seeing it as a discipline that can increase the overall effectiveness of a legal aid program while minimizing the chance that an unforeseen disruption will derail your mission — risk management should rise to a spot near the top of your list.

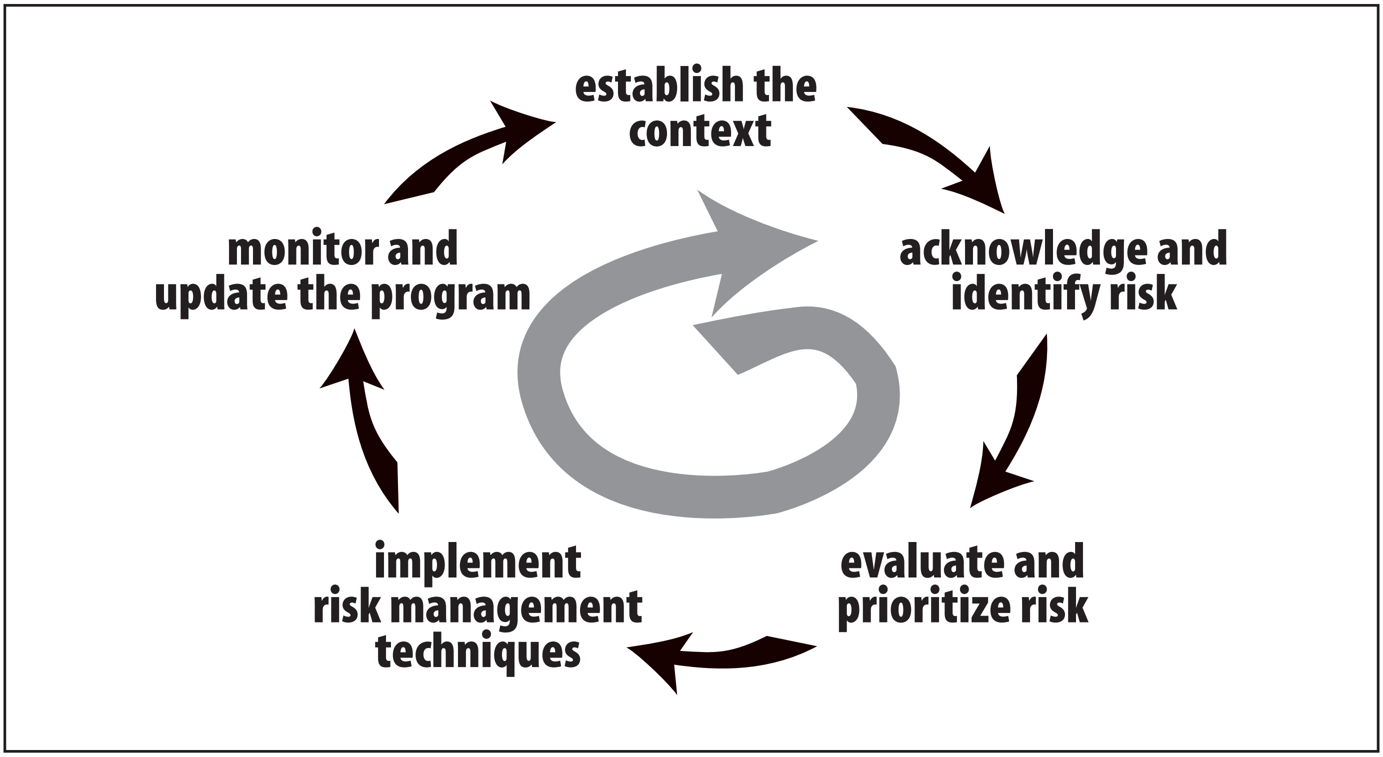
The paragraphs that follow provide a suggested list of ground rules that will help you integrate risk management into your legal services program without breaking the bank or the backs of your current staff.

Prepare for Surprising Threats and Opportunities

The first step to integrating risk management and taking a strategic approach while you're at it is to commit to identify surprising threats *and* opportunities. You have to predict the future in order to prepare your organization to cope with what lies ahead. The first order of business is to assemble a group that can brainstorm the threats and opportunities (risks) in your legal services program's future. Focus on those risks that represent a significant deviation from what you expect (assuming, of course, that other internal planning processes have prepared you to deal with the future you expect). Don't forget to include insurable threats (such as a suit alleging malpractice) as well as those that aren't insurable (such as a scandal following the suicide of a client in a custody case). Before completing this important exercise, make certain your group spends time discussing surprising opportunities — what events would dramatically change the agency's future for the better, or put it on a solid foundation for the future? The key to adequate preparation is trying to shape as successful a future as best you can, while preparing for things that you cannot control.

Focus on Your Mission

Risk management efforts often fail when the people tasked with implementing loss prevention activities fail to see the connection between the activities they are required to implement and the mission of the nonprofit. For example, organizations that serve young people often direct service providers (both paid staff and volunteers) not to develop personal relationship with clients. Some agencies specifically prohibit staff from



offering rides to young clients, welcoming clients into their homes, or giving money or gifts to service recipients. Despite the prevalence of these rules and the good intentions behind them, staff in the social services world often report violating these rules because "they don't make sense." Every rule and procedure adopted by your legal services program should lift up, rather than impair your mission. Sometimes the problem is a failure to communicate the reasons behind the rule. In other cases the rule or policy is out of sync with the mission of the agency. Change any rules and procedures that are odds with your mission.

Another important concept related to mission-focus is that when your agency is deciding how to focus limited time and resources addressing threats or pursuing opportunities, a good rule of thumb is to focus on the risks — threats and opportunities — that matter most to your mission.

Involve Everyone in Managing Risk

The activities of every staff member — from the accounting clerk to the executive director to the volunteer lawyer — create risk for a legal services program. Therefore, it's important that everyone in your organization be attentive to reducing hazards and maximizing opportunities. Remember, however, that as part of your efforts to involve everyone in risk management, you must support and encourage some risk-taking in order to achieve your mission. A healthy organizational culture recognizes and rewards risk taking while providing the means for individuals to accept personal responsibility. Ask, "what is each staff member's role in reducing threats — the risk of loss, harm or unwanted litigation against the agency? Do they understand their role? If not, how can we more effectively communicate these roles and responsibilities?" Ask a parallel set of questions with regard to involving staff in seizing opportunities.

Apply a Risk Management Logic

Most nonprofits manage risk without knowing they are doing so. From carefully screening applicants for professional positions to keeping a blank check stock in a locked safe to documenting client and witness interviews, legal services professionals have a track record with risk management. But most legal services agencies do not manage risk in a systematic way, and many managers have voiced concern that the lack of a formal process may lead to some critical risks being overlooked. This is a valid concern. The Nonprofit Risk Management Center offers a five-step process by which an organization can systematize its risk management program (see diagram). It's important to understand that the precise steps in the process are not as crucial as the fact that a regular process should exist within your agency.

Here's an overview of the process:

Step 1: Establish the Context

Just as a gardener who ignores the importance of proper soil preparation and plants acid-sensitive plants in highly acidic soil risks sickly results, failure to thoughtfully consider the context for an organization's risk management program could lead to disappointment down the road. Instead of a multifaceted program that reduces injuries at the nonprofit's facility and enables it to expand its menu of services, the risk management program may be doomed to fail even before the first loss-prevention or risk-financing technique is put to the test. To increase the odds of success and establish a suitable foundation for the activities to follow, a nonprofit should begin by looking at its history, culture and operations. The questions that follow will help you get started. (Some of these questions are for organizations that have started doing risk management, perhaps a few years ago; others are for organizations that have never had a risk management program.)

- What has been the history of risk management in our legal services agency? What lessons have we learned from past attempts?

- What is the risk-taking culture of this agency? Do we tend to shy away from risks and pursue the most conservative course of action? Or do we sometimes take risks carelessly without giving adequate consideration to losses that might stem from risk taking?

- What is the general attitude of the members of the board of directors? Do they readily support the development of a risk management program, especially one that considers both downside and upside risks? Are they driving the creation of a program or simply following the staff's lead? Are they willing to be involved in policy-level activities related to risk management? Or have they expressed a desire to place full responsibility for the program on the shoulders of the staff? Do they take active responsibility for knowing the major risks and how the organization is responding to them?

- How is the staff likely to react to the announcement that the agency will be undertaking a risk management program? Will there be volunteers amongst the staff eager to serve on a risk management committee?

- What is the culture of the organization with respect to safety and risk management? Do we already have a track record of identifying and addressing dangers or will this be the first effort?

- What breadth of effort is likely to enjoy the most success at this time? For example, is starting with one operational area (e.g. financial management or advocacy or legal representation) a good approach to easing into the discipline of risk management, or would it make more sense to start with a comprehensive, organization-wide program that systematically engages all areas or departments within the nonprofit?

- Is a single person assigned both responsibility and authority for the risk management program?

Answering the previous questions will allow you to create a profile of the organization that will be invaluable as you proceed with the remaining steps in the process. For example, if you are likely to face resistance from members of a staff that perceives the organization as policy-heavy, you need to focus on practical risk management strategies that do not require voluminous documentation. In another instance, if the board feels that risk management is simply an administrative task, you need to include an examination of governance risks in the program.

Step 2: Appraise Risks

In this second step, a legal services program sets about identifying its portfolio of risks and continues by assigning values or weights to the risks.

One of the first decisions you must make before beginning to appraise risks is, "Who should be involved?" In many instances it make sense to charge the same group of people with undertaking the five steps in the process, rather than use one group for risk appraisal and a second group for strategy identification. It is important to include individuals who have operations-level familiarity with your agency, as well as persons from different rungs on your organizational ladder. Do not make the mistake of naming only senior managers to the risk management committee. Doing so will make it more difficult to get support from staff and volunteers at all levels down the road.

Step 3: Decide What to Do and Communicate Your Decision

Most nonprofits employ a variety of risk management techniques — often without knowing that the discipline of risk management acts as a structural support for the nonprofit's foundation. The techniques may be regarded as sound risk management by some, and as simple common sense, good business practices or even necessary evils by others.

Many complex risk management challenges, such as the desire to minimize the likelihood of malpractice claims against the agency or increase the agency's chances of obtaining private sector support for advocacy activities, require a combination of techniques applied thoughtfully to the situation at hand. It is a rare instance when a risk such as the possibility of a lawsuit by a client can be fully addressed with one simple measure. The exception, of course, is avoidance, such as when a legal services program decides to avoid the risks associated with using volunteer lawyers by simply eliminating the volunteer lawyer program.

Some of the most common risk management techniques include:

- Establishing limits, rules and requirements
- Conducting staff, volunteer and client screening
- Providing appropriate supervision and training
- Designing programs thoughtfully
- Undertaking crisis management planning
- Providing explicit direction
- Obtaining outside expert help
- Communicating with key stakeholders
- Establishing appropriate internal controls

Step 4: Act on Your Decision

This step follows the logical progression of the strategic risk management process, from conceptual to specific, from a wide swath of context analysis, to a list of specific action steps the organization will take to protect its core assets and take advantage of opportunities.

As an organization proceeds to implement a strategic risk management program, it is a good idea to keep the following guiding principles in mind:

- *Practical, not protracted* — Where a practical, straightforward approach is available and is expected to yield the same result as a more technical approach, choose the practical. A complicated diagram showing a 12-step process for evacuating the building during a fire is unlikely to be effective. A graphic flowchart showing three steps is probably all that is needed.

- *Consider people first* — Try to involve the persons most affected by a risk management strategy in its design. After gaining experience implementing a wide range of risk management techniques, you will have ample evidence that the people required to follow the policy, install the security measures, train staff attorneys, and screen clients, will be your most creative problem-solvers. Even more rewarding, they will champion the new policy they helped craft.

- *Do not assume* — Be sure to confirm that applicants have the credentials you require, that software licenses for programs installed on your office computers have been obtained legally, and that your Web site is monitored regularly.

- *Use common sense before dollars and cents* — In many cases, you will find that a common sense approach works more effectively and offers a better solution than one costing next year's fund-raising proceeds. Few nonprofits need the kind of video surveillance security systems that are standard fare at Las Vegas casinos. However a sound Technology Policy providing advance consent in writing by the employee for periodic monitoring of e-mail and Web traffic can effectively dissuade staff from using your Internet connection for illegal, unethical or inappropriate purposes.

Step 5: Follow Up and Adjust

Few nonprofits describe their operations as stagnant. Most report that they are constantly seeking and evaluating new opportunities to positively change the lives of their clients or the health of a community. This constant state of flux in the nonprofit necessitates a continuing review of strategic risk management strategies to make certain they remain viable and appropriate given the new circumstances facing the organization. Abandon techniques that have proven futile, have cost the nonprofit more than expected or that are simply no longer appropriate given the new environment. Consider changes, adjustments and revisions anytime the technique serving an important purpose is not as effective as it might be.

Believe in Averages; Be Ready for Variations

When the team you have assembled to identify and address risks completes its brainstorming, it will have daunting lists of threats and opportunities that could lead to an even longer list of action steps. No nonprofit is in a position to tackle all of the risks it faces. Difficult choices must be made to narrow down the list to threats and opportunities that deserve special attention during the coming fiscal year. From a list of one hundred threats and opportunities, the brainstorming group may choose half a dozen threats and two or three opportunities. It is important to keep in mind that a risk management program focused solely around highly unlikely scenarios is probably unsustainable. Why? It will be hard to get members of your staff energized about preparing for unlikely events when more likely threats — such as loss of one stream of the agency's funding — are materializing. Focus on likely threats and opportunities, while being prepared for variations. For example, one opportunity may be the chance of receiving a large donation to support work that cannot be undertaken with government funding. Yet the opportunity may be realized in the form of a donation from a controversial person who wishes to receive public recognition for his support.

Manage Risk by the Golden Rule

One of the greatest, continuing exposures facing legal services agencies is the risk of a complaint or lawsuit alleging illegal employment practices. Lawsuits by current, former and prospective employees represent the largest category of claims files under nonprofit directors' and officers' liability policies (also know as "D&O Insurance"). One of the most effective strategies for managing employment risks (as well as other categories of risk) is to follow the Golden Rule: "Do Unto Others as You Would Have Them Do Unto You." Remember that employees in a legal services agency expect to be treated fairly, consistently, and with the same degree of compassion afforded your clients. Try to avoid surprises: staff members who cannot perform up to the standards of your program should not be caught off guard when they are terminated. With the exception of employees who present a danger, your efforts to coach these problem employees should be well documented and the subject of several performance counseling sessions before you inform them of your decision to terminate. Think about how you would wish to be treated in a situation where — for whatever reason — you could not do the job per the requirements of your employer.

Many leaders of nonprofits express doubt that a simplistic, home-grown approach to risk management will pay off for their agencies. They question how a home-grown approach can compete with a fully-staffed risk management department. But only a handful of the largest nonprofits in the U.S. today can afford to retain a professional risk manager. Most agencies approach risk management by developing or customizing a process that works in the nonprofit's unique environment. For example, an agency whose services are principally delivered by volunteers is most likely to create an all-volunteer risk management committee. An agency with a complex insurance program is likely to focus some of its risk management activities on the procurement of insurance. A program whose most compelling threat is negative publicity resulting from the types of cases it accepts should focus its risk management program on addressing damaging publicity.

Do not be put-off by a process or approach that seems out of touch with your reality. Resolve to integrate a sustainable risk management effort in your agency that enables your agency to protect assets, realize opportunities, and stay on track in pursuit of your mission.

1 Melanie Herman is executive director of the Nonprofit Risk Management Center, a Washington, DC-based nonprofit resource center that provides free technical assistance to nonprofits on a range of risk management issues as well as affordable publications, training programs and consulting assistance. For more information on the Center or to access its technical assistance program, visit www.nonprofitrisk.org. Melanie can be reached at Melanie@nonprofitrisk.org or (202) 785-3891.