

Liability insurance for lawyer/directors of charities or non-profits

Serving as a director of a charitable or not-for-profit corporation can be a rewarding but potentially risky experience. A director can be held personally liable for his or her own actions or failures to act, as well as jointly and severally liable with the other members of the board of directors. Directors with specialized knowledge and expertise, such as lawyers, are held to a higher standard of care. Moreover, a lawyer/director may be perceived to be a “deep pocket” by potential plaintiffs.¹

Given this exposure to the risk of liability, if you intend to serve as a director of a charity or non-profit, you should ensure that adequate directors’ and officers’ (D&O) liability insurance coverage is in place.

LAWPRO standard policy

LAWPRO’s [standard professional liability insurance policy](#) covers you only for the “professional services” that you provide as a lawyer. It does not provide coverage for liability arising as a result of your activity as a director.

Part 1, A of the standard policy states that in consideration of payment of the premium, LAWPRO agrees “to pay all sums which the insured shall become legally obligated to pay as damages arising out of a claim” that results from the insured’s “error, omission or negligent act in the performance of or the failure to perform *professional services* for others.” [Emphasis added.]

The policy defines “[professional services](#)” as follows:

Professional services means the practice of the law of Canada, its provinces and territories, and specifically, those services performed ... by ... an insured *in such insured’s capacity as a lawyer* ... and shall include ... those services for which the insured *is responsible as a lawyer* arising out of the insured’s activity as a trustee, administrator, executor, arbitrator, mediator, patent or trademark agent. [*Emphasis added*]

Services arising out of the insured’s activity as a director are not included.

LAWPRO excess policy

Like the standard policy, LAWPRO’s optional [excess professional liability insurance policy](#) covers only professional services that you provide as a lawyer. It does not cover liability arising from your activity as a director, or in other words, it does not provide incidental D&O coverage. LAWPRO’s excess policy incorporates by reference the definition of “professional services” in the underlying standard policy to ensure uniformity in the scope of coverage in the underlying and excess policies.

Generally speaking, most excess professional liability insurance policies do not cover lawyers for their activities as directors or officers. But some excess insurance policies

may offer some incidental D&O coverage. You will need to refer to the specific policy wording and consult with your insurance broker or excess insurer to find out whether your excess policy does so. If it does, you should also ascertain whether it “drops down” to afford primary coverage, since the LAWPRO standard policy does not afford such coverage.

Indemnity by charity or non-profit

A charitable or not-for-profit organization can agree to indemnify a director for any liability arising out of his/her role as director. The organization may maintain D&O insurance for this purpose. Indemnification is permitted, provided that the director’s civil or regulatory liability arises out of actions taken honestly, in good faith and in the best interests of the organization.

If the charitable or non-profit organization is in financial difficulty, this indemnity may be of little or no value, particularly if there is no D&O insurance in place. It is therefore prudent, before agreeing to serve as a director, to insist that the organization not only provide indemnification but also undertake to maintain adequate levels of D&O insurance.

This is not an absolute guarantee against the risks of personal exposure. If the organization becomes insolvent, it may be unable to maintain adequate levels of insurance to protect directors, particularly if the D&O policy does not include extended or “tail” coverage.

Directors’ and officers’ (D&O) insurance

Directors’ and officers’ (D&O) insurance policies are the principal means of protecting directors from the risk of personal liability as a result of their activities on behalf of an organization.

Two types of D&O coverage are available: (1) single policy coverage for all directors and officers of the organization (often maintained by the organization); and (2) outside director liability policies, secured by individual lawyers and/or their firms.

Standard D&O Policy

A standard D&O policy is underwritten and issued on a group basis. It is a single policy that generally insures all directors and officers of an organization for their activities as directors and officers of the organization. This type of coverage is often maintained by the charitable or non-profit organization itself.

The nature of the coverage, the policy wording and available coverage options can vary significantly from one insurer to the next. Coverage is often narrowly drafted; claims may be denied or only partially covered.

For example, if there is doubt about whether the lawyer was giving advice in his or her capacity as lawyer or director, the D&O policy and the lawyer's professional liability policy may both deny coverage.

You should therefore work closely with your insurance broker to review the D&O policy maintained by the organization and its terms, conditions, exclusions and coverage options.

Outside Director Liability (ODL) policy

This type of coverage may be purchased by law firms or by individual lawyers. It provides insurance coverage to individuals who sit as directors on the board of a business corporation or a non-profit organization and are not employees of the organization.

There are three bases for coverage:

1. Individual coverage for named lawyer
2. Group coverage for selected lawyers within the firm who act as directors
3. Group coverage for all lawyers in the firm

ODL policies usually operate as excess insurance coverage, providing defence and indemnity coverage over and above corporate indemnity agreements and D&O policies.

ODL policies for lawyers are available from the [Canadian Bar Insurance Association](http://www.barinsurance.com) (CBIA) (www.barinsurance.com). CBIA's ODL program started in 1989 and currently insures over 7,000 lawyers across Canada. CBIA's ODL policy limits are quite flexible and can be adapted to the particular circumstances of the lawyer or firm and extent of the underlying insurance coverage.

[CBIA's ODL policy](#) is written as an excess policy but in certain limited situations can "drop down" in the absence of underlying coverage.

Your firm may already have an ODL policy in place. It's important to ensure that all directorships are named in the policy. You should review any such policy with your insurance broker to understand what coverage it provides.

¹ For a detailed discussion of the nature and scope of liability risks for directors of charitable and not-for-profit corporations, see "[The Legal Duties of Directors of Charities and Not-for-Profits](#)" (January 2010) by Terrance S. Carter and Jacqueline M. Demczur. The paper is available on the Carters Professional Corporation website (www.charitylaw.ca).