

Planning for the Unforseeable: How Smart Risk Management Provides Peace of Mind

By Richard H. Nakamura, Jr.

Scenario #1: Caller to a nonprofit domestic-violence shelter for women: “Hello. I’m a battered man. Admit me to your shelter.”

Scenario #2: Caller to a nonprofit shelter for troubled young women: “Hello. I know my daughter is there. Give her back.”

Are there lawsuits lurking in these scenarios? You bet. Two nonprofit shelters facing scenarios much like these were vindicated by California appellate courts in cases that underscore the need for smart risk management planning (*Blumhorst v. Jewish Family Services of Los Angeles*, February 14, 2005, 126 Cal. App. 4th 993; *Robbins v. Hamburger Home for Girls*, February 22, 1995, 32 Cal. App. 4th 671).¹

Both cases were triggered by phone calls. Both callers had, on the surface, plausible claims: A man had been battered, and a father was looking for his daughter. But, scratch that surface and an entirely different picture emerges. Unfortunately, it took protracted litigation to get that complete picture out – litigation that ended only when appellate courts ventured into what had previously been unexplored legal terrain. But for the shelters’ foresight in smart risk management planning, the scenarios could have been financially devastating.

One lesson from *Blumhorst* and *Robbins* is clear: Risk can arise as much from whom you *don’t* serve as from your established client base. In the maze of today’s federal, state, and local laws, someone is bound to find a law to throw at a nonprofit organization when a request is denied. No nonprofit, of course, can be expected to staff its phone lines with lawyers. But every nonprofit ought to protect itself with risk management policies should trouble come calling.

***Blumhorst*: Is This for Real?**

Blumhorst began when, over a one-week period, a male caller telephoned 10 women’s domestic-violence shelters that receive state financial assistance. Litigation revealed that the caller was a member of the National Coalition of Free Men, and that he decided to “test” these state-funded shelters to document whether they discriminate against men. That affiliation and motive, however, were never stated in the phone calls; instead, he told the shelters that “he needed shelter from domestic violence perpetrated against him.”



Two extraordinary cases highlight the importance of risk management planning.

When the shelters, all of whom serve battered women, declined to admit the caller, he sued. The complaint demanded an injunction permanently enjoining the shelters from denying men equal access to their programs.

The caller relied on a rarely-litigated state anti-discrimination statute that prohibits programs receiving state assistance from discriminating on the basis of sex (Cal. Govt. Code § 11135). But the Legislature qualified this prohibition against discrimination with the following language: "This article shall not be interpreted in a manner that would adversely affect lawful programs which benefit the disabled, the aged, minorities and women" (Cal. Gov't Code § 11139).

In court, the shelters persuaded the judge to rule that section 11139 exempted them from the anti-discrimination provisions of section 11135, and to reject the caller's argument that section 11139 was constitutional. The appeal,

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however, never reached the constitutional issues and instead was decided on much narrower grounds: As a self-described "tester," the caller didn't suffer an actual injury that was compensable under the state anti-discrimination statute. No case had previously addressed whether testers have standing to bring a reverse-discrimination suit under section 11135; in fact, state law on tester standing was an essentially clean slate. Nonetheless, the Court of Appeal's reasoning was driven by well-established California law requiring a plaintiff to suffer actual injury. "Testers" are not "damaged," or, as the Court put it, "The right to sue for a

violation of section 11135 exists in *injured victims* of unlawful discrimination. The statute does not give standing to a plaintiff who was not injured by a defendant's alleged discriminatory practices."

The case finally ended when the California Supreme Court declined to review the Court of Appeal's decision. It took more than two years to end what the "tester" had started.

Robbins: Balancing Parental Rights with Child Safety

The issue in *Robbins* was vexing: Must a nonprofit shelter for abused teenagers disclose its address to a parent who is the alleged abuser when the teenager comes to the shelter for temporary protection?

In *Robbins*, a 15-year old girl sought out a shelter where she temporarily remained of her own volition and from which she was free to leave at any time. The girl had complained of repeated instances of progressively worse abuse by her father, including

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beatings, whippings, and being hurled across the room. When the girl arrived, the shelter notified the child welfare agency and was instructed by the agency not to disclose the shelter's address to the girl's parents. If contacted by the parents, the shelter was told that the only information they could give was that the girl was safe, in protective care, and that further inquiries should be directed to the agency.

When the girl didn't return home from school, her father contacted school employees, who told him that his daughter had made allegations of child abuse that were reported to the police. The father went to the police station. A detective called the shelter and put the

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father on the line. The shelter's response to the father's phone call was in accordance with the agency's instructions. The father called the shelter repeatedly for three days, making similar demands and receiving similar responses. The next day, after a difficult meeting with her parents and counselors, the girl went home.

Her parents then sued the shelter, alleging that the shelter had interfered with their parental rights of

custody. The court ruled in the shelter's favor, and the Court of Appeal affirmed that decision.

The gist of the lawsuit was not the reporting of suspected child abuse – which the Court of Appeal ruled protected by statutory immunity – but what the Court called the “subsequent concealment” of the girl while authorities investigated. Existing California law recognized the importance of private assistance efforts in “voluntary, noncommercial and non-custodial relationships.”² Case law had deemed the need for such outreach particularly compelling for child abuse and domestic violence.³ But no case had attempted to balance the competing interests of

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Checklist for Risk

As a nonprofit leader, you have a responsibility to manage risk for your organization. Attracting and retaining key talent requires managing business risk so that your board members aren't unnecessarily risking their personal assets. If you don't already transfer business risk with a Directors', Officers' and Organizational (D & O) Liability Policy, consider doing so. While no D & O policy will cover all potential liabilities, a comprehensive policy should provide broad coverage for "wrongful acts" that may occur in managing and leading a nonprofit organization. When choosing D & O insurance, ask yourself the following questions:

- **Does your insurance agent have expertise** in nonprofit Directors and Officers Liability Insurance, enabling you to comprehensively consider policy terms and conditions?
- **Is the insurance carrier dedicated** to serving the nonprofit sector by providing attractive pricing, deductibles, and coverage specific to nonprofits?
- **Does the insurance carrier provide** broad D & O coverage, including employment practices liability coverage?
- **Is the provider able to show** strong financial stability and a superior rating with the A.M. Best Company?
- **What is the carrier's claim management philosophy** and reputation? In the event of a claim, will the provider stand by you with expert legal counsel and assistance with mitigation strategies?

parents (who may, or may not, be abusive) against the rights of their children to be free from abuse. The Court of Appeal in *Robbins* concluded that the shelter has "no tort liability for merely giving shelter to a child known to have left home

without parental permission, if the child was not induced by other means to stay away from home and [the shelter] was privileged based on probable cause to protect the child from imminent physical violence." Thus, two facts were pivotal: The shelter did nothing to induce the teenager to stay separated from her parents, and the shelter reasonably believed that the teenager might suffer physical harm if her location were disclosed.

Had the shelter lost, the proposed theory of liability could have sounded the death knell for shelters everywhere. If shelters owe a tort duty to an abusive parent or spouse to reveal the exact whereabouts of a person who has voluntarily come for a safe haven, then the idea of a "shelter" loses its meaning. How can any shelter, in good conscience, hand its keys over to an alleged abuser and turn its back on a person who has sought safety?

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Risk Management: Taking No Chances

As these cases show, even an organization that is fully compliant with the law and diligent in its duties can be made the target of a lawsuit. Such lawsuits are costly and can devastate an organization if it doesn't have liability insurance.

In both *Blumhorst* and *Robbins*, the organizations took no chances. They remained true to their missions, putting their clients' interests ahead of callers claiming equal or superior rights. But when their decisions were second-guessed in litigation, they had liability insurance to mitigate legal expenses and give them legal peace of mind. ■

Footnotes

¹Morris Polich & Purdy, LLP, represented the shelters in both cases at trial and on appeal. Richard H. Nakamura, Jr., chair of the firm's Appellate Practice Group, worked on both appeals.

²*Nally v. Grace Community Church*, 1988, 47 Cal. 3rd 278, 298.

³"Society, we believe, favors the attempt at such help" (*Koepke v. Loo*), 1993, 18 Cal. App. 4th 1444, 1458.

More Resources on Risk

For more guidance on managing risk in your organization, see these *Nonprofit World* articles, available at www.snpo.org/members:

- **Choosing the Right D & O Insurance for Your Board** (Vol. 12, No. 1)
- **Protect Yourself Against Employee Lawsuits** (Vol. 15, No. 2)
- **Sexual Harassment: Don't Let It Destroy Your Organization** (Vol. 10, No. 2)
- **The Emperor's New Clothes, Or How to Protect Against Lawsuits and Other Chilling Surprises** (Vol. 13, No. 6)
- **Does Your Board Need Liability Insurance?** (Vol. 12, No. 6)
- **The Most Likely Lawsuits—and How to Protect Yourself** (Vol. 19, No. 1)
- **Don't Be Sued for Negligent Hiring** (Vol. 21, No. 3)
- **Is Your Organization Lawsuit-Proof?** (Vol. 20, No. 1)

Richard H. Nakamura, Jr. (Rnaka@mpplaw.com, 213-891-9100) heads the Appellate Practice Group at Morris Polich & Purdy, LLP, and is the chair of the Appellate Courts Committee of the Los Angeles County Bar Association. He was appellate counsel for the nonprofit shelters on both of the appeals discussed in the article.