WHAT, ME WORRY?
AN OVERVIEW OF LEGAL CONCERNS FOR ACCREDITORS

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I. **INTRODUCTION**

There may have been a time, in "the good old days," when all an accreditor had to worry about was establishing standards, conducting site visits, and making sound accreditation decisions. The world outside of higher education rarely intruded into the affairs of academic evaluation and certification. But, make no mistake about it, those halcyon and insular days are long gone. The new reality confronting directors and board members is one marked by three "shuns:" legislation, regulation and litigation. Why? There are at least two reasons. First, as a society we are ever more aggressive about assigning blame and redressing perceived infringements of individual "rights." Second, I believe it is a direct consequence of the increased necessity for a quality post-secondary education in order to achieve the "American dream" (a high school diploma will no longer get you there), and the increased competition between institutions of higher education both for "good" students and for dwindling economic resources (especially governmental appropriations). Accreditation is the ultimate source of consumer protection for prospective students. This is especially the case for those seeking a specialized or professional degree. Accreditation is essential to successful marketing of educational programs in a highly competitive environment. Accreditation is often an express prerequisite for governmental funding. Graduation from an accredited program is increasingly stipulated by state law as a necessary predicate to even sit for the licensing or certification examination. So, is it any wonder that the microscope of public accountability is focused upon the accreditation process?

Officers, directors, and board members of accrediting bodies wear at least two hats. The most obvious of these is the accreditor hat. The second hat, often worn almost as an afterthought, is the cap of the nonprofit organization fiduciary. However, in the wake of recent scandals involving the Red Cross, United Way and other unfortunate organizations, and in the spillover from ENRON, IMCLONE, TYCO, etc., the fiduciary hat has been marked with a bull?s-eye. This paper addresses legal concerns engendered by wearing both hats and gives suggestions for "best practices" to help in minimizing (not "eliminating") risk. *"Best practices"* are italicized and underlined. The order of discussion will be (1) fiduciary responsibilities, and (2) legal issues of special concern to accreditors including some especially "sticky wickets."

II. **WHAT SHOULD CONCERN YOU AS A "FIDUCIARY?"**

The word "fiduciary" literally means a thing held in trust. An individual with a fiduciary responsibility is a trustee or "keeper of the trust." For shorthand, I will refer to such an individual as a "Fiduciary." Breaches of trust have historically been sources of personal liability in the "common law," and more recently as a matter of statute, both civil and criminal. Officers, directors and board members of nonprofit organizations are Fiduciaries in every legal sense of the word. The law imposes certain duties upon Fiduciaries. Note that it makes no difference whether the individual is compensated or is acting solely as a volunteer or Good Samaritan.[1] These duties are the duty of care and the duty of loyalty. Broadly speaking, these duties require that the individual:

- act in the best interests of the organization
- avoid conflicts of interest and self-dealing
- exercise objective, independent, and informed judgment

- exercise diligence and active participation
- adhere to the organization?s mission and goals
- maintain confidentiality

We will now look at each of these duties separately, in a bit more detail. Note, however, that these duties tend to overlap one another.

A. Acting in the Best Interests of the Organization

The Fiduciary must not act in ways that expose the organization to unnecessary legal and financial liability, e.g., through violation of federal and state laws or through negligent injury to third persons or property. Further, the Fiduciary must be a good steward of the organization?s assets, both tangible (e.g., its budget) and intangible (e.g., its credibility and reputation). For example, in *Aramony v. United Way of America*,[2] United Way was awarded punitive damages on its breach of fiduciary duty claim against a former president who defrauded the nonprofit corporation and whose conduct was deemed to have caused a loss of public trust in the organization. Although the standard of care required of officers and directors is a matter of individual state law, the general requirement is that the individual act in good faith and exercise reasonable prudence.[3] Mere errors of judgment are not actionable. Additionally, the Fiduciary has a responsibility to correct wrongdoing of other fiduciaries and to cooperate with investigatory bodies. Covering up wrongdoing is as much a breach of duty as committing the wrongful act itself.[4]

B. Avoiding Conflicts of Interest and Self-Dealing

Fiduciaries must not use their position for personal benefit. An obvious example would be advocating the lease of property from a company in which the Fiduciary has more than a minimal financial interest.[5] The current trend is not only to require recusal from the acquisition process, but also to require full disclosure of the interest. An example of this occurred in *Kettle Morain Hospital, Inc. v. Hale*,[6] where Hale was the CEO of a nonprofit hospital. Unknown to the hospital?s board, Hale was also a partner in a real estate firm from which the hospital leased various properties. The court found that Hale breached his fiduciary duties by acting in this dual capacity without disclosing that fact to the Board. Further, the court held Hale liable for a conspiracy with his partner to reap substantial financial benefits from the hospital by causing the hospital to sign leases which constantly increased the rent paid without any additional benefit.

Some courts have gone so far as to hold that any transaction between a nonprofit corporation and one of its officers is presumed to be fraudulent. The burden rests on the officer to prove by "clear and convincing evidence" that he or she acted in good faith.[7] In the case of accreditors, an obvious example would be voting on the accreditation of an educational institution where the Fiduciary is currently employed, or where the Fiduciary has applied for employment.

Every organization should have a written conflicts of interest policy. A very good example may be found in Appendix D to Jerald A. Jacobs? Certification and Accreditation Law Handbook (1992) published by the American Society of Association Executives.

C. Exercising Objective, Independent, and Informed Judgment

The Fiduciary must not be a "rubber stamp" for any other party or interest. He or she needs to study and evaluate the available information, consult with knowledgeable sources, listen to the arguments, but ultimately reach his or her own conclusions. It is important for both the Fiduciary and the organization to maintain autonomy from related, associated or affiliated organizations.[8] The Fiduciary is obligated to put the interests of the organization above his or her own and above those of other entities, and to avoid championing another entity?s "hidden agenda" where that agenda is inconsistent with the interests of the organization. An interesting statement about this latter situation was made by the court in *O?Leary v. Board of Directors, Howard Young Medical Center.*[9]

> "When bad faith motivates an act otherwise within the directors? authority, a cause of action based upon a breach of the directors? fiduciary duty results?Where the act,?though lawful in itself, is designed to accomplish ? some ulterior motive, and the result?will be injurious to the corporation or members,?[the directors may be held liable]."

D. Exercising Diligence and Active Participation

Exercising diligence requires that the Fiduciary not "fall asleep at the wheel," but rather, pay attention to the business of the organization, ask appropriate, sometimes hard questions, and challenge questionable practices. The Fiduciary has a responsibility to attend the organization?s meetings and to participate in decision making. Recusal from that process may be necessary at times in order to avoid conflicts. However, abstention is an often misused "cop-out" at best, and a cover up of undisclosed conflicts at its worst.

In *Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*,[10] a case alleging mismanagement of assets under the District of Columbia Nonprofit Corporation Act, Judge Gerhart Gesell (of the Nixon tapes case fame) said,

> "A director who fails to acquire the information necessary to supervise investment policy or consistently fails to attend the meetings at which such policies are considered has violated his fiduciary duty? ."

E. Adherence to the Organization?s Mission and Goals

When a Fiduciary accepts his or her position in an organization, the Fiduciary undertakes a pledge of loyalty to the organization?s stated purposes and goals which are embodied in its charter and bylaws. For example, in *Robert v. Madison County Realtors Ass?n. Inc.*,[11] the court held that board members who followed procedures violative of the nonprofit corporation?s articles of incorporation and bylaws regarding mergers could be held liable for breach of fiduciary duty. This does not in any way mean to say that the Fiduciary cannot or should not work to change the organization's mission or goals if the Fiduciary disagrees with them. It does mean that such change should be sought openly and through fair and appropriate means.

F. Maintaining Confidentiality

Proprietary information about the organization or information acquired by the organization that is legally entitled to confidentiality must be protected by the Fiduciary like any other organizational asset. However, maintaining confidentiality does not justify covering up wrongdoing as was earlier discussed. Confidentiality will be discussed in more detail later.

III. **WHAT SHOULD CONCERN YOU AS AN ACCREDITOR?**

There are certain legal issues of special concern to accreditors. These include challenges to validity of accreditation decisions, antitrust law violations, and breaches of confidentiality. We will look at each of these in turn.

A. Accreditation Decisions

Challenges to accreditation decisions can come from a variety of sources and in a variety of forms. Generally speaking, disgruntled institutions will attack the decision making process, the substance of the decision itself, or both ("due process challenges,") while students, graduates and third parties may assert breach of duty or "negligent accreditation."

1. Due process challenges

Due process challenges divide themselves into two categories, "substantive due process" and "procedural due process." Substantive due process concerns the reasonableness and even-handedness of the decision, while procedural due process refers to the fairness of the steps that were followed in making the decision.

a. *Substantive due process*

Judges are loath to second-guess accreditation decisions. Recognizing that they do not have academic expertise or expertise in the professions subject to accreditation, judges give accreditation decisions "great deference," and have consistently limited their review to whether the decisions were "arbitrary and capricious" and whether they were supported by substantial evidence.[12] In other words, if the court can find that the decision was based on honest professional judgment, then the substantive due process challenge will be rejected. Conversely, if the court should find that the accreditors abandoned professional judgment and made a decision based on malice, self interest or other extraneous factors, the challenge will succeed. A very recent and disturbing example of this occurred when a federal judge entered a preliminary injunction against an accrediting body that had revoked a school?s accreditation status. The judge believed that the decision makers were competitors of the school and had a financial stake in the outcome.[13] In a scathing opinion he said,

> *Although decisions of accrediting agencies have historically been given deference, where, as here, accreditation decisions are made by actors with a financial interest in the outcome, little deference should be given. Here, there were admitted conflicting economic financial interests in the decisions that were made. That fact is shown by the recruitment of [the school?s] students?by competitors whose representatives were involved in the decision making on accreditation; an attempt by a competitor whose representative was one of the decision makers to buy [the school] after its accreditation was withdrawn, at a time when the monetary value of [the school] had been reduced by the accreditation decision; [and by] the fact that persons with competing financial interests to those of [the school] made the accreditation decisions?.Actions which could violate the antitrust laws if incorporated in an accreditation procedure, per se, indicate a lack of due process.*[14]

As a practical matter then, it is important that the reasons for any adverse accreditation decision be clearly articulated and documented and that they be related to evidence supporting findings that standards were not met. Incidentally, the fact that there may be internal disagreement about the decision is not a bad thing. In *Foundation for Interior Design Education Research v. Savannah College of Art & Design,*[15] the court found that such disagreements "are reasonably understood as part of a procedurally fair deliberative process."

Some institutions have tried to allege that standards were applied to them differently than to other institutions. Here again, courts will grant accreditors much leeway in the assessment of an institution?s compliance with standards. For example, in *Medical Institute of Minnesota v. National Ass?n of Trade and Technical Schools*,[16] accreditation of the private technical school was withdrawn based, in part, on its failure to demonstrate that it had a sound financial structure. The school argued that the decision was discriminatory because another school, Lakeland Academy, was in worse financial condition, but had been granted reaccreditation. The court rejected that claim stating,

> *"Fairness requires that Lakeland Academy and MIM be treated similarly, but only if they are similarly situated. MIM has made no showing that it was similar to Lakeland in all other relevant respects. Simply showing that Lakeland also had financial and placement problems ignores all of Lakeland's other attributes."*[17]

However, where it appears clear that decisions are being made in a discriminatory fashion, the courts are likely to intervene. Perhaps in recognition of that fact, in November of 2002, the American Academy for Liberal Education backed down on its refusal to grant pre-accreditation status to Patrick Henry College in a dispute over the teaching of creationism. The College?s president had threatened legal action pointing out that AALE had previously granted accreditation to Southern Virginia University which supports the beliefs of the Church of Jesus Christ of Latter-day Saints. He is reported to have said, "We simply cannot understand why AALE has singled out our evangelical Christian viewpoint for particularized discrimination."[18]

b. *Procedural due process*

Judges are much more comfortable dealing with challenges to the fairness of procedures than they are with challenges to the content of accreditation decisions. However, complex, court-like processes are not required. Boiled down to its essence, what is required is "notice and an opportunity to be heard." Having said that, however, there are no particular procedures that are required by the courts. Rather, each accrediting body is free to establish its own procedures so long as they do, in fact, provide adequate notice and opportunity to be heard. *In practical terms this means that the institution must be given advance notification of the standards it will be required to meet, or of the deficiencies that have been identified, and an opportunity to present evidence in its behalf prior to a final decision.*[19] Needless to say, whatever procedures are adopted should be followed.

Caveat: There is a potential trap to be avoided here with regard to site team reports. Most accrediting bodies require the institution to provide a response to the site team report with regard to any deficiencies noted by the team. This process has the effect of narrowing the institution?s focus to those areas identified by the site team as problems. However, if the accrediting body disagrees with the site team over standards the site team believed to have been met, and denies accreditation on that basis without first notifying the institution, the institution may rightfully argue that it was "sandbagged" since it was never given an opportunity to respond to those unknown deficiencies. *Better practice would dictate that the institution be given advance notice and an opportunity to respond to the new concerns prior to final action.*

2. Negligent accreditation

Institutions are not the only sources of challenge to accreditation decisions. Students, graduates, and third parties may also try to claim that they were harmed by reliance on accreditation when choosing a program to attend or by the impact withdrawal of accreditation has on their professional certification or employment prospects. These attacks have almost always been given short shrift by the courts. In order to prevail, the plaintiff has to prove that the accreditor owed him or her a duty of care, that the duty was breached, that the breach caused the plaintiff injury, and that the injury was a foreseeable consequence. Judges tend to balk at the notion that accrediting bodies owe a duty to individuals. Rather, the duty is viewed as being owed to the institution. Additionally, injury can be difficult to link to the decision itself. Accreditation does not guarantee a quality education. It is simply an opinion that the institution or program meets certain minimum standards. Finally, loss of accreditation is not the fault of the accreditor, but of the institution.

An example of this type of attack can be found in *Ambrose v. New England Association of Schools and Colleges, Inc*.[20] Graduates of the school?s medical assistant program found that they were unable to find work because the program lacked a clinical component. They sued NEASC under a number of theories that the court boiled down to a claim of negligent accreditation. However, the court rejected the claim on the basis that it was an invitation to substitute the court?s judgment for that of the accreditors. The case is even more interesting for what the court had to say about flexible application of standards. The plaintiffs complained that NEASC granted the school accreditation even though the school failed to meet a number of NEASC?s standards. They pointed to testimony from NEASC?s director who said that NEASC had engaged in a balancing process whereby shoddy performance in one area could be offset by better-than-average performance in another. He admitted that the Commission engaged in a rather holistic approach to accreditation. The judge rebuffed this line of attack holding that neither NEASC?s standards nor the law required a "digital, up or down, pass or fail" approach. In a highly insightful and eloquent statement he said,

> "An accreditor is ?entitled to make a conscious choice in favor of flexible standards to accommodate variation in purpose and character among its constituent institutions, and to avoid forcing all into a rigid and uniform mold.? This makes perfect sense: after all, benchmarks for accreditation are not intended as reference points for laymen. To the contrary, their raison d'être is to guide professionals in a particular field of endeavor (here, education). In constructing such benchmarks, *standards that are definitive in theory easily may become arbitrary in application*.[21] Flexibility blunts the sharp edges of this potential hazard. (Emphasis added).

B. Antitrust Law Violations

Although it seems a bit bizarre, accreditors have, on occasion, run afoul of the Sherman Antitrust Act; the same act designed to reign in the likes of Microsoft and AT&T. Antitrust laws are designed to prevent restraints on trade that may lead to market monopolization, price-fixing, boycotts and other anticompetitive tactics. So, how have accreditors gotten themselves into trouble here? In most cases it has been a matter of adopting and enforcing standards that require certain salary scales for faculty (price-fixing),[22] mandating membership in certain trade or professional associations (illegal "tying" arrangements),[23] and forbidding practitioners from associating with certain specialty areas (e.g., a rule forbidding MDs from associating with chiropractors was deemed to be an illegal boycott).[24] *Thus it would be prudent for accreditors to have their standards reviewed by legal counsel for potential antitrust violations.*

Antitrust allegations against accreditation decisions are normally analyzed according to the "rule of reason" which places the burden of proof on the plaintiff to prove that the accrediting agency?s action may suppress or even destroy competition.[25] Under this rule it isn?t adequate for a plaintiff to show that it was injured by the accreditor?s actions. Rather, the plaintiff must show a restraint of trade and competition. Courts have usually found that a decision to revoke or deny accreditation does not result in antitrust type injuries. For example, in *FIDER v. SCAD*, the Sixth Circuit Court of Appeals held that even though denial of accreditation might result in a loss of reputation or a drop in school enrollment at SCAD, neither of those constitutes antitrust injuries.[26] And, in *Massachusetts School of Law at Andover, Inc. v. American Bar Ass?n,* the law school complained that denial of accreditation created a significant restraint on trade because it resulted in students not being permitted to sit for bar exams in several states. The Court rejected that claim finding that any disadvantage the school incurred "was attributable to the decision by the individual states to preclude graduates of unaccredited schools from taking bar examinations, and such injury cannot be the basis of antitrust liability."[27]

Antitrust law is exceedingly complicated and full details are outside the scope of this paper. An excellent and more complete discussion may be found in Jerald A. Jacobs, *Certification and Accreditation Law Handbook*, ASAE (1992) at pages 10-21.

C. Confidentiality

Accreditors typically come into possession of two types of confidential information when evaluating an applicant institution: (1) information that the institution must itself keep confidential as a matter of state and federal law, and (2) "proprietary" information about the institution itself. As a third point for discussion we will also address exceptions to confidentiality and how to protect yourself.

1. Information protected by law

Educational institutions are subject to a host of state and federal laws that protect the privacy of individuals? personal information. Examples are the Federal Education Records Privacy Act ("FERPA") protecting student records,[28] the Health Insurance Portability and Accountability Act ("HIPAA") protecting patient medical records,[29] the Gramm-Leach-Bliley Act ("GLBA") protecting individual financial records,[30] and state personnel records privacy laws protecting employee files, just to name the big ones. Both FERPA and HIPAA expressly address sharing confidential information with accreditors. Regulations implementing FERPA provide that prior consent of students to disclose their records need not be obtained when "[t]he disclosure is to accrediting organizations to carry out their accrediting functions."[31] Similarly, HIPAA expressly permits an institution to disclose its patients? health records to a person or entity that provides "accreditation services" to that institution.[32] Both FERPA and HIPAA condition disclosure upon assurances from the recipient that confidentiality will be maintained. The penalties for violating confidentiality that could be imposed against the institution may also be imposed against the accreditor. These same requirements are generally found in other privacy laws that permit the sharing of information between institutions and organizations. *Therefore, it is crucial that all site teams, board members, and staff be trained about statutory requirements for maintaining confidentiality.*

2. Proprietary Information

The term "proprietary information" broadly refers to any information about an institution that it would not want its competitors or other outsiders to know. Examples are customer or client lists, sales strategies, formulas, future expansion plans, etc. Many state laws protect "proprietary information" as "trade secrets." Theft of proprietary information, or wrongful disclosure can be grounds for civil suit under state unfair and deceptive trade practices statutes and even criminal prosecution in aggravated cases (e.g., industrial espionage). It is very likely that site visitors and other accreditation agency personnel will come into possession of proprietary information. It is incumbent upon the institution to identify the information or data that it wants to protect. However, once it has done so, it is critical for the accrediting agency to ensure that confidentiality of that information is preserved.

3. Exceptions to confidentiality and how to protect yourself

"What the Legislature giveth, the Legislature may taketh away." Most statutes that create confidentiality also create exceptions. The most usual exceptions are for access by governmental investigative bodies, for civil and criminal court process (e.g., subpoenas and discovery requests), and for "whistle blowing." Can you legally protect yourself from having to disclose this information? The answer is that you can, to some extent, but not entirely. By far, *the best protection is to have a comprehensive records retention policy that puts realistic time limits on the length of time that records are kept.* You need to catalog the various kinds of records and data that you make or receive. Then you need to evaluate the necessity for storing that information and decide how long each category should be retained. Your policy should then mandate destruction of the information after the time period has expired. The policy should allow for exceptions on an as needed basis, but be sure to document the reason for retaining anything beyond the normal policy period. CAVEAT: If litigation or criminal investigation appears likely, you may not destroy records that you have reason to believe might be of importance to those proceedings, despite your records retention schedule. You MUST retain those records until the proceedings are concluded or until a competent legal authority gives permission for their destruction. Failure to follow this rule may lead to criminal indictments or contempt proceedings (e.g., ENRON).

Another good practice is to make or obtain only that information you really need in order to conduct business. Clarity in your criteria and in your requests for information is one key. Other prime targets for plaintiffs' attorneys, who love to mine for gold in your files, are e-mail and voice mail archives, correspondence files, computer back up files, and minutes of board and committee meetings. A sample e-mail retention policy may be found at: *http://www.uncg.edu/apl/POLICIES/iip019.htm*. As a general rule, minutes need only reflect those matters upon which official action was taken and then only in enough detail to identify the subject matter under consideration, and the up or down vote. Details of discussions are not legally required in most states. Where it appears critical to document the rationale for a decision in order to avoid charges of "arbitrary and capricious" decision making, the key points are all that are necessary to be recorded.

IV. OTHER "STICKY WICKETS"

A. Site Team Visitors - Are They Responsible Agents or "Loose Cannons?"

Most site team visitors are volunteers rather than paid staff. Don't let that fact lull you into complacency. Your organization can be just as liable for the acts of your volunteers as for your regular, paid staff. On the flip side, your site team visitors may want to hold you responsible for injuries or property damage they incur while "on the job."

1. Liability for injuries or damage caused by volunteers

Whether an individual is paid for his or her services or not, when you authorize that person to perform duties on behalf of your organization, you have made that person your "agent." In a recent series of articles published on the Internet, two prominent insurance industry representatives cautioned that,

> *"Many organizations believe that the largest bodily injury exposures comes from the risk of accidents happening to their volunteers. It is our experience that the largest bodily injury exposure often comes from accidents or incidents caused by volunteers?*
>
> *One legal doctrine behind this is agency. Agency is tied to the notion of control. If an organization has or should have control of a volunteer, it can be held responsible for his or her actions.*
>
> *A volunteer can also bind the organization to contracts, or create expectations of safety or service delivery, which can create other kinds of organizational liability. This can occur when an individual has apparent authority to act for an organization, which can also create liability. A "hands-off" approach to someone whom others see as a representative of your organization is unlikely to be the best risk management strategy. And if that person is deemed to be an agent, you may find that you were expected to have considered the risks involved, and may be considered negligent for having failed to do so."*[33]

Some states provide immunity to nonprofit charitable, religious, and educational organizations by statute. However, in most cases, those statutes limit that immunity to injuries caused to beneficiaries of the organization, leaving other persons free to sue for damages caused by the organization?s employees and agents, including volunteers.[34]

The message should be clear; *it is important that volunteers be trained, that their duties and authority and the limits of their duties and authority be spelled out, and that they be adequately supervised.*

2. Liability for injuries to volunteers

It is also the case that your organization may be sued by your own volunteers if they suffer injury while performing their volunteer duties. For example in *Scottsdale Jaycees v. Superior Court of Maricopa Co.*,[35] a nonprofit organization was sued for wrongful death of passengers in a member's car while traveling to a state board meeting of the organization. Plaintiffs had volunteered to attend the meeting as delegates from their chapter and agreed to vote in the manner directed by the local leaders. The accident occurred on the way to this meeting. The court held that there was an employer-employee type relationship between the members and the organization, even though the plaintiffs had served voluntarily, because the organization had consented to the relationship through its directors. However, with somewhat questionable reasoning, the court let the Jaycees off the hook finding that the relationship only existed during the meeting itself, and not during the time they were traveling to and from that meeting because the Jaycees exercised no control over the volunteers while they were traveling. In another case, *DeVries v. Habitat for Humanity*,[36] a volunteer who was injured during construction of a house was allowed to sue the nonprofit organization for his injuries.

Although you can have your volunteers sign waivers of liability and hold harmless agreements, you need to know that most courts will not honor those documents or will construe them so narrowly as to render them practically useless. *Your best protection here is to seek insurance coverage. Make certain that your insurance policy expressly includes coverage for injury to volunteers.*

3. Liability of volunteers

Finding good volunteers is difficult enough without their having to worry about being sued for the uncompensated work they perform. The good news is that there exists federal and state legislation providing a fair amount of immunity from lawsuits. The most prominent of these "Good Samaritan" laws is the federal Volunteer Protection Act (VPA).[37] In its introduction to the Act, Congress very clearly stated that it was concerned about the chilling effect potential lawsuits have on volunteerism and the rising cost of liability insurance borne by nonprofit organizations. Congress viewed volunteerism as essential to the national interest because "the Federal Government lacks the capacity to carry out all of the services provided by [nonprofit] organizations and volunteers." The VPA supersedes ("preempts") state law unless the state law provides additional or greater protection to volunteers than the VPA. The VPA grants complete immunity from civil suit to any volunteer who was acting within the scope of his or her volunteer duties - which is another reason for spelling those duties out clearly. However, the protection from suit will NOT apply,

- if the volunteer wasn?t properly licensed or certified under state law if the activity requires such certification or licensure; or
- if the harm was caused by willful or criminal misconduct, gross negligence, recklessness, or a conscious, flagrant indifference to the rights or safety of the harmed individual; or
- if the harm was caused by operation of a motor vehicle, boat or airplane; or
- if the volunteer was under the influence of alcohol or drugs.[38]

The VPA also does not immunize volunteers for harm they cause to the organization itself.

One final note here, the VPA only immunizes the volunteer. The organization may still be sued for the acts of its volunteers under certain circumstances as was discussed earlier. So, the VPA does not absolve the organization of its duty to properly train and supervise its volunteers.

B. Liability for Wrongs Done to Your Employees

If your organization has a paid staff, you and your board are likely to be deemed employers subject to innumerable federal and state employment laws. In a 1997 Internet article, *Liability Exposures and Protections for Nonprofit Organizations and their Directors and Officers,*[39] Elizabeth A. Pitrof and Cunera M. Buys, made the following observations about lawsuits against nonprofit organizations and board members:

> *Recent data show that employees are the single most frequent claim source. Significantly, employee discrimination suits allege violations of federal law which may preempt a grant of immunity frequently to directors and officers sitting on nonprofit boards pursuant to state laws. Moreover, employment claims can be very costly for employers as they can generate substantial legal fees and/or result in significant settlements or judgments."*

Some of the most prominent of these laws are;

- Title VII of the Civil Rights Act of 1964 (prohibiting race, and gender discrimination)
- The Americans with Disabilities Act
- The Age Discrimination in Employment Act
- The Equal Pay Act
- The Fair Labor Standards Act
- The Family and Medical Leave Act

In addition to suits brought under these federal laws (and their state law counterparts), employees may bring common law claims for wrongful termination, failure to promote, sexual harassment, workplace harassment, and breach of employment contract terms, just to name a few. Details of these actions are beyond the scope of this paper. <u>*The critical point to be made is that you need to have a consultant or executive director who is well versed in the requirements of employment law or you are a lawsuit waiting to happen.*</u>

C. Autonomy from Parent Associations: Are you Emancipated?

Many accrediting bodies are not completely independent, freestanding entities but may be committees or subsidiaries of parent associations and may also be dependent upon the parent for funding and other resources. Lack of autonomy from the parent association can bring the credibility of accreditation decisions into question, and create potential liability for antitrust violations. A prime example of this problem can be found in the complaint brought against the American Bar Association by the federal government in 1995. In that lawsuit, the U.S. Department of Justice?s antitrust division complained that the ABA had restrained competition through its law school accrediting committee by fixing compensation levels of professional personnel at ABA-approved schools and by acting in ways to limit competition from non-ABA-approved schools. As a result of the lawsuit the ABA agreed to limit the control it exercised over its accreditation arm.[40]

The issue of autonomy is considered to be of such importance that the U.S. Department of Education has expressly required it as part of its regulatory criteria for recognition under Title IV of the Higher Education Act of 1995.[41] Specifically,

- the accrediting body?s decision makers must not be elected or selected by the board or CEO of "any related, associated, or affiliated trade association or membership organization;"
- there must be at least one public member and at least one-seventh of the body must consist of public members;
- the body must have established and implemented conflicts of interest guide lines;
- dues paid to the agency must be paid separately from dues paid to a parent or affiliated organization;

- the accrediting agency must develop its own budget without review or consultation by any other entity or organization; and, finally,
- joint use of personnel, services, equipment or facilities must be paid for at fair market value, and must not compromise independence or confidentiality.

Even if your organization is not seeking recognition from D.Ed. the regulatory criteria are a good menu of best practices to follow. As I mentioned earlier, failure to maintain autonomy from a parent organization can lead to a court finding that there is no difference between the parent organization and the accrediting body and each may be held liable for the other?s wrongs.

D. Nonprofit Organizations and the IRS: The Tax Man Cometh

There are at least two reasons for becoming a "nonprofit" organization: (1) you are tax exempt (sort of) and (2) you can solicit charitable contributions (maybe). The reason for the parenthetical caveats is that certain kinds of activities can subject your organization to taxation or even loss of your tax-exempt status, and you are only eligible to receive deductible contributions if you are a 501(c)(3) organization versus a 501(c)(6) entity.

1. Unrelated Business Income (UBI)

There is a common public misconception that if a nonprofit organization realizes income that exceeds its expenses, i.e., "profits," then taxes must be paid. This is, of course, false, and is exactly why an organization seeks to qualify as a "nonprofit." The Internal Revenue Code exempts such "profits" from taxation *if* they are the result of activities that are related to the organization?s tax-exempt purpose as stated in its charter. Conversely, if the organization regularly carries on a trade or business that is not substantially related to its exempt purposes, that "unrelated business income" will be taxed, and if it becomes too extensive, may result in loss of the organization?s tax exempt status. An activity is considered to be "regularly carried on" if it is conducted with a frequency and continuity comparable to commercial operations of for-profit corporations." This is a somewhat subjective test of the "I know it when I see it" variety. Generally speaking though, a one-time event won?t be a problem, but if the same event is held every month or every year it might be considered as a "regularly carried on" activity.[42]

The other prong of the UBI test, i.e., whether the profit making activity is "substantially related to exempt purposes," is defined by the IRS as an activity that "contributes" to the nonprofit organization's mission rather than solely to the production of income. Even a pressing need for funds generated by an activity will not necessarily make that activity "substantially related."[43] Thus, if your accrediting organization opened up a used car dealership to make money, even for the desirable goal of becoming autonomous from your parent association, your profits would be taxed as UBI. On the other hand, forming a joint venture with a for-profit company to train your member or prospective member institutions on how to write self-studies, and splitting the profits therefrom, would probably not be taxable to you, since that training activity is compatible with and advances your tax-exempt purposes. The IRS has also given examples of some other types of fund-raising activities that it deems "substantially related" and therefore not taxable:

- Work performed by volunteers
- Selling donated merchandise
- Distribution of low-cost articles (as incentives to contributors)
- Activities carried on primarily for the benefit of the organization?s members, students,

patients, officers or employees.
- Certain gambling activities like bingo games.

Another big source of UBI scrutiny comes from sponsor acknowledgements. In brief, it is perfectly alright to publicly thank and acknowledge a sponsor?s generosity and to tell the public who the sponsor is. However, if you cross the line and start touting the sponsor?s products or otherwise induce people to patronize your sponsor, you will likely find the IRS knocking on your door to tax the "donation" you got as really being advertising fees.[44]

Finally, paid advertising in newsletters or other publications (*including your web site*) will often result in UBI treatment unless the content of the advertising is directly related to your tax exempt purpose. For example, if a partner entity is going to conduct a seminar on how to write self studies, advertising that seminar in your newsletter probably won?t be considered UBI. But just about any other kind of advertising will get you taxed. For example, in *United states v. American College of Physicians*,[45] the ACP published a professional journal that contained ads for pharmaceuticals, medical supplies, and equipment useful in the practice of internal medicine as well as notices of positions. The ACP argued that these ads served to educate its members about new technology and other developments in the field. Although the Court rejected the Government?s argument that Congress intended to establish a per se rule subjecting all advertising to UBIT, the Court was unimpressed with ACP?s argument, finding that the ads were not "substantially related" to the ACP's exempt purposes. Writing for the unanimous Court, Justice Marshall said, "...all advertisements contain some information, and if a modicum of informative content were enough to supply the important contribution necessary to achieve tax exemption for commercial advertising, it would be the rare advertisement indeed that would fail to meet the test."[46] In the Court?s view, to be nontaxable, the advertising would have to be coordinated with the editorial content of the issue or be limited solely to those ads reflecting new developments in the pharmaceutical market.

If you have any questions about whether a contemplated activity may incur UBI, you really must consult a tax attorney or CPA. While this discussion cannot possibly cover all the complexities of tax law, hopefully you will be better prepared to give your tax advisor relevant information and to help you understand the advice you are being given.

2. Charitable contributions

There are two important things to remember about charitable contributions. First, if you are a 501(c)(6) organization (a "trade" association) a donor?s contributions are not deductible from his or her taxes. You have to be a 501(c)(3) entity for those donations to qualify. Unfortunately, the IRS may not give you a choice about this. Many professional certification and accreditation organizations have failed to qualify as 501(c)(3) organizations and, instead were classified as "business leagues" under 501(c)(6) because they were seen as primarily fostering the businesses of their constituents, rather than serving the public interest.[47] *Again, you need to consult with a tax attorney when framing or amending your articles of incorporation to have a better chance of qualifying.*

The second thing to know about charitable contributions is that you must give a written acknowledgement to anyone who donates a gift of $250. Moreover, if you give the donor any "premiums" or goods and services as an incentive, you must inform the donor of the fair market value of those items, and the donor may only deduct the difference. Failure to follow these rules can result in serious fines.[48]

Finally, you need to be aware that almost every state has a mandatory charitable solicitation registration law that must be complied with before donors may be solicited in that state.

E. HIPAA and Confusion about Business Associate Agreements

As was discussed earlier, recent amendments to the Health Insurance Portability and Accountability Act have necessitated attention to the Act and its implementing regulations by anyone who has access to patient information, including accreditors. Accreditors may become "business associates" of an entity covered by HIPAA if the accrediting body "provides accreditation services to" that covered entity, for example the accreditor of a university student health center. However, the business associate concept is causing a great deal of confusion among accreditors as well as institutions that deal with patient information. Both parties seem to think that a business associate agreement is required any time an accreditor needs to look at patient records or personally identifiable health information ("PHI"). That, emphatically, is NOT the case. For example, a university may send its student nurses to a hospital for their required practicum or internship experience. The body that accredits the nursing program may need to visit the hospital to verify the practicum experience. The hospital (or the accreditor) may then insist that a business associate agreement be executed by or on behalf of the accrediting agency. However, this is a patently erroneous interpretation of the requirement. Why? Because the accreditor is not accrediting the hospital or providing accreditation services *to* the hospital. Rather the accreditor is only accrediting the university program. *It would not only be a waste of time to execute a business associate agreement, it would, in my view, violate HIPAA to do so since business associates may be given access to patient information without patient authorization that other persons are not legally entitled to get.* If the accreditor needs to look at patient records in order to verify the practicum experience, the hospital must obtain written authorizations from the patients whose records will be reviewed. This also means that the hospital, and not the accreditor must select the patients whose records are to be reviewed, since even divulging the names of patients without authorization may violate HIPAA. A sample letter written to a hospital administrator, is attached to this paper.

F. Insurance: Is it Worth the Price?

Some statistics may be of interest here. The 1996/1997 Watson Wyatt Worldwide Survey reported a total of 1,290 claims made against nonprofit directors and/or officers during the ten-year survey period of 1987 through 1996. The average indemnity payment for all claimants was $376,168. The average indemnity payment for D&O claims was $275,179. Approximately five percent of all nonprofit claims had an indemnity payment over $1 million. With respect to defense costs, the Survey made two specific findings: (1) nonprofit organizations have been very successful in keeping defense costs to a minimum, and (2) defense costs for cases that were settled were generally much less. The average defense cost for those claims that were closed by litigation was $147,274. The average defense cost for those closed by settlement was $118,204. In those instances where the claimant dropped the claim, the average defense cost was $19,092.[49] Whether you feel that these figures are encouraging or not, *the failure to protect your organization's assets through insurance may be a breach of fiduciary responsibility.* Most accreditation agencies operate on small, tight budgets, and the cost of defending even one lawsuit could easily break the bank, even if the outcome is favorable.

There are generally two types of insurance you ought to consider, director's and officer?s liability coverage ("D&O" insurance) and commercial general liability insurance ("CGL") Each of these responds to different types of claims. D&O policies generally protect against unfair employment practices (the most frequent type of lawsuit against nonprofits), sexual or racial harassment and bad management decisions. D&O policies usually exclude claims alleging bodily injury, property damage, and automobile related claims. CGL policies will cover the things excluded from D&O policies, and vice versa. *Thus, it would be prudent to carry both CGL and D&O policies.* D&O policies are typically written on a "claims made" basis covering claims asserted during the policy period, regardless of when the wrongful act occurred. These policies require the policy owner to notify the insurer promptly of circumstances likely to result in a claim. If the claim subsequently develops, it will be deemed to have been made during the policy period, even if the policy has expired at that point in time. A good example of such a policy (issued by The Hartford) can be found at: http://uw.npo-ins.com/pdfs/D&O_Spec_Policy_wm.pdf. There are some companies that write comprehensive policies combining many features of D&O and CGL insurance specifically to cover accreditation, certification, peer review and other standard setting activities, e.g., "Boardroom Plus."[50] Premiums and deductibles will vary tremendously and can be a matter of negotiation. It is best to consult with an independent insurance agent prior to making a purchase.

V. CONCLUSION

If this paper has done nothing more than to raise your awareness level and help you know when you need a lawyer, then it has been a complete success. My purpose has not been to frighten or immobilize you, but to broadly define the legal boundaries within which you are free to operate and to keep you from stepping on landmines. The fact remains that courts are very reluctant to intrude upon your affairs or to second guess your decisions, so long as there is evidence that you exercised a semblance of professional judgment and good faith, even if the judge might personally think you made a bad decision. You really have to be pretty dreadful to make a judge mad enough to rule against you. The problem isn't so much with judges. Rather the problem usually lies with someone who genuinely feels wronged. Although there is much press about "frivolous litigation," the reality is that most lawsuits aren't brought by completely malicious, unreasonable people and their shyster lawyers. If you take the time to make a rationale decision, through a fair process, you will avoid most litigation, or at least win that which you couldn't avoid.

NOTES

[1] This is true notwithstanding federal and state laws that provide protection for certain volunteers, e.g., the federal Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501 et seq.

[2] 28 F.Supp.2d 147 (S.D.N.Y. 1998).

[3] Boston Children?s Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429 (1st Cir. 1996).

[4] Along these lines, the Sarbanes-Oxley Act is instructive even though, by its terms, it applies only to publicly traded companies, their executives and public accounting firms. Most lawyers predict that the public policy principles supporting Sarbanes-Oxley will become the legal standard applied to all types of organizations, including nonprofits. The Act requires:

- Creation of a dedicated audit committee to oversee accounting and financial processes
- Periodic rotation of the external auditor
- Barring engagement of an auditing firm that has employed key personnel within the last year
- Prohibiting officers and trustees from exerting influence on the auditor
- Revising policies to comply with new rules and prohibitions governing the destruction, alteration or falsification of

records.

[5] Boston Children?s Heart Foundation, Inc. v. Nadal-Ginard, 73 F.3d 429, 433-34 (1st Cir. 1996) (Officer must fully and honestly disclose any information relevant to the transaction, thereby permitting a disinterested decision maker to exercise informed judgment).

[6] 137 Wis.2d 647, 405 N.W.2d 83 (Wis.App. 1987).

[7] Mile-O-Mo Fishing Club, Inc. v. Noble, 62 Ill.App.2d 50, 210 N.E.2d 12 (1965).

[8] Autonomy of accrediting bodies is required by federal regulation as a condition of Department of Education recognition as a Title IV "gatekeeper, 34 C.F.R. § 602.14, and was deemed to be central to settlement of the United States? antitrust case against the American Bar Association?s Law School accrediting arm. United States v. American Bar Association, 934 F.Supp. 435 (D.D.C. 1996), *modified*, 135 F.Supp.2d 28 (D.D.C.), *modified*, 2001-1 Trade Cases 73,182(2001); Staver v. American Bar Association, 169 F.Supp 2d 1372 (M.D. Fl. 2001).

[9] 278 N.W.2d 217 (Wis.App. 1979).

[10] 381 F.Supp. 1003 (D.D.C. 1974).

[11] 474 S.E.2d 783 (N.C. 1996).

[12] Wilfred Academy of Hair & Beauty Culture v. Southern Ass?n of Schools and Colleges, 957 F.2d 210 (5th Cir. 1992); Marjorie Webster Junior College v. Middle States Assoc. of Colleges and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir. 1970).

[13] I personally believe his Honor completely misunderstood the nature of accreditation as a "self-regulatory" endeavor. By definition, accreditation board members come from institutions that are potential competitors. That is why conflicts of interest policies are so important along with the duty of independence and the need for autonomy from parent organizations. The problem in this case was the "appearance" that CCE?s board members were acting in their competitive self interest.

[14] Life University, Inc. v. The Council on Chiropractic Education, Inc, et al, No. 1:03-CV-4-CAM (N.D. Ga. February 12, 2003).

[15] 244 F.3d 521, 529 (6th Cir. 2001).

[16] 817 F.2d 1310 (8th Cir. 1987).

[17] Id., at 1314.

[18] Paul Bradley, "College to Fight Decision: Patrick Henry Cited for Creationism Stance," The Richmond Times Dispatch, May 12, 2002.

[19] *See, e.g.,* Peoria School of Business, Inc. v. Accrediting Council for Continuing Education and Training, 805 F.Supp. 579 (N.D. Ill. 1992) (due process was afforded where accreditor gave school prior written notice regarding concerns over financial status, school was given and opportunity to respond and was granted an appeal).

[20] 252 F.3d 488 (1st Cir. 2001).

[21] Id., at 494.

[22] United States v. American Bar Association, 934 F.Supp. 435 (D. D.C. 1996).

[23] Boddicker v. Arizona State Dental Ass?n, 549 F.2d 626 (9th Cir. 1977).

[24] Wilk v. American Medical Ass?n, 719 F.2d 207 (7th Cir. 1983).

[25] Some antitrust violations are considered to be "per se" violations, which shifts the burden to the defendant. However, the "rule of reason" is applied in accreditation cases since "accreditation serves an important public purpose." Foundation for Interior Design Education Research v. Savannah College of Art & Design, 244 F.3d 521, 530 (6th Cir. 2001).

[26] Id., at 531.

[27] 107 F.3d 1026, 1032 (1997).

[28] 20 U.S.C. § 1232g.

[29] 42 U.S.C. §§ 1320d, et seq.

[30] 15 U.S.C., §§. 6801-6809.

[31] 34 C.F.R. §99.31(a)(7).

[32] 45 C.F.R. § 160.103. More specifically, HIPAA defines the term "business associate" to include a person or entity that provides accreditation services to a "covered entity." HIPAA then permits covered entities to share patient records with a business associate under certain standards and circumstances. 45 C.F.R. § 160.504(e)(1).

[33] Hal Denton and Fiona Lally, Myths of Volunteer Risk Management *http://www.nonprofitrisk.org/nwsltr/archive/nl798_4.htm*. Examples in case law are, Beul v. ASSE Intern., Inc. 233 F.3d 441 (7th Cir. 2000). (nonprofit university could be held liable for sexual assault by a volunteer in foreign exchange student program); Scott v. Ross 140 F.3d 1275 C.A.9 (Wash.),1998 (nonprofit organization could be held liable for injury caused by volunteer "deprogrammer."); Trinity Lutheran Church, Inc. v. Miller, 451 N.E.2d 1099, 1102 (Ind.App.1983)(Nonprofit organization could be held liable for accident caused by volunteer driver).

[34] See, e.g., N.J. Stat. § 2A:53A-7 which provides that

"No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association."

[35] 17 Ariz.App. 571, 499 P.2d 185 (1972).

[36] 676 A.2d 152 (N.J.Super.A.D.,1996), *aff?d*, 147 N.J. 619, 689 A.2d 142 (1997).

[37] 42 U.S.C. §§ 14501-14505.

[38] 42 U.S.C. § 14503.

[39] http://www.altru.com/liability.htm.

[40] United States v. American Bar Association, 169 F.Supp.2d 1372 (2001).

[41] 34 C.F.R. § 602.14.

[42] To illustrate this criteria, the IRS has indicated that sporadic or short-term sales, such as food vending at state fairs, is not "regularly carried on." On the other hand, sales which regularly occur on a seasonal basis may be covered. 26 C.F.R. § 1.513-1 (c)(2).

[43] The test applied by the IRS is found in 26 C.F.R. § 1.513.1(d) and states that a, "[t]rade or business is ?related? to exempt purposes...only where the conduct of the business activities has *causal relationship* to the achievement of exempt purposes (other than through the production of income) and it is ?substantially related?...only if the causal relationship is a substantial one." (Emphasis supplied). To be "substantially related," the activity "must contribute importantly to the accomplishment of the [exempt] purpose." And, finally, the analysis "depends in each case upon the facts and circumstances involved."

[44] 26 U.S.C. § 513(i)(2)(A); *and see*, IRS Pub. 598, Tax on Unrelated Business Income of Exempt Organizations 7 (Rev. Feb. 1998).

[45] 475 U.S. 834 (1986).

[46] *Id.*, at 848.

[47] Jerald A. Jacobs, Certification and Accreditation Law Handbook, ASAE (1992), at pp. 85-92.

[48] This discussion is just a bare introduction to the topic for the purpose of raising your awareness. More detail can be found in "The Volunteer Legal Handbook-Law and Government Regulation," at *http://www.ptialaska.net/~jdewitt/vlh/Law/VLHGovtRegulation.html*. That article also has an excellent discussion about restrictions on lobbying and other legislative activities.

[49] From, Elizabeth A. Pitrof and Cunera M. Buys, *Liability Exposures and Protections for Nonprofit Organizations and their Directors and Officers,* October 1997, http://www.altru.com/liability.htm.

[50] http://www.standardsetting.com.