

Legal Q/A

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Q: *I am a member of the Board of Directors of our P.C. and also sit on the Board of an IPA. What kind of liability exposure do I have as a director and how can I limit my risk?*

A: Directors (in their capacities as directors or members of corporate committees) are required to discharge their duties in good faith and with that degree of diligence, care and skill which an ordinarily prudent person would exercise under similar circumstances in a like position. This is commonly referred to as the "prudent man" standard. Directors who act prudently will usually be immune from liability. In performing their duties, directors are entitled to rely upon the advice and reports of others, such as attorneys, accountants, and consultants.

The liability of directors can be broken down to two categories – the liability to third parties generally, and the liability to those persons who have a special relationship with the corporation (shareholder and credi-

In addition to their decision-making function, directors also perform an oversight function. In exercising his/her duty of care, the director is obligated to exercise general supervision and control with respect to corporate officers. If the director is presented with information (through a compliance program or otherwise) that causes, or should cause, concerns to be aroused, the director is obligated to make further inquiry until such time as his/her concerns are satisfactorily addressed and favorably resolved. Of course, crucial to the oversight function is the fundamental principle that a director is entitled to rely in good faith, on officers and employees as well as professional experts and advisors in whom the director believes confidence is merited.

A corporation has the right to indemnify its directors for liabilities incurred in their official capacities so long as the director acted in good faith for a purpose he reasonably believed to be in the best interests of the corporation. The statutory right of indemnification also extends to those persons who serve as trustees of an employee benefit plan of the corporation. The right of indemnification is usually included in the corporation's bylaws or charter.

Larger physician groups and IPAs may wish to explore the desirability of directors and officers (D&O)

liability insurance to protect against lawsuits. Unfortunately, the coverage is rather expensive and often contains exclusions which tend to limit its effectiveness. Moreover, one of the principal benefits of insurance – providing a legal defense at the insurers' expense – is usually absent. Most D&O insurance policies do not include a duty to defend on the part of the insurer, and any legal defense costs that are incurred by the insurer will reduce the amount of liability coverage available to pay any settlement or judgment award.

In the final analysis, the best protection for directors is one of process – making sure that corporate decisions are made carefully and with the exercise of due diligence. Keep informed and ask questions. And don't hesitate to seek the advice of consultants, accountants and attorneys in making important decisions. Finally, keep accurate minutes of corporate deliberations reflecting the steps followed in the decision-making process.

Bruce E. Wood, Esq., is a shareholder of Wood & Smith, P.C., a Syracuse based law firm concentrating its practice in the area of health law.