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The following memo is part of a series on risk-management topics for organizational leaders. We encourage you to review the entire series so that management addresses all forms of risk at your organization. All memos are informational and intended as organizational advice, not legal advice, and not the final word on your legal protections. There is no substitute for maintaining 100-percent in-house legal compliance and discussing these matters with your private legal counsel.

Why is this topic important?

The Network has always faced legal threats from private and government entities that oppose our work from an ideological or political standpoint. While this is not new, in a world that is hyperpolarized politically, where networked swarms can quickly sabotage an organization's reputation online, we encourage affiliates to increase their vigilance. Taking preparatory steps now means you and your organization will be in the best position to defend yourselves when someone decides to use the law to slow or stop your mission. Time will be of the essence if someone attempts to use the law to attack you. Advance thought and preparation will prove vital if it becomes necessary to make wise decisions quickly.

What kinds of legal threats might affiliates face?

The Network relies on litigation to protect individual rights and advance sound policy reforms, but litigation can also be used to attack groups in the Network. An increasing number of center-right nonprofits are being sued, de-platformed, audited by the IRS, or subjected to intrusive government legal action. Here are some examples of potential legal actions an SPN affiliate might find itself defending:

- *Breach of contract*: a party alleges your organization didn't deliver on something it was supposed to.
- *Tortious interference with a contract*: a claim is made that your organization intentionally damaged someone's business relationships.
- *Intellectual property claims*: alleged copyright violations or theft; demands for payment for copyright-protected images on your website.
- *Donor intent*: a supporter provided targeted funding and then saw your organization as failing to deliver.
- *Employment situations*: a disgruntled departing employee sues for wrongful dismissal, discrimination, harassment, etc.
- *Board disputes*: allegations of breach of fiduciary duty.
- *Negligence*: someone gets hurt at an event.
- *Subpoenas*: the US Department of Justice demands documents as part of an investigation, including disclosure of donor lists.
- *IRS action*: an audit or allegations of (c)(3), (c)(4), or (c)(6) violations.
- *Defamation*: someone sues based on a publication produced by your organization.

Defending a lawsuit can be expensive, distracting, and demoralizing, especially if you are caught off-guard. Because you need to act quickly and strategically, arming yourself with information and on-call advisors and knowing what to do in advance can make the difference between minimal disruption and potentially catastrophic failure.

While it may be tempting to take a defensive strategy, try viewing the situation through an opportunity mindset. A lawsuit provides a more human-centered way to make a policy or legal point for various audiences and has the potential to attract donors, especially if it's a David versus Goliath situation. At the same time, being sued may be an opportunity in disguise.

Step 1: Consider triggering your insurance.

When sued, organizations should consider triggering the liability and directors and officers (D&O) insurance they have in place to protect themselves and their boards. Familiarize yourself with the stipulations and restrictions of your current policy pertaining to lawsuits. Some policies require you to contact the insurance carrier first to ensure coverage. Some policies exclude specific types of liability.

Concerns that your insurance provider could cancel coverage or that you might face skyrocketing rates are not implausible but are often overblown. Insurance companies might refuse to write future policies or sharply increase the rates, but this is quite fact dependent and happens infrequently in practice. Your insurance broker, assuming they are not one of the (relatively rare) brokers who work for the insurance company, should be a helpful resource who could answer questions about actual and hypothetical situations.

Some CEOs and boards weigh whether the potential liability, if their organization loses the case, outweighs the potential of being without insurance in the future when a "big one" comes along.

Note: We strongly recommend all organizations have liability and D&O insurance policies.

The insurance company will provide expert legal representation if you trigger your insurance. They will also decide the case strategy, including whether to settle the claim. In some cases, insurance companies may take the path of least resistance to resolve the matter quickly based on a cost-benefit analysis. When deciding whether to call your insurance company, consider all these factors.

What should you consider when hiring legal representation?

Network affiliates are used to being on the plaintiff's side, using litigation as a means to restore rights and a separation of powers in pursuit of a mission. If your organization is sued or served with a subpoena, you need effective, expert outside counsel. At this moment, the decisions are less about your mission and more about making sound business decisions.

The law is complex in most areas. Most non-lawyers do not have the experience or training to navigate the law's formal and informal processes, standards, and practices. Here are some guidelines for outside attorney selection and some steps you can take in advance of a legal entanglement:

- Select the attorney based on who will best represent your case. Going with the cheapest or most familiar representation may not be prudent or adequate. Cases can be intensive and fact specific. Strategy is critical, and procedure is paramount. An attorney who understands why "going public" may be a good strategic option for fundraising and other purposes can

help you make the best decisions. At the same time, your mission is practically irrelevant when your business is on the line.

- Pause before engaging movement lawyers better known for political or plaintiff work. They are our friends, but the strategies, incentives, and knowledge you need now are different. Deploy the right people for the right causes of action.

Media law firms are immersed in defending both malicious and valid claims. Those lawyers focus on representing all kinds of people; alignment with your mission is not their primary concern. There is a range of these firms, from costly national firms to more reasonably priced regional firms. For example, in the case of being sued for defamation, you will find the best representation in media law firms because these attorneys shaped anti-SLAPP legislation.

- Vet potential attorneys as carefully as you would any other close partner who will represent your business. Do your due diligence. Check references, consider a few options, and talk to attorneys who may know them. You will be working closely together, and trust will be critical.
- It is easier to add local counsel to help the right legal team to add the right legal team to local counsel.
- Pro-bono lawyers may not want to take on full trial proceedings, but they could effectively manage early interventions and hearings.

No matter whom you select, have an engagement agreement clarifying fees, how billing will be coded, client expectations, roles, decision rights for the case, and who will do the work.

What should a CEO try to keep in mind?

This is far easier said than done: You must manage your emotions because this is one of the most stressful situations you will find yourself in as a CEO.

Here are some other ways to stay focused on what's important:

- *Know whom to call before the lawsuit happens because time will be of the essence.* The people you call should be objective and not motivated by the policy aspects of the case. Your board chair should be on this short list.
- *Keep a mission focus throughout and separate the business decisions surrounding the lawsuit from your policy agenda.* Seek multiple opinions from those you trust outside your organization who can objectively help you think about this issue. Should you settle quickly and live to fight another day? Remember, the mission continues when this one attack is over, as tempting as it is to defend yourself and your team from unfair allegations. At the same time, those allegations may damage your organization's reputation irreparably.
- *Think critically about the advice you are getting, even from the movement's preferred vendors, including SPN.* Does the potential resource have your organization's business interests in mind? Are they listening to your story and ideas? Have they vetted the situation adequately to offer objective advice? Ensure you evaluate the information as you would for any other business decision.
- *Always maintain a learner mindset.* You are not the *expert* in this situation; you are the *client*. Make sure you understand your options enough to direct the litigation.
- *Consider having your own in-house counsel.* This person's job is to have your organization's interests in mind and will help you identify which battles are critical to fight and which are optional and ought to be set aside or settled as soon as possible. This is a crucial role; this person serves as a professional advocate for your organization.
- *Enlist the help of your board.* Unlike big businesses, our organizations are not ready to defend themselves from frivolous or substantive lawsuits. If you have practicing attorneys or

experienced business leaders on your board, consider asking them to oversee critical decision making and ensure your board is aligned with your defense strategy. At the very least, you should inform your board of lawsuits, given their fiduciary and legal liability to the organization.

- *Keep a reserve fund.* It is sound financial management to ensure you have a reserve fund of at least three to six months' worth of operating costs. Should the unexpected happen from a legal perspective, a reserve fund might make the difference between financial disaster and continued stability.
- *Have a list of pro-bono legal advisors on call.* Know which lawyers in your community have legal specialties and are willing and able to advise should the need arise. Invest in those relationships so you have people to call when you need time-sensitive input.

How can SPN help?

While the best defense is one you prepare and customize for your situation, SPN is also available to assist the Network in the event of legal action, including:

- Providing a series of *practice memos* similar to this one, laying out essential information to help prepare for and respond to different types of legal action.
- Convening a confidential, standby *board of advisors* with experience and knowledge in responding to lawsuits and other legal actions.
- Exploring *insurance options and issues* and deciding whether to trigger your insurance. (*Note: This is not legal advice.*)
- Providing *training* for you, your board, and your in-house counsel.
- Having *resources* on hand, such as sample attorney engagement letters.
- Creating a *roster of attorneys* with specialized experience (to supplement your list) who might serve as a point of first contact to help find appropriate legal counsel.

We take seriously our role in defending the Network and preparing for the best and the worst. Unfortunately, we are all vulnerable to legal attacks, regardless of bandwidth. SPN is committed to helping you think ahead and being a resource should those attacks occur.