

LIABILITY AND RISK MANAGEMENT FOR BOARDS

Board Leadership Lethbridge 2018

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Community Development Unit

Community Development Officers across Alberta provide customized services to build capacity in organizations and groups on topics including:

Strategic planning,
organizational
planning and
action planning

Board development
training

(roles and responsibilities,
effective meetings, bylaws,
recruitment, etc.)

Fund development
and grant writing
consultation and
assistance

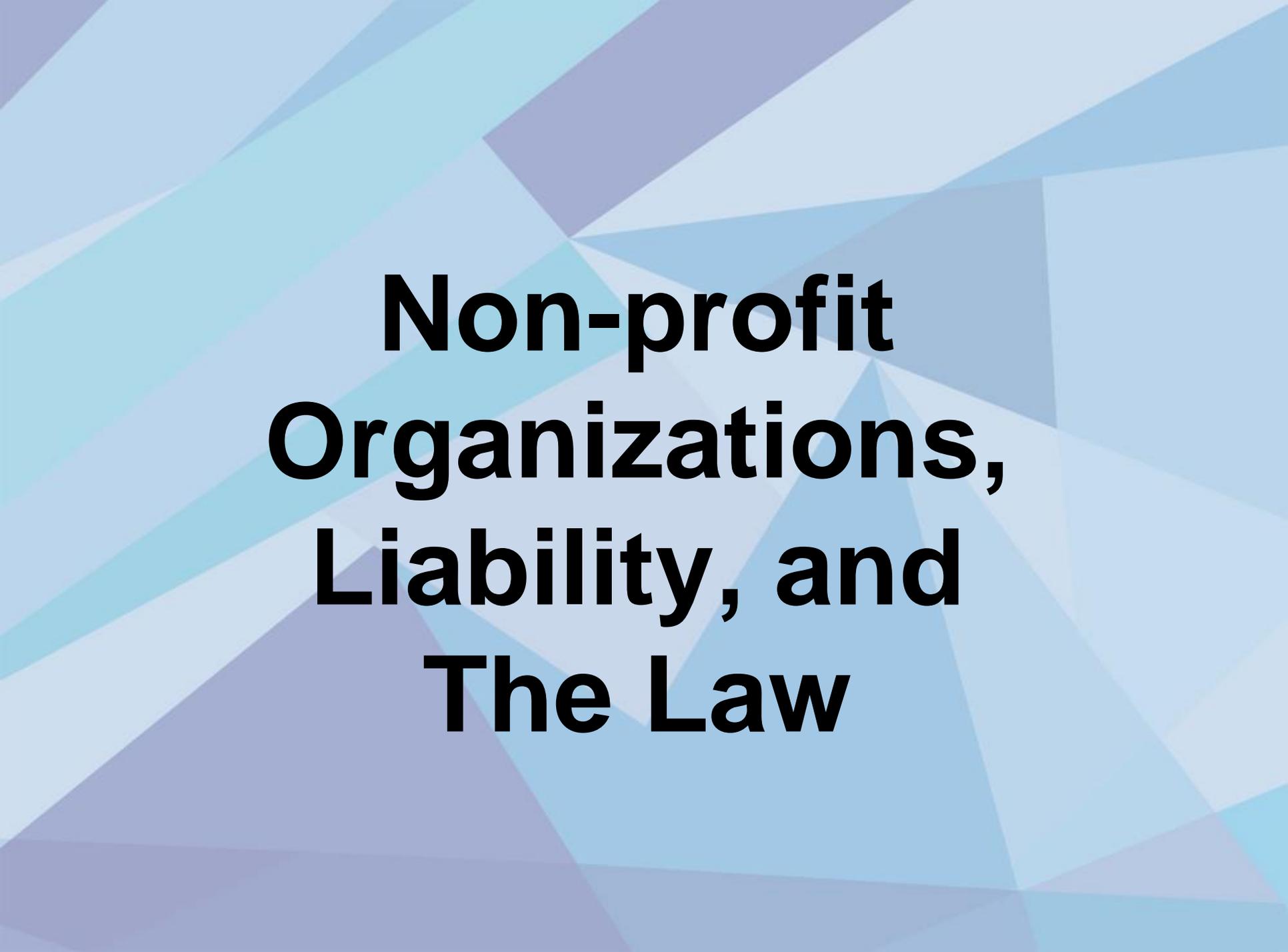
Partnerships,
collaboration and
leadership

Community
engagement and
public stakeholder
consultations

Project
development and
evaluation

“Disclaimer”

- I am not a lawyer.
- I am not an insurance broker or agent.
- Consult with a lawyer or insurance broker or agent for legal or insurance advice.



Non-profit Organizations, Liability, and The Law



**Is your
organization
incorporated and
if so, under
which legislative
act?**

Incorporation Options in Alberta



- **Society** (Societies Act)
- **Non-profit Company or Part 9 Company** (Alberta Companies Act)
- **Not-for-profit Corporation** (Canada Not-for-Profit Corporations Act)
- **Extra-Provincial Corporation** (Business Corporation Act)
- **Religious Society** (Religious Societies Land Act)
- **Cooperative** (Cooperative Associations Act)
- **Private Act of the Legislature** (e.g. Libraries Act, Agricultural Societies Act)



Ladder of Authority

Legislation

Legislature

Regulation

Public
Officials

Bylaws

Members

Policy

Board

Procedures

Staff

LEGAL IMPLICATIONS

Incorporation as a Part 9 Company provides a way to limit the individual board member's liability – it does *not* eliminate liability entirely.



WHAT IS 'LIABILITY'?

Liability is being responsible for the losses we cause and for compensating those who suffer as a result of our conduct failing to meet an acceptable standard in the eyes of the law.



STATUTORY, REGULATORY AND CONSTITUTIONAL LIABILITY



Compliance with laws or legislation passed by government and related regulations

- Incorporation and charitable status
- Employment and labour law
- Income Tax Act
- Human rights
- FOIP, CASL, PIPA
- Disclosure obligations
- Fundraising, gaming
- Others that may apply (Boards of Trade Act, Traffic Safety Act)

COMMON LAW / CASE LAW

Case Law, often used interchangeably with the term **Common Law**, refers to the precedents and authority set by previous court rulings, judicial decisions and administrative legal findings or rulings.

CONTRACT LIABILITY

- Understand and monitor major contractual obligations, including funders
- Set and follow policies and procedures for procurement and requests for proposal processes

CRIMINAL LIABILITY

- If the organization is charged with a criminal offence, directors may also be charged if they are a party to, actively participated in, assisted with, encouraged, or failed to report a crime.



NEGLIGENCE AND LIABILITY

- Tort law deals with wrongful acts that lead to physical, emotional or financial damage, loss or injury to another person.
- The Tort of 'Negligence' relates to carelessness rather than deliberate acts and is often defined as not doing something which a reasonable person would do, or doing something which a reasonable person would not do.
- If found liable, wrongdoers must compensate victims for losses.

FIDUCIARY DUTY

- The duty to act honestly, in good faith, and in the best interest of the organization at all times while using the care and diligence of an ordinarily prudent and reasonable person.
- Stakeholders entrust the direction and success of the organization to the board of directors.
- The fiduciary role as trustee must be at the heart of the board member's commitment.
- The public and the law look to the directors to ensure accountability.

WHAT ARE DIRECTORS' FIDUCIARY DUTIES?

1. Duty of Care

The requirement to act with a certain standard of attention, competence, diligence and to be informed about issues in order to make good decisions for the organization.

2. Duty of Loyalty

The requirement to act honestly and in good faith in the best interests of the organization.

How can a director fulfil the Duty of Care?

Pay attention and exercise 'due diligence'

Due diligence refers to the level of judgment and degree of care, diligence, skill and activity that a person would reasonably be expected to exercise under particular circumstances.

How can a director fulfil the Duty of Loyalty?

- Be familiar with the organization's conflict of interest policy.
- Avoid actual conflict of interest and the appearance of conflict for self or another organization by immediately declaring any conflict of interest and following the process and requirements of the policy (i.e. abstain from discussion and voting).

AREAS OF INDIVIDUAL LIABILITY

- Non-Management
- Negligence or Willful Mismanagement
- Conflict of Interest and Self-Dealing



- Personal liability is minimized when board members are acting prudently, within their authority, and are not negligent.



Reflection

When you reflect on your organization, what are some of things you do well in the area of liability and risk management?

What are some of the areas where you have challenges, struggle or need more information?

WHAT IS 'INDEMNIFICATION'?

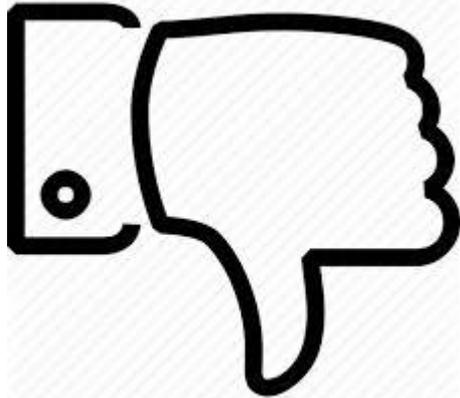
- Indemnification: covering, assuring or guaranteeing another against loss
- An organization may agree to pay the costs associated with a claim related to a director's service on the board by 'indemnifying' board members in its bylaws.
- While indemnification helps protect board members, indemnity clauses do not provide absolute protection to the officers and directors.

*As fiduciaries, can directors
delegate their authority and/or
responsibility?*

Role of the Board: COLLECTIVE ACTION

**See with many
eyes, think with
many minds,
speak with one
voice**





*What if a director disagrees with
a decision of the board?*

MYTH

“Upon their election, new board members will transform into effective directors without orientation and training.”



Tools to help board members reduce liability

- Board orientation
- Peer mentorship
- Board development training
- Board retreats
- Meeting minutes
- Policies and procedures
- Financial information
- Professional advice
- Risk management

Board manual

- incorporation documents
- current bylaws
- code of conduct for directors
- policies
- Registered Charity information



Risk Management for Non-Profit Organizations

WHAT IS 'RISK'?

- **Risk** is the possibility that something harmful or undesirable may happen.
- This could include harm, injury, or abuse to your organization's clients, volunteers, funders and supporters, board members, employees, property, or reputation.



Some areas in which risk can occur....

- People
- Premises and property
- Operations, programs, services
- Special events
- Finances
- Reputation and goodwill
- Technology, information, data, intellectual property
- Governance
- Regulatory compliance
- Natural disasters

WHAT IS 'RISK MANAGEMENT'?

- Risk Management is a process that an organization uses to identify, assess, control, and minimize the risks of bodily injury or financial loss from its activities and operations.
- Any organization that provides programs and/or services to the public has a moral and legal obligation to institute appropriate risk management practices.
- It is legally required under the duty of care.



Questions boards should ask about risk management....

- Who is responsible for risk management?
- How does the organization identify the risks that it faces?
- How does the organization assess the risks that it faces?
- What strategies does the organization use to manage risks?
- What records does the organization keep related to risk management?
- What is the organization's financial capacity to take on risks?
- How are the board's expectations for risk management coordinated across the organization and communicated to staff and volunteers?
- What plans does the organization have for responding to crises?

Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk (Chartered Accountants of Canada 2009)

Checklist for minimizing Your Liability as a Board

**A group exercise to generate awareness
and discussion**

Everybody, Somebody, Anybody, Nobody

There was an important job to be done and everybody was asked to do it;

Everybody was sure that somebody would do it;

Anybody could have done it, but nobody did;

Somebody got angry because it was everybody's job;

Everybody knew anybody could do it;

But nobody realized that somebody wouldn't do it;

And everybody blamed somebody because nobody actually asked anybody.

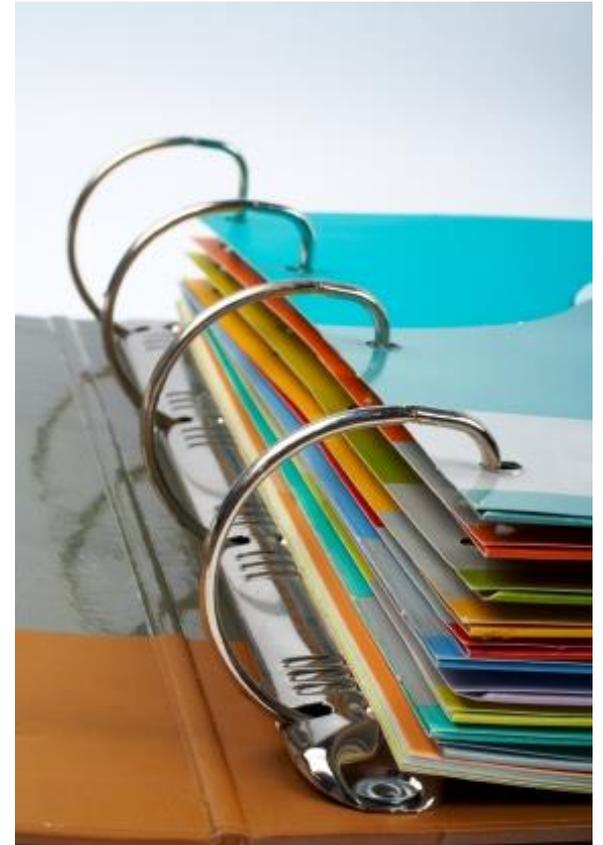
Adapted from Charles Osgood

Did you know?

- In a non-profit organization, the board is responsible, and potentially liable, for the programs and services of the organization.
- To reduce risk, board must be aware of their responsibilities and develop policies to ensure these responsibilities are met.
- Without clear policies and procedures, risk management can be both everyone's job and no one's job

TYPES OF GOVERNANCE POLICIES

1. Framework Policies
2. Board Self-Governance Policies
3. Operational Policies
 - Program
 - Personnel
 - Financial
4. Advocacy Policies

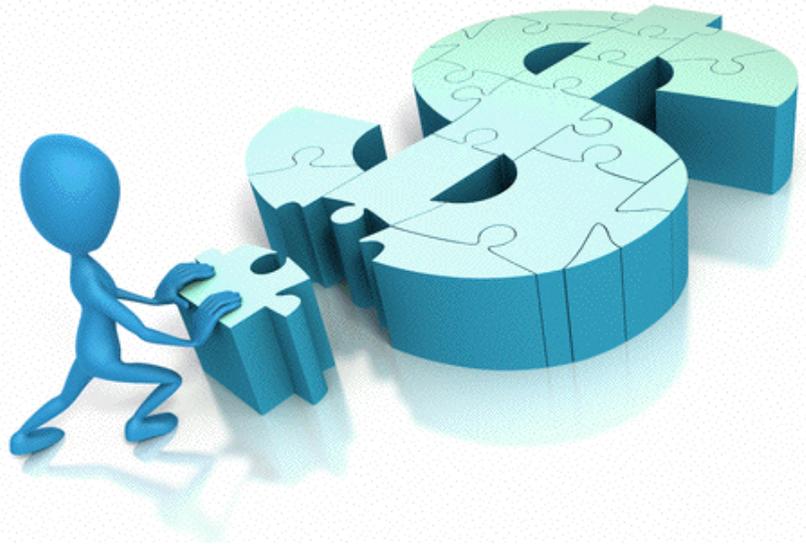


Policies that Prevent Liability

- Screening volunteers
- Job descriptions
- Orientation
- Training
- Supervision
- Follow-up



FINANCIAL GOVERNANCE



- Resource Management
- Resource Distribution
- Resource Development

Approving and monitoring the budget is a critical responsibility of the Board

NOSE IN, FINGERS OUT



In a policy governance board, the board's job *is not* to do it, but it *is* their job to make sure it is done.

Code of Conduct

- Sets out the organization's ethical values and standards that determine how board members, staff, volunteers and other stakeholders behave and treat each other with honesty and integrity.
- Establishes boundaries of acceptable behaviour.



Risk Management Process

1. Identify the risks
2. Assess the risks
3. Determine how to manage the risks
4. Lay out what will be done if something does go wrong
5. Develop, communicate and implement the risk management plan
6. Set up and maintain risk-related monitoring, recording and reporting systems (including close calls)
7. If something goes wrong, review the situation for lessons learned and take swift action to make improvements

ORGANIZATIONAL RISK ASSESSMENT

- Organizational Policies and Procedures
- Financial Management
- Board Governance
- Human Resources
- Volunteer Management
- Information and Privacy Protection
- Insurance

Risk Assessment Heat Map

Impact x Likelihood = Risk Level

Potential Impact	3-High	3	6	9
	2-Medium	2	4	6
	1-Low	1	2	3
		1-Remote	2-Possible	3-Probable
		Likelihood		

Determine how to manage the risk

1. Eliminate or avoid the risk
2. Mitigate or reduce the risk
3. Transfer the risk
4. Accept the risk

The difference between risk management and insurance

- Insurance is one form of risk management
- Not all risks can be insured against

Case Studies

- Take a few minutes on your own to read and consider your group's case study
- As a group discuss the Case Study and share your viewpoints
- Be prepared to report back to the large group

False Sense of Security

- Every organization is different, but some common kinds of risks are:
- Associated with premises – fire and theft
- Those involved in activities – volunteers and participants
- Those working on the premises such as staff coverage for workplace injuries
- Risks related to the work of the board
- Risks related to activities away from the premises, such as sports or special events
- Risks related to advice that employees or volunteers give to clients or participants
- Risks related to the functioning of the organization, such as firing employees.

INSURANCE

- Organizations have an obligation to acquire liability and other forms of insurance appropriate to the activities of the organization.
- Liability insurance covers the cost of legal defense if needed.



TYPES OF INSURANCE

- Commercial General Liability (CGL)
- Directors and Officers Liability (D&O)
- Errors and Omissions (E&O, professional liability, malpractice)
- Employment Practices Liability
- Automobile
- Property
- Tenant / Leasing
- Crime
- Business Interruption
- Liquor Liability
- Machinery Breakdown
- Special Event Liability



Insurance only one avenue of protection

- Manage the risk of theft through proper lighting, securely locked doors and windows, engraving equipment, regularly conduct security checks, etc.
- Special events – your policy may not provide coverage;
- Add special insurance or purchase separate insurance

Remember....

Risk Management is all about good business practice

No organization can eliminate *all* risk!



What does the board do to assess its effectiveness in overseeing risk?

- *Does the board champion and support risk management?*
- *Does the board support a Code of Conduct and lead by example?*
- *Does the board have members with knowledge and experience in risk management?*
- *Do board members receive orientation and updates on risk issues?*
- *Does the board agenda provide for regular reporting and discussion on risk issues?*
- *Are the board and its committees effectively organized to oversee risk management?*
- *Does the board make use of opportunities to integrate risk management with other board processes, such as strategic planning, business planning, budget reviews, new program approval, etc.?*

*Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk
Chartered Accountants of Canada 2009*

Managing risk is an integral part of good governance. It is a consideration in everything a board, staff and volunteers do and the reason for establishing a risk-aware culture in an organization.

Source: 20 Questions Directors of Not-For-Profit Organizations Should Ask about Risk
Chartered Accountants of Canada 2009

**The greatest risk of all:
DO NOTHING!**



A FEW GOOD RESOURCES

Chartered Accountants of Canada

- '20 Questions Directors of Not-For-Profit Organizations Should Ask' Series (...About Risk, ...About Fiduciary Duty, ...About Codes of Conduct)
- Liability Indemnification and Insurance for Directors of Non-For-Profit Organizations

Alberta Voluntary Sector Insurance Council

- Insurance Toolkit for the Voluntary Sector. Prepared by Calgary Chamber of Voluntary Organizations (CCVO)
- Directors' & Officers' Liability: How Are You Managing?

Insurance Bureau of Canada

- Insurance for Voluntary Organizations: Are Your Volunteers and Clients Covered?

Imagine Canada

- Developing a Risk Management Strategy

Volunteer Alberta

- Volunteers and The Law in Alberta
- Risk Management Strategies and Tactics
- Protect Your Assets training sessions

The People's Law School

- Volunteers and the Law

Alberta Culture of Tourism, Board Development Program

Handouts on your tables

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