

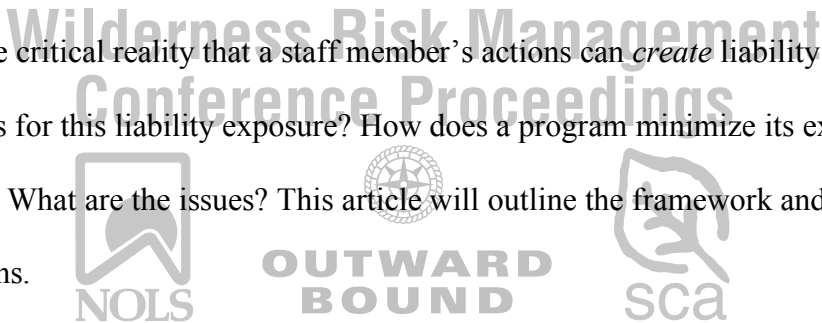
Important Staffing Issues for Running a Quality Program

Charles R. (Reb) Gregg and Catherine Hansen-Stamp* Reprinted with adaptations from the Spring 05 issue of *The CampLine* by permission of the American Camp Association; copyright 2005 American Camping Association.

I. The Issue

There are many areas of staffing important to the running of a quality program.

Recreation providers and outdoor programs (“programs”), for example, must be sensitive to the variety of state and federal laws that outline procedures and parameters for the hiring, firing, and management of employees. Laws such as the Americans with Disabilities Act, Civil Rights and Workers’ Compensation must be understood and complied with—these laws and doctrines affect a program’s liability *to* its staff. However, a growing and key area of concern, and the focus of this article, is the critical reality that a staff member’s actions can *create* liability *for* the program. What is the basis for this liability exposure? How does a program minimize its exposure for the acts of its staff? What are the issues? This article will outline the framework and provide some practical solutions.



II. The Challenges

Fueling this staffing issue are several key factors, playing into most recreation and adventure arenas. From a marketing perspective, programs feel increasing pressure to differentiate their operation from the program down the road, or within the region. Every program is looking for a way to distinguish its operation, whether on its Web site, in its brochure, or at the next conference or trade show. This pressure fuels the increasing desire to develop new techniques, offer new activities, venture into new environments, and create more variety in the experience. At the same time, programs are seeing developing and increasing standards, new and increasing participant health and behavior issues, and importantly, new and increasing

participant and parent expectations about both program quality and safety. As a result, programs must be increasingly vigilant about understanding their exposure and seizing opportunities to minimize that exposure, while focusing on the main goal of running a quality operation.

III. The Problem

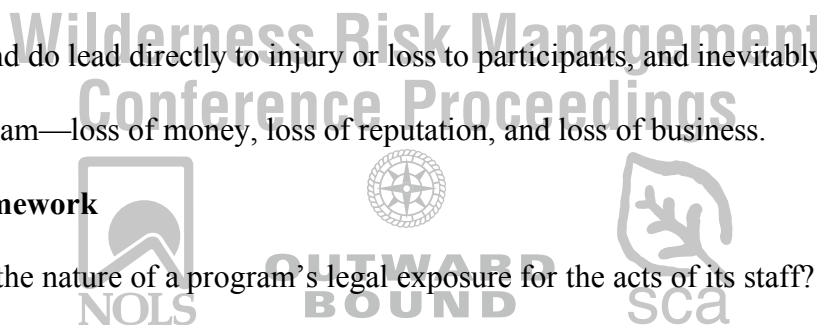
A program's liability exposure for acts of its staff is key because staff *are on the front line*. The staff are in many ways, a central piece of the program's identity—the feel, the personality, and the reputation of the program. These are the folks who make the first impression when participants and families walk up the steps to the program registration desk. These are the folks who supervise, instruct, and lead the participants in the day's events and activities. These are the folks who respond, when a participant is hurt. Issues arising from staff conduct or judgment can and do lead directly to injury or loss to participants, and inevitably, to injury or loss to the program—loss of money, loss of reputation, and loss of business.

IV. Legal Framework

What is the nature of a program's legal exposure for the acts of its staff? When a participant gets hurt, and a lawsuit is filed, the most common claim filed against the program (and sometimes, against the individual employee) is a claim of negligence. That is, a claim that the program—or its employee—failed to exercise reasonable care (was “negligent”) in the conduct of some aspect of the program, and that that negligence caused the participant's injuries. To prove a claim of negligence, the plaintiff must prove that there was: 1) a duty owed; 2) a breach of that duty; 3) a causal connection between the negligence and the harm done; and 4) “damages” (usually monetary loss, resulting from injury or death).

V. Nature of Claims

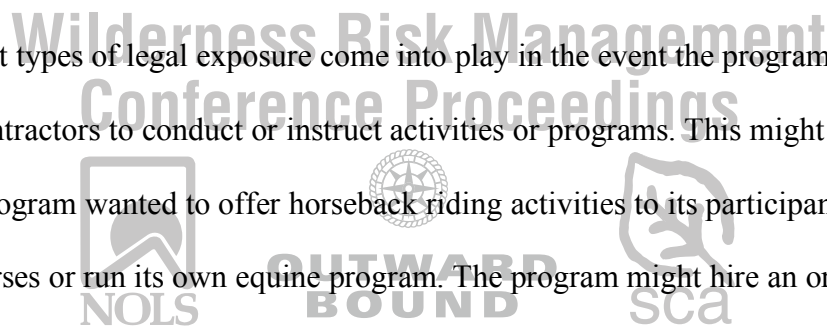
Generally, a program can be both *directly* and *vicariously* liable for the acts of its



employees. For example, if a participant is injured as a result of the alleged carelessness, inexperience, or inattentiveness of a program employee, a participant's ("plaintiff") lawsuit might claim that the program was negligent in hiring or training the employee ("direct" liability). Alternatively, the plaintiff may claim that the program is responsible for the employee's negligent instruction or supervision of the injured participant, committed in the course of his/her employment ("vicarious liability"). This vicarious liability (often referred to as the doctrine of "Respondeat Superior") commonly extends as well to a program's volunteer leaders or interns. The notion is that the employee or other representative is a logical extension of the program and that the program should therefore be responsible for its employees' acts or omissions, during the course of the work time.

Different types of legal exposure come into play in the event the program hires independent contractors to conduct or instruct activities or programs. This might be the case, for example, if a program wanted to offer horseback riding activities to its participants but did not own its own horses or run its own equine program. The program might hire an organization down the road to conduct horseback riding lessons for the participants or simply offer a day horse pack or horseback riding trip during the program session.

Generally, to be defined and considered an "independent contractor" under the law, the individual or entity must retain control over the scope and details of how it conducts its work. If the relationship is upheld, the independent contractor—and not the program—will be legally responsible for the acts of its employees and any injury to participants hurt on its "watch." However, if, the program calls the individual an independent contractor, but treats the relationship otherwise (directing and controlling, for example, the scope and details of the individual's work), the court can treat the independent contractor as an employee— subjecting



the program to vicarious liability. In addition, the program must exercise diligence in selecting any independent contractor, because it can be held responsible to an injured party on a claim that it “negligently selected” the independent contractor.

Another legal twist is a program’s legal liability on an “agency” theory. Under the legal doctrine of “apparent authority,” a program can be found liable for the acts of an independent contractor or third party if it *appears to the public* that the program is responsible (even if it isn’t) for the other party’s actions. This can happen, for example, if a program uses a third party to conduct a particular activity, but doesn’t disclose to the public that there is another entity involved.

VI. Defenses

The program can assert a variety of defenses in response to a claim of negligence (either direct or vicarious). These include: 1) that one of the elements of a claim of negligence is missing (for example, the program did not owe any duty or was relieved of a duty owed); or, 2) that the injury resulted from a participant’s contributory fault or negligence. A common defense stems from the “inherent risk” legal doctrine—the well-accepted notion that a provider of outdoor or recreation activities has no duty to protect participants from the inherent risks of those activities, and has no legal responsibility for harm to a participant that results from those risks.^a An admitted gray area is defining the line between inherent risks and negligence. However, in some jurisdictions, courts have ruled that—in the instructor/student context—the inherent risks of the activities *include* instructor carelessness, stretching the inherent risk doctrine beyond its original limits (this extension has also been applied as between co-participants in sport or recreation activities). Another common defense is that the participant signed a document assuming the risks of the activity, and/or agreeing to release the program from liability for its

negligence. These types of documents, if upheld, can justify dismissal of a claim; in essence, the participant has agreed to relieve the program of liability for harm to the participant resulting from the program's negligence.

A fuller discussion of the law goes beyond the scope of this article. However, understand that the laws vary from jurisdiction to jurisdiction, and a program's own unique operation can have a bearing on how it hires its staff and structures its programs. Work with your legal counsel to understand how these laws and doctrines apply in your jurisdiction. In addition, understand that a variety of industry standards (i.e. ACA, AEE) address staff and staffing issues in a variety of areas, and should be taken into consideration as well—whether or not a program is accredited. Standards in the industry are an important “measuring stick” that courts and juries look to (and experts refer to) in determining whether a duty was owed, and whether that duty was breached in any given case (see discussion below).

VII. Areas of Concern

Areas of concern regarding liabilities created by staff inevitably focus on the prospect of injuries to participants. Issues include the screening, hiring, training, and supervision of staff (including volunteers); disclosure to participants and families regarding staff and their competencies; and responsibilities of the program for (and to) staff during off-duty times.

In addition, the program must deal with independent contractors in such a way that their status does not change to one of employment and a resulting enlargement of exposure to the program to claims arising from their conduct.

The priority, and the solution to these issues of a program's liability, is of course the maintenance of a quality program—one that is fair to the participants and their families, reasonably manages the risks of the program environment and activities, and reasonably meets



the expectations of the program community as a whole. Such a program will minimize serious incidents and create relationships that will facilitate an efficient and mutually acceptable resolution of problems—even serious injuries.

VIII. Hiring

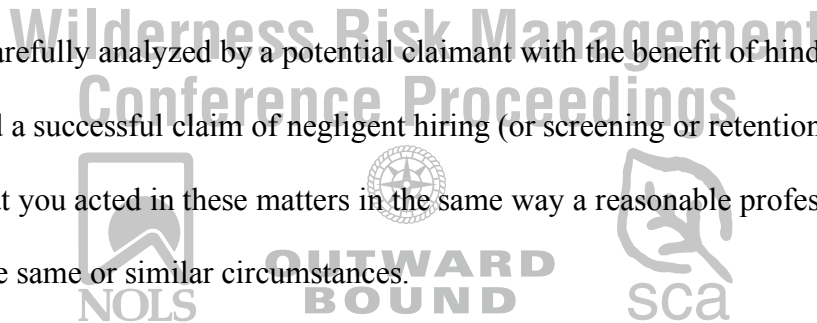
A quality program will conduct personal interviews and background checks on its personnel and collect references. Background checks regarding younger staff members will be limited, if they are available at all, and references and personal interviews therefore take on added importance. Be prepared to defend against any deviation from applicable standards, and understand and comply with applicable laws. In addition, the information sought by your background checks, interviews and references, and what you do with the information that you gather will be carefully analyzed by a potential claimant with the benefit of hindsight.

To avoid a successful claim of negligent hiring (or screening or retention), you must be able to show that you acted in these matters in the same way a reasonable professional would have acted in the same or similar circumstances.

IX. Staff Competency

Your administration must understand and communicate the responsibilities of the staff member, which include not only competency in certain activity areas, but a demonstrated ability to deal with these energetic and creative young people. Participants today arrive with expectations, and behavior and medical issues (as well as homesickness and medications) that present special challenges to staff, not encountered even ten years ago. It is your responsibility to understand these special challenges and hire accordingly. Your background checks must recognize that staff will have direct and close relationships with vulnerable young people.

(ADA and state law employment issues are not within the scope of this article, but



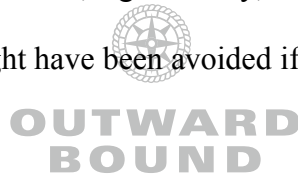
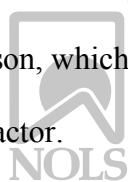
certainly merit your consideration. Consult with competent employment counsel.)

X. Independent Contractors

You will be charged with a similar duty of reasonable care in your selection of independent contractors: Did you act reasonably in hiring a transportation company (or an independent driver) to carry your participants to an off-campus activity? What was the nature of your investigation or inquiries? Did you ask for references? Do you have any reason to believe that this person, or organization was not capable of handling the tasks assigned? Has your contractor conducted background checks of its staff?

Failure to scrupulously maintain “independent contractor” status—by refraining from directing the manner in which he or she does the job, for example—can have serious consequences. These include: fines and penalties and the payment of taxes that otherwise should have been withheld from an employee and, significantly, vicarious liability for the acts or omissions of that person, which might have been avoided if the person had in fact been treated as an independent contractor.

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XI. Training and Supervision

Training must be provided regarding equipment, activities, and supervision of participants. Staff members must be familiar with the inherent and other risks of the experience—the activities, the environment, and the special issues presented by the participants themselves.

The program administration, in determining and developing competencies, must address a variety of new activities (challenge courses, for example); new “toys” (including at the waterfront); and new environments (wilderness outings, and inner city or other urban projects or visits). In addition, staff members must be familiar with and adhere to policies of the program,

and, importantly, standards and accepted operating procedures within the industry. If an injury occurs, a competent lawyer for the injured person will look for a violation of the program's own practices, policies and procedures, and to industry standards. The act or omission of the staff person will be measured against what was or should have been the intent of the particular program administration. Staff should receive training regarding unique issues involving today's participants and be aware of prominent issues of the time—including eating disorders, attention deficits, and sexual misconduct. Training must include the identification of these and other important issues and an understanding of corrective or adaptive measures accepted by the program.

Training and supervision of independent contractors should focus on adherence to program policies and outcomes, and not otherwise on the methods of the contractor in performing his tasks.

Staff members should receive periodic reviews of their performance and relations with participants, by peers and supervisors.

XII. Employment and Other Contracts

The program's relationship with its staff members should be governed principally by a written agreement of employment. The elements of such an agreement would include at least the following:

- a. The duration of employment, including the start and stop dates;
- b. Compensation;
- c. Duties and expectations, including specific activities, and responsibilities for “non-program” circumstances, general responsibility for participants; drug, alcohol, “exclusive relationships,” and other prohibitions; acknowledgment of

program policies and standards;

d. Off-duty issues, including a disclaimer by the program of any responsibility for injuries suffered by the staff person during such time; (and perhaps a release signed by the program staff member, of claims arising from off-duty activities);

e. Available insurance (including workers' compensation insurance), and its coverage limitations;

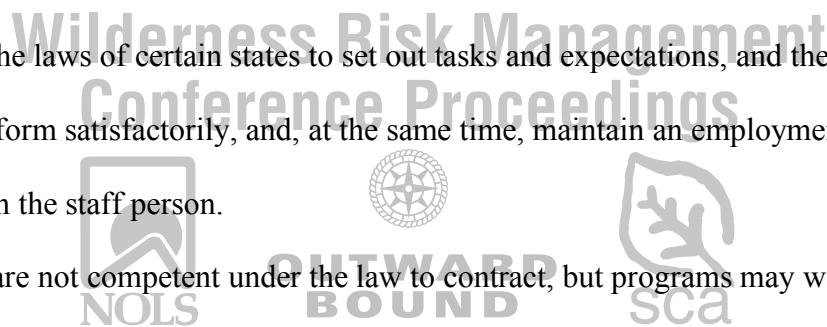
f. Causes and procedures for termination.

Programs should consult with legal counsel regarding the laws of their particular jurisdictions that might allow "employment at will"—that is, an employment relationship that may be terminated at any time, for any reason, without legal consequences. Programs will find it difficult under the laws of certain states to set out tasks and expectations, and the consequences of failing to perform satisfactorily, and, at the same time, maintain an employment at will relationship with the staff person.

Minors are not competent under the law to contract, but programs may wish to have the minor intern or counselor-in-training sign a document setting out the terms of employment and other elements of an employment "contract." Seek the assistance of legal counsel on how you might commit a minor to an understanding of, and compliance with, these matters.

A program may choose to have a single form of contract for a variety of employee functions—field staff, office staff, maintenance personnel, etc. Program policies and general expectations will not vary, though the description of duties, compensation, and certain other terms will.

Independent contractors also require written agreements to define specific areas of responsibility. These can include: an express acknowledgment of the independent contractor



relationship; the contractor's agreement to release the program, for injuries or other losses suffered by the contractor; the contractor's agreement to indemnify (agree to protect) the program, in the event the program is named in litigation resulting from the contractor's activities or otherwise; and the contractor's agreement to obtain liability insurance sufficient to cover claims, and to add the program as an additional insured.

XIII. Insurance

The program should be familiar with its own insurance policies, including protection from claims of participants and third parties. Particularly important will be an understanding of who is covered by such insurance (contractors? volunteers?) and what claims might be excluded (sexual misconduct, for example, is not included in all such policies).

XIV. Participant Agreement

Programs will (or should) have a participant agreement in which participants and their families acknowledge and assume the risks of the activities of the program session; release (to the extent the law allows) the program from claims arising from those activities; and, indemnify the program from claims arising out of the participant's experience.

XV. Marketing

The careful program administration will be cautious in its representations of staff competencies, avoiding the use of extravagant promises of experience or abilities. If expertise in a certain undertaking is limited, either avoid that activity, or be very clear in describing staffing issues to your program families.

If independent contractors are used, the administration should make it clear that independent contractors will be used for identified activities and that, while care has been taken in their selection, the program is not responsible for what those independent contractors do. A

family that has reason to believe that the contractor is an employee, or acting in some agency relationship, may attempt to hold the program responsible for that contractor's misconduct.

XVI. Conclusion

As we said at the outset, a program's staff is its interface with the program family. The policies, standards, and codes of conduct, and the beautiful surroundings and modern gear are of no consequence if staff members do not deal professionally with the individuals entrusted to them. Participants and their families have a right to expect careful selection, training, and supervision of staff. A program's failure to address these important issues can have serious consequences for the program. Give careful thought to these staffing issues in your efforts to run a quality program operation.

**This article contains general information only and is not intended to provide specific legal advice. Programs should consult with a licensed attorney regarding application of relevant state and federal law as well as considerations regarding their specific business or operation.*

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Charles R. "Reb" Gregg is a practicing attorney in Houston, Texas, specializing in outdoor recreation matters and general litigation. He is an active speaker and author in the field of managing risks of legal liability in education and recreation programs. He has served as legal counsel to The National Outdoor Leadership School since the late 1970's and serves as legal counsel to numerous other education, recreation, and study abroad programs. Gregg is a member of the Wilderness Risk Managers' Committee, and the Accreditation Council of AEE. He is President of Friends of Big Bend National Park. He can be reached at 713-982-8415 or e-mail rgregg@gregglaw.net; www.rebgregg.com.

Catherine Hansen-Stamp is a practicing attorney in Golden, Colorado. She consults with and advises recreation and adventure program providers, recreational product manufacturers, and related organizations on legal liability and risk management issues. She speaks and writes on these issues, both regionally and nationally. She has co-chaired (with Reb Gregg) the first three CLE International conferences on Recreation & Adventure Law & Liability held in Vail and Denver, Colorado, in 2003, 2004 and 2005. She serves on the Continental Divide Trail Alliance and High Mountain Institute boards of directors and is a member of the Wyoming, Colorado, and American Bar Associations. She can be reached at 303-232-7049, or e-mail reclaw@hansenstampattorney.com; www.hansenstampattorney.com.

^a Many states have enacted statutes defining the inherent risk doctrine as it applies to one or more recreational activities (e.g. many states have a 'Ski Act,' an 'Equine Act' or a 'Baseball Act.' Other states, like Wyoming, have

a statute applying the inherent risk ‘no duty’ rule to a broad variety of recreational activities. It is important to understand these laws in your jurisdiction, and what impact they may have on your operation. For example, some laws require that providers include a written warning in any contracts entered into with participants. Other laws may restrict or affect the program in other ways. Check with your legal counsel.

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