

Managing the Other Risk

By Charles R. Gregg and Catherine Hansen-Stamp

The risk management program of a provider of goods or services to the outdoor adventure industry focuses on protecting the client from harm. An often overlooked element of a thoughtful risk management plan is the protection of the provider of that service or product - you.

The best protection from a claim of a consumer is a quality program. In the service industry, this includes establishing and maintaining a good relationship with the client and thoughtful attention to issues that arise after an incident which produces the claim. Appropriate screening and supervision, exchange of information, staffing, gear, logistical support, careful record keeping and emergency protocols all combine to create a program that will minimize the severity and frequency of accidents. Good customer relationships are equally important for the manufacturer of goods and, of course, careful attention must be paid to design, manufacturing, marketing and distribution.

But accidents will happen, in spite of your best intentions and sound policies and practices. This article discusses how you can best prepare yourself, and your organization, for dealing with claims of customers who may have suffered some loss because of your action or inaction.

Choice of Entity

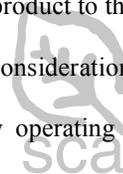
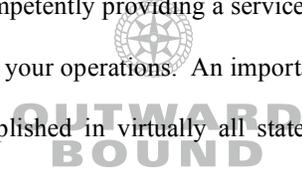
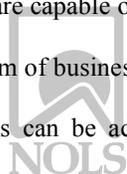
Having decided that you are capable of competently providing a service or product to the market, you should move quickly to a decision about an appropriate form of business for your operations. An important consideration for many is the shielding of personal assets from possible claims. This can be accomplished in virtually all states by operating as a legal entity, distinct from you, personally, which will be liable to the extent of the assets of that entity. The formation of a corporation or a limited liability company will be an option available to you. The benefits and burdens of doing business as such an entity must be explored with legal counsel familiar with these matters, and an accountant with the appropriate expertise.

Entities are regulated, to some extent, by state law, and you can expect requirements regarding fees and taxes, record keeping, reports and other procedures, to maintain the separation between that entity and your personal affairs and properties. Accountants and lawyers will guide you through the intricacies of employment, tax, contracting and other issues. The landowner who wishes to build and operate a camp or challenge course may, for example, choose to put the land into an entity separate and distinct from the entity which operates the facility, thereby increasing the chances that the land itself - often the primary asset - might be protected from a claim arising out of the operations conducted on the site.

Use of Professionals

Another early and very important decision to be made by the entrepreneur is the identification of professionals to assist in the

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operation. Such professionals include experts in insurance, law, accounting, and, in some circumstances, medical, engineering and public relations. Establishing early relationships with persons in these and other fields will serve you well, particularly in the event of a crisis which requires some background knowledge of your operation.

Your lawyer will help you with the formation of your business, including contracts, permits and licenses and other relationships which may have legal ramifications. The accountant, too, will assist in the early stages of your development and will be available for consultation regarding tax and other matters. A reliable insurance agent to effectively interpret the mysteries of the insurance industry will help you choose insurance which is appropriate for your business. If medical screening and the prospect of delivery of medical care might be a part of your operation, a physician who understands your program and your clientele will be an important asset to you. Public relations expertise is invaluable if you must respond to media inquiries, or craft a press release, regarding an incident which may reflect on your organization.

Shifting or Allocating Liability through Written Agreements

A major component of your protection plan will be the development of strategies, and documents, which avoid or allocate liability for claims which may arise.

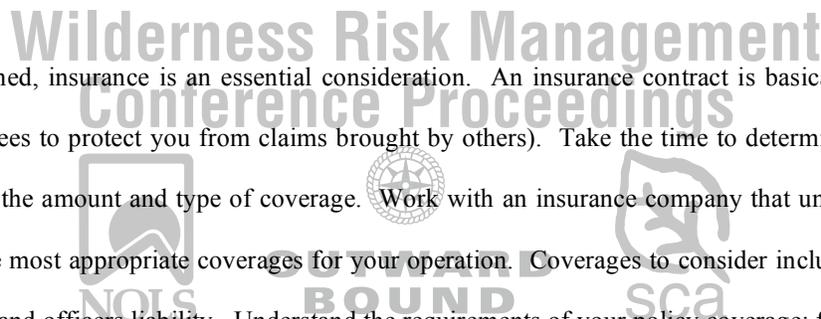
1. Insurance

As already mentioned, insurance is an essential consideration. An insurance contract is basically an indemnity agreement (the insurance company agrees to protect you from claims brought by others). Take the time to determine appropriate insurance for your organization – both in the amount and type of coverage. Work with an insurance company that understands your industry, and can assist you in finding the most appropriate coverages for your operation. Coverages to consider include general liability, workers compensation and directors and officers liability. Understand the requirements of your policy coverage; for example, when and if you must give your insurance company notice of a claim; or, whether your insurance company requires you to use a written agreement with your clients. Understand your insurance policy agreement. If you have questions about coverage, work with your legal and insurance counsel to understand the coverage. Ask your insurance representative for written confirmation of coverage questions.

2. Participant Agreements – Release, Indemnity, Assumption of Risks

In the service industry, releases, indemnities and the assumption of risks are often set out in an agreement between you and the client - referred to collectively here, as a “Participant Agreement”. This may be the most important document in your file cabinet, so be sure you are counseled well regarding its contents and effectiveness.

As discussed in our recent Law Review articles, ‘Is it Really Worth the Paper Its Written On?’, (Releases & Related Documents, Parts I and II, contained in the Fall and Winter 2003 issues) this document, should, among other things, describe the activities and risks of the offered service, contain an acknowledgment and assumption of these risks, and, if appropriate (considering



issues of state or federal law), contain an agreement of release and indemnity. These, agreements, if well crafted by a knowledgeable attorney, may discourage claims and ultimately avoid liability for such claims. State laws vary, of course, and you will find that protection of claims of minors is a particular challenge. Do not expect to be released from liability for gross negligence or intentional misconduct.

Some form of agreement (e.g. release and/or assumption of risks) may also be used by those in the business of manufacturing, distributing or otherwise selling or renting recreational products (e.g., ski rental equipment). Warranties, instructions and warnings and disclaimers associated with products are also important elements of protection for those who manufacture, distribute, sell and rent such items. Varying state, and applicable federal law impact the drafting and ultimate enforceability of these documents, and requires work with experienced legal counsel.

Staffing considerations

If you choose to use employees or independent contractors to staff your activities and programs, or some combination of both, important considerations come into play.

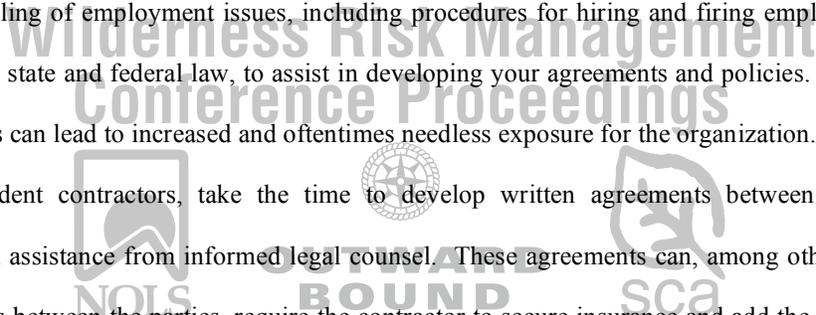
Regarding employees, consider the value of employment agreements, employee handbooks, workers' compensation coverage and fair and consistent handling of employment issues, including procedures for hiring and firing employees. Work with informed legal counsel, versed in both state and federal law, to assist in developing your agreements and policies. Failure to thoughtfully draft these documents and policies can lead to increased and oftentimes needless exposure for the organization.

Regarding independent contractors, take the time to develop written agreements between your organization and the independent contractor, with assistance from informed legal counsel. These agreements can, among other things, define the relative responsibilities and liabilities between the parties, require the contractor to secure insurance and add the organization as an additional insured, and include an agreement of indemnity, whereby the contractor agrees to indemnify the organization in the event of a subsequent claim or lawsuit.

Work with your legal counsel to understand the critical differences between employees and independent contractors, and how to preserve and protect those different relationships. See our Law Review article 'Staffing Issues in Adventure/Outdoor Programming' (Summer 2001 issue) discussing these general concepts in more detail.

Internal Policies and Procedures, including Emergency Response and Risk Management Plans

Think carefully about your internal policies and procedures both written and unwritten. These policies and procedures can be vital to assist you in protecting your organization in the event of a claim or lawsuit. Importantly, an emergency response or 'crisis' response plan is vital to minimizing loss or injury to your participants in the event of an incident on your program. In addition, the effective development, use and implementation of a well thought out crisis response plan can assist the organization in defending



claims emanating from the incident. The same can be said for an effectively drafted and regularly reviewed risk management plan. Policies, procedures, guidelines and manuals, providing direction for staff and focus for activities or other matters are important as well.

However, organizations must carefully and thoughtfully develop these policies, understanding some important ramifications. If a lawsuit is ever filed, attorneys for the plaintiff (complaining party) can seek, through the 'discovery' process, to review an organization's written documents. Those documents can be reviewed by legal counsel, unless there is sufficient reason to prevent disclosure (for example, the documents are protected by a privilege). If the organization's internal policies have not been followed, or been ignored, in the particular case, it can lead to serious problems in litigation, greatly increasing potential exposure for the organization. Regularly review these policies and how they are crafted, and work with your legal counsel to consider these important ramifications.

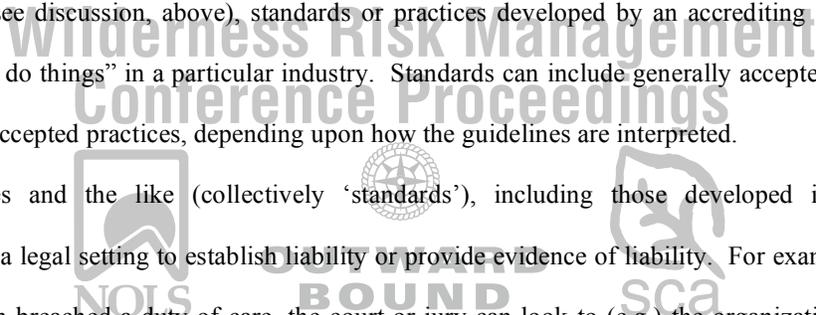
Standards & Practices in the Industry

Terms like 'standards', 'guidelines' and 'policies' are used loosely in the outdoor industry, and are important to clarify here. 'Standards' can include those established by law (such as state or federal statutes), internal standards developed by an organization to apply to its programming (see discussion, above), standards or practices developed by an accrediting or certifying organization or simply the accepted "way to do things" in a particular industry. Standards can include generally accepted practices. 'Guidelines' can be just that; or, can include accepted practices, depending upon how the guidelines are interpreted.

Standards, practices and the like (collectively 'standards'), including those developed internally developed by an organization, can be used in a legal setting to establish liability or provide evidence of liability. For example, in determining whether an individual or organization breached a duty of care, the court or jury can look to (e.g.) the organization's own internal standards. They may look to large programs to cite examples of reasonable conduct, or look to other evidence of standards (e.g. accreditation standards or practices). This is generally done through the use of expert testimony.

Standards can be rigid and exact, or general and flexible. If developing internal standards or policies, understand that whether you term it a standard, practice, guideline or something else, in the event of litigation, it will probably be interpreted in a way consistent with the context in which it is used. For example, if it is called a guideline, but people are told that it must be followed, it may be viewed as a mandatory requirement. As a result, give careful thought to the wording and structure of any standards or polices that your organization puts in writing.

Take the time to understand the standards or practices (including laws, see below) that may potentially apply to your industry niche. If you don't follow certain standards or practices, be prepared to explain why you don't, in the event you are confronted with those standards or practices in litigation. Consider the potential value in seeking accreditation or certification with the services you



provide and/or products you sell. Is such accreditation or certification required or voluntary? Will it provide you with an opportunity to examine important risk management issues for your organization, or a 'road map' for addressing important issues? Again, if you do choose to seek accreditation or certification, be prepared to honor the practices or standards you have agreed to follow, for the reasons discussed above.

Consider carefully what may be viewed as a standard in your industry. Courts have sometimes found an entire industry negligent in the conduct of a standard or practice. Therefore, the way "everybody is doing it" may not always be the best way. In other words, consider the bandwagon before jumping aboard. If you don't agree with voluntary standards or practices developing in your industry, get involved and assist in changing those standards or practices.

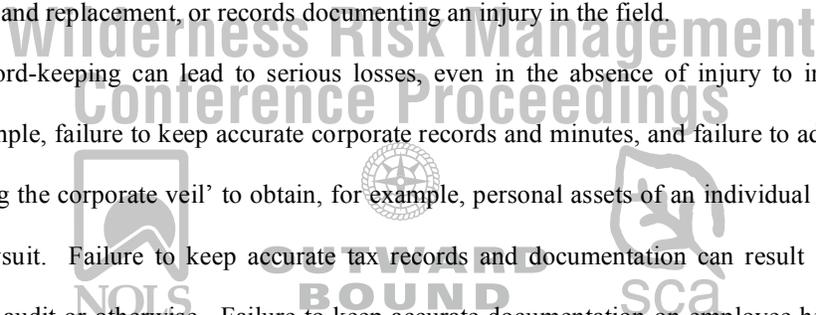
Documentation and Records

Documentation and record keeping is vital to protecting your organization from loss. Again, if someone claims they were hurt while participating in an organization's program or activity or as a result of using a manufacturer's product, the individual's loss or injury can ultimately result in loss to the organization. In this event, a service provider or product sellers' liability exposure can be greatly increased if they have failed to keep accurate records. In the case of service providers, for example, records reflecting equipment use, maintenance and replacement, or records documenting an injury in the field.

Weaknesses in record-keeping can lead to serious losses, even in the absence of injury to individuals partaking of your service or product. For example, failure to keep accurate corporate records and minutes, and failure to adhere to corporate formalities can result in a court 'piercing the corporate veil' to obtain, for example, personal assets of an individual associated with the entity, in the event of a claim or lawsuit. Failure to keep accurate tax records and documentation can result in increased tax liability (or penalties) in the event of an audit or otherwise. Failure to keep accurate documentation on employee hiring, firing or other disputes can result in lengthy litigation and potential loss to the organization. Failure to apply for applicable patents, and keep valuable records of these official documents can result in the loss of important protection to your company's unique material.

Understanding and Adhering to Applicable Laws

It is critical that the organization understand the laws, both state and federal, that apply to its operation. Laws that apply to those providing a recreation or adventure service are different, to some degree, from those that apply to manufacturers and other 'sellers' of recreational products. Take the time to wisely use your professional advisors (legal, accounting, tax, medical) to understand how to understand and comply with these laws. For example, tax laws, the Americans with Disabilities Act and state disability laws, OSHA and HIPAA are some important laws. For product sellers consider, among others, state products liability laws and consumer protection acts (including the Federal Consumer Product Safety Act). For those who may use volunteers in their operation and/or who may operate as a non-profit corporation, federal and state immunity laws and doctrines provide important



protections that are valuable for you to understand. Those who may operate as a state or federal entity are entitled to limited governmental immunities defined by case law and statutes.

Involvement or Membership in Industry Trade Groups or Associations

Take the time to understand and get involved in your local, regional and/or national trade groups or associations. Many times, these groups are involved in a variety of local and national issues that can address your concerns or serve your interests. In addition, these organizations can assist you in understanding applicable laws or industry issues, and helping you obtain a broader awareness of issues that affect your service or product. These organizations can also provide you an opportunity to get involved in the industry, and to influence and implement changes in industry laws, standards and practices, where you may feel appropriate.

Conclusion

Consider the above discussion a starting point or vehicle for you to identify where you are in considering valuable and practical ways to protect your organization from loss. You have worked hard to create an organization that delivers valuable and unique services and/or products. Take the time to see that you are caring for and nurturing that organization, and work with informed professionals, including legal counsel, to assist you in monitoring these issues. Remember that attention to these details is not a “now it’s done” proposition, nor can it be accomplished in a vacuum. Ongoing monitoring, attention to the industry, and adjustment of policies, documents or activities to changing laws and practices is vital to the continued strength of your organization.

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This article contains general information only and is not intended to provide specific legal advice. Adventure and recreation providers should consult with a licensed attorney, experienced in these issues, regarding application of state and federal laws and matters specific to their business or operation.

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