Managing Legal Issues After a Serious Incident: What Do You Do? What Do You Say?

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What we will cover

- Investigation process
  - Collecting evidence
  - Taking witness statements
- Managing communications
- Litigation issues
  - What the other side can find out
  - Your internal investigation and report
- Other legal issues
  - Land managers
  - State agencies
  - Criminal charges
- How to work with the injured and their families
What to take to site

- Pen and paper to write out witness statements (and statement logs)
- Camera/video camera
- Form to track statements
- Form to track collection of evidence
Collecting evidence

- Collect physical evidence
  - Tag or put identifying mark on item
- Create detailed inventory
- Document condition at the time
  - Take photographs
  - Describe conditions, especially those not captured by photos
- Preserve evidence in same or substantially same condition
- Store in secure location with limited access
EVIDENCE LOG

Evidence should be preserved in the same condition as it was at the time of the incident as much as possible. Any items collected should be kept in a location where access can be controlled and limited.

Evidence collected (describe item and its contents):

MSR Pocket Rocket Steve's MSR fuel bottles

Collected by: Matt Greene

Date collected: 10/15/09

Original location of evidence (where collected from):

Camp site at Willow Rock

Describe any characteristics (i.e. weight, hot/cold, wet, pertinent smells, sounds, etc.)

Fuel bottle was half full. Stove was hot—had just been used for cooking dinner.

Where evidence is to be kept:

Sherry Wincher’s office

Who has access to the evidence:

only Sherry

Attach any relevant photos, inventories, etc.

Transfer Log

The above evidence was transferred

from: __________________________________________
to: __________________________________________
on (date): ______________________________________

Where evidence is to be kept: __________________________________________

Who has access to the evidence in this location: __________________________

Witness Statements

- Need statements from:
  - Students/participants
  - Staff
  - Witnesses, etc.

- Process and format:
  - Two systems:
    - Taken by interview
    - Written in witness’s own handwriting
  - Document signed by person saying it is a true, accurate, and complete reflection of their statement

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STATEMENT LOG

The purpose of a statement is to document factual information. Witnesses should be asked to describe what they saw and heard. Avoid statements analyzing the incident or speculating about causes.

Statement given by: Jasmine Johnson

Date statement given: 10/14/09

Location where statement taken: In field at Willow Rock Canyon

Staff member collecting statement/conducting interview: Jason Beckworth

Attach copies of the statement and any revisions made to the statement by the interviewee to this form.

Handwritten statement attached —

* If a witness is interviewed, a written statement should be created. The person interviewed should then review the statement and make any changes, corrections, or additions to the statement to ensure that it is accurate and complete. The proposed revisions should be kept but a new statement that includes the revisions should be created, if possible. The following sentence should then be added at the end of the statement.

“This statement is a true, accurate, and complete representation of the information I provided.”

The interviewee should then sign and date the statement below that sentence.
Collect pertinent documents

- SOAP notes
- Enrollment documents
- Medical forms
- Course description
- Other information provided to participant
- Incident report form
- Liability release form
Who is involved in an incident?

- Injured party
- Family of injured party
- Organization (instructors, staff, Board, etc.)
- Rescue personnel/medical personnel
- Law enforcement
- Land Managers
- Media
- Insurance Company
- State Agencies
- Other students (in that group and other groups)
Form to track communications:

- Who communicated
- What
- To whom
- When
- How (written, by phone, in person, etc.)
- Any promised follow up
- Attach any materials provided (incident report, description of incident, statements, etc.)
COMMUNICATIONS LOG

This form is intended to track communications with participants, a participant's family, law enforcement, land managers, the media, state agencies, insurance companies, etc. Attach copies of any written materials, correspondence, emails, or other documents given to any party.

Incident: 10/9/09 [Redacted] Westminster Brokeback Mtn
(Injured party, date, location)

Date of contact: 10/10/09 10:20 a.m.

Staff member communicating with outside party: Mary Abernathy

Method of communications: (circle one)
- Phone call
- Letter
- Email
- In person discussion

If conversation, how long did conversation last? 10 min

Person talked to and affiliation:
Name: Joe Reporter

Affiliation: (circle one)
- Injured party
- Other Participant
- Family member of participant
- Family member of another participant
  o Name of other participant:
  o Relationship to participant (mother, brother, etc.):
- Law Enforcement
  o Name of Agency: _______
- Land Manager
  o Name of Agency: _______
- State agency
  o Name of Agency: _______
- Insurance representative
  o Company Name: _______
  o Name of newspaper, magazine, etc.: Times Herald

Documents given (incident report, description of incident, statements, etc.):

Substance of communications (describe the communications including any pertinent comments by the person, any representations or promises by the staff member, etc.)

- Wants details about incident
- Wants to interview [Redacted]
- 4:00 pm deadline

Follow up to be completed: Told me we'd call him back...
(919) 555-0104
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(Injured party, date, location)

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Person talked to and affiliation:
Name: Joe Reporter
Affiliation: (circle one)
- Injured party
- Other Participant
- Family member of participant
- Family member of another participant
  - Name of other participant: __________________________
  - Relationship to participant (mother, brother, etc.): ____________
- Law Enforcement
  - Name of Agency: _______________________
- Land Manager
  - Name of Agency: ____________________________
- State agency
  - Name of Agency: ____________________________
- Insurance representative
  - Company Name: ____________________________
- Media
  - Name of newspaper, magazine, etc.: Times Herald

Documents given (incident report, description of incident, statements, etc.):

Substance of communication (describe the communications including any pertinent comments by the person, any representations or promises by the staff member, etc.)

- Wants details about incident
- Wants to interview instructor
- 4:00 pm deadline

Follow up to be completed: Told we will call him back — (919) 555-0100
“I really don’t think we are going to have a problem with the family. We are getting along great. The mother has been very appreciative of all we have done for her son.”
Litigation Issues

- False sense of security
- Extended statute of limitations period for minors
- Litigious society
- Don’t assume that because you haven’t done anything wrong that you won’t get sued
“We blew it...”
Discovery

- Must produce documents including email, reports, notes, etc.
- Potential protection by attorney-client privilege
- Potential protection by work product doctrine (limited)
Internal Investigation

- Likely discoverable
- Mea culpa mindset
- Give context, explain what report doing/not doing
- Get attorney involved before an incident to discuss your process
General advice

Assume whatever you say and whatever you write, will be heard or read by someone suing you.
Land Managers

- Review permit, concessionaire’s agreements, etc. for reporting requirements after an incident
- Information may be available to public under FOIA
- Information may be used by land manager against you
State Agencies

- Violation of regulations could be negligence per se
- Incident could result in:
  - Penalties from State Agency
  - Loss of license
  - Being required to be licensed
  - New regulations
Criminal investigation

- Charges could be against:
  - Organization
  - Individuals

- Hire counsel
  - Evaluate potential conflicts of interest

- Consider implications of negligence per se
Communications with the family

- The impact of “I’m sorry”
- Provide logistical and financial support
- Give facts/description of what happened
- Take to site?
- Inform doing an investigation
- Follow up with additional information when you have it
Take Home Action Steps

- Create forms to help you track (evidence, statement, communications)
- Identify person in organization responsible for collecting, documenting, and preserving evidence, documenting statements, and collecting pertinent documents (medical form, liability release form, etc.).
- Educate staff about the discoverability of internal communications and the need to be thoughtful about what they say about an incident.
- Confer with an attorney about your incident report process and potential protections.