

Post Accident Conduct — Hunker Down or Cooperate? Legal and Ethical Issues for Outdoor Programs

By Catherine Hansen-Stamp and Charles “Reb” Gregg

Originally published in the *Outdoor Education & Recreation Law Quarterly*, 2(3), Fall 2002. Reprinted with permission of the authors and publisher, The Outdoor Network (800-688-6387).

I. Introduction

Suppose an accident occurs on your program. Pick a scenario — emotional trauma, serious or disabling injuries, or death. The medical response was quick and the immediate situation is stabilized. What do you do next? Contact the media? Set up an external investigation? Just sit down and shut up? Does it matter what you do? As a matter of fact, yes— it does matter what you do. A program’s conduct after an accident may be far more significant in the ultimate resolution of a claim than the actual events leading up to the accident. This article outlines legal tools available to allow organizations to block interested parties’ access to information, and prudent use of those tools. However, we make the case here that following an accident, a cooperative and more open approach with interested parties (and their attorneys) can, in many cases, result in a much more positive resolution of an incident, regardless of whether a lawsuit is filed.

If you have a serious accident or a death, your immediate concern is to effectively handle the crisis — and activate your emergency response plan. Some of your concerns will include:

- * Administering medical care to the victim and providing care and comfort to the remaining instructors and students.
- * Going forward with any required evacuation and notifying your home base.
- * Dealing with the instructors and other course participants — does the trip continue or abort?
- * Preserving the accident scene and determining how and when to contact the next of kin.
- * De-briefing the instructors and students.
- * Employing counselors and conducting critical incident stress de-briefing.
- * Considering whether to contact the media or implement your media response plan.
- * Investigating the accident and considering whether to conduct an internal and/or external review.
- * Working with professionals following the accident — *e.g.*, your lawyer and insurance company representatives.

A program’s post-accident philosophy and procedures should already be well in place before an accident occurs. These procedures, policies and philosophies will govern the above, as well as relations with affected persons (including the victim of the accident and family members), the media and various professionals, the

collection and sharing of data, and the ultimate resolution of any dispute.

Will a lawsuit be filed? Hopefully, it won’t. However, in many cases, you may not know for certain — at least for awhile. Jurisdictions vary, but generally, an injured party or their family will have a period of time (statute of limitations period) within which they can file a lawsuit. If the victim is a minor (generally, 18 yrs. of age or under) this time period can be even longer. Therefore, in many cases, you must accept the fact that you may not be completely certain about litigation for a substantial length of time. If suit is filed, the rules of ‘discovery’ or, exchange of relevant information are very broad — parties are generally entitled to obtain information, not privileged, that is ‘relevant’ to the claim or defense of any party to the action. This can include the existence, identity and location of books, documents, records, or individuals. The opposing attorney attempting to gain access to information through this discovery process will likely request written information (*e.g.*, formal questions (interrogatories) requesting information, and requests to review documents) as well as sworn testimony (depositions) from your staff, witnesses, experts and other relevant individuals.

So, how do you handle post-accident issues, whether or not you know if suit will be filed? Do you attempt to keep the information protected by some kind of ‘privilege’ so that ultimately you can claim that no one can have it? If the injured party asks for information about the accident, do you provide it? Do you conduct an internal or external review of the incident; and if requested, do you turn those results over to the injured party’s family? Do you turn those results over as a matter of courtesy — even without a request? In the event of a death, do you take calls from the deceased student’s family, or attend the funeral? Do you express compassion towards the deceased person’s family? Do you develop internal organization reports on the incident, in an effort to analyze the data? Do you keep all such reports and data or do you periodically refine or edit it to reduce the volume? Would your response (to the incident) be different if you knew for sure that suit would (or wouldn’t) be filed?

The law does provide some protections to restrict access to information. These principles include the attorney/client privilege, the ‘work product’ privilege and other limited privileges. Our purpose here is to discuss legal tools currently available to protect information from discovery (if that is your goal). We will then discuss the possible benefits of cooperating to provide information (and intelligent use of these privileges), versus using these privileges or other means to block access to information, ultimately refusing to cooperate.

II. Cooperation or Silence?

In our litigious society, the argument can be made that, following an accident, cooperating and providing information facilitates early, less adversarial, less expensive and more effective resolution — whether or not suit has already been filed. Bottom line, what victims or grieving families usually want most is to make some sense of what occurred. That is, gain relevant information and a sense that others involved share in their loss. If they don't get this, they may feel anger and frustration, and be more likely to file suit, seeking maximum damages from the people they consider responsible. Well-informed victims and/or their families with access to accurate information (dealing with a program which projects genuine compassion), are more likely to reach closure and move on with their lives, possibly resolving the dispute without formal litigation, or through some form of alternative dispute resolution (like mediation or arbitration). This approach may not be appropriate in all cases. Importantly, any approach you take should be discussed with both your attorney and insurance company and managed with their assistance and agreement.

Examine the situation — consider the value of openness and cooperation. Think carefully before employing an approach that reflects a desire to 'batten down the hatches' — an approach which will inevitably give the impression that you do not expect to cooperate and that the family will have to fight for everything it gets. This approach can ratchet up the level of frustration and anger, and ultimately, the recovery demanded. Too many cases reflect the unfavorable results of organizations and their attorneys 'clamping down' and refusing to cooperate. Angry, grieving and uninformed family members assume the worst and feel they have no recourse left, but to file a lawsuit; or in the context of a lawsuit, push for more damages because of the avoidance tactics taken on by the defense attorneys, investigators, and others in the organization. Furthermore, note that if there are 'bad' facts, both sides are likely to uncover those facts — and it is a rare 'bad fact' that isn't discovered — usually sooner than you might expect.

Despite the value of openness, some organizations may take a different view; or, it may be apparent that a particular case may not benefit from an open and cooperative approach. Perhaps the injured party has no desire to cooperate or negotiate outside the formal litigation process. In addition, from your program's perspective, there are many factors to consider in deciding how to approach the resolution of a conflict — actual fault, reputation, staff time and distractions, setting an unfavorable precedent, supporting the staff directly involved, consistency with the program's mission, even the availability of resources with which to meet the demands of the affected family. Your approach may then vary, from case to case. If you do find yourself in the unfortunate position of an extremely adversarial lawsuit, with no apparent prospect of amicable or reasonable settlement, what do you do? Make the best

deal you can, or take the case to trial with all guns blazing. Whether you fight or fold will depend on a number of factors (including those mentioned above).

III. Protecting Information from Disclosure

As mentioned, the law does provide certain protections that can assist in preventing disclosure of information. Laws vary from jurisdiction to jurisdiction and you should seek qualified legal counsel to understand the laws in your jurisdiction. The following is a brief description of certain legal 'privileges' and how they might be used to preserve the opportunity to protect information.

The 'attorney-client privilege'

Definition:

The attorney-client privilege protects communications between your organization and its representatives and your lawyer and his or her representatives. Neither the client nor the attorney is obligated to disclose communications between them that assist the attorney in his or her representation. There are some limitations (for example, a client can't protect otherwise discoverable documents by delivering them to an attorney for 'safe-keeping'), but, generally, the communications between the attorney and the client cannot be disclosed. The privilege belongs to the client, but can (generally) be asserted or waived by either the client or the attorney (see below).

Limitations:

A necessary element of the privilege is that the communication must be *intended and treated* as confidential. If the communication is not intended or treated as confidential, the privilege may never arise. In addition, after the privilege arises, it can be waived (either purposefully or inadvertently). For example (although there are some exceptions), if an attorney or client discloses the communication to a third party, or a third party is present during the attorney-client communication, the confidentiality may be lost and the privilege may no longer exist.

Although the privilege protects certain information from disclosure, it does not prevent the opponent from learning the same facts that the attorney has learned. For example, the opponent can obtain background facts and, in some unique situations, even obtain conclusions reached by the organization or its representatives. Again, only the actual communications between the attorney and the client are protected, not the underlying facts of the case.

Another example: a post-event course participant debriefing might not be sufficiently confidential or private to preserve communications between a client representative and the attorney, occurring in the context of that debrief. Course participants are not clients. In addition, an attorney's presence at the students' critical incident stress de-briefing ('CISD') session would probably not protect the communications between the

student and a counselor (under the attorney/client privilege). However, there may be some possibility of having all communications between the students and counselor (or staff) conveyed by the organization representative to the attorney, thus attempting to protect those communications under the attorney-client privilege.

'Work product' doctrine

Definition:

The work product doctrine (sometimes called a 'privilege') protects information gathered in reasonable anticipation of litigation (or for trial), by the attorney and attorney representatives, and often extends to include (as 'work product' or intra-party communications) post-event internal communications and investigations conducted or developed by the *client and its representatives*.

Limitations:

An opponent may sometimes obtain 'work product' information if they show a substantial need, and an inability to obtain the information elsewhere. However, this 'substantial need' exception normally does not extend to justify disclosure of an attorney's (or other party representative's) conclusions, opinions or deliberations in anticipation of litigation or for trial.

Again, in order for the work product doctrine to protect the information, the documents or other information or data must be developed when there is a reasonable anticipation of litigation. Unfortunately (as mentioned above) a client may not know whether litigation will occur. The rules of discovery do not generally protect documents prepared in the ordinary course of the business (before suit is filed). Therefore, if no litigation is pending or likely, and the organization has a practice or policy to investigate all accidents, the work product doctrine may not protect the information from discovery.

Materials prepared in anticipation of litigation and protected by the work product doctrine include, for example, the product of an investigation, the collection and sorting of relevant materials, memoranda of interviews, etc. Witness statements may be included, but can often be obtained by an adversary. The material collected, and related analyses and memoranda are covered by the protection. The data "out there" is not. The opponent can always go to various sources — including, for example, witnesses to the event — and learn the very facts that were collected by the attorney or the client.

Note:

Unlike the attorney-client privilege, the communication does not have to be made to the attorney, or necessarily involve the attorney, in order for the work product doctrine to protect the material. However, in many cases, it can be helpful for the attorney to be involved in the investigative process (and in the hiring of consultants or experts), potentially allowing the

assertion of both the attorney-client and work product privileges to attempt to protect disclosure of information.

Consulting and Testifying Experts

After a serious incident, programs often engage the services of recognized experts in the field to investigate the accident, render opinions and give recommendations. The program may choose to share such reports with the victim or family — and in fact may commit to do so beforehand. However, such reports may be protected by engaging an expert as a "consulting expert" either in anticipation of litigation or in preparation for trial — an expert who will not testify at trial and whose work will not be used by an expert who does testify. The work product doctrine would generally protect (from disclosure) the identity and opinions held by these consulting experts, whether or not the organization's attorney hired the expert. However, in some jurisdictions, having the organization's attorney involved in hiring and retaining experts can perhaps provide an additional layer of protection regarding the expert's report — in asserting both work product and attorney-client privilege. In addition, some jurisdictions are more likely to apply the work product doctrine to protect the information if the attorney is involved (for example, the attorney's involvement can buttress an argument that the materials were prepared in anticipation of litigation, and not in the ordinary course of business).

In the course of pre-trial discovery, parties are generally required to disclose testifying experts, and provide a copy of reports of such experts. Testifying experts may be required to furnish reports and to be available to testify (by deposition or otherwise). Through these means, the opponent can learn about the assumptions, if any, upon which the expert relies, and the expert's opinions on the issues. Again, generally, parties are not required to disclose the identity of consulting experts. Even if the adversary should stumble upon the *consulting* expert, the consulting expert usually cannot be required to reveal his opinions on the issues in the case. Once again, however, it is the consultant and his or her opinions which are protected — not the underlying facts.

Physician or psychotherapist-patient privilege

Definition:

Given the growing frequency in the field to provide critical incident stress debriefing (CISD) for persons affected by a serious incident, we should consider the availability of another privilege: that which covers communications between a psychiatrist, physician or a counselor (the degree of licensure or other credentials may vary from state to state) and his or her "patient".

Consider a CISD provided by a program for staff or students closely involved with a serious accident or death. Depending upon the credentials or licensure of that counselor, communications occurring during the

course of that session may be protected under a physician-patient privilege. An expectation of privacy or confidentiality is, again, an important element of this privilege.

Limitations:

Third parties who attend the sessions may destroy the privilege. In addition, like the attorney-client privilege, only the communications are protected. Therefore, the opponent may in fact — formally or informally — collect significant information from the individuals who participated in the session. The opponent may not be able to learn what was said in the CISD session, but could certainly attempt to gain information from the participants regarding the accident.

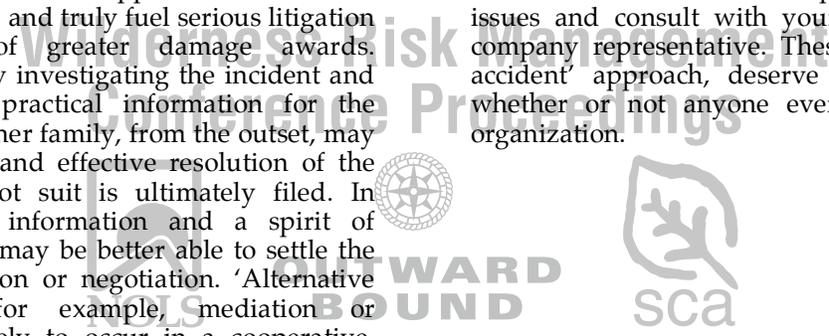
Considering the serious nature of litigation, the potential exposure to damages, and the availability of these various privileges and limitations, it can be tempting to 'bolt the door' and limit communication and exchange of information with the injured party, his or her family and opposing counsel. Note, however, how limited some of the privileges may be, and how much information an opponent can obtain, if they are determined to get it. Refusing to investigate the accident and provide information, and maximizing efforts to assert privileges and other limitations to an opponent's access to information can backfire, and truly fuel serious litigation and the likelihood of greater damage awards. Alternatively, adequately investigating the incident and providing useful and practical information for the injured party and his or her family, from the outset, may set the stage for quick and effective resolution of the incident, whether or not suit is ultimately filed. In addition, with shared information and a spirit of cooperation, the parties may be better able to settle the matter through discussion or negotiation. 'Alternative dispute resolution' (for example, mediation or arbitration) is more likely to occur in a cooperative, rather than in an antagonistic environment.

The organization can reap additional rewards from this type of approach — including preserving its reputation for fairness. Others observing the incident and ultimate resolution of the matter can view the organization as honest, professional and willing to seek the truth and learn from the incident. In addition, appropriate investigation of the incident, both internally, and potentially, through an external review, can allow the organization the opportunity to evaluate and learn from the incident — possibly avoiding future, similar problems, and increasing instructors' awareness on relevant issues.

IV. Conclusion

Give some serious thought to the approach that you take to these issues in your organization. Develop an approach, and achieve buy-in from your board, staff and other constituencies, well in advance of any incident. Work with your legal counsel to understand the law, and collaborate with your insurance company in crafting a philosophy about these important matters. Understand the privileges and protections available to your organization to protect information, and consider the intelligent and prudent use of these privileges. Work with those representatives to consider the value of a more open and cooperative approach to incidents occurring on your program.

We have talked about the value of healthy 'information exchange' between organizations and their clients, at every juncture — post accident is no exception. Following an accident, an organization's targeted, effective and compassionate information exchange with victims and their families can be key to a resolution of the conflict that leaves both sides in a better position to carry on with their personal and institutional lives. This approach can expedite 'truth finding' and the ultimate resolution of the matter. Importantly, reflect on these issues and consult with your attorney and insurance company representative. These issues, and your 'post accident' approach, deserve important consideration, whether or not anyone ever files suit against your organization.



This article may not be reproduced without the author's permission.