

Contracting With Outside Organizations – Handout Suggestions WRMC 2015 ©Catherine Hansen-Stamp, Todd Duncan

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Layers of the Onion - Value of Thoughtful Contracting:

- Examine purpose/goals of the contracting relationship: Reasonable? Aligns with mission? Realistic?
- Undertake reasonable effort to screen: diligent inquiry; documentation
- Craft informed, simple and clear written contract that matches roll-out
- Inform participants[/parents] of contracting relationship; in addition, provide (them with) good information exchange on activities, responsibilities and liabilities (including use of participant agreement)
- Coordinate with contractor/preserve the independent relationship
- Train and prepare attending staff on contract, role with contractors, 'culture', coordination and other
- Understand insurance 'picture' going in (in conjunction with written contract)

Taking these steps, works to:

- Focus on running a quality program/alignment with mission – thoughtfully consider issues/risks
- Competent and responsible contractor (consistent with Organization's pre-screen)
- More effectively manage risks; manage/minimize risk of loss to participants and to program
- If incident occurs, informed and efficient emergency and other response
- Organization's effective efforts, perhaps result in positive resolution and no lawsuit
- If lawsuit is filed, organization is better prepared with defenses and tools to minimize loss
- Appropriate insurance in place to cover any loss

(Some) Ramifications of Poorly thought out Contracting Relationship:

- Contracted activity/program isn't considered in light of Organization's mission
- No or little effort to screen contractor
- No contract or "un-informed" contract
- No disclosure to participants[/parents] about contracting relationship or details of program, no signing of participant agreement
- No staff preparation before trip, in regard to roles/coordination/contracting relationship
- No evaluation of insurance coverage

This scenario can lead to:

- Poor quality programming not aligned with mission
- Surprises on program, regarding contractor's expertise, qualifications
- Poor rapport or confusion in roles/responsibilities between attending staff and contracted guides
- Increased risk of injury or other loss to participant and to organization
- Frustration and anger by student/families who were not informed about contracting relationship or details of program
- Increased legal exposure for actions of independent contractor, or, independent liability
- Gaps in insurance coverage.

Thoughts on Screening Contractors

Reasonable (“diligent”) Inquiry: Even though, generally, an organization should have no liability for the acts of its independent contractors, there are exceptions (see the slide presentation). One of those is that an organization has a duty to exercise reasonable care to select a competent contractor (and resulting liability for “negligent selection” of a contractor if found to have breached the duty). The endeavor is to determine if you have a contractor competent to conduct the services (fulfilling the duty is important for both practical and legal reasons (see p. 1)). Conducting reasonable screening/vetting is in an effort to have a reasonable basis for determining competency. What is ‘reasonable’? This is an objective standard (what would an organization in the same or similar circumstances do to determine competency). What is “reasonable” in any given case can be measured (in court litigation, typically via the testimony of an expert) by, e.g.: practices engaged in by other programs in the industry, applicable accreditation standards or practices, any state laws or regulations, direction from published case law.

The following is an example (not exclusive) of some potential areas of inquiry when screening contractors.

Company Business and Contact Information – relevant details

Company Operations

- Required/voluntary licensing or accreditation – associated details, compliance, revocation, etc.
- Permits (company or guide) required or other – associated details, compliance, revocation, etc.
- Liability Insurance – carrier, types and amounts; ability to add additional insured endorsement
- Internal policies or operational standards – including risk management plan, emergency response plan, etc.
- Internal or External reviews – details

Staff

- Staff hiring and selection criteria (required certifications, licenses, amount/type of experience, etc.)
- Background or sexual offender registry check
- Staff to participant ratios
- Staff hired as employees or independent contractors; use of volunteers
- Details (timing, substance) of staff training
- Workers’ Compensation coverage

Equipment (slightly different for Animals)

- Description of equipment (including safety equipment) used
- Equipment use, inspection, maintenance, repair, storage and retirement (and assoc. documentation)
- Equipment policies in accordance with manufacturer’s recommendations?
- Students instructed on proper use – describe
- Communication devices: use, reliability, etc.

Transportation

- Description of means of transport used (make, model, year) – own or lease
- Insurance and licensing for vehicle/plane/other and operator

- maintenance and inspection – details
- Seatbelts or other safety equipment
- Operator experience and training required; background checked – details

Participants

- Student orientation and appropriate details
- Supervised/unsupervised times – description
- Student instruction, sequencing and appropriate details

Emergency Response

- Emergency response plan – describe or attach. Associated staff training on it
- Plan for student separation from program in event of behavioral issues or other
- Staff understanding re: definitive care (location, directions); ability to respond in remote locations
- Pre-coordination/compliance with public authorities (land managers, SAR, etc.) re: emergency response plans

Serious Incident History

X yr. history for serious incidents, seeking appropriate details (fatality or serious injury, whether or not hospitalization involved; how matters resolved, etc.)

Premises/Site/Route selection (if company uses premises or selects a site (either land or water) for the activity):

- For onsite programming (buildings, facilities, grounds) – inspection and maintenance
- Premises/site/route selection process (for various activities)
- Opportunity for guide or leader to evaluate conditions/hazards that may affect the location or nature of the activity (and allow for change, cancellation, etc.)

Follow up reports from Organization attending staff. Documenting appropriate areas vis a vis their actual experience with, and observation of the contractor, post program. This can be the basis for “retro-vetting” (building a record of your organization’s repeated internal vetting).

Change of ownership or leadership – existing contractors; worth investigation.

Written Contract

- **Legal Issues:**
- **Preliminary: factors affecting preliminary enforceability:**

Mutual Assent or Agreement – “meeting of the minds” (no coercion, duress or fraud)

Legal Consideration (bargained for exchange)

Legal Competency

Contract ‘purpose’ not prohibited by law

- **Other:** substantive law related to enforceability of other contract provisions (indemnity, defense, release, etc.)
- **Potential issues affecting contract:** U.S. organization hiring foreign (outside U.S.) contractors for in-country programming; arrangements with U.S. public entities
- **Important considerations:**
 - Who is drafting the contract? (you may not be in the driver's seat)
 - Issues with negotiating the contract
 - The contracting parties should be able to read and understand the contract – keep it simple and clear!
 - Healthy and accurate **information exchange**
 - The contract should reflect what is *actually* going to happen on the ground
- Preserving the independent relationship
- Outline details, including relative responsibilities and liabilities of each party
- The contract should be informed by any applicable standards or laws
- Reviewed by experienced legal counsel and by insurance representative
- Discussed with/input from attending staff
- **General elements:** (these are not exclusive, and vary with the nature of relationship – whether outside contractor, mutual services, facilities use/rental or other arrangement):
 - Title
 - Parties
 - Introductory paragraph (outlining the general arrangement)
 - Consideration
 - Defining terms
 - Brief description of arrangement
 - Beginning and ending point
 - Description of facilities offered or used
 - Sections addressing each party's respective responsibilities/services provided
e.g., activities, staffing, supervision, equipment use, premises use, orientation, medical screening/healthcare, emergency response, transportation, property damage or loss, compliance with laws or regulations, other, catch all?
 - Payment (including terms of deposit, cancellation, refund, etc.)
 - Facility rules (facilities use arrangement)
 - Independent contractor relationship intended (via sufficient description)
 - Workers' Compensation
 - Liability Insurance and additional insured – one or both?
 - Obligation to indemnify and defend/release of liability – one way or 'cross?'
 - Participant(/parent) agreements?
 - Term
 - Other important provisions (applicable law, venue, amendments, dispute resolution (e.g. mediation, binding arbitration), etc.)
 - Date, Signatures

Handout, NAIS presentation: “Risk Management, Legal and Practical Challenges – Off Campus Programming”

Hats ©Catherine Hansen-Stamp, 2/26/16*

As a business owner offering recreation and adventure services to the public, what is your duty of care? In a negligence context (a common claim), the duty of care generally owed is to exercise reasonable care to protect others from unreasonable risks of harm. Reasonable care is that degree of care that a reasonably prudent person (or organization) would exercise, under the same or similar circumstances. But what is that? Can you say that a program owes a static duty of care, under all circumstances, for the children or adults in its charge? The answer is no. Instead, the question is: “what hat are you wearing?”

Organizations and their staff wear different hats, throughout a program, and frequently, throughout even one day. Each hat changes the nature of the duty owed, or may create or eliminate a duty. The good thing is, it is pretty intuitive and involves common sense.

The duty of care owed by an organization (and its staff) weaves in and out of the program experience, changing with activities, circumstances, relationships, and environments. Whether a duty exists — and the nature and scope of that duty in a given situation — is determined by a court as a matter of law. The fact-finder, judge or jury, determines if a duty has been breached.

When a program is in session, duties of care commonly arise because the organization has chosen to provide these services to the public — and implicitly assumed an obligation to protect the participant from unreasonable harm. Depending upon the facts of a particular case, common duties of care include the duty to hire, screen, and train staff, and the duty to supervise participants and instruct them on how to use equipment or otherwise engage in an activity. However, even if an organization is providing services it (and its staff) may have no duty under some circumstances, or effectively create or eliminate a duty in others.

A variety of factors can affect a duty of care and a determination of whether that duty was breached, including a program’s representations in its marketing materials, federal and state laws, a staff member’s words or conduct, the status of a participant or the relationship of the parties, an organization’s own policies, and industry accreditation standards or other standards or practices.

Here are a few examples:

- In many states, a program and its staff may have a general duty to supervise, but have no duty to protect a participant from the inherent risks of recreational activities, and no legal responsibility to the participant for injuries resulting from those risks. No duty hat here, although a court or jury may be parsing it out.
- Even in cases where courts have articulated the doctrine of ‘in loco parentis’ (in the place of the parent) as the basis for the duty of care, those courts have found consistently that the organization is not responsible for ensuring safety, that kids will be kids, and in many cases, no amount of supervision (by the organization OR a parent) would have prevented the harm. Essentially, the program did not breach a duty of care. You wore your hat well.
- If your program falls within the scope of the Americans with Disabilities Act, even if you don’t want to, your program is required to consider access for individuals with disabilities. You need to put this

hat on. The same goes for other state law requirements (child care or outfitter licensing laws, for example).

- Most states allow an organization, in a written agreement, to seek a release of its liability for negligence (the duty to exercise reasonable care). If the court upholds the agreement, a duty normally required under the law, is eliminated. You should still wear your duty hat, but later on, you may be okay if you failed to wear it properly.
- The organization may have a shared duty with another program or individual. If your program staff take a group of minor participants to a public swimming pool – the pool lifeguards have duties related to supervision and enforcement of pool rules, but your program staff likely still have a duty to supervise program participants. They shouldn't take off their hat, and, they should discuss with the pool, their respective hats.
- A geology teacher wears a different duty 'hat' in the classroom than she does if she leads the students on a hike up a Fourteener to observe local geology. The program and teacher need to change the hat, and think through the differences. Is there training or skill sets expected of the teacher, if she leads the hike? Is it prudent for her to put on that hat? In the long run, is it better to hire a contractor, adequately vetted, to conduct that activity?
- An organization that guarantees that its participants will be supervised "at all times" and that it will "ensure participants safety" may have created or increased its duty of care – added a hat where none existed.
- You lease your premises to another organization for use by its own participants and staff. However, the lessee asks your staff to supervise some of the activities – among other responsibilities you have agreed to take on. Both of you are wearing hats – you need to think through what those hats are, and make it clear in the parties' agreement.
- The organization decides to hire a contractor to lead a multi-day backpacking trip for students. The contractor is in charge of conducting the activity (and has been hired, because of that expertise). Does the school have a duty going into that relationship? Yes. The school's duty 'hat' is to exercise reasonable care in an effort to determine if the contractor is competent to conduct the services.
- A school sends two teachers with students to attend a multi-day program led by an independent contractor. The contractor's activity goes from 9-5 (climbing instruction; river rafting), with the group camp overseen by school staff. School staff will be taking on certain responsibilities during the trip, and those 'hats' will be different when school staff are attending the contractor's program during the day, versus when they are overseeing the students at night. Even though the school has hired a contractor to conduct the activity, it still needs to think through the hats, and make it clear in the parties' agreement.

[An organization can be directly liable for a breach of its duty of care, and alternatively, can be vicariously liable for a staff member's breach of duty in the course of his or her employment with the organization. A third basis for liability can arise from the notion that the organization's actions made it appear to the public that an individual was acting under the organization's direction and control (in the law, termed "apparent authority").]

Learn to consider what hat you are wearing when – it makes good sense.

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