

Kayak or Counsel

By Charles R. Gregg

At the outset let me acknowledge some self-interest in the subject of this paper. I am suggesting - no, its stronger than that - I am urging the proposition that investing in good legal advice is as important to your program as investing in a new kayak (or other gear). I am a lawyer, and of course have a definite bias in this regard.

You should have competent legal counsel available from the outset of your business planning. While an accountant's advice, including regarding tax issues, may be helpful, you should consider consultation with an attorney regarding the form of your business - corporation, limited liability company, partnership, sole proprietorship, etc. The preservation of your personal (as distinguished from business) assets may be an important matter for you. You may also want to consider the relative advantages of for-profit and not-for-profit status.

Legal counsel should be consulted regarding not only the establishment but the maintenance of the business entity. Corporations and limited liability companies, for example, may require periodic reports, meetings and other institutional formalities to maintain their limited liability status.

Legal counsel will assist you in determining the requirements of applicable ordinances and regulations, including requirements of land managers, in those areas in which you intend to operate.

Legal counsel should review your marketing and other materials to help you avoid exaggeration or misstatements which might have legal implications.

Legal counsel will assist you in documenting your agreements with various persons with whom you expect to do business: employees, vendors, clients, landlords, land managers and others.

An important function of legal counsel is the development of an agreement between you and your participants (clients or students). This agreement should include at least a description of activities and their hazards and risks; an allocation of financial liability for an accident (releases, waivers, indemnities, etc.); the choice of applicable (state) law to be applied to a dispute; alternative methods of resolving disputes, including mediation or arbitration; the place at which such a dispute should be decided, and other provisions.

Counsel can help you with other aspects of your management of legal liability issues, including insurance, use of independent contractors, employment law and compliance with applicable laws regarding collection and management of medical information.

Well before an accident (and accidents will happen to even the best programs) counsel should be involved in developing strategies regarding notifications, relations with family and media, debriefings and the gathering and management of pertinent information. Counsel may also be involved in the decisions and procedures for internal and external reviews and the protection or sharing of their results. All these matters have legal implications which are best interpreted for you by legal counsel.

In the event a demand or claim is presented to you, counsel may assist in responding, and, should a lawsuit or other form of dispute resolution follow, counsel should play an active role in relations with your insurance company (including selection of counsel), oversight of the lawsuit, and (if allowed by the insurance company) participation in settlement and trial decisions. Your insurance company may resist active participation by your counsel. You should reach some understanding in this regard at the beginning of your "insured" status.

In all these matters, it is important that your counsel sufficiently understand your mission and culture, so that the product of the lawyer's services will conform to the message you wish to convey regarding not only the nature of your operation, but its essential character.

Document your relationship with counsel by means of an Engagement Letter which sets out the services to be performed, the charges (flat fee? hourly?), method of billing, and other aspects of your relationship. Require that you be informed of significant developments and included in significant decisions. Ask for regular reports of the status of the matter.

Finally, be sure that you select counsel who is competent to perform the anticipated required tasks, or who can find appropriate legal expertise for you.

Think of your relationship with legal counsel as a partnership. It calls for mutual respect, collaboration, and a shared understanding of appropriate roles and expectations to achieve what is best for your organization.

The role of legal counsel, remember, is to advise you regarding the law. The lawyer works for you. He or she can give advice, and you can accept it or reject it. Business decisions, including decisions which affect internal operating efficiencies, your program's reputation, fairness to staff which have been accused of wrongdoing, and other issues which are internal, belong to you. Not to the lawyer. You may accept or reject the lawyer's advice, but you cannot afford to be uninformed about the legal implications of your actions and actions threatened by others.