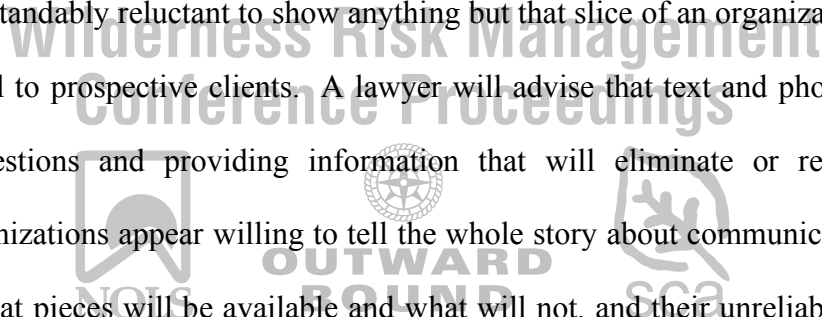


The Lawyer's Role

If a lawyer is being used effectively in the life of an outdoor program, he or she regularly reviews the public presentation of that organization - its websites, catalogues, material describing its activities, and the like. The job of a lawyer with respect to marketing and the exchange of information with potential and actual clients is to help the organization understand the difference between selling and informing, and to prevent representations that are misleading, and expectations that cannot be realized. Understandably, then, there will be some tension between the lawyer's "nose" for an overstatement, or failure to state facts which he or she feels should be known to the audience, and the desire of the program to market itself effectively. Administrative staffs are understandably reluctant to show anything but that slice of an organization's life which will most appeal to prospective clients. A lawyer will advise that text and photos be balanced, anticipating questions and providing information that will eliminate or reduce significant surprises. Organizations appear willing to tell the whole story about communication technology in the field - what pieces will be available and what will not, and their unreliability under some circumstances. And they generally are quite good about describing the risks of activities, including the prospect of bad weather, and other circumstances that can cause discomfort. Their enthusiasm is somewhat less for the inclusion of photographs of medical evacuations, or accidents or the description or depiction of stressful, perhaps even painful, circumstances.

Certainly the program does not want to attract the "extreme sports" fringe, but the more responsible approach to marketing is a full, and balanced presentation of the pleasant and the not so pleasant features of a program or activity.

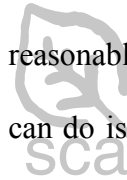
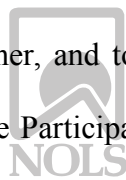
Conflicts between legal counsel and management can arise in crafting documents which



shift or eliminate liability for acts or omissions of the program. Participation Agreements for example should include, directly or by referenced, a description of the planned activities and their risks. The lawyer wishes to protect the program by committing the Participant, in advance, to an understanding of a wide-range of unappealing outcomes. And the lawyer wants some confidence that a judge will consider that a waiver of release of future claims was made with knowledge of risks, and of activities from which those claims might arise. An organization may be reluctant to describe as an inherent risk of an activity, for example, the misjudgment of co-participants and staff members. The lawyer feels she is best serving the organization if she can obtain an acknowledgment from the Participant that instructor error is an inherent risk and obtain Participant's release of any claims arising from such error.

Wilderness Risk Management Conference Proceedings

Once again, the tension is between a desire to present the activities of the program in a non-threatening manner, and to protect the organization by a reasonably full exposition of the dangers that await the Participant in the field. All the lawyer can do is advise the client of the loss of some degree of protection from claims, when the description of activities and risks is compromised. In fact states' laws differ regarding the degree of specificity with which risks must be identified, for them to be effectively assumed, and claims of injuries effectively released. And developing case law appears to support an argument that simple negligence on the part of an instructor-occurring within the course of instruction-is in fact an inherent risk-or in any event is assumed by the student or co-participant - as a characteristic of participation or instruction which simply comes with the territory. The Courts rule that, to hold an instructor liable for simple carelessness would stifle the creativity, energy and "pushing the envelope" characteristics of effective teaching. The cases are clear that an instructor may be held liable for



OUTWARD
BOUND

SCA

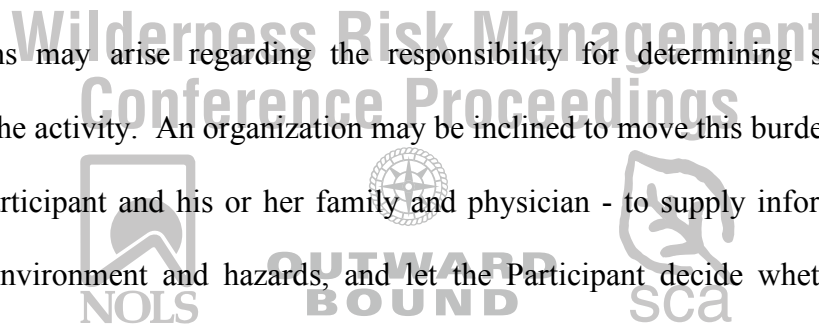
conduct which falls outside the scope of reasonably foreseeable mistakes of assessment of skill development, for example, such as failing to sequence the training of a pupil so that he or she is reasonably capable of taking the next step.

The job of the lawyer is to work with the organization, understand its resistance to certain provisions which might maximize protection, and settle upon a degree of protection which is satisfactory to the organization and which fairly and adequately describes the activities and risks with which the Participant will be confronted.

Medical

Questions may arise regarding the responsibility for determining suitability of the Participant for the activity. An organization may be inclined to move this burden significantly to the potential Participant and his or her family and physician - to supply information about the activities, the environment and hazards, and let the Participant decide whether he or she is mentally and physically capable of participating, without causing harm to herself or others. In terms of legal liability, the organization probably is better served by shifting as much responsibility as it can for determining suitability. It does, however, nevertheless have some obligation to give the candidates sufficient information so that an informed and intelligent choice can be made.

With regard to medical screening and suitability, an organization is at some risk of legal liability if it asks questions of a medical nature, collects responses, and determines, for example, that an asthmatic, or diabetic, is qualified to be on the course. Better, it might be suggested, to



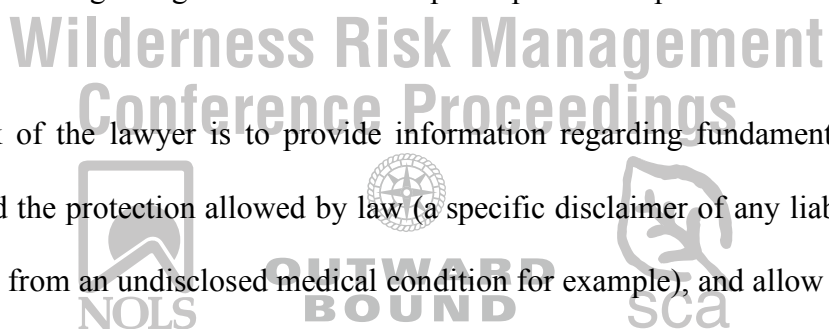
let the physician of the diabetic candidate, armed with knowledge of activities (including levels of exertion, diet, available medical support, and the degree of “control” over the disease), make the call.

There is a point at which the culture of the organization dictates the extent to which it - possessing vastly more information about the experience - must accept responsibility for not only conveying information about the experience but also the final decision about whether or not the candidate will be accepted. The lawyer may encourage conversations between and among the organization, or perhaps its medical advisor, the candidate, and the candidate’s physician, to arrive at a consensus regarding the conditions for participation and protocols for treatment.

The task of the lawyer is to provide information regarding fundamental duties of the organization and the protection allowed by law (a specific disclaimer of any liability of any loss or injury arising from an undisclosed medical condition for example), and allow the organization to determine what responsibility it is willing to take regarding suitability and treatment issues.

Operations

Events in the field can produce learning opportunities for counsel to an adventure program. I recall an incident in which a student was suspected of having drugs in his possession. The student had left his pack in camp when he and other members of a small group went for a day hike. The headquarters of the organization received a call on a cell phone, which was relayed to me, from the instructor, who had searched the pack and found incriminating evidence. I was concerned about issues of privacy and, frankly, some ethical questions (students had not



been told that their packs would be subject to search without their consent), and I suggested we could take no action against the student under these circumstances. The organization decided, instead, to confront the student with the discovery. This was done, and led to a very productive exchange with the student, and other members of the course, regarding matters of trust and safety. The student was separated from the course, and later thanked the staff for what it did! My advice was not taken, but I must say that the outcome was better than any I could have anticipated coming from my approach. No issue was raised regarding invasion of privacy or trespass and the matter was closed with everyone having learned a great deal, including me, about the lawyer keeping his eye on the potential for positive outcomes and not contesting the instincts of the professionals in dealing with their clients and students.

Wilderness Risk Management Conference Proceedings

Post Accident

Dealing with serious injuries and death-the handling of other course participants, staff, families of the victim, and media - presents opportunities for tension between the best impulses of an organization and legal considerations.

Many times the commitment of the organization to the injured party and his family presents real dangers in terms of ultimate liability of the organization arising from the accident. In fact, many times, post-accident behavior of an organization - unreasonable or improper, uncooperative or too generous - can influence the outcome of a claim or a lawsuit.

Litigation - the filing and defense of a lawsuit, the collecting of facts, by demanding documents and taking sworn testimony from parties and witnesses - assumes an adversarial

relationship between the parties. Someone has been hurt and seeks compensation from an organization that either feels it is not responsible for the loss or should not have to compensate to the extent demanded.

State and federal laws contemplate an exchange of information which is relevant to the controversy, and designed to lead to evidence which will be admissible at the trial of the controversy. It allows questions to be asked and requires answers, under oath, regarding the incident and circumstances before and after the incident - inquiries which might be pertinent to a decision regarding fault, a causal connection between the fault and the loss, and an assessment of the extent of the loss.

Wilderness Risk Management Conference Proceedings

In the event of an injury, for example, almost every aspect of an organization's operating policies and practices, qualifications of staff, representatives made in marketing and other materials, and post-accident conduct (including statements of regret, apology, or anger) are fair game.

A grieving co-participant's or staff member's statement of fault can become evidence of an admission; an entry in a journal or log which indicates a contributing act or omission, becomes part of the evidence in the case. Without proper steps to preserve confidentiality, post-accident interviews, including therapeutic critical incident stress debriefs, can produce evidence of wrongdoing.

It is easy to understand, therefore, an admonition from lawyers that the organization

essentially “shut down” after an accident, saying nothing, offering nothing. Every move is orchestrated by trial counsel, usually appointed by an insurance carrier, with an eye to its implications at trial.

This approach may contradict instincts and values of the organization, which are more focused on the physical and emotional well-being of the injured person and her family. The organization, for example, coming from a strong cultural commitment to the student, may wish to bring the family to an injured student (or the site of a death); the organization might even invite the family to talk to willing co-participants or staff members. Official expressions of regret - rarely apology - might be issued to the media which can be subject to interpretation of an admission of some responsibility.

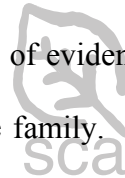
An organization may immediately convene an internal investigation whose findings might be protected from adversaries in a lawsuit by legal rules of evidence; but the organization may wish to commit, in advance, to share its results with the family. The organization might appoint an outside review team - might even offer the family the opportunity to suggest members of that team - with assurances that the results will be made known to the family.

These accommodations have serious legal implications.

The question, of course, is whether these implications are positive or negative.

We might fairly characterize the reasonable strategies on either side of the line as 1) reasonable cooperation, including a generous interpretation of applicable laws of procedure and

Wilderness Risk Management Conference Proceedings

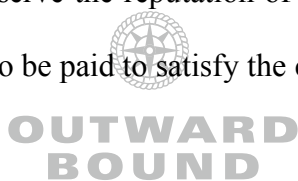


evidence which favors the sharing of information and an early resolution; and 2) offering no more than the law requires, read most conservatively in favor of the organization.

Whichever is chosen, including an option somewhere along a spectrum between the two, the choice must be made only with a clear understanding of the legal implications of that choice.

In my experience, including serving as general counsel to a major outdoor program in several death cases and several more serious injury cases, operating on the “cooperation” side of the line in these matters has been the preferred way to proceed for all parties. That approach preserves, generally, the value system of the organization which has sustained it through the years; and, in the long run (though not always), it has economic benefits as well. Cooperation and empathy are more likely to preserve the reputation of the organization for fair dealing, and reduce the dollars which may have to be paid to satisfy the claim.

Wilderness Risk Management
Conference Proceedings



The approach which the organization will take to post-accident relationships must be determined long in advance of the claim - producing incident. Policies and practices in this regard should be a part of the critical incident protocols of the organization. Those protocols should be the result of thoughtful discussions among staff, board members, legal counsel, representatives of the insurer, and other constituencies of the organization.

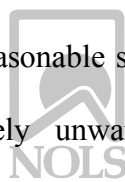
They should be clearly understood and written, and so embedded into the culture of the organization that they are implemented without question in the event of the serious incident.

Some flexibility must be built into the policies, of course. Conduct or claims from an injured party or family which are unfair and mean spirited must be countered with firmness and the withholding of cooperation which might have led to a quicker and more satisfying resolution for both sides.

Money rarely is the primary goal of a victim or the family of a victim. If they consider the organization at fault you would expect a demand that expenses be recovered and perhaps some compensation for other factors; but primarily the family wants to know how the accident occurred, why it occurred and what steps will be taken to keep it from happening again. The family, in other words, wants meaning more than monetary compensation.

The priorities for the organization, too, are an understanding of what happened and why, so that it can take reasonable steps to prevent a reoccurrence. Usually the organization, unless faced with absolutely unwarranted claims or demands, will expect to provide some compensation. The willingness to compensate may exist whether or not the organization considers itself at fault. A willingness to do so is generated by the earliest formation of a “partnership” relationship between the organization and the participant and his family, for the achievement of certain goals or expectations. This relationship is formed from the earliest marketing and promotional materials, through the application process, interviews or discussions regarding medical or other issues of suitability, and certainly continues importantly through relationships that are developed during the course activities. Again, except where there is an utter lack of reciprocity, understanding and cooperation, the organization may be willing to share in the sadness of an injury or death and the disappointment of unrealized expectations, and pay dollars,

Wilderness Risk Management Conference Proceedings

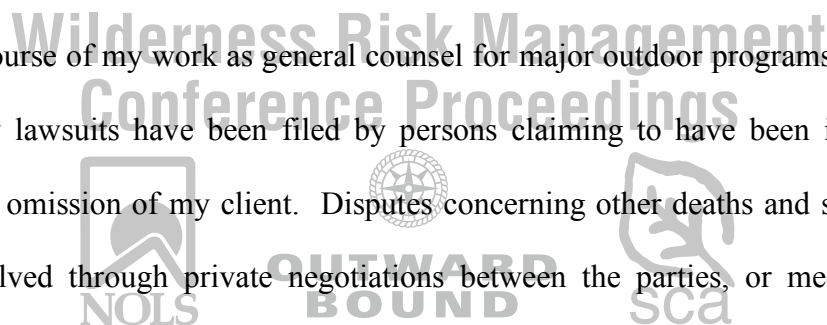


erect a monument, organize a conference, or provide some other material and symbolic memorial to the event, and learn from it.

There appears to be something of a trend these days in favor of “transparency” and the early, and aggressive, recognition of responsibility by even governmental agencies, and certainly many other institutions. Unhappily, for - profit corporate institutions seem to be lagging behind a bit, but the conduct of one of the world’s major corporations, in the Exxon Valdez incident, provided important learning about the public relations and financial consequences of ignoring accountability.

In the course of my work as general counsel for major outdoor programs, over almost 30 years, very few lawsuits have been filed by persons claiming to have been injured by some wrongful act or omission of my client. Disputes concerning other deaths and serious accidents have been resolved through private negotiations between the parties, or mediation before a neutral third party.

Interestingly, although these organizations had confidence in the strength of their waivers and releases (which included a release for negligent conduct), that document has never been the most prominent part of negotiations or even the sometimes contentious mediation and pre-trial procedures. The parties were aware of its existence and acknowledged, to varying degrees, its validity, but proceeded, instead, to explore those issues which were shared by the claimant and the organization: how did this happen, how do we keep it from happening again, and what would be faire compensation to the person injured. I can recall no instance - and there have been four



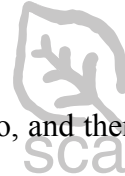
or five quite significant matters - in which I feel the organization paid too much, or subsequently learned of expressions of anger, disappointment or regret from injured parties or their families regarding the settlement.

A number of years ago a student with promising prospects as a business school student and business person was injured and suffered some disfigurement. The organization, and the woman and her co-participants, arguably had failed to take certain steps which might have prevented the accident. I believed the organization was less at fault than the student and co-participants. What happened was not reasonably preventable by the organization nor could it have been foreseen. Nevertheless, the organization wanted very much to participate in the healing - physical and emotional - which was to be a significant part of this woman's near term future, and paid an amount of money which both sides felt acceptable to achieve that.

The "let's don't do anything that we are not forced to do, and then only after a dog fight" approach is expensive, severely distracts staff and other constituencies, has at least the potential for damaging an organization's reputation for fair and ethical dealing with its clients and students and, more often than not, simply delays what talented lawyers on both sides recognize early on as a reasonable and logical outcome of the dispute.

I was impressed in the serious events that I describe above with the close cooperation of counsel appointed by the insurance companies involved. They understood the value of preserving certain standards which permeated the practices and policies of the organizations. They agreed, as part of a claims handling process, to honor the organization's approach. They

Wilderness Risk Management
Conference Proceedings



NOLS OUTWARD BOUND SCA

understood the potential for cooperation to reduce payments to claimants. Those values contributed importantly over the years to a program which had demonstrated a reasonable management of risks associated with its activities. The insurer, the program, and, it appears, the injured person and families, all were sensitive to events which might erode or compromise that value system. Allowing this important aspect of the organization's culture to predominate best served the interests of all involved.

Charles R. Gregg

713/982-8415

rgregg@gregglaw.net

Wilderness Risk Management Conference Proceedings

