

Best in Class Operations - Get in Front of Contract Disputes and Litigation

2018 Annual Conference

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Introduction

- When most Outdoor Recreation Companies (ORCs) discuss risk management it is referring to insurance, waivers and litigation due to accidents
- What we have come to find however, that in addition to the traditional areas of exposure related to injury in the provision of service, the failure to perform to expected customer outcomes has created a whole new form of exposure
- A comprehensive risk management program contemplates the integration of service contract management and a greatly expanded view of a traditional risk management program

Service Contracts

- Largest growth in potential customer conflicts in last 5 years is not in traditional risk management arenas but rather in the failure of ORC to meet the expectation of a customer
- Uptick in following:
 - Request for partial or full refund upon conclusion of service
 - Stop payment request to credit card company
 - Poor service reviews and bad ratings on advisory sites or threat of such if demands aren't met
 - Complaints filed with agencies against permit holder, e.g., USFS, BLM, NPS

Service Contracts

- Use of service contracts helps secure a pre-activity understanding of what customer can expect
- Becoming the norm for multi-day trips or packaged bundled services in actual contract form
- Many “mini-versions” in use for short duration services or use of “expectation disclosures” e.g., skiing
- Who is currently using them?

Why have contracts?

- For some states, it is required by regulations within licensing promulgation for outfitters: AK, MT, ID, WY, UT, others?
- Some land agencies expect it
- It is sound business practice and protects the ORC from misunderstandings and disputes

What has to be there?

- What ORC Provides
- What Participant Provides
- Any licenses required, additional fees or pass-through
- Arrival details
- Departure details
- Payment and additional information
- Terms and conditions including venue
- Agreement supersedes statement
- Client information and critical medical/meal disclosures
- Signatures

How they work and why it matters

- Confirm details that were likely verbal, done awhile ago and perhaps confused with other ORCs
- Once client signs it memorializes and supersedes all previous discussions, new starting point
- You gather information that will support or refute issues that arise later e.g., health issues
- Strongest level of defense in legal/regulatory matters that you did not violate statute or rule, or land agency policies



Sample Service Contract



Expanding the Definition of a Traditional Risk Management Program

Typical approach to risk in the industry

“If you have a well written waiver, insurance and know of a good litigation attorney, your bases are covered”

Typical approach to risk in the industry

- Assume it won't happen to you
- Under document, "paper work is not my thing"
- Borrow other people's paperwork and make it your own
- Save money on insurance by under reporting and under insuring
- Selecting an agent based on relationship instead of expertise

Typical approach to risk in the industry

- Not reading the policy, know what is and isn't covered
- Not selecting an industry legal expert
- Making changes but failing to update insurance company
- Assuming paperwork = bad customer service
- Lazy about the details

What Creates Vulnerability in a Lawsuit?

- Experts testify to industry SOPs or SOAPs that the ORC is not following
- A system is in place, but the company didn't follow it
- Final delivery of services doesn't equal what advertising and promotion stated it would
- ORC doesn't follow minimum acceptable standards of practice "because we've always done it this way"
- Employees say and do things inconsistent with what the company says it will deliver either due to lack of training or apathy or occasionally spite
- Paperwork designed to create protections lacks the proper application of processing or proper signatures and acknowledgements



Three components to a sound risk management system

It is about comprehensiveness, rigor in planning and execution and preparedness for the inevitable

Three components to a sound risk management system

The 3 Legged Stool

Paperwork

Operations

Mitigation



Three components to a sound risk management system

If one of them is missing...



System Collapse

Three components to a sound risk management system

- Leg 1 – Operations
 - Safety a priority
 - Train not only to do job, but to do it safely
 - Train employees on risk management issues and what to say/not to say
 - Practice what to do in an emergency
 - Post accident triage

Three components to a sound risk management system

- Leg 2 – The paperwork
 - Use of legal forms
 - What they are and how they work
 - Contracts and waivers → must be integrated
 - Documentation of what you do
 - Equipment/stock inspection
 - Maintenance
 - Training
 - Employee/animal isolation or correction
 - Research
 - Records management and retention

Three components to a sound risk management system

- Leg 3 – Mitigation
 - Insurance
 - Brokers versus underwriters
 - Policy construction
 - Managing cost the right way versus the wrong way
 - Legal entity structure
 - Insulation from law suits
 - Protection of assets and estate
 - Managing incidents
 - Your legal team



Three components to a sound risk management system

Sample Best Practice Tools

Establishing safe procedures

- Think through what can go wrong and prevent
- Consider independent reviews by experienced consultants
- Document how things are to be done
 - Employee manual
 - Job descriptions
 - Safety manual
 - Meetings and inspections
 - Use in-practice aids → laminated procedure cards

Establishing safe procedures

- Training at the core:
 - Train for the job
 - Train for preventing the accident
 - Train for managing the accident
 - Train for post accident behavior
- Benchmark best practices
- Understand this could and should change over time as cases are brought in the industry

The Forms

- What is at the core of legal documents:
 - Contracts for services
 - Educating clients about the risks they will be taking and therefore getting them to acknowledge the risks and assume responsibility
 - Can you get them to waive their legal rights, or indemnify you if something goes wrong?
 - What liability are you trying to mitigate with the forms you are using?

The Forms

- What goes wrong
 - Incompleteness
 - Don't follow procedures you said you would
 - Employees don't take it seriously
 - Clients refuse to sign or scratch out clauses
 - Filing of forms and retrieval poor
 - "We'll do it later"

The Forms

- Which ones should you have?
 - Catch-all forms are bad
 - Don't use someone else's
 - Insurance company not a source
 - At a minimum:
 - Acknowledgement of and Assumption of Risk
 - Contract for services
 - Waiver of certain (when legal) rights
 - Permission of use of likeness

Using an Attorney

- Which ones should you have?
 - Contract & Corporate
 - Defense
 - Tax/Estate
 - Buy/Sell
- Not the same areas of law, don't use one attorney for all areas
- Best policy is to use professionals with proven industry experience

When the Accident Does Occur

- You should rehearse your handling of the event and aftermath:
 - Emergency procedures should be documented under a variety of scenarios
 - Comprehensive plans in place for transport, emergency service communications, event-of-death, etc.
 - Damage control, employee and witness statements
 - Insurance, agency and defense attorney notification

Insurance

- Levels required by agencies
- How much should you have
- Types
 - PP&C
 - Worker' s Comp
 - Umbrella
- Brokers versus Underwriters
- Read the damn things!
- Do you qualify for a captive?

Where to go for help?

- AO has great resources to start
- Ask fellow members for referrals in insurance and law
- You can start the process right here at the convention
- Consider the use of an independent risk consultant or industry expert to “audit” your system

Questions?





Thanks