

A Is for Awareness: A Framework for Presenting Legal Issues

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“It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.”

Thus pondered James Madison in his 18th century tome, *The Federalist*. Nothing boggles the mind of a manager of volunteer resources more than trying to understand the myriad aspects of the law as it pertains to volunteers. When Congress passed the Volunteer Protection Act in 1997 no one thought that those 2,161 words would be so complicated. The words themselves are fairly straightforward; it is the application, the actual impact, and the underlying principles that keep us awake at night.

Presenting information on volunteers and the law to U.S. nonprofits and volunteer organizations has been my 15-year challenge. As a lawyer I am trained to think logically, to challenge the law and to interpret legislation, statutes and cases. It is not a simple process since the legal wording is wrought with archaic terminology and innuendoes. This paper will outline my methodology for presenting information about the law specifically for volunteer managers. My goal is to present complicated matters in a practical setting,

based on real life experiences. In addition, as the law is constantly being “repealed and revised,” I believe it is vital to be cognizant of the issues that appear on the horizon.

A IS FOR AWARENESS

When conducting a workshop on volunteers and the law I start with several caveats. First, I am a lawyer but I am not present to give legal advice or to create an attorney-client relationship. I simply offer information, insight and thought-provoking ideas to enable volunteer managers to sleep better at night. The second caveat is the arrangement of the general headings being addressed. There are 10 general issues, in no order of importance or priority. They are based on my observations, perusals of materials on the topics, and questions posed to me over the years.

The first issue is one of laws. Typically we think of those statutes passed by a legislative body but we must also remember the many sources and types of law—federal, state, local, statutory, regulatory, civil, criminal. A quick survey of the audience will determine if I present an analysis of the Volunteer Protection Act of 1997 or a specific law; however, I generally explain the importance of awareness of such laws but advise not to become stifled because of their existence. The Volunteer Protection Act of 1997 was passed by Congress to address what was perceived as a huge barrier to people volunteering—the threat of

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Started in 1989, the USC School of Law Pro Bono Program is the first voluntary pro bono program in a U.S. Law School.

being sued. The reality is that there are few suits against volunteers. The Act provides limited liability protection for the actions of volunteers. Many states had existing volunteer liability protection statutes that provided broad protection but the federal law takes precedence. As a result of the passage of the Volunteer Protection Act, many organizations took a serious look at their risk management process and implemented excellent procedures to protect volunteers, clients, and the organization. The key point on this issue is that the federal and state law is constantly changing. A statute may be enacted and years later courts may interpret the legislative intent. In reality, few direct cases exist involving volunteers.

The second issue is screening. Entire workshops are held on this important aspect of volunteer management. I start with a discussion of the need for a process that can vary greatly from organization to organization. A screening process should be holistic, uniform, ongoing, and necessary and appropriate to the volunteer position. The list of screening tools might include applications, references, interviews, on-the-job observation, internet searches, as well as registry, license, and criminal record checks. It is important to remind the audience that a criminal record check may be required by law for some types of volunteers but relying solely on the results of such a check is a bad practice. There are serious limitations on the information resulting from such checks. Criminal and sex offender registry checks will only catch the caught; those who have not been caught and convicted are the people who cause me to lose sleep.

The third issue involves the differences between employees and volunteers. One fundamental difference is that employees are in a contractual relationship; volunteers are not. Although many organizations and states treat volunteers and employees almost the same when it comes to screening, training, and benefits, there are distinct differences. It is important to look first to your state labor and employment laws and regulations. Ironically, the Volunteer Protection Act of 1997 has a provision that defines a volunteer as "an individual performing services for a nonprofit

organization or governmental entity who does not receive compensation (other than reasonable reimbursement or allowance of expenses actually incurred) or any other thing of value in lieu of compensation in excess of \$500 per year." Have you considered the value of the training you offer to employees and volunteers? medical services? day care? In the eyes of this law your "volunteers" may not be volunteers if the total is over the allowed amount. Another key element is the level of control by the organization over the volunteer. Procedures for handling employment complaints, discharging, recruiting, and interviewing can be very different than those for volunteers. Employee issues are often addressed in a myriad of state and federal protection statutes, i.e., the Americans with Disabilities Act (ADA), Age Discrimination Employment Act (ADEA), Title VII of the 1964 Civil Rights Act, and the Equal Pay Act. Volunteers should be awarded many of these same protections but challenges of these laws by volunteers may be difficult as the general thrust is directed at employees.

The fourth issue is the need to have and comply with a comprehensive risk management policy. This is an excellent topic for in-depth discussions. To managers new to this issue, I recommend Linda Graff's excellent publication *Better Safe: Risk Management in Volunteer Programs in Community Service* as a starting point. Other very useful publications include *Playing It Safe: How to Control Liability and Risk in Volunteer Programs* from the Minnesota Office of Citizenship and Volunteer Services and the brochures available from the Nonprofit Risk Management Center. To ensure an organization's comprehensive risk management policy, I recommend a risk analysis of every volunteer position. With experience, this process can become second nature and result in catching and correcting the little problems before they become huge liabilities. During the risk management discussion an organization will be confronted with the issue of insurance. It is important to understand all the fine print, the coverage, the exceptions, and the need for excellent record keeping.

The next issue is a growing area of con-

cern: confidentiality. The need for a written policy that is enforced without exception is vital. I am reminded of one group that talked with me about their confidentiality policy. They were very proud of their policy and procedures but forgot one thing: only new volunteers knew about it. Periodic written acknowledgement and a written agreement to comply is important. The growing concern for me is the inadvertent use of privileged information. This is especially important with the increased use of e-mail, blogs and other electronic communication. It is very easy for casual conversations to become breaches of confidential information. A volunteer wearing a nametag from an organization heads home, stops in the library, sees a client of the organization and starts a conversation. A third party overhears and jumps to a conclusion. Results: the gossip starts in a small town and soon everyone thinks the client has AIDS. Inadvertent, unintended and harmful results but easy to see how it could happen. Client, volunteer, and donor information should all be handled with the utmost care.

Transportation is the issue that most frustrates volunteer managers. There is no good answer to the questions arising from transportation and liability. The bottom line: if someone is hurt, someone is going to pay. The best advice is to reduce your organization's risk as much as possible with techniques such as insurance, supervision, training, conducting driver's records and insurance checks, having a complaint system, and even performing random road checks.

The seventh issue to address is the use of waivers and releases. Many organizations rely on these documents to protect them from all liability, but in general they are tools to be used by the defense in a legal matter. A court will closely scrutinize waivers and releases to determine if they violate public policy, if they are specific, and if the parties had the legal capacity to understand the ramifications. I recommend looking at them as tools, putting a person on notice that he or she is engaging in an activity that may have some danger. Waivers and releases should not replace a good risk management process and may only provide a limited level of protection to an

organization. Again, this is very state-specific.

Money is the next legal issue. Frequently I receive questions about petty cash. My rule of thumb: petty cash is only that amount I am willing personally to replace. Who has access to the petty cash? Are there rules for what it is to be used for? Is there a record of withdrawal and replacement? What about periodic accounting? Nothing can cause dissension in an office more than the petty cash drawer! Other monetary legal issues include proper donation records, grant accounting, insurance claims, and raffles.

I place firing a volunteer in the discussion of volunteers and law. This is a painful process but one that should and can be done. The key is to return to the basics: look to the job description, develop a policy and follow it uniformly, and document, document, document. Fire deliberately, not emotionally; and if a bad behavior is festering, nip it early and decisively—festering is bad.

The last topic is labeled "emerging issues." Things we don't typically think about but should. Often these are issues in other areas of the law but have not invaded the volunteer world. Issues such as what to do if a controversial group wants to conduct a fundraiser for your organization, increased legislative demands on screening, and new arenas of tort litigation. Cell phone liability based on distraction and driving as well as confidentiality is a growing area of serious concern. Increasing legislation controlling the use of cell phones while driving, medical studies, and enormous jury awards make this an extremely hot topic. A policy on cell phone use while volunteering is imperative. Keep cognizant of emerging issues by monitoring employment, human services, tort and insurance law on both a state and national level.

Differences between laws from state to state and country to country are enormous. It is extremely difficult to make generalizations and any discussions should be based on current and specific knowledge. Audiences should be reminded that legal awareness is a tool and not a barrier to the creative activities of volunteer programs. The law only sets the parameters for operation. Josephine Robinson, a wise circus performer, said it best:

"There are so bewilderingly many laws in the Outside World. We of the circus know only one law—simple and unfailing. The Show must go on."

NOTES

The Volunteer Protection Act of 1997 (42 U.S.C. 139) can be found at <http://uscode.house.gov/download/pls/42C139.txt>

For an in-depth analysis of the Act as it relates to one state's laws, check out the following: *Volunteer Protection Act of 1997, Public Law 105-19: A Synopsis and Analysis*. SC Association for Volunteer Administration. Retrieved June 6, 2005, from http://www.strom.clemson.edu/teams/ced/scava/scava_reports.html

"The Volunteer Protection Act of 1997: An Imperfect Solution" is an excellent article highlighting the limitations of this legislation. It can be found at http://www.runquist.com/article_vol_protect.htm

The Nonprofit Risk Management Center (<http://nonprofitrisk.org>) has a wealth of information about legal issues that relate to volunteers.

Some of the more egregious cases resulting from accidents and injuries incurred while using a cell phone while driving include the following: the State of Hawaii paid \$1.5 million to the family of a New Jersey man who was struck while walking by a car driven by a school teacher; and a lumber wholesaler paid \$16.2 million to a 79-year-old woman injured by one of its salesmen.

REFERENCES

- Andrew, R., Biggs, M. & Seidel, M. (Eds.). (1996). *The Columbia world of quotations*. New York: Columbia University Press.
- Davis, N. (1998). *Guidelines for the screening of persons working with children, the elderly, and individuals with disabilities in need of support*. Office of Juvenile Justice and Delinquency Prevention. Department of Justice. Retrieved June 6, 2005, from <http://www.ncjrs.org/pdffiles/167248.pdf>
- Graff, L. (1999). *Beyond police checks: The definitive volunteer and employee screening guidebook*. Dundas, Ontario, Canada: Linda Graff And Associates Inc.
- Graff, L. (2003). *Better safe: Risk management in volunteer programs in community service*. Dundas, Ontario, Canada: Linda Graff And Associates, Inc.
- Kramnick, I. (Ed.). (1987). *The federalist papers*. No.62. London: Penguin Books.
- McMenamin, R. (n.d.) *Volunteers and the law: A guidebook*. Beaverton, Oregon: Jomac Publishing.
- Michael, J. (2003). Liability for accidents from use and abuse of cell phones: When are employers and cell phone manufacturers liable? *North Dakota Law Review*, 79, 299
- Minnesota Office of Citizenship and Volunteer Services. (1998) *Planning it safe: How to control liability and risk in volunteer programs*. St. Paul, MN.
- Pope, L. (Ed.). (2000). *Volunteers and the law*. Columbia, SC: South Carolina Bar.
- Redelmeier, D., & Tibhshirani, R. (1997). Association between cellular-telephone calls and motor vehicle collisions. *The New England Journal of Medicine*, 336(7), 453-458.
- Robinson, P. (1998). *Volunteer Protection Act of 1997, Public Law 105-19: A synopsis and analysis*. SC Association for Volunteer Administration. Retrieved June 6, 2005, from http://www.strom.clemson.edu/teams/ced/scava/scava_reports.html