

LEGAL LIABILITY IN VOLUNTEER PROGRAMS

(A general guide to some of the liability situations which may confront volunteer programs in Virginia)

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## LEGAL LIABILITY IN VOLUNTEER PROGRAMS

### Introduction

Legal liability for negligent acts is a frequent concern among managers of volunteer programs. The purpose of this work is to present the basic information which volunteer organizations and state agencies need to understand potential liability situations confronting volunteer programs, particularly in Virginia.

The guidance of a competent insurance agent and a knowledgeable attorney are highly recommended for specific information and advice regarding the extent of liability coverage and protection.

Although there are some recorded instances of lawsuits which have been brought against voluntary organizations, the issue of volunteers and legal liability seems to be blown out of proportion. In almost all instances, legal liability coverage can be provided, and the issue of volunteers and legal liability should not be used as a rationale for not using volunteers. In Virginia, there have not been any specific lawsuits. Nevertheless, it is still important to have a concrete plan of action in order to satisfy officials and to address the concerns of volunteers.

This guide is simply a general explanation of some of the liability situations which may confront volunteer programs. It does not attempt to identify all liability situations that may be present in the operation of any particular volunteer program. Furthermore, due to exclusions and limitations of various insurance policies, it is necessary to verify the coverage which is provided in specific policies.

### The Issue of Liability

The basis of legal liability is torts. Torts are civil as opposed to criminal wrongs. Torts bring about liability, and liability leads to the award of money damages. In regard to torts, the idea is that a duty was owed and not fulfilled. For example, the most common tort claim situation is the case of the automobile

accident. The driver at fault violated a duty to all other drivers and pedestrians to operate the automobile carefully. If injuries are caused to persons or property as a result of negligent driving, the driver who is at fault will be considered liable and will be expected to pay damages.

In order to hold an individual liable for damages, it must be shown that that person directly caused the injury (the question of causality) or that the injury was the foreseeable end result of that person's actions (the question of foreseeability).

Tort liability also applies to state agencies. Many agencies that use volunteers become concerned about the extent to which they may be held liable for torts committed by the volunteer. Although there are few cases in which a volunteer caused an agency to be held liable for his actions, a prudent agency should explore situations which could occur.

#### Clarification of Terms

There are several terms which are used and frequently misused regarding liability situations and immunities to liability. Some of the general terms will be reviewed here.

Good Samaritan - Under our legal system, a person who volunteers to help another is liable if such help causes further damage or injury. Although some states have good samaritan statutes, relieving the helper from liability, such statutes generally apply to emergency volunteers who render help at the scene of an accident, usually of a medical nature. The statute does not apply to the organized or formal volunteer programs that are prevalent today.

Waivers - A waiver is an agreement between an agency and a volunteer in which the volunteer agrees in advance not to hold the agency liable for injuries related to his participation in the program. Although a waiver may be considered a way for the agency to deal with volunteer liability in cases where the volunteer is injured, courts generally dislike such waivers. Waivers are contracts, and courts

dislike contracts in which one party gives up a right, such as the volunteer's right to sue, unless that party receives something in return.

The two factors which courts consider interpreting waivers are Voluntariness and consideration.

Voluntariness requires that the party surrenders the right to sue without coercion. This can be shown by stating in the waiver that the individual signs it voluntarily.

Consideration refers to the individual's receipt of anything of value in return for surrendering the right to sue. If that person did not receive something of value in return, the courts may dismiss the waiver and permit a suit. In volunteer programs, consideration may be shown by the training, education, and experience which the agency is giving to the volunteer.

Charitable Immunity - At one time there existed the concept of "charitable immunity" in instances where volunteers were organized for a private group, and it provided protection to such organizations based on its charitable status. This provision no longer exists in any state in the country.

Sovereign Immunity for State/Local Officials - Historically, sovereign immunity evolved from the idea that the sovereign (in modern times, a state) could not be sued at all. Since this principle is unfair in some situations, state law has allowed a limited liability for the state.

In order to understand what state actions can be sued, it is necessary to review the basic functions of state activities:

Governmental functions are those functions which the government can perform and which are necessary for the continued operation of the government, (e.g., court and legislative activities).

Proprietary functions are those functions which the government may carry out but which are not essential to the continuation of the government, and may be contracted out to private parties, (e.g., fire protection, utilities, and sanitation services.)

Virginia prohibits suits against itself which arise from its governmental operations but may permit suits for torts arising out of proprietary operations.

Another distinction needs to be drawn between discretionary and ministerial acts of the government.

Discretionary acts are high level policy and planning decisions made by government representatives. Theoretically, the operation of the government depends upon its ability to make decisions which would be free of nuisance litigation; therefore, discretionary acts, such as decisions made by state agency directors, are not subject to lawsuits.

Ministerial acts are those day-to-day acts of the government which carry out the decisions made on the discretionary level. The ministerial acts that carry out the policy decisions, such as work performed by state agency employees, are subject to liability. Most of the duties which are given to volunteers are ministerial, and therefore, subject to liability. In order to minimize the chances for legal liability on this level, volunteers should be adequately trained so that they understand their specific job and have sound supervision.

Four Areas of Liability

There are four general areas of liability which will be discussed here: personal liability of the volunteer, general liability of the agency, automobile liability, and board liability.

Personal Liability of the Volunteer

Personal liability is legal liability arising out of personal activities as opposed to business activities. This is an area of concern to individual volunteers as their volunteer duties are personal activities.

No policy protects against "wanton or willful misconduct" or "gross negligence". Individuals who commit tortious acts can expect to be held responsible for damages which result from those acts. This holds true whether the individual acts as a

private citizen or as a volunteer. It is important that volunteers are advised of such potential liability. Careful planning in all states of volunteer program operation should include appropriate training and supervision of volunteers. Liability situations rarely occur in programs where proper training and supervision of volunteers are provided.

A Comprehensive Personal Liability Policy can be obtained individually, but 99% of the coverage is sold as a part of the standard homeowners or apartment dwellers policies. This Comprehensive Personal Liability coverage does protect the individual from lawsuits for bodily injury or property damage arising from personal volunteer activities, with the notable exception of automobile accidents in connection with volunteer work. Most homeowners policies provide up to \$25,000 per occurrence. A \$1,000,000 Personal Umbrella can be purchased to increase the limits. All of the above should be purchased by the individual volunteer for his protection.

#### General Liability of the Agency

If a volunteer, or for that matter, an employee, commits a negligent act on behalf of the agency, the agency can be held legally liable. Even though the possibility of a volunteer-related lawsuit may be remote, it is advisable for agencies operating volunteer programs to prepare and protect themselves from legal liability cases. Such protections can be obtained through adequate liability insurance coverage. As noted previously, the volunteer can protect himself by the Comprehensive Personal Liability coverage contained in his homeowners or apartment dwellers policy. The agency protects itself through a Comprehensive General Liability Policy.

To bring volunteers under existing state insurance policies, a state must either define them as employees through legislation or amend the insurance policy to specifically cover volunteers. In Virginia, volunteers are not defined as employees through legislation, although the Code of Virginia states that "Liability insurance

may be provided by the department utilizing their services both to regular-service and occasional-service volunteers to the same extent as may be provided by the department to its paid staff. Volunteers in State service shall enjoy the protection of the Commonwealth's sovereign immunity to the same extent as paid staff" (Chapter 34, Sec. 2.1-558).

It is possible for an agency to amend its general liability policy to provide direct liability coverage for the volunteer. This would eliminate the need for the volunteer to rely on his or her Comprehensive Personal Liability coverage while volunteering on behalf of the agency. This is accomplished by adding an endorsement (an addendum to the insurance policy that either limits or broadens the coverage) naming employees and volunteers as additional insureds under the general liability policy.

It is advisable to check the extent of liability insurance coverage which is provided to paid staff. In some instances, the coverage may be minimal or non-existent, unless the above mentioned endorsement is added, naming staff and volunteers as additional insureds.

The general liability policy provides coverage for any damages to others caused by the agency staff or volunteers and for the cost of defense in court. The latter is particularly important to cover unsuccessful lawsuits which still must be defended and which incur attorneys' fees.

Keep in mind that the agency only is protected by the basic policy. For the staff and volunteers to have personal coverage under the agency policy, an endorsement must be added to the policy. Some volunteers may not have a home-owners' policy.

The insurance agent who handles the organizations's insurance should be contacted to determine if coverage can be extended in the above manner and any additional cost for such coverage. Insurance agents vary in knowledge and ability, and the coverage which is offered also varies depending on the insurance companies



which the agent represents. If one agent is not familiar with coverage for volunteers, it may be helpful to check with other insurance agents.

Organizations are advised to carry comprehensive general liability insurance coverage, which covers judgements against the agency for bodily injury or property damage caused by its negligence or that of its employees or volunteers and covers defense costs, even if the lawsuit is groundless, fraudulent, or false. The suggested limits of liability to carry are \$100,000 per person and \$300,000 per accident for bodily injury, \$100,000 for property damage, or \$300,000 combined single limit. For comprehensive coverage, a \$1,000,000 Catastrophe Umbrella Policy is also available for organizations. Again, the amount of coverage for any organization can be best determined in discussion with the insurance agent who handles the agency's business, but in all cases, the coverage should be as comprehensive as possible.

As mentioned above, the general liability policy protects the agency against lawsuits from third parties -- lawsuits that arise from the agency's negligence. A volunteer could sue the agency for personal injuries sustained while volunteering, if he or she can prove that the agency was negligent. The general liability policy provides coverage for this situation. Although waivers are generally disliked by courts and have not held up as binding contracts in court, the general liability policy will provide protection to the agency.

In case of an accident (excluding automobile) in which the volunteer injures himself, the agency may want to provide medical expense coverage to the volunteers, without regard to the agency's negligence, as a benefit to the volunteers. The agency should be aware of available options to reduce the damages for the volunteer and the agency. Options for consideration follow:

- 1) Workers' Compensation provides coverage for job-related injuries to employees in accordance with the State Workers' Compensation Act. An employee who is covered gets medical expenses, benefits based upon a schedule of injuries, and a percentage of wages lost because of injury. In Virginia, as in most states,

volunteers are not included in the Workers' Compensation coverage, because they are not employees. Some insurance companies will allow an agency to extend Workers Compensation to provide coverage for volunteers, but such coverage tends to be very expensive.

2) Some organizations offer standard accident insurance for paid staff, and in such agencies, it may be possible to extend the coverage to volunteers, although it is usually expensive to do so. An alternative is to provide an accident insurance policy providing medical expense benefits for volunteers subject to a pre-determined limit for all volunteers on a blanket basis, in which it would not be necessary to name individual volunteers in the policy. The cost of such coverage will vary depending on the activities of the volunteers.

3) It is also possible to purchase Special Event, Time-Limited Policies which cover volunteers only during special activities such as camping trips or skiing trips with clients or on relatively long journeys. The coverage can apply to the particular number of volunteers and clients involved in each event, and it can usually be easily obtained at a reasonable rate.

4) The agency can purchase Premises Medical Payments Coverage which will help pay medical bills of third parties injured on the premises of the agency, without regard to the actual negligence or legal liability of the injured agency. It is important to point out that the coverage applies only to the permanent premises occupied by the agency. Suggested limits of coverage are \$1,000 per person and \$10,000 per accident.

5) The volunteer may also purchase and carry individual medical coverage for himself. Whether this is a group policy through the volunteer's agency or an individual policy written specifically for the volunteer, the coverage will generally apply to injuries that volunteers sustain in personal activities, including volunteer activities. It is advisable to check the policy or check with

the insurance agent to determine the extent of coverage.

At one time it was possible to purchase special protection for volunteers through special organizations formed for the purpose of researching available and feasible insurance relating to volunteers and designing and placing insurance for volunteers. The last known organization which was providing such coverage was the Volunteers Insurance Service Association (VIS), in Washington D.C., and that agency is withdrawing the insurance coverage from the market.

### Automobile Liability

According to Virginia laws, all licensed drivers who operate vehicles on public roads should have a minimum of liability insurance which covers damages to the other vehicle(s) and occupants involved in an accident. (Uninsured drivers must pay an Uninsured Motorist Fee). If a volunteer needs to use his car for performing volunteer duties, the volunteer should check his coverage to make sure the limits are adequate. Suggested limits are \$100,000 per person for bodily injury, \$300,000 per occurrence for bodily injury, and \$100,000 per damage. The \$1,000,000 Personal Umbrella previously mentioned can also increase the limits of the automobile policy.

The agency also carries an automobile liability policy which applies to owned vehicles. If a volunteer uses his own car, he must rely on his own policy. In Virginia if the volunteer uses an agency-owned vehicle, the agency's policy will protect him or her. The reason for this is that the agency's automobile policy provides direct liability coverage to anyone using an agency-owned vehicle with the permission of the agency and within the scope of that permission.

Private Agency Coverage - An agency which uses vehicles regularly to conduct its business generally provides automobile insurance for paid staff who use the automobile in the line of agency business. In such cases, it may be possible to extend the automobile coverage to include volunteers. It is important to determine whether the policies offer secondary or primary coverage. Secondary (excess) coverage applies only if the

volunteer is already covered in a specific category by his own policy, and the claim exceeds the limits of that policy. Primary coverage applies regardless of the benefits provided in the volunteer's own policy.

The agency should also purchase a Non-Owned Automobile Liability coverage as an endorsement to the automobile policy to protect itself when it is sued as a result of damage to a third party caused by a volunteer's accident in its own vehicle. The volunteer's personal policy will protect the organization on behalf of whom the volunteer is operating the vehicle. However, if the volunteer has allowed his coverage to lapse, or carries very low liability limits, the protection afforded the agency can be limited or non-existent. The Non-Owned Automobile Liability coverage endorsement provides liability coverage to the agency in excess of the volunteer's own policy. This means that the volunteer's policy would pay until its limits are exhausted. At that point, the agency's policy would step in with additional coverage.

As recently as the Fall of 1979, it has become possible to extend the Non-Owned Automobile Liability endorsement to cover the volunteer as well as the agency. Of course, this costs more (approximately 50¢ per volunteer per year). If this coverage is purchased, the agency can provide primary automobile liability protection to the volunteer for the use of his vehicle on behalf of the agency. Again, this would be in excess of the volunteer's own policy, thus providing additional coverage should the volunteer's own policy be inadequate to cover the judgement.

As an additional safeguard, the agency should verify that the volunteer has a valid driver's license, a good driving record, and adequate liability insurance coverage. A copy of the volunteer's driving record can be obtained by the agency from the Division of Motor Vehicles upon written request on the agency's letterhead, accompanied by a check for \$3.00. The letter should indicate that the request is being made in connection with "employment or volunteer services".

State Agency Coverage - A state agency's insurance plan often includes protection for volunteer drivers when they have access to state vehicles. In Virginia, "Volunteers may utilize state vehicles in the performance of their duties, subject to those rules and regulations governing the use of state vehicles by paid staff." (Code of Virginia, Chapter 34, Sec. 2.1-558). Standard protection is afforded to volunteers using State vehicles, but is important to remember that no policy will protect against wanton or willful misconduct or gross negligence on the part of paid staff or volunteers. Volunteers should be clearly oriented to this fact.

If the volunteer needs to use his car in the line of volunteer duty for the agency, the agency can obtain the Non-Owned Automobile Liability policy mentioned earlier for volunteers using their own cars.

It is important for the volunteer to be familiar with the state agency's coverage and his personal coverage. Although insurance coverage may not make a difference in an individual's choice to volunteer, it is imperative for a volunteer to know what coverage is provided while performing volunteer duties.

#### Board Liability

In general, boards of directors are charged with the overall management and supervision of a corporation, and they have the power and duty to carry out transactions for the corporation in accordance with its chartered purpose. The executive director or administrator reports as an employee to the board. The number of duties which are directly performed by the board will depend upon the size and complexity of the corporation and the availability of staff. Final determinations in the areas of finance, personnel, policy, charter, by-laws, and programming are examined and approved by boards.

Liability of the members of boards of directors is an area just coming to the attention of most non-profit organizations. With the increase in lawsuits against

non-profit groups and the increasing scrutiny and regulation of non-profit activities by governments and courts, board liability will assume growing importance. Increasingly, there have been more instances of board members being held personally liable for the actions of the executive director. The courts have ruled that board members of charitable organizations should exercise reasonable care in the performance of their duties and exhibit "good faith".

In general, protection from personal liability is best handled by a "good faith" effort on the part of the board member to do a conscientious and careful job for the organization and to exercise the reasonable diligence and care of a prudent person. To demonstrate good faith and reasonable care, a board member should undertake precautions and actions in attending board meetings, knowing the duties and provisions within the by-laws and the charter, keeping informed of organization activities, and ensuring that minimum requirements are met, such as filing annual reports and withholding employee taxes. The records of the organization should reflect a board member's conduct, and votes on issues should be duly recorded.

It is particularly important that board members avoid self-serving or enrichment transactions, as in business dealings between a board member and the corporation. It is also important that board members make no monetary profit from the corporation other than compensation as expressly provided in the by-laws.

In performing supervisory duties, the board member may place reasonable reliance on the information and reports of others, such as financial statements done by accountants, information provided by an attorney, and reports of outside experts. However, reliance on such sources will not relieve the board members of the need to exercise ordinary prudence and good judgement. In essence, the best protection available to a board member is to do a conscientious job on behalf of the organization.

Indemnification is a method by which the corporation may provide for the expenses of a board member accused of misconduct. Under such a provision, a board member

may obtain indemnification for his reasonable expenses, including litigation costs and attorney's fees, unless he has been found guilty of actual misconduct or bad faith. The expenses are covered either from corporate funds or through an insurance policy. In Virginia, as in other states, the provisions for indemnification are outlined in the state's corporation law. (Code of Virginia, Non-Stock Corporations, Sec. 13.1-205.1)

Because of the financial limitations of most non-profit corporations, insurance has become more important for providing protective coverage. Each board liability policy is usually individually negotiated and written to match the situation and requirements of the organization. Coverage is not generally expensive for most non-profit organizations (approximately \$600), and a knowledgeable insurance agent and competent attorney would be able to provide advice and guidance in necessary coverage, costs, and availability.

#### Conclusion

An organization utilizing volunteers should look closely at the components of the program in which volunteers are involved and develop a comprehensive plan to ensure that volunteers, clients, and staff are aware of and afforded protection from potential liability situations. Such protection may either be provided by the organization or by the volunteer, but each aspect should be carefully considered so that all parties are fully aware of coverage provided by the organization and coverage which should be obtained by the volunteer.

All parties should consult a knowledgeable attorney and a knowledgeable insurance agent to determine their degree of liability in situations where injury to person or property could occur and the availability and cost of insurance coverage for potential liability situations.

Although waivers are often dismissed in court if a volunteer waives his right to sue without getting something in return, it is advisable to use waivers not merely to avoid liability, but to alert all parties that potential liability situations may occur.

All volunteers should be thoroughly oriented and trained on their roles, responsibilities, and obligations in the organization as well as their rights and protections. Volunteers who will be exposed to potential legal liability situations, particularly those involving automobiles, should be thoroughly screened by the organization for a valid operator's license, a good driving record, and adequate automobile insurance coverage.

Liability insurance should be secured to protect the organization, the staff, and the volunteers so that they may proceed about the business of the volunteer program without fear of litigation should accidents or damages occur.