

Contracting with Outside Organizations

©Catherine Hansen-Stamp and Todd Duncan
Thursday October 15, 2015: 8:30 – 10 a.m.

This presentation contains general information and is not intended to provide specific legal advice.

Organizations should consult with legal counsel, experienced in recreational law, regarding matters specific to their business or operation, and aware of the laws in their jurisdiction.

Perspective and Framework

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- Why this presentation?
- Contract importance, but more than the contract!
- **Triangle**: contract between your org and contractor – but other ‘involved’ party is participant/parent
- **Role of Handout** – provide perspective

Contracting – Our Focus

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- contracting relationship – perspective, overview of **key elements**, and then:
- Focus on **one key element: the written contract**
- Structure: 45 mins present; 40 mins q & a – your collective questions/issues
- **Knowing the structure** – is this for you?

Approach

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- Provide an Operational Perspective
- The endeavor to run a Quality Program
- Choosing to responsibly manage risks rather than just avoid lawsuits

The Written Contract

- The written contract - a tool to accurately 'inform' the parties, and the contracting relationship (good 'information exchange'):
 - Better manage 'field' risks, and reduce risk of loss; (RM)
 - Address each party's responsibilities and liabilities (legal)

Typical Contracting Relationships

- Subcontracting a portion or multiple portions of an organization's programming
- Mutual Services – 'teaming up'
- Facilities use or rental – with or without organization's assistance
- Other

Why Establish an Independent Contractor Relationship?

- Practical – Cost; programming diversification
- Administrative – No withholding, WC, unemployment taxes; no additional infrastructure
- Risk Management – Contract out to experienced org that can more effectively manage risks
- Legal – Org protection from legal exposure

What is an Independent Contractor?

- (You have) No control or right to control the manner and method of the work
- Indicia of an independent relationship
- (Theoretical result): Organization has no liability for the acts of the contractor (but there are exceptions!)

Hiring a Contractor – There IS a duty

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The org has a duty to exercise reasonable care to select a competent contractor – ‘diligent inquiry’

Conducting reasonable vetting/screening is an effort to have a reasonable basis for determining competency.

SO, Contractor can be liable for NEGLIGENT SELECTION of a contractor

Is that it? Other legal exposure?

Legal Exposure

(Attempts to avoid the independent relationship)

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Potential claims - contractor’s actions injuring participant or others:

- Negligent selection of contractor
- Contractor is an employee or apparent agent (court overrides contract)
- Joint enterprise or venture
- Negligent misrepresentation
- Consumer Protection Act – DTPA

Legal Exposure

(Attempts to avoid the independent relationship)

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Injury to contractor:

- Contractor claims he/she is org’s employee
- Contractor makes claim for workers’ comp, labor claim for back pay, overtime, unempl...

Other: (fed/state audit; kicked off by contractor action)

- Federal and state penalties for failure to properly designate individual as employee

Framework – Key Elements to Contracting Relationship

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- Maintaining mission & purpose
- Screening and selecting contractor
- **Written Contract – OUR FOCUS TODAY**
- **IE:** informing participants/parents of the CR
- Coord. w/ contractor/maintaining independence
- **IE:** education, prep and training for attending staff on contract, culture, coordination

Focus: Negotiating the Written Contract – U.S. based

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- Value/Danger
- Who drafts the contract? Want it clear, complete and simple, but you may not be in the driver's seat.
- Administrative issues – determining needs, developing contract template/s, management structure, oversight and contract “dealings”
- Negotiating the contract

Focus: Negotiating the Written Contract – U.S. based

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- Legal: contract ‘elements’; other applicable law/standards
- Reaching mutual and clear understanding (**good IE!**):
 - Basic contract terms including relative responsibilities and liabilities of each party, insurance and indemnity considerations; **Handout**
- Match what happens ‘on the ground’/preserve independent relationship (practical/legal)

Focus: Negotiating the Written Contract – U.S. based

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- Clear, simple and readable for both parties!
- Discussed with/input from attending staff
- Get help! Assistance from legal counsel; review by insurance rep

Discussion

Your questions:

Why are you here?
Greatest contracting issue or challenge
Contract negotiation issue?
Other?

We will refer you out if question is too involved or targeted...

Discussion – C & T

US based contractors – common areas of negotiation:

- Relative responsibilities of the parties (particularly in ‘mutual services’ relationship (e.g. supervision))
- Insurance and Indemnity
- Choice of law/venue
- Contracting with Governmental entities

Non US contractors - issues: US jurisdiction? Lawsuit filed outside US; pushback on written K; insurance; alternative; pre-planned ADR in country or close proximity (e.g. JAMS);

Discussion – C & T

- Managing multiple contracting relationships
- Gray area of shared responsibilities in the contract
- Insurance component – dev. rel. w/ broker
- Get the help you need! Lawyers, insurance

Layers of the Onion

What are they? **Handout**

- Steps taken to run a quality program
- consider risks, and corresponding risk of loss to participant and to operation

Contact Information

Catherine Hansen-Stamp:
reclaw@hansenstampattorney.com; Tele: 303-232-7049

Todd Duncan: todd.duncan@sierraclub.org;
Tele: (720) 280-7793