

## What you say and do makes a difference!

This article offers some insight that may help you prevent “accidents” from becoming lawsuits. Part of your risk management plan could address these situations.

### Time of the essence

The brief period following an accident or incident can be the key to your legal defense several years later. Use that time wisely! These are the minutes when you have to treat the injured party; the hour(s) before the evacuation; the minutes or days before the other guests leave and their memories of the events are changed or forgotten; the time before your guides forget the details or leave your employ; and the responses to the media following the incident. Let us look at each of those.

### Your guests

Most lawsuits are filed by guests for one, or both, of the following reasons. One, they believe they were not properly informed of the requirements and hazards of the activity; or two, guests feel you have not demonstrated the highest level of care and concern for their well-being and personal safety.

In the first instance, your only real protection is the guest’s signed waiver. Although you may offer safety speeches or instruction prior to trips, this can come to hearsay as to whether they were properly informed, whether they could hear the speech, whether they could understand the speech, ... etc. Therefore, having a signed waiver is extremely important for every guest that participates in your activities as it provides, in writing, evidence that the guest did understand the hazards of your activities.

In the second instance, the care and concern you provide starts in the minds of guests at the beginning of their activity with you, so make a personal connection. Address guests *by their names*. Treat them, their concerns, and their family members as individuals and as honored guests. If a guest is injured, we recommend trying to keep one guide with the injured party from the time of initial response and with treatment through evacuation; waiting for him or her at the doctor’s office or hospital; and following up afterward. That personal relationship and consistency can reduce stress, help calm and assure the injured party, and is often the key factor in whether the injured party chooses not to file suit. Personal care and attention *do matter*.

Take the actual case of whitewater adventurers who were seriously injured: They or their attorneys subscribed to the belief that “... for every societal wound, there must be a financial poultice.”; however they enjoyed their guide and appreciated the care and concern demonstrated after the incident, so they didn’t sue the guide. They did sue the travel agent who booked them without providing adequate warning about the hazards of the activity!

### What *do* I say?

If an incident occurs, be responsive. It is okay to let the guest know you are sorry they are hurt and you are doing everything you can. Be both empathetic and sympathetic. Show care and concern, both for the injured party and for other participants. While one person may be injured, family members and other guests may be experiencing shock or concern for their own safety, or may be generally “shaken” by what they have seen or experienced. Help your guests feel they are in capable hands. Check with them about how they are doing. You need to provide a calm, settling influence on the guests. It is okay to say things like, “I’ve sent for help.” “The techniques we practiced in the Red Cross first aid class seem to have stopped the bleeding.” “I’ll do everything I can to keep you comfortable (until we evacuate, continue, etc)...” Both the injured party and others need to be reassured. Their evaluation of what happened and how you handled the incident can be important issues if litigation ensues.

### What *don’t* I say?

***Don’t admit wrongdoing***, e.g., “Oh, you’re the third person that darned horse has thrown.” “Gee, I must not have adjusted your climbing harness correctly.” “The brakes must have failed.”

***Don’t make value judgments***, e.g. “Well, that was a stupid thing to do.” “You said you were an experienced equestrian, so we gave you a spirited horse.” “Anybody with half a brain could have...,” etc.

***Don't guarantee a speedy evacuation.*** You may have no control over the timing, and your idea of "soon" may be very different from that of an injured party.

***Don't profess to be a medical expert.***

## **Photographs**

If you or your guests have a camera available, take photographs of the incident site and of the injured party as soon as possible. Photos of the physical conditions encountered immediately prior to the incident, i.e. steep terrain, a fallen tree obstructed from view by snow, wet or slippery path or roadways, etc., may be especially helpful in reconstructing how the incident occurred.

## **The Media**

If there is a serious accident or fatality, you can expect the media to get in touch with you. Often, that contact will be by phone. It is in your best interest to assign one spokesperson to handle those media inquiries. Let your other staff know immediately whether inquiries are to go through one person. That person (with your supervision) should prepare a factual statement (which may need to be reviewed by legal counsel).

- ∅ Be clear about the assignment. It *is* to provide the who, what, where, when, why, and how which go into a typical media story (though you may not want to disclose "who" while you are still trying to locate the family). You will probably want to provide some background on your organization's experience at providing the activities and favorable safety record. It *is not* the place to assign blame, admit guilt, faulty equipment, or speculate about what may have occurred. If a story is delivered in that manner, *you will get more press than you want.*
- ∅ Attempt to be accurate and provide the facts. If the answer to a question is unknown, say it is unknown. Don't speculate.
- ∅ If you are dealing with restrictions, such as not releasing names until family members are notified; unable to talk with the injured party until the doctor gives the okay; etc., politely explain that to the media.
- ∅ If you provide, see, or hear erroneous information, correct the error as quickly as possible. Provide the correct information.
- ∅ *No one (including your chosen spokesperson) is to release any information assigning responsibility or admitting liability for the accident without first consulting your insurer's legal counsel.* Failure to observe this restriction can jeopardize your case and your insurance coverage.
- ∅ **It is often best to say simply, "The incident is under investigation at this time, and it would not be appropriate to comment further."**

## **After the incident**

1st.....SECURE THE CUSTOMER(S) SIGNED WAIVER(S) in a safe place. This will be needed by the insurance company if a claim results.

If any equipment is involved in an incident, pull it out of service, preserve it securely, and discuss what you should do with your claims representative and/or your legal counsel. They may suggest having it checked by an authorized dealer or repair facility, taking photographs, or returning it to service, as long as it is marked for easy identification in the future.

## **Incident-Accident Reports and Witness Statement**

Keep several copies of an Incident-Accident Report and Witness Statement Report with your first aid kit(s) so required information can be gathered and easily recorded after an incident occurs and the guest has been

taken care of by the guide or medical professionals.

Record the information as *soon as possible*, while memories are fresh and recollections are clear. These forms, and the information they contain, will be critical to your defense. Try to document and record everything said. Information you obtain immediately after the incident usually will be more accurate than statements taken at a later date.

## **Discovery**

This term generally refers to a pre-trial device which can be used by one party, i.e. a guest injured while participating in an activity offered by you, etc., in order to assist that party's preparation for trial.

Tools of discovery include facts, documents, or other things in your exclusive knowledge and possession. *The litigating attorney can request and obtain any and all records and can take deposition of witnesses.* For that reason, it is essential that you (and persons working for or on your behalf) avoid comments, which can be potentially damaging. Avoid writing or publicly expressing assumptions, opinions, and personal feelings that may arise during the stressful time at and after the occurrence of an incident. Even verbal statements can be subject to discovery.

## **Incident-Accident Report**

The insured or insured's risk / compliance manager will complete the Incident-Accident Report form. It recounts information about conditions at the time of the incident, provides for the guide's perspective of events, and includes space for the comments of others. The insured or insured's risk / compliance manager should also provide a narrative of "what happened, how, and why." Try to be factual and objective.

## **Witness statement(s)**

Ideally, you want to get statements from all witnesses. However, if a witness is hostile, blaming, accusing, or otherwise unfriendly after a catastrophic accident, make sure you have the person's name and how to reach them, but leave it to your insurance company's claims staff or legal counsel to take their written statement. Take the written statements of witnesses who are positive, friendly, or neutral. When interviewing, ask the question, "What happened?" It's a simple question for each person to answer. The statement may be completed by the witness or taken by someone from your organization. Once completed, the witness must review, sign, and date the statement. You can use the same form to note the injured guest's version of "what happened" and to note other comments e.g., "If I'd only followed your instructions about," or "I know I was over ice. I didn't think the snowmobile would...," or "... I looked down and panicked. It wasn't anything you did," etc. Those comments may be of assistance in defending you in the event of suit. However, your primary task is to be sure the person is properly cared for after an accident. *We are not* suggesting that you get a signed statement from the Injured guest. That can be done once the injury has been attended to and the shock is past. If the person is in pain, in shock, agitated, or hysterical following an incident, it *is not* the time to play inquisitive reporter. Don't be insensitive or intrusive. If the injured party makes comments about what happened, jot them down when you get a free moment. Try to put it on paper while the words are fresh.

## **Report incidents in accordance with your Claim (Incident) Notification & Reporting Clause attached within your policy**

You must report all incidents in a timely manner in accordance with your Claim (Incident) Notification & Reporting Clause. *If your guests are injured or fail to return as expected, notify your insurer immediately.* Whether you treat them, evacuate them; transport them to medical personnel; they say they will see their personal physician at home; or your equipment is found and the person who rented it is gone or missing, *notify your insurer.* It is a condition of your insurance that you inform your Insurance Company of accidents and incidents which might reasonably result in a claim.

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