

RISK MANAGEMENT

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Tips for Contracts

Centuries ago, our ancestors did business informally. One informal business practice was “never buy a pig in a poke” (bag). Now this advice may be obvious to us, but at one point it was cutting edge business and risk management thought!

The advice to never buy a pig in a poke became *caveat emptor* — Latin for “let the buyer beware.”

When you buy something or make a business arrangement for a product, a service, or the use of a facility, you are responsible for making sure what you receive is what you intended to buy or arrange.

Tip #1: Make Sure You Read Every Contract You Sign

Do you read every contract you sign? Do you ask your attorney to review the language in advance? Do you ask your insurance broker to look at the contract to identify insurance and contractual risk transfer issues?

If you do, you are among a select few. Unfortunately, experience shows that most business people — camp directors, owners, and managers included — don’t take time to read the contracts they sign.

Failing to read and understand the terms and conditions of each contract, especially the risks and obligations assumed from other parties, can lead to big trouble.

Tip #2: Use Attorneys to Write Your State-Specific Camp Contracts

Sometimes, when camp directors create new agreements or update their existing contracts, they ask other directors to share samples of their camp contracts — then they attempt to cut and paste terms, conditions, and clauses from the samples to create contracts for their purposes. Sometimes these samples are from the same state; sometimes they are not. Avoid this “do-it-yourself” practice at all costs. It doesn’t save money in the long run. It’s okay to share information, but use local legal counsel to write your contracts to ensure the contracts are legally enforceable and comply with your state’s laws.

Tip #3: Insist Upon Clear, Simple, Language Whenever Possible

Contracts are formal and use legal words. Sometimes lawyers must use the language of the law. But whenever possible, ask your lawyer to use clear and simple language. Risk managers and insurance people prefer well-written contracts that clearly communicate the responsibilities and duties of the respective parties.

One consequence of failing to have an attorney craft your contractual agreements is increased risk of expensive litigation at a later date to clarify vague, ambiguous, and imprecise language.

Another consequence of poorly written contracts is the blind assumption of risk. When contract language is hard to follow, risk may be assumed without realizing it. Camp directors and risk managers everywhere want to avoid blindly assuming risk.

Failing to read and enlist your legal and insurance advisors in a timely contractual review may offer the *worst* consequence because of the potential for agreeing to liability that is uninsurable or incompletely insured.

Tip #4: Enlist Your Advisors Immediately

Your lawyer will be engaged in writing your contracts, but don’t forget to get him or her involved in reviewing contracts you are being asked to sign that are written by other parties. Lawyers will be able to identify legal issues that may be adverse to your interests. Your attorney will have the ability and time to negotiate different language and terms.

Enlist your insurance broker in the contract review process as well. His or her focus will be on the insurance and contractual risk transfer clauses — which could require

your camp to hold the other party harmless, defend them in litigation, and indemnify them (make them whole). These terms should be a “red flag” and signal an automatic referral to insurance advisors.

With early involvement, advisors may be able to renegotiate the language to reduce the risk, offer other suggestions to transfer or avoid business risks. If the relationship with the other party to the contract is mutually desirable, this process should result in a new awareness, a new section in your risk management plan, and a better contractual relationship with that organization.

Unfortunately, experience demonstrates that many requests for a contractual review of the “red flag” language take place after the agreement has already been signed. Nothing can be done to minimize the legal and contractual risk transfer issues under these circumstances. Seek advice early and often. The expense will be worth it in the long run.

A Case in Point — Outsourcing Horseback Riding Instruction at a Local Riding Academy

Consider the following elements of an enforceable contract:

- Offer
- Acceptance
- Consideration
- Legal purpose
- Competent parties

Working with your attorney will ensure that all of these elements for a proper contract will be met.

Reb Gregg and Catherine Hansen-Stamp wrote an article for *CampLine* (winter, 2008; revisited in winter, 2011) titled “Contracting with User Groups.” While their article’s perspective was slightly different than the focus of this article, their suggestion to determine “who is responsible for whom, what, where, and when . . .” is right on target from a

risk management perspective. Using these questions in the context of your business relationship increases the likelihood that you will have the details needed for your lawyer to create an unambiguous contract.

The “who” part of the hypothetical riding instruction contract is the legal business names and addresses of the entities who will be parties to the contract. This is easy to control when you are writing the contract, but make sure your business information is correct when another party is writing the contract.

“How” might address supervision. For example, the riding academy staff will be responsible for supervising campers during instruction. Camp staff will be present to supervise campers while they are waiting for their turn (outside of the riding rings). Consider specifying desired riding academy staff-to-camper ratios.

“How” might also address transportation — the camp will transport campers to the premises. The camp is responsible for the campers during this time, but shared responsibility begins when the campers get off the camp bus on the premises. This is a way to communicate expectations and get agreement.

“Where” would most likely be the premises, but could be your camp premises, and it could include on-premises or off-premises trail rides, if that is part of your arrangement.

“When” sets out the time and duration of the services. For example, five days per week, Monday through Friday, at 10:00 a.m. and 2:00 p.m., for eight weeks, beginning June 15 and ending August 15.

The subject of the service or operation is the “what.” In our example, you’ll want to be clear about your expectations for things like riding instruction using your horses, helmets, and tack and matching the campers’ size and riding experience to the characteristics of your horses. Does the riding academy do criminal background checks on their staff? Should that be a requirement in your contract?

You’ll also want to make sure the riding academy is aware of ACA standards and that your contract with them includes their agreement to comply with those standards.

Ideally, the insurance and contractual risk transfer clauses in the agreement with the riding academy will include the following:

- The camp will be included on the riding academy’s general liability insurance as an additional insured for liability arising out of the operations of the riding academy; minimum limits \$1,000,000.
- A mutual hold harmless, defense, and indemnification clause, which effectively separates each organization’s liability and makes each organization responsible for their own tort liability.

Resist any request that you should name the riding academy as additional insured, or that there should be mutual additional insured status granted under each organization’s general liability policy.

Most camp business contracts are written to benefit one party over the other. After all, that is the nature of business. Simple, clearly written contracts are preferred because they speed the claims process and can still provide appropriate risk transfers.

This is especially important in circumstances at camp where there is joint responsibility for the conduct of programs. In these situations, it makes sense to write clear contracts that require each party to

be responsible for their own negligence. In instances where campers are turned over to independent contractors, such as riding academies and white water rafting outfitters, it also makes sense for those entities to insure the camp as an additional insured under their independent liability insurance policy. Get a certificate of insurance in these situations, and don’t forget to share a copy of the certificate with your insurance advisor. And remember: Don’t buy any pigs in a poke!

Note: Your camp’s circumstances are unique. The foregoing is intended as a guide but is not to be relied upon in every situation. Consult your camp’s insurance and legal advisors about your camp’s specific circumstances.

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