

Management and the Law

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Law is *not* just litigation. *The law is pervasive in all management operations*, whether a public agency, a nonprofit association, or a for-profit enterprise. Thus, there are references to legal aspects throughout this book. However, here we will place such references in the larger legal context.

Organizations need their own legal counsel, but if managers are to have firm grasps on all operational aspects, then they must understand some basic legal concepts and the legal framework within which they manage.

The law helps an organization's management keep order and protects the rights of an individual, the organization, and society. This chapter is an overview of some basic legal concepts and perspectives:

Legal authority to operate;

- "Force of law;"
- Fields of law;
- Legal systems; and
- Legal audits.

Legal Authority to Operate

What legal authority does a public park and recreation agency, a nonprofit association, or a private-for-profit enterprise have to operate? All entities are given authority by the state in which they reside, whether through enabling acts or incorporation.

Enabling legislation starts in the U.S. Constitution in the 10th Amendment, which allows the states to pass taxes and make laws for the good of their citizens. The states in turn pass legislation giving power to counties and municipalities to provide for the needs of their communities. It is termed "police power." This is *not* the power of the police, but the right of government to establish controls for the health, safety and welfare of the people. Authorized by "police power," the states and especially local government by state regulations and local ordinances exercise broad controls on management over health and safety to zoning.

Incorporating allows for nonprofit and for-profit organizations to establish an entity to provide services that the community wants and needs. A nonprofit is given tax breaks because it provides services that the society needs.

Then, each entity has an authorized body or governing authority that is given *ultimate authority* to act in its behalf to conduct or manage certain types of activities, programs, services or enterprises, hold property title, contract, select the executive, make policy. This ultimate authority body generally is elected by the electorate for a public agency, by the membership of a nonprofit association, or by the stockholders/members of a private-for-profit enterprise.

The "Force of Law"

What is "the law?" The law is more than statutes! It is *any action enforceable by the legal system*.

There are three major types of law:

1. Constitutional law;
2. statutory law; and
3. common law or case law (precedents).

Two additional forms are important to management and are based on the first three:

1. administrative actions to implement policy, including executive orders, administrative law, and rules and regulations established by administrative/executive branches; and
2. operational policies and regulations, such as those governing use of areas and facilities and control of user/participant behaviors.

The nature and function of professional/industry standards and practices also are included because of their legal ramification, but are *not* one of the "forces of law," unless codified (that is, incorporated into a statute).

Constitutional Law

Constitutional law is that law based not only on the federal Constitution, but on state constitutions and municipal charters. Constitutional law, as defined by our US Constitution, as interpreted by the courts, is the “supreme law of the land.” While states and communities can make laws, the legislation they pass cannot conflict with their state or the federal Constitution. Most human rights are based in Constitutional law and are integral to employment law (see Chapter 14). Programs and services, such as equal opportunity, participant rights, freedom of speech and religion and the right to assemble, also have significant effects on recreation and park agencies (see Chapters 8 and 9). A park is a public forum, a place where freedom of speech is guaranteed. The park and recreation manager can create policies on how to handle this freedom, but the policies must be related to time, place and manner of speech, not the content of speech (see Chapter 9, Physical Resource Planning and Chapter 11, Maintenance and Operations). The federal Constitution also sets the parameter regarding property, the taking of property and eminent domain (see Property sections of Chapters 9 and 10).

Statutory Law

Statutory law is legislative enactments of governmental policy and includes statutes passed by Congress and state legislatures, ordinances passed by cities, townships and counties, and resolutions passed by federal, state and local bodies. (See Chapter 3 on how these statutes are passed.)

These statutes and resolutions set forth the policies on which executive/administrative actions are based and operational policies, rules and regulations are established. These statutory policies include authority to operate and to tax and, under police power, to regulate an enterprise or activity, such as health and sanitation of swimming pools, building codes regarding exits and capacity, permits and licenses to demonstrate or hold a parade, OSHA protections of employees, and statutes which address equality, such as Civil Rights and Title IX, and environmental quality as to pollution standards.

Common Law

Common law (or case precedent) is based upon judicial determination of lawsuits upon the decisions of previous cases, known as *stare decisis*. The case opinions of the judiciary, at all levels—federal, state, local—interpret both statutes and the Constitution and establish legal precedence in the fields of law, such as contracts, torts, and property. Case opinions also reflect social

philosophy, which subsequently may be implemented by statutes, such as civil rights and human equality (see section on Fields of Law, below).

Administrative Law/Executive Policy

This “type of law” includes presidential executive orders, state executive orders by a governor, municipal executive orders by a mayor, administrative laws, and regulations by an executive/administrative agency, such as camp licensing, snowmobile regulations, hunting and fishing regulations, OSHA, or Title IX. When police powers are given to an administrative agency, they must then determine how and what needs to be done. They implement through administrative law the regulations such as that the Health Department enforces for safe pools and clean restaurants. Similar to legislated law, the department must go through hearings, many of which are done on-line through the Federal Register.

Operational Policies

Operational policies, rules and regulations are those set forth for the control of behavior, the use of areas and facilities and the participation in programs and services. And, yes, they are legally enforceable when properly authorized. However, one must distinguish the basic operating policies established by the governing authority on which rules and regulations are based, and rules and regulations that are set forth by an operational or advisory board to which authority was not given. City Councils have authority to pass policy and ordinances that have the power of law. Other types of boards, like advisory boards, can suggest policy, but they do not have the power of law.

Professional Standards

Professional standards are desirable practices of a profession or industry. Many people believe that they have the “force of law,” and courts will find that their violation, without further proof, is negligence, which is known as “negligence *per se*.” *This is not correct.* They do not have the “force of law” and are not enforceable in the courts unless they are codified, that is, incorporated into statutes or set by court order and precedent. Few standards are codified. However, about a dozen states have codified the CPSC and/or ASTM playground standards; that is, they have incorporated the standards by reference into a statute. As for negligence *per se*, a violation of a standard is not evidence of negligence; there still must be shown such a violation to have been the proximate cause of the injury (see section on Negligence, below).

Professional standards do, however, have great legal impact. Expert witnesses use professional and industry standards in court as evidence that these standards are desirable practices. They will argue that they show the “standard of care” that the defendant should have exhibited. *Thus, it behooves every manager to be aware of professional and industry standards and to follow them, as appropriate to the services being offered.* There are essentially two types of standards for the park and recreation industry: equipment, areas, and facilities; and personnel and operations.

Regarding the first (equipment, areas, facilities), the American Society for Testing and Materials (ASTM, an American National Standards Institute-approved standard issuing organization) issues a large annual publication that includes standards for sports equipment and facilities, safety and traction for footwear, amusement rides and devices, consumer products and snow skiing. Those standards are then generally followed by the industry as the minimum requirements equipment and operation of facilities.

In addition, there are many checklists for inspections, such as for playgrounds, building planning and risk management audits. Many sport associations and industries—from softball to horseback riding, from the extreme sports to figure skating—set forth requirements for equipment, areas and facilities. These do not have the power of law, except where they become standard of care (see section on Negligence, below).

The second type of standard (personnel, operations) includes accreditation, licensing, certifications and entity policies and procedures. Accreditation relates to the agency and operations; licensing is mandated for certain operations and personnel; and certification relates to the training people working in agencies receive.

Accreditation

Professional associations and other bodies develop accreditation and grant it to operations or management of an agency/program, such as park and recreation agencies, zoos, organized camps, adventure/challenge programs and university curricula. These accreditation standards provide guidelines for what professionals in the field have determined is important or essential to providing a minimum quality to these programs (van der Smissen, 2004). Failure to follow the suggestions of the accrediting agency can lead to liability. American Camping Association (ACA) accredits camps. To be accredited, the camp must have in place certain policies and procedures. In the case of *Lesser v. Camp Wildwood*, a young boy got hurt when a tree fell on him. The tree fell during a sudden storm that occurred during a fireworks display. ACA accreditation requires that the camp have emergency action plans, and that the

plans are practiced so that when an emergency occurs, everyone, both counselors and campers, knows what to do. The camp had a beach evacuation plan for storms that arose quickly, but had never practiced it. When the storm arose, the children were told to head to their bunks, instead of the dining hall, as required in the plan. Such a deviation from an accreditation standard can be a cause of liability, although it still needs to be proven that the breach was the proximate cause of the accident (*Lesser v. Camp Wildwood*, 2003).

Licensing

The state gives licenses to agencies and people that provide certain services where it determines it is important to protect citizens. Licenses may be necessary for operating a day care program or organized children’s camp, or the state may authorize an individual to practice a certain trade or profession, such as lawyer, nurse, teacher, physician or barber. Usually, a license issued to a professional requires an approved education program and testing to qualify.

Certification

Professional or special interest organizations train individuals as evidence that they have had certain training or accomplished certain levels of competence in the field, e.g., Certified Park & Recreation Professional (CPRP), life guard, first aid, aerobics instructor, or archery instructor. There are *many* certifications offered. While they give evidence of certain training and can be used as an employment credential or by an agency to indicate that they have given certain training to staff or volunteers, *it is important that the agency evaluate whether the certification is given by a creditable organization, and whether the training is adequate and appropriate for their needs. It is equally important that the education or training received is done properly and based on industry standards.* Many universities have started special certifications that are backed only by a program indicating a set of courses has been taken. Certain facilities offer certification for trainers. For example, a facility that has a ropes course may give certification for training on their course. It is only good for that course, but it does indicate some level of training and experience. Careful examination must be done to determine the legitimacy of the certification and exactly for what it purports to qualify people. In *Kane at al. v. National Ski Patrol*, the trainer for new patrol members took the class to the most difficult slope on the resort near the end of the course. It was full of moguls and stumps, and there was a cliff on one side. The hill was icy. One of the students lost control and fell from the cliff. The courts concluded that the trainer was providing appropriate instruction because the certification standards required that the Ski Patrol members could do rescues on the most difficult slopes

of the resort where they would be working (*Kane et al. v. National Ski Patrol System, Inc.*, 2001).

Entity Policies and Procedures

Organizations set forth policies and procedures, usually in their policies and procedures manual or in a collection of rules for the operation of their organization. The courts expect an organization to have such policies and procedures and hold it responsible for enforcing them. These may be based on recommendations of national organizations, such as those that exist for horseback riding. (See Chapter 4 for policy and procedure development.)

Some public managers say that having such policies is a matter of “discretionary function” for which they are not liable. They believe that, if they do not have certain policies, they are not liable; thus, they choose not to have policies and procedures in writing. This is misguided. An organization is expected to have at least minimum or essential policies and procedures that safeguard the public, participants or users. However, from a legal perspective, if a policy or procedure is set forth, then it is essential that it be followed; for an agency or business not to do so evidences a breach of a standard or duty. If one cannot enforce a policy or procedure, then one should not have it. For example, if one says protective eye glasses are *required* to play racquet ball or that bicyclists *must* wear helmets on the bike trails then there must be regular enforcement of that rule. If an organization cannot do so, it is better to make it a *recommendation for safety*, not a required regulation. Warnings can be effectively written and communicated, rather than made mandatory. This can then be used as the “assumption of risk” defense in case of injury. That is, if a person chooses not to follow the safety precaution recommended, then the person assumes the risk of injury by not following the recommendation (see section on Negligence, below).

The Fields of Law

The various operational and management aspects fall under different fields of law. Legal counsel will be responsible for legal intricacies, but managers need to know the basic differences in terms of who can bring the action against whom, for what and with what potential outcome. Managers also should know the importance of, and when to use, legal counsel.

As this section will show, there are many fields of law that touch parks and recreation. There is no way to include all of it. However, legal issue of negligence under tort law and contract law will be discussed in more detail than other types of law, as they are not discussed at length in any other section and have a significant impact on our field.

Tort Law

Tort law is liability for a wrong to another. Torts are the principal field of law related to programs and services. The most publicized lawsuits typically center on personal injuries or torts. These might be related to supervision, conduct of programs, behavior management of participants, maintenance and dangerous physical conditions, protecting spectators, etc. These are based in *tort law*—a wrong against another person; that is, it is a failure to protect against an unreasonable risk of injury. In general, tort law falls under state law. All states are different, and, therefore, discussion of the subject must be in generalities. A manager should check with legal counsel and be familiar with the laws of their own state. There are two forms: intentional torts and unintentional torts or negligence.

Intentional torts include acts such as assault and battery or defamation. The injured person sues the one who caused the injury. Intentional torts are easily distinguished from negligence, because of the intent of the actor who caused the injury.

The agency is not usually liable for an intentional tort like molesting a child; no job description would include that. The person who commits the act is responsible, unless there is “deliberate indifference” by the administration toward these intentional wrongs after they are aware they were occurring, or if a background check had not been done that would have exposed an employee’s propensity for such activity. Then, the agency “should have known” and could be held liable. An individual is *always* responsible for his or her own acts, but the injured person may choose to sue only the agency since it has “deeper pockets.”

Unintentional torts or negligence are those acts that cause injury, but were not intended. The injured party may sue either the person causing the injury or the entity that the employee or volunteer represents, or both, for damages. Under the doctrine of *respondeat superior*, an employer is responsible for the acts of its employees/volunteers, as long as they act within the scope of their responsibility. Most anyone can be sued; however, as a professional in the field, the doctrine of *respondeat superior* is usually applied. Thus, managers must understand the ramifications of the doctrine. Generally, the corporate entity is responsible for those acting in its behalf, including both employees and volunteers. There are three basic levels of responsibility: the corporate entity; the administrators and supervisors; and employees and volunteers, including trainees and interns.

The *corporate* entity is responsible for the acts of those in its employ or volunteering, unless the individuals act outside the scope of their responsibilities or authority. Thus, *it is very important that all employees and volunteers know their responsibilities and authority through*

proper orientation and job descriptions. Board members, also in level one, generally are not personally liable for their policy actions.

Administrators and supervisors compose level two. Generally, these people are not personally liable for the actions of those under them. However, they are personally liable for failure to perform their administrative/supervisory functions, which include failure to employ competent personnel, failure to properly supervise, and failure to properly establish rules and regulations. They also are personally liable when they have knowledge of improper actions of their subordinates and are “deliberately indifferent,” such as in cases of sexual harassment or of child abuse by an employee that could have been prevented by a proper background check. This is known as “negligent hire.”

The third level is *employees and volunteers*, including trainees, interns, student teachers and aides. Generally, individuals are personally liable for injuries they cause, but so is the corporate entity; the entity is responsible for the actions of those who act in its behalf.

Even though an employee at any level may be personally liable for his or her actions, the corporate entity is the entity ultimately responsible. For the employee to be personally liable, the employee must be acting on their own and far outside of the scope of the employment or volunteer status.

Elements of Negligence

There are four elements of negligence, all of which must be proven to hold someone liable for negligence:

- a duty to the injured;
- the breached duty, (the act) usually defined as failing to meet “the standard of care;”
- the act was the proximate cause of the injury; and
- damages.

Duty. One is not responsible for everyone with whom one comes into contact! One must have a *special relationship that gives rise to a legal obligation to protect someone from unreasonable risk of harm.* This special relationship is usually inherent in programs and services of parks and recreation, such as a leader of recreational activity to the participants, a coach of a youth sport to the players, the supervisor of a facility/area to the users, etc. Sometimes, it depends on what the entity has held itself out to do. Did it voluntarily assume a responsibility; for example, an agency generally does *not* have to supervise an open playground, but did the agency say they would supervise the playground at a given time? Or, there may not be a responsibility to provide a lifeguard on a beach area; again, did the agency indicate they would, indeed, provide lifeguards?

However, protection from unreasonable risk of harm does not have to be only through direct super-

vision; it also can be provided through warnings or maintaining a facility or area in a safe condition.

The nature of the duty is dependent upon the relationship in terms of the category of the person; most individuals are *invitees*, or persons who are there for the benefit of both the agency and the participant. It is usually a situation where the participant pays or would pay (like a store patron) for the right to be there or for the service to be provided. The agency must be *proactive* in protecting participants from unreasonable risk of harm in activity and use of facilities when the individuals are invitees.

A *licensee* (a category of user, not to be confused with a person who is issued a license, such as a fishing or hunting license or a licensed professional) is a person who is on property with permission, but then uses the property in a manner for which they had not been given permission; that is, one who enters a property for their own purposes and not for the benefit of the owner. An example might be a snowmobiler or a hiker who is crossing land; the landowner does not benefit from the user. Such person takes the property as it is and must watch out for hazardous situations. The landowner is only required to warn of *known* dangers.

As for a *trespasser*, no special duty is owed, except that one cannot intentionally injure them. A landowner must mark the land for no trespassing as defined by state law, and tell people to leave if he knows someone is there. Failure to do that indicates permission to be there and may move the person to licensee status. A number of states no longer distinguish these categories, but use the elements of negligence to determine the nature of responsibility.

For example, a group of landowners allowed runners to use their land for cross country practice. They had trails that were perfect for the purpose. The runners were licensees, allowed to use the land with no obligation of the land holders to them other than to warn of a known unsafe condition. One year, the landowners decided to charge the runners and determined that all those who did not pay would be trespassers. As soon as they started charging, the status of the users and the obligations of the landowners to both the runners and the rest of the public changed. The runners became invitees and the landowners were obligated to keep the land to the standard of other public trails or be liable for injuries that occurred because they did not meet standards. If they did not enforce the trespasser status of all others, they would become licensees. It put them in a much more precarious position.

The act. The “act” is the standard of care that must be exhibited by the entity. When this act falls below such standard of care, it is said that the entity has breached the duty of responsibility to protect an individual from

unreasonable risk of harm. This standard is determined by what a *reasonable and prudent person would do under similar circumstances*. “Reasonable and prudent person” is a reasonable and prudent *professional* in the parks and recreation field, not the ordinary person. This goes for volunteers, as well as employees. If a volunteer assumes the responsibility (special relationship), this volunteer is held to the same standard of care as a professional. “Similar circumstances” are determined by the nature of the activity, the type of participants and the environment in which the activity is taking place. The unreasonable risk must be *foreseeable* by a professional; if not foreseeable, then not liable. Professional standards do, however, have great legal impact. Expert witnesses use professional and industry standards in court as evidence that these standards are desirable practices. They will argue that they demonstrate the “standard of care” that the defendant should have exhibited. Thus, *it behooves every manager to be aware of professional and industry standards and to follow them, as appropriate to the services being offered*. In the case of Camp Wildwood described above, standard of care required that emergency action plans were written and practiced. The camp had not practiced evacuation from the beach. The campers were told where to go but Lesser, the boy who got hit by the falling tree, was not with a supervisor. He claims he became confused. Not following the standard of care was a major issue in court.

Proximate cause. The “act” must be the proximate cause of the injury. For example, there may have been failure to supervise, when it might have been prudent to do so, but such supervision failure must be the proximate cause of the injury.

The court in the *Camp Wildwood* case above determined that standard of care was not followed. However, then the court had to determine that, if the standard of care had been followed, would the camper still have gotten hurt. One statement in the case was that since the supervisor did not get hit by a falling tree, if Lesser had been with the supervisor, he would not have been hit by a tree. They also had to ask the question: if they had gone to the dining hall as the emergency action plan stated would there have been less chance of being hit by a tree? Were there fewer trees on that route? If the breach of standard of care cannot be proven to be the cause of injury, negligence cannot be found.

Damage. There must, in fact, be damage. This can be in the form of physical, economic, or emotional.

As related to allocation of damages (any dollar award), most states have what is termed “comparative fault.” This means that the fault of the injured (plaintiff) is compared to the fault of the entity. That is, how much did the injured party contribute to his or

her own injury compared to that of the entity (defendant)? There are two forms. Some states have a 50/50 form, which means that the injured receives whatever percentage the entity is at fault, except if the injured is more than 50 percent at fault, and then the injured receives nothing. In the other form, the “pure form,” the injured receives whatever percentage the entity is at fault. For example, if the injured was 75 percent at fault and the entity 25 percent, under the 50/50 form, the injured receives nothing. However, under the “pure form,” the injured would receive 25 percent. Thus, *it behooves the manager to have a record system in place to be able to document not only the fault of the injured, but also what the entity did to protect the injured*. (See Chapter 21, Risk Management, for methods to protect from law suits.)

Defenses to Negligence

A variety of different defenses are used to protect agencies from paying large lawsuits. The first defense is that all or any one of the elements are not present. For instance: there was no duty; or there was no breach of standard of care; or the breach of standard of care was not what caused the injury; or there was no actual damage. If any one of these is proven, there is no negligence.

Common law doctrine of assumption of risk.

Generally, participants assume the inherent risks of the activity in which they engaged, known as *primary assumption of risk*. This assumption rests on the fact that the participants *consented* by participating. Participants must be knowledgeable regarding the nature of the activity, understand the requirements of the activity in terms of skill and physical/emotional condition required to participate, and appreciate the fact that injury may occur. If a person goes skiing, she knows there is a chance of falling and getting hurt. There is no way to take that out of the activity; so, if she skis, she assumes the risk of falling and getting hurt. However, it is not assumption of risk, if the ski resort puts up a fence that is hard to see and is unexpected. The skier does not assume a risk that is not a part of the sport, so the resort would be liable, in this case.

Participants also may assume risks based on their *conduct* (called the *secondary assumption of risk*). In this circumstance, the participant is aware of dangers, whether obvious and open (e.g., playing surface), warnings have been given, or the participant has knowledge of the activity (i.e., has expertise), and participates anyway. Then, there is comparative fault. Using the example above, if the skier went outside of the groomed trails and hit the fence, then the courts would need to decide how much of the injury was caused by something the skier did, versus how much of it was the fault of the resort.

Statutes that reduce liability. These might include or provide statutory defenses:

- immunity statutes;
- volunteer immunity;
- recreational land use statutes; and
- hazardous recreation statutes.

These statutes often set forth the responsibilities of the provider and the participant (user).

Immunity statutes are of several types of immunity statutes. The first is *Sovereign Immunity*. This is where the government cannot be a defendant in its court for negligence. About 15 states have immunity under a philosophy that to pay recovery to an individual for an unintentional tort takes away the benefits the government can give to the general population. Many of the states with immunity have exceptions to those statutes and every director should understand their own state's law. For example in *Barnes v. Dallas Parks and Recreation* (1999), Barnes suffered a near drowning experience when a lifeguard at a Dallas pool did not respond appropriately. Barnes sued the City for negligent hiring, training and supervision of life guards. Texas has sovereign immunity with some exceptions, but none of these allegations fell under an exception, so the city was not liable.

Volunteer immunity: Volunteers are given some protection by the Federal Volunteer Protection Act, and some state Volunteer Protection Acts protect volunteers in public agencies and nonprofit associations. If they hold the proper credentials, where there are such, their standard of care is lowered to gross negligence (acts even a reckless person would not do); that is, they are immune from their acts of ordinary negligence (acts that a prudent person would not do). However, the corporate entity still is liable for their ordinary negligence. If there is a volunteer lifeguard and that guard is certified at the same level as a paid lifeguard, then the volunteer guard cannot be sued, but the agency for which he or she is volunteering can be sued.

Many states have similar immunity statutes for nonprofit association volunteers and give some protection to public volunteers under their tort claims acts. Tort claims acts are statutes that give certain immunities to governmental entities. The level of immunity is determined by state laws. Where there is joint programming or sponsorship, managers must be careful about joint relationships that bring liability (see Chapter 19 for discussion of parties at risk).

Recreational land use statutes are acts passed in most state to protect the private land owner who has opened his land to the public for recreational activity without charging a fee. Generally this is for outdoor pursuits that take more land than the government could provide. Hunting, fishing, snowmobiling, cross-country skiing,

sledding, etc. take lots of land. Such users assume the risks of the activity in which they are participating and the land owner must only warn of known ultra-hazardous dangers. Some states that do not have sovereign-immunity statutes have used recreation land-use statutes to obtain immunity for recreational activities in their parks.

Nebraska allowed municipalities to use recreation land-use statutes for public facilities that were being used for recreational purposes. A woman was on the courthouse lawn for a historical celebration when she stepped into a hole and was injured. The courthouse claimed they fell under the recreational user statutes as the injured party was there for recreational reasons. The Judge pointed out that the courts should not have to look at why a person was at a facility to determine negligence. If someone had been going to the courthouse for business and stepped into the same hole, he could collect, but someone attending a historical purpose could not. The Judge ruled against the county, saying the intent of the recreational-users statutes was for private landowners to allow the public to use their lands for recreation without worry of law suits (*Bronsen v. Dawes County*, 2006). The municipalities reacted by closing down the sledding runs in public parks, as they were worried that public parks were not protected by the recreational-users statute any longer. Within two weeks, the Nebraska legislature passed legislation that added park land to the recreation user statute.

Hazardous recreation statutes are another form of immunity protection. Because the public has demanded certain activities, like skateboarding, sledding, etc., that are potentially dangerous, and the communities are worried that if those activities were provided, they might open themselves to lawsuits; these statutes have been passed for protection. With the advent of these statutes, skateboard parks and other opportunities have become available across the country. Almost all 50 states have protected their parks and recreation departments in some manner through one of these methods.

Transfer of Liability by Contract

Managers must work with their legal counsel to draft agreements that effectively transfer liability or allocate the risk to another, such as:

- liability insurance;
- employing independent contractors to provide a service;
- indemnification and waiver clauses for lease and rental agreements; and
- participant waivers or releases.

The most common method of transfer is liability insurance. This is an insurance policy that provides for defense of a liability suit and payment of any award to

the extent of coverage, which is defined in dollars. A second method is to transfer the liability to someone else by using independent contractors to provide service. If the agency provides the service through a contractor, then the contractor takes on the liability. Waivers and releases transfer liability through contractual promises not to sue for negligence, in exchange for the right to participate in an activity. All of these transfer methods are discussed in Chapter 21.

Contract Law

There are many contracts with which the manager must deal: employment; purchasing equipment, supplies, products, and services; renting or leasing a facility; a participant waiver; transfer of liability to an independent contractor; etc. One party offers a service or product under stated conditions, and the other accepts the offer. If one party (entity, person) fails to perform the contract, then the other may sue for performance or damages and the law will enforce the contract.

Contracts should be in writing, but are enforceable if they are only oral. A *contract* has three elements—an offer, an acceptance, and consideration—and the manager must understand what constitutes each of these elements. If an organization would like a person to serve on its staff, then it will make an “offer,” stating the nature of the position and remuneration and benefits. The recipient will either “accept” those terms or may counteroffer, saying “I’ll accept, if certain changes are made in the position or benefits.” This is another offer, and is considered an automatic rejection of the first offer. It is up to the organization to accept or reject this new offer. The mutual consideration is that the employee gives services and the agency gives designated payment.

Offer

An offer must be specific and made with intent. It should not be vague; that is, the offer should explain the what, where, when, and how much, so the person who would accept knows exactly what they will be getting and at what cost. That offer, while it is on the table, can be withdrawn. Once it is accepted, it cannot be changed.

Acceptance

The person who receives the offer has two choices: to accept or reject. If the offer has a time limit (that is, if it states a response is required within three days), it constitutes a rejection, if there is no reply in that time period. They can accept by replying in writing or signing; once it is signed and put in the mailbox, it is accepted. It cannot be withdrawn or rejected after that. The contract can be accepted by performance. If you make an offer for someone to clean your pool for X dollars, and they do it, it is accepted by performance. Once they start the

performance, the offer cannot be withdrawn. Finally, if they change the contract in any way, it is a rejection and becomes a counter offer.

Consideration

Consideration is the trade that each party makes. It is the service of the employee for the wages and benefits, the item for the cost, or the use of a facility for the rent. However, there are some special issues with consideration. For example, if an agreement is made for something that is already being done, or for which there is a pre-existing duty, there is no consideration. Consideration must come after the offer. If the offer is made, and the work is then begun, then there is reliance on a promise and then consideration from one party has been given, so the other party becomes obligated to follow through with their offer.

Written contracts must have certain elements. They need to include a description of the offer and the price with a signature. Other essential clauses include: quality of the goods and services; duration of agreement and price; who can change the agreement; what happens if something is damaged; payment plans; how disputes should be resolved in the event one party does not meet their end of the bargain; and other policies that will protect the parties.

While some agreements can be oral, all should be writing and some *must* be in writing. Agreements that will last longer than a year, or occur up to a year in the future, must be in writing. Also contracts that include an item of uniqueness must be in writing; that would always include the sale of land, because no two parcels of land are exactly alike. Any contract for the sale of goods over \$500 or the sale of property over \$5,000 must be in writing in most states. Finally, if you are signing for another party’s contract (like co-signing—you will be responsible for the contract if the first party cannot fulfill their responsibility), it must be in writing.

There are many rules regarding contracts with which a manager should be familiar. The first is who is authorized to contract. Just because someone agrees to a contract does not mean they have the authority to do so, and a contract signed by someone without authority will make it void. Attempts should be made to determine the signing agent has authority. If a contract is made with a person without authority, the courts will ask if you knew or should have known there was no authority.

Besides not having permission from an agency to enter into the contract, there are other issues. A contract cannot be made with a minor, a person who is incapacitated, signing under duress or force, or who is incapable of understanding the contract. In *Jones, v. Dressel*, Jones, a minor of 17, entered into a contract with a skydiving training company to provide skydiving lessons. Jones signed a waiver and took lessons from the company.

Jones was hurt in an airplane crash while skydiving and, at that point, attempted to void the waiver (contract). The accident occurred several months after Jones had turned age 18. The Colorado Supreme Court held Jones could not void the contract he had signed as a minor, because he had taken advantage of the services and had not attempted to void the contract immediately upon turning age 18. Jones had used the services of the company, waivers are legal in Colorado, and he was not forced to sign the contract (as skydiving is not a necessity and, if he did not want to sign the contract, he could have gone elsewhere for the services).

The courts, when requested to enforce a contract, will also consider some other issues. The contract should be clear and understandable. If there is ambiguity in the contract, the courts will have the originating party or the one who wrote the contract absorb any cost of the ambiguity. Whatever is in writing will be the final word. If there was an agreement orally that does not get in the written version of the contract, it will not be enforced. Obviously, a court will not enforce a contract that is illegal or against public policy. If you had a contract to sell marijuana, the court would not enforce it. In *Global Travel Marketing, Inc v. Shea*, Shea, the father of an 11 year-old boy who died while on safari, requested the court to determine whether a contract made by the mother (divorced from the father) was binding on the father and the son. The court determined that it was not. The mother had signed that she agreed for her and her son that, if there was a dispute, the parties had to use arbitration. The court forced the mother to use arbitration, since she had signed the contract, but did not do the same for the father. A parent cannot sign away the rights of a minor, and the father was not a party to the contract. From a legal perspective, a contract is a very technical document and carries the force of law; thus, legal counsel should be involved in all contracts of whatever type.

Human Rights

A person whose human rights have been violated—whether in employment, in use of facilities, or as a participant—may sue. A government or an independent watchdog organization may also bring action against the organization.

The injured party may sue for compensatory damages and/or restitution. Human rights are based on Constitutional law and implementing civil rights statutes, and are different from human resources law, which is a separate, specialized field. Human rights are integral to many management aspects, such as discrimination, harassment, physical and sexual abuse, protective laws, civil liberty violations, privacy of participants and employees, and the public freedoms

of speech and the right to assemble. Having management policies and procedures in accord with human rights law is one of the most important legal aspects of management, and the penalty for not being in compliance can be significant both financially and in terms of public relations.

While the suit usually is against the entity under the doctrine of *respondeat superior*, in certain situations it may be negated, such as for deliberate indifference for sexual harassment. The individual employee involved, as well as the administrator in charge, also may be sued.

The legal issues of human rights are based in equality of race, ethnicity, religion, gender, age and disability. There are many laws that have been created to ensure equality including sexual harassment, equal pay act, American for Disabilities Act and many other civil rights bills. Most of these are discussed in Chapter 16, but relevant comments can also be found in almost every chapter of this text.

Environmental Law

Environmental law is not just for the manager of undeveloped areas and parks. Environmental considerations encompass protection of the health and safety of workers, protection of and enhancement of use of natural resources (sustainability), right of people to quality environment, including reduced pollution, and setting aside land for future generations as provided under the Wilderness Act. (See Chapter 11, Physical Resource Planning; Chapter 12, Physical Resource Management; and Chapter 13, Management of Operations.)

Criminal Law

The field of criminal law differs from others in that the victim does not bring the lawsuit, but rather a crime is considered an “act against society,” so the government brings the action on behalf of the victim and society and serves as both investigator and prosecutor. The *victim*, unless there is a victim’s compensation law in the state, does not receive any compensation. The perpetrator of the crime may receive a fine, be imprisoned or both. The victim also may sue as an intentional tort in a civil action against the one who caused injury for damages. (See Chapter 20 for a discussion how a park and recreation agency should handle criminal issues.)

Property Law

Managers need to understand basics of property law, including the rights of property, the various legal methods of property acquisition, and legalities of disposal

of and encroachment on property. Land-use controls, such as zoning, building code and health department requirements, are especially relevant to management, and the penalty for not being in compliance can be significant financially and in terms of public relations (see Chapters 11 and 12). In addition, property management involves many other aspects of law, such as contract (rentals, leases), torts (maintenance, layout and design), statutes relating to use (skateboarding, skiing, equine, etc.). (See Chapter 21).

Commercial/Business Law

The business aspects of management have many legal aspects, not only financial management (financial resources, auditing, purchasing), but also business aspects of programs and services (copyright, marketing fraud/misrepresentation). It is not sufficient to have an accountant or financial manager; the chief executive also must understand the many legal controls on business operations. (See Chapter 19, Financial Management; and Chapter 20, Budgeting.)

The Legal System

The court system is divided into federal, state and local, and the system in which an action is brought depends on which court system has *jurisdiction*. Jurisdiction is determined by the nature of the substance of the action, the amount of dollars involved, and the persons bringing the action. The nature of substance of action is the type of law under which it falls. Negligence is state law and will most often be brought in state court. However, if the people involved in the suit are from different states, *and* if the suit is for over \$75,000, it can be brought at the federal level. On the other hand, Federal Constitutional law falls under federal jurisdiction.

Not just anyone can bring a lawsuit! One must have a special interest that has been damaged. Who is allowed to bring a lawsuit differs by the field of law.

Legal Audits

Just as there is a financial audit, there should be a legal audit. A legal audit should not be confused with a risk management plan, which assesses hazards. The risk management plan is only part of a legal audit. Just as law is pervasive throughout all operations, a legal audit reaches into all aspects of operations. Its purpose is to have management do what it can to comply with all legal requirements and, in case of legal questions or lawsuits, have all the proper legal documentation. In this documentation, the management information system is

critical (see CAPRA Standard 3.4.). *A legal audit assesses the legal health of an organization—is all well, legally?* A legal audit is the systematic process of:

1. assembling (having on file) all documents/documentation related to legal aspects;
2. reviewing them for any needed modification due to changing situations;
3. verifying that all documents have been properly authorized by the governing body of that entity or duly designated representative; and
4. identifying documents that must be protected or are not available to the public and why.

Such authorization should appear in the minutes of the governing body. (See the section on “Legal Authority to Operate,” below, and Chapter 3 on Legal Authority and Jurisdiction.)

For an entity with good management practices, a legal audit will not be an undue burden, for all the legal records will be properly authorized, up-to-date and on file. Agencies that have been accredited by the Commission for Accreditation of Recreation and Park Agencies (CAPRA) will already have the documents in order by virtue of the accreditation review process. Thus, the audit becomes the annual review and updating of the documents and/or documentation.

The foregoing discussion in this chapter gives the legal foundation of the legal audit, but it will vary by the nature and size of the entity. The audit should encompass, but not be limited to, these 10 categories, which are reflected in the various chapters of this book and in the CAPRA standards. The fiscal policy and management and human resources categories are especially critical for protection from potential lawsuits. For CAPRA standards references, see Compendium under the respective subject chapter.

Legal Entity (Chapter 3)

What is the source of legal authority and powers? (See Standard 1.1.1.)

What is the jurisdiction of the entity, set forth by legal geographic description? (See Standard 1.1.2.)

Are the policies, rules and regulations, and operating procedures *approved by the governing body* and set forth in a manual? (See Standards 1.4.1 and 1.4.2.)

Interagency Relationships (Chapters 4 and 6)

Are the agreements related to agency interrelationships, especially operational agreements, written and approved by the governing body? (See Standard 1.5.2.)

Planning (Chapters 7, 8, 9 and 11)

Have the various plans been approved by the governing body? Such plans include:

- strategic plan (see Standard 2.3.);
- comprehensive plan (see Standard 2.4.);
- master site plan (see Standard 2.4.2.2.);
- resource management plan (see Standard 2.4.2.3.); and
- phased development (see Standard 2.4.2.6.).

Human Resources (Chapters 4, 16, 17 and 18)

Are the position responsibilities delineated? (See Standards 3.1.2 and 4.1.2.3.)

Have the human rights of employees been protected both in recruitment/hiring and on-the job? (See Standards 4.1.3.2 and 4.1.3.)

Are the personnel policies, including compensation, benefits and conditions of work, as well as discipline and grievances, set forth in writing? (See Standards 3.1.3, 3.4.2.1, 4.1.4.1, 4.1.4.2.1, 4.1.4.3, and 4.1.4.7.)

Are performance appraisal policies and procedures in place? (See Standards 4.1.4.5.)

Are health and safety regulations (e.g., OSHA) met?

Records Management (Chapter 16)

Is there a records management system for appropriate storing of documents, especially protection of privacy, (see Standard 3.4.2)? These include:

- a central records component for keeping all documents (see Standard 3.4.2);
- a procedure for handling funds (see Standard 3.4.2.2); and
- accident reports (see Standard 3.4.2.3).

Fiscal Policy and Management (Chapters 19 and 20)

Are fiscal policies set forth in writing, with the legal authority clearly established, and approved by the governing body? (See Standard 5.1.) These include fees and charges, purchasing procedures, insurance poli-

cies, advertising liability, tax issues, et al. (see Standard 5.0 for scope).

Programs and Services (Chapters 8, 9 and 10)

Do participant rights comply with statutes, including equal opportunity, ADA, Title IX and civil rights?

Are appropriate program/services legal requirements met, such as licenses and permits (e.g., selling food, parades), copyrights for music, films and print materials?

Are agreements to participate or waivers used with participants reviewed by legal counsel?

Are appropriate warnings and guidelines to participants related to activity participation, use of facilities and their behavior, provided by leadership or posted to provide some basis for assumption of risk defense in case of injury and a lawsuit?

Facility and Land Use Management (Chapters 11, 12 and 13)

Are all rental agreements, including fees and charges schedule and use regulations, in writing?

Are acquisition, encroachment and disposal policies written and approved by the governing body? (See Standards 7.1, 7.3 and 7.4.)

Are all regulatory requirements related to facilities, such as licenses, health and sanitation, fire, inspections, environment (e.g., pollution), met? (See Standards 7.6.1 and 7.9.)

Security and Public Safety (Chapter 22)

Is the authority of personnel, as related to law enforcement, specified? (See Standard 8.1.)

Are there procedures for recording and documenting accidents and disturbances? (See Standard 8.2.3.)

Are there policies and procedures for handling evidentiary items and disruptive behaviors? (See Standards 8.3.2, 8.3.3.)

Risk Management (Chapter 21)

Is there a risk management plan and operating procedures manual approved by the governing body? (See Standards 9.3, 9.6.)

Resources

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Betty van der Smissen (Deceased) Original Chapter Author. Dr. van der Smissen died November 2008. Her expertise in the law and recreation was second to none. She strongly believed in standards and their power to help improve how organizations were administrated. Her expertise was in Risk Management and Law, but she lived for her students.

