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ABSTRACT

This article recreates the plenary session presented by Susan Ellis and Steve McCurley at the ICVA. It illustrates the arguments for and against exercising strict risk management practices for volunteer programs and then attempts to describe a middle ground that should be of benefit to both volunteer programs and those they serve. The essence of the discussion involves whether it is appropriate for some social service programs to avoid either the involvement of volunteers or to cease operation totally because of a fear of potential liability. The opening arguments for and against risk management are intentionally phrased in a somewhat extreme fashion to help stimulate discussion.

Protection or Paranoia: The Realities of Volunteer Liability

Susan J. Ellis and Steve McCurley

THE ARGUMENTS AGAINST STRICT RISK MANAGEMENT PRACTICES

1. In the United States, we live in a society that is dangerously close to paranoia about risk and liability. So it isn't surprising that fears surface about volunteering. Yes, you and your organization can be sued about matters involving volunteers, just as you can about every activity in which you engage.

The real question is whether what you are doing is *worth* the risk of being sued and, if so, whether you (and your organization) ought to be willing to go to court and defend whatever you did that causes legal action. The worst that can happen is that you lose the suit and have to go out of business to pay the liability damages.

Think about it: Under the fear of the worst-case scenario of losing a law suit, we stop ourselves from being innovative or taking the kind of risk that can truly help so many people. To give the most needed service to the most participants, we sometimes need to walk on the edge.

2. It's lily-livered to stop ourselves from developing creative volunteer assignments simply because there is a small chance that someone might get hurt or sue. The *real* issue here is that liability is a smoke screen hiding unwillingness to involve volunteers substantially. It's all based on prejudice about the low skills and poor attitudes of volunteers. So administrators, lawyers, and insurance agents simply *assume* volunteers are inherently more risky than paid staff and therefore say "No" to new volunteer assignments. This is *risk avoidance* and not *risk management*.

3. If American society can justify continuing high school football games—an activity with enormous risks—how can anything volunteers do be questioned? We take the risks that we care about. When our desire to do something outweighs our desire not to, we do it. That's why bungee jumping isn't against the law. But why is it we become apoplectic about letting a volunteer drive the agency van?

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4. Remember the turtle only makes progress when it sticks its neck out. We must accept that some of the work volunteers do is *inherently* more risky than other activities. If you are helping the homeless on the street at midnight, providing services to frail and vulnerable populations, challenging the status quo with advocacy, protest, or even unpopular public education, you must accept that some issues of safety or accountability will arise. If a person won't volunteer because he or she is afraid of being sued, this might be the *wrong candidate* for the risky position. This is especially true for board members of non-profits. If there is a need for the non-profit, there probably is some underlying social concern that could some day make someone unhappy enough to sue. That's why going on a board is not just a client development step for corporate bigwigs, it's a statement of one's beliefs.

THE ARGUMENTS FOR STRICT RISK MANAGEMENT PRACTICES

1. Avoidance of risks is an intelligent response to danger that allows you to both safeguard your agency and your clients and to continue to deliver services into the future. Programs need to accept the fact that they can't just do everything they want to do. Particularly in times of scarce resources it's reasonable to eliminate some program areas that are more dangerous than others. It's great to talk about leadership and innovation, but the real risks are going to be experienced by those who get hurt when something goes wrong and those who don't receive services in the future because your program has been eliminated. Ignoring risk doesn't mean that you're imitating the turtle; instead, you're imitating the ostrich, burying your head in the sand and hoping that reality will go away just because you're pretending you can't see it.

2. Saying that you will apply risk management only in "extreme" cases is nice in theory but difficult in practice. The

reality is that you can't always predict, especially in the case of new and innovative programs, where the risks are likely to occur. Deciding to go ahead and leap in when you don't know the extent of the risk is foolish. Remember the Ashanti proverb: "No one tests the depth of a river with two feet."

3. Volunteer programs are inherently risky for two reasons. First, involving volunteers creates a more complex system of service delivery, and complexity is always an invitation to greater risk. Second, we all know and recognize that volunteer programs are under-funded and understaffed. This makes it extremely difficult to maintain standards of care that are as high as we would like. The reality of good volunteer management is that you do safely what you can with what you have available, and recognize that you generally won't have everything available that you would want. Many, if not most, volunteer programs have some deficiency in screening, training, or supervision of volunteers.

4. Saying we can defend volunteer programs in court underestimates the harm that is done by any incident. First, no court case can completely redress the damage done to those who are seriously injured. Second, any court case will decimate the resources of an organization. You can be driven out of business even if exonerated. Third, every time a volunteer program anywhere gets into trouble, it adversely affects the recruitment efforts of every other program in the community. One of the few pieces of real information we have about lawsuits involving volunteers is a Gallup poll which revealed that 16 percent of potential volunteers were so afraid of lawsuits they were altering their behavior by either avoiding all volunteer involvement or shying away from volunteer activities that looked dangerous. We can't afford the bad publicity generated by a few foolish programs.

IDENTIFYING A SAFE MIDDLE GROUND FOR VOLUNTEER PROGRAMS

These are our suggestions for a way to operate your volunteer program that both heeds the realities of risk and strives to provide service to the community.

1. Here are four of the main issues. First, there's *safety*. We must take steps to assure all our program constituents are as safe as possible. This means clients (perhaps the most critical group, especially if you serve a vulnerable population), volunteers, employees, and perhaps the public (if your organization is open to the public or you interact with the public in some way).

Second, there's *risk of suit*. This has two sides to it. Any client, volunteer, or employee can both sue or be sued. The organization as a whole is also vulnerable to being sued, which raises the question of the liability of the board of directors as individuals.

Risk of suit revolves around the third issue of *accidents versus negligence*. You can do a lot more to limit negligence than to prevent all accidents (that's why they are called accidents).

Fourth, from an organizational perspective, you must decide whether you are trying to *protect participants from harm or protect the organization from suit*. The difference here may be between someone experiencing physical harm or someone taking offense—becoming riled up about an action or position taken.

2. Risk management is designed to proactively deal with potential problems. In order of preference, it advocates:

- Minimizing or eliminating risks through better management.
- Allowing others to assume risks, through such things as purchase of insurance.
- Avoiding risks by deferring them until they are safe.

The true goal of risk management is not inactivity, but safer activity. Conducting risk management decisions by only engaging in worst-case scenario planning is an incorrect and somewhat absurd application of risk management principles. Risk management is based on probabilities, not just possibilities. No one can prepare for all possible risks and no one can predict all possible risks, particularly in programs that have not been tried before. If volunteer efforts are truly worth doing, then it is worth considering the risks, making all possible efforts to reduce those risks, and then proceeding *even when some risk remains*. As Niccolo Machiavelli once wrote, "God is not willing to do everything and thus take away that share of glory which is rightfully ours."

3. Liability is often a consequence of bad management. For your program to be found at fault, it must have done something wrong. Good management is both the best mechanism for avoiding risk and the best defense when problems arise. Good volunteer management is the best form of risk avoidance for volunteer programs. Make sure that the volunteers in your program are adequately screened and selected and that they have the training and materials required to perform their work safely and effectively.

Place the safety of clients first. Be more concerned with risk management in situations in which someone vulnerable is placed into danger. But if you're worried about exposing clients and volunteers to risk, the best practice is to involve them in evaluation of the risks, examination of the alternatives, and development of protective practices. Allow others the dignity of deciding whether and how they will be involved.

4. Avoiding volunteer involvement because of a fear of liability is more likely to be an excuse than an appropriate exercise of risk management.

- Volunteers need not be less skilled, less trustworthy, less experienced than paid staff.
- Volunteers need not be less reliable or more inclined to risky behavior than paid staff.
- Volunteers will not take their responsibilities less seriously than paid staff.

Making a decision not to undertake a volunteer program due to risk may be a rational exercise of management judgment; making a decision not to undertake a program simply because the work will be performed by volunteers is an unfounded exercise of prejudice. In the latter case, risk management has simply been used as a smoke screen hiding basic resistance to volunteers. "Pay" does not automatically confer competence, nor does the lack of it mean a lack of reliability.

5. As a volunteer program manager, you probably do not have complete authority in these matters. This means you will be dealing with your bosses and perhaps your board, a lawyer, or an insurance agent. Keep in mind that none of these people have spent very much time thinking about volunteer-related issues and will most likely give you an off-the-cuff quick-and-dirty reaction. Their first inclination will be to avoid risk and say "No." Hold your ground. Be prepared to explain your screening, training, and supervision plan. Offer to test your idea with a pilot project. Involve volunteers and staff in developing risk management practices.

The ignorance of those in your organization concerning volunteers is your responsibility. If you let them make decisions based on that ignorance you are likely to end up with ignorant decisions. You need to educate and involve others to change their attitudes. The best approach is to be bold about risk management and to use it as a tool to help you. Fear of liability will get the attention of management, and you can use that fear to gain

support for making needed changes in your volunteer program. But remember: If you are not using the tool to help you, someone else will be using it against you.

6. Innovation does require taking risks. One of the distinguishing characteristics of volunteer programs is their willingness to "walk along the edge." We all face risks in what we do, most of them much greater than will ever be faced by our volunteer programs. You'll face more danger on the way home from a conference than the average volunteer program faces in a year. Don't overreact to the prospect of risk; it may be a requirement to accomplishing the important work for which the program was created. View risk as simply another obstacle to be overcome, not an insurmountable barrier.

SUMMING IT ALL UP

What we're talking about here is an intelligent balancing of harms. By operating a program that has some element of risk you may, if things go wrong, cause some harm to your clients. But by not operating your program, you will also cause harm by depriving them of services they need. Either way has dangers.

The proper course of action requires determining what needs to be done to make your program as well-managed and as safe as is possible, and then going ahead and working your hardest to help those in need.