

Legal Issues Survey Results

Jeffrey D. Kahn

This article analyzes the results of the Energize Associates Legal Issues Survey, and discusses some of the questions raised by the survey responses. The seven-question survey was completed by over three hundred people at the 1984 National Conference on Volunteerism in Asheville, NC. The preliminary survey results were published in the Winter 1984-85 issue of this JOURNAL, along with a copy of the survey and a request to readers to complete and return it; another one hundred people have therefore completed the survey since the Conference. The survey respondents represent volunteer programs from throughout the nation, and Energize Associates would like to thank all of them for their participation.

GOALS OF THE SURVEY

The Legal Issues Survey developed in response to the increasing frequency with which legal questions seem to be raised by volunteer administrators. Energize Associates wanted to know which legal issues were of greatest concern, what kinds of legal problems had *actually* been encountered, and the amount of overlap between these two areas. We wanted to get a sense of the degree to which legal issues influenced program planning, and of the resources available in dealing with legal issues.

The goal of the survey was *not* to come to statistically correct conclusions about which legal issues were perceived as most pressing or how often lawsuits occur. Though the sample was as diverse as the AVA membership, it was neither large enough nor controlled enough to produce definitive answers to questions about legal issues. Rather, the survey was intended as a beginning attempt to get in-

formation from some number of volunteer administrators, and to use the responses of these people to generate discussion and further investigation of legal issues.

While many volunteer administrators encounter numerous legal issues in their work (especially since so many of them perform other job functions in addition to running a volunteer program), the focus of the survey and this article is on those legal issues stemming from the presence of *volunteers*, and questions about how volunteers are viewed in the law.

SURVEY RESULTS

Four hundred fourteen (414) people responded to the survey. A complete tally of the responses for each question appears at the end of this article. At this point, however, some broad generalizations about the survey results might be helpful. Respondents indicated that legal issues play some substantial role in program planning (though a significant number felt that these issues play a less important role). When asked how adequate their knowledge of legal issues related to volunteerism is, most respondents indicated that their knowledge was inadequate to some degree. Most respondents, had, at some point, consulted with a lawyer or someone else about a volunteer-related legal issue. Fifty respondents indicated that their volunteer program had been involved in some sort of legal action or lawsuit. Another fifty respondents said that they were aware of lawsuits or legal actions involving another program.

A detailed report of these actual actions will occupy the remainder of this article. A number of the reported lawsuits did not involve legal issues related to the

Jeffrey Kahn is a third-year law student at the University of Pennsylvania Law School and the author of "Organizations' Liability for Torts of Volunteers," in the July 1985 issue of that school's *Law Review*. He also works with Energize Associates, a volunteerism consulting and training firm, on special projects.

presence of volunteers, but dealt with other, unrelated legal questions (such as property disputes, questions of corporate structure, etc.), and those responses will not be discussed here. This article will focus on the legal issues related to the utilization of volunteers, in which the law may be unclear as to whether it matters if a person is salaried or a volunteer. Each general category of legal actions will be discussed individually; the *actual responses* (using respondents' words wherever possible) about lawsuits will be reprinted according to category, followed by some discussion of the legal questions raised by those lawsuits and actions.

One important caveat: the following discussion (or any other you read) should by no means replace consultation with your organization's lawyer. Your lawyer can advise you on the specific laws of your state and locality, and how those laws apply to your particular circumstances.

LIABILITY/INSURANCE

When asked what legal issue related to volunteers they would most like more information about, 68% (134) of those answering this question mentioned a liability or insurance issue. In addition, of respondents who had consulted a lawyer or someone else about a legal question, the majority had asked a question related to liability or insurance. Thus, liability and insurance questions are the foremost legal issues in the minds of the volunteer administrators who responded to the survey.

Liability issues also figured prominently among the actual legal actions experienced by respondents. The situations they encountered included: a suit by an intern over an injury, result not determined; negligence suit won by organization (no other details listed on survey); suit over an accident in a day care center, settled out of court by the liability insurance company; individual injured at fundraising event, "papers were served," case turned over to insurance lawyers; falling in hospital, law suit resulted in financial reimbursement; student injured during off-campus apprenticeship, theater company held liable (not the school); car accidents and personal injury, not yet re-

solved; volunteer fell while on duty at blood center, negligence suit resulted in volunteer receiving hospital expenses and some damages; volunteer injured on the job (she fell), law suit brought but not settled yet; and a suit by a 40-hour-a-week volunteer who was injured and felt she was entitled to Workers Compensation.

While all of these situations involve questions of liability for an injury to someone, they can be divided into two categories. Most of them involved injury to a volunteer, and the volunteer's attempt to recover damages from the organization. Other cases, however, involved injury to someone not working for the organization at all, but whose injury may have been caused by a volunteer (this was the aspect most respondents had asked lawyers questions about). The relevant liability issues are different in the two types of situations.

ORGANIZATION'S LIABILITY FOR INJURY CAUSED BY A VOLUNTEER

The general basis for imposing liability is "negligence." If one party negligently acts and that act causes an injury to someone, the negligent actor may be liable for the injury. The precise meaning of negligence is not clear and may vary from state to state, but the basic idea is that negligence is a departure from the standard of care a reasonable person would exercise.

If a volunteer acts negligently and causes an injury (the requirement of cause is also very complex), then the volunteer may be personally liable for the damages resulting from the injury caused. As volunteer administrators who plan training for volunteers, you might consult with your organization's attorney about how your volunteers would be personally liable and then inform your volunteers of this possibility. At the same time, you might inform them about possible insurance options, and discuss how they can reduce the likelihood of such accidents occurring.

In many cases, however, the organization may *also* be liable for the injury caused by the volunteer's negligence. The organization's liability does not depend on its own negligence in supervising

the volunteer, and is imposed without regard to whether the organization could have prevented the accident. Its liability for the accident caused by the volunteer depends on the finding of certain characteristics in the relationship of the organization and the volunteer. If a court finds that the organization had the right to control the volunteer's actions, and that the volunteer was working on an assigned task at the time of the injury, then the organization may be liable for the damage resulting from the accident. In most cases of structured volunteer programs, a court is likely to find the necessary conditions satisfied.

This imposition of liability for the acts of volunteers is exactly the same as for salaried workers. It is well established that an employer is liable for the acts of its salaried employees if the necessary conditions are satisfied, and recently courts have been applying this scheme of liability to cases where the worker is an unsalaried volunteer.

There are only about a dozen published court decisions in which an organization is held liable for acts of a volunteer. While an organization theoretically may be liable for any kind of injury caused by a volunteer, including emotional injury for example, all of the published cases involve serious physical injuries. Among the situations in the published court decisions are the following: a volunteer scuba instructor's negligent supervision led to the drowning of a student; a volunteer scoutmaster failed to properly supervise a child who fell out of a tree; an inner city child staying with a volunteer family in their country home drowned in the family's pool; and several cases of severe automobile accidents.

However, most legal cases do not result in published decisions, and so cases with any kind of injury could result in liability. In anticipation of this, your organization should check its insurance policy and should engage in a program of "risk management," to minimize the chances of accidents happening.

One way the volunteer administrator can help in risk management is by making sure all volunteers have written job descriptions. Job descriptions, if properly detailed, will help everyone in the organi-

zation who plans for and supervises volunteer involvement to think about what risk situations the volunteer might face, what skills the volunteer needs to perform the work safely (some of these skills might be a prerequisite to taking on the work, others might be taught by the organization), and what other steps the organization can take to help the volunteer work safely. In using job descriptions as risk management tools, there may be a tension between wanting to carefully anticipate and restrict what volunteers can do, and recognizing that volunteers are often valuable because they have the freedom and willingness to innovate. Each job description should thus reach an appropriate balance between these two goals.

ORGANIZATION'S LIABILITY FOR INJURY TO A VOLUNTEER

The allocation of liability in case of an injury to a volunteer involves issues similar to those raised when a volunteer causes an injury to a client. Again, whether the organization is liable depends on the circumstances of the accident and whether anyone acted negligently to cause the accident.

It is again important for you to know whether your organization's insurance covers instances where volunteers are injured, and what types of injuries are so covered. Note that some volunteers may have other sources of compensation available to them, such as personal insurance, which might obviate the need for them to proceed against the organization. You may, when bringing new volunteers on board, want to encourage them to check their insurance coverage. In some states, certain categories of volunteers may be covered by Workers Compensation plans, a subject on which an attorney can advise you.

HIRING AND FIRING VOLUNTEERS

A second broad cluster of legal issues raised in the survey fell into the category of questions about hiring and firing volunteers. A number of survey respondents mentioned this subject as one they had asked a question about or would like more information on.

Actual legal actions reported by re-

spondents that dealt with hiring and firing of volunteers included: a threatened court action over whether the agency has the right to fire volunteers, the result was that the agency did have the right to fire; E.E.O. (Equal Employment Opportunity) threatened court action, was dismissed; a class action E.E.O. suit; a Foster Grandparent was fired and appealed to ACTION, was eventually reinstated; a volunteer was abruptly terminated by the hospital in which RSVP had placed her, volunteer filed an internal grievance to the volunteer administrator, but the volunteer was not reinstated and "was never active as a volunteer again"; dispute over proper screening of volunteer (the volunteer was convicted of child molestation), the agency was cleared, it had done everything possible; volunteer filed personnel discrimination complaint, alleging discrimination in hiring when a paid position became available, but the complaint was ruled unfounded.

These cases present the problem of whether legal standards for hiring and firing salaried employees apply to the utilization of volunteers. Many volunteers now feel they have a substantial stake in their positions, and hope to translate skills and experience acquired while volunteering into positions in the salaried workforce. As a result of this place volunteering has in the lives of many volunteers, it seems the volunteers have an incentive to hold their organization to standards of fairness in hiring and firing.

Both federal and state laws regulate discriminatory policies and practices in hiring and firing. The law will need to develop solutions as to when volunteers should be considered "employees" for purposes of these laws. Federal laws prohibiting employment discrimination based on race, religion and sex are administered by the Equal Employment Opportunity Commission (EEOC). The EEOC has held that it can apply the statutory requirements in cases of discrimination claims by volunteer workers when those claims involve a "Title VII" employer (which excludes some nonprofit organizations) and where the volunteer work usually leads to salaried work. In such cases, discrimination in the hiring and firing of volunteers amounts to denial

of an employment opportunity. Some states have applied similar reasoning in applying state employment law to cases involving volunteers. Volunteer programs connected with units of government may be subject to special rules regarding hiring and firing of employees, and these restrictions may extend to volunteers. The laws against discrimination in hiring and firing are very complex, and you should consult with a lawyer about your state's laws and the current federal law.

These laws may affect the types of questions you ask on volunteer applications and during initial interviews, and may impact on your practices for terminating volunteers. Volunteers can certainly be fired in most cases (just as salaried employees can usually be fired). However, it is probably a good idea to document, in your volunteer personnel files, the specific behavior of the volunteer which led to the termination.

OTHER ISSUES—CONTRACTS, LABOR LAW

Almost all of the reported lawsuits fell into one of the two categories discussed above, liability/insurance or hiring and firing. However, some survey respondents raised other questions which should be noted here.

Some volunteer administrators had questions about the use of employment contracts or other written agreements between the volunteer and the organization. Such an agreement may be useful to clarify mutual expectations between the volunteer and the organization. However, there is a basic legal principle that a valid contract in which the volunteer promises to provide certain services but the organization makes no promises in return could conceivably not be enforced by a court.

Respondents also raised questions about labor law and the extent to which it regulates volunteer participation. These questions cannot be answered here, but you may find the general nature of the questions of interest. Two broad problems emerge from these questions. The first involves the impact of volunteers on salaried workers and the extent to which volunteers threaten the jobs of salaried workers. Volunteers' roles and rights in the case of a union strike are

part of this concern.

The second broad problem raised by respondents involves the extent to which volunteers themselves are workers entitled to protection under various labor laws. For example, one respondent raised questions about an employee who wanted to work for his employer as a volunteer in his spare time, and whether he could later sue for overtime pay. This issue is within the scope of a federal statute, the Fair Labor Standards Act (FLSA), but this particular question has not been sufficiently tested. The FLSA applies to some government, nonprofit and business organizations, and requires that an employee receive overtime pay for any time worked in excess of 40 hours per week. It is unclear whether the statute would be interpreted to mean that this requirement of overtime pay applies even when the employee is volunteering in his or her spare time. To reduce the chances of liability you should be sure that any employee who volunteers does so out of free choice, that such an employee is subject to all of the application and registration requirements of other

volunteers, and that the employee's volunteer work is different from his or her salaried work.

CONCLUSION

The Legal Issues Survey brings to light a number of legal questions you might consider in relation to the volunteer program you administer. As you discuss these issues with an attorney and/or your organization's other managers and board, keep in mind that volunteers do not present any more legal obstacles than do salaried employees. With both categories of workers your organization faces problems of liability and insurance, of using proper standards for hiring and firing, of establishing clear mutual expectations, and of ensuring smooth working relations. In the case of volunteers, the relevant legal doctrines are often less established.

As we continue to think about whether there are any legal reasons for treating volunteers and salaried employees differently in various contexts, and as the field of volunteerism develops in importance, these legal issues will be clarified and discussed further.

Appendix

DETAILED SUMMARY OF RESULTS ENERGIZE ASSOCIATES LEGAL ISSUES SURVEY

The following is a detailed summary of the results of each question in the Survey. Note that some respondents did not answer some questions, and other respondents gave more than one answer to some questions. This accounts for the variations in total number of responses for each question.

1. To what extent do legal concerns enter into your volunteer program planning?

No Influence									Great Influence
1	2	3	4	5	6	7	8	9	10
<i>Response Circled</i>					<i>Frequency</i>				
		1					20		
		2					30		
		3					48		
		4					42		
		5					58		
		6					34		
		7					47		
		8					54		
		9					23		
		10					<u>48</u>		
404 total responses									

2. How adequate do you feel your knowledge of legal issues in volunteerism is?

Inadequate									Sufficient
1	2	3	4	5	6	7	8	9	10
<i>Response Circled</i>					<i>Frequency</i>				
		1					54		
		2					46		
		3					64		
		4					39		
		5					66		
		6					36		
		7					39		
		8					30		
		9					12		
		10					<u>15</u>		
401 total responses									

3. If you had a legal question relating to volunteers, to whom or where would you turn to get an answer?

<i>Response</i>	<i>Frequency</i>
Organization's lawyer	125
Other lawyer (family member, friend, etc.)	38
Lawyer on Board	41
Executive Director/Administrator	39
VOLUNTEER: NCCI	30
State Office on Volunteerism	30
City/County/Municipal Attorney	31
State Attorney/Attorney General	17
Community volunteer lawyer	16
National association (other than VOLUNTEER or AVA)	15

Insurance Agent	16
AVA	10
DOVIA	10
Another volunteer administrator	8
Don't know	<u>1</u>
	427 total responses

4. Have you ever consulted with a lawyer or anyone else about a legal question relating to volunteers?

Two hundred and sixty-five (265) respondents responded "yes" to this question. They identified the following subjects about which they raised legal questions:

<i>Question Area</i>	<i>Frequency</i>
Liability/Insurance	162
Hiring/Firing Volunteers	14
Volunteer/Salaried Staff Relations	9
By-laws, organization structure, etc.	9
Board member liability	6
Fundraising	5
Taxation	6
Contracts and Agreements	5
Confidentiality	4
Alternative sentencing	5
Miscellaneous/No response (question not related to volunteers)	40
	<u> </u>
	265 total responses

5. Has your volunteer program ever been involved in a legal action or lawsuit? This could include any of the following: actual trial; suit settled out of court; formal investigation; licensing authority hearing; administrative proceeding; threatened court action.

Fifty (50) respondents answered affirmatively to this question. Their responses are discussed in the above article.

6. Are you aware of any legal actions involving another volunteer program?

Again, forty-five (45) respondents answered "yes" to this question.

7. What legal issues or questions related to volunteers would you most like information about?

Responses fell into the following categories:

<i>Response</i>	<i>Frequency</i>
Liability/Insurance	136
Volunteer/Staff Relations	21
Hiring/firing volunteers	17
Contracts/Agreements	9
Board Member Liability	7
Confidentiality	<u>10</u>
	200 total responses