

Risk Mitigation Paper Final for
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Bea Halstead

University of Denver University College

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Faculty: Marilana S. Walsh, JD, LLM

Director: Joseph Hutchison, MFA

Dean: Michael J. McGuire, MLS

Legal Risk Mitigation for a 501(c)7 Social Club

Aerial Performing Arts Studio (APA Studio, The Studio) is in Denver, Colorado, and is a 501(c)(7) nonprofit social club (APA Studio n.d.). The Studio offers access via memberships, social events, educational classes, and an Aerial Art performing space in a building equipped and rented by the organization (APA Studio n.d.). This research will review potential legal risks, existing organization policies, and procedures to facilitate evaluating mitigation solutions for APA Studio and its mission. APA Studio's mission is, "We strive to create a place of safety, trust, freedom, and connection where you can open new awareness, develop mastery, and engage the body, mind, and emotions" (APA Studio n.d.). APA Studio has operated for six years and hosts around four to six weekly events for up to forty members at a time (APA Studio n.d.).

The membership fees and volunteers must support The Studio's operations, and any nonmember attendee data is recorded to meet revenue requirements for tax-exempt status (IRS n.d.) The Studio has seven member-elected Volunteer Board Members who hold a one-year term of office (APA Studio n.d.). In addition to the Board, eight volunteer committees manage programming, finances, technology, marketing, volunteers, and equity, belonging, and diversity; each comprises five to seven members and a Board Member (APA Studio n.d.). Protecting the Aerial Performing Arts Studio and volunteers from legal risks promotes sustainable practices and longevity for the organization.

Goals of Risk Management

The 501(c)7 requirements from the IRS state that the social club must provide opportunities for social contact, and membership must be limited and not open to the public (IRS n.d.). The club also needs to ensure that no operations or publications discriminate against

anyone based on race or religion (IRS n.d.) The services of this social club offer education in aerial arts safety, skill building, communication, and performance, along with practice times and social events (APA Studio n.d.). To maintain tax-exempt status and reduce litigation risks, reviewing the Federal and State legal requirements, risk potential, and existing mitigation solutions to reveal gaps in current efforts and provide solutions for the organization.

Potential Risk Audit

This potential risk audit aims to understand how to mitigate legal risks to APA Studio and volunteers. The existing program operations, membership terms and conditions, waivers, contracts, and insurance policies have been analyzed to assess potential legal risk mitigation. Litigation for claiming mental, emotional, or physical injuries may target The Studio's education, instructors, other members, equipment, facility, discrimination, and volunteer activities (Stanford Encyclopedia of Philosophy 2022). Federal and State requirements are met to maintain tax-exempt status and protect the volunteers from liability.

Federal and State Requirements

The first article a 507 (c) social club needs to create is the bylaws that govern the social organizations' processes, Board Members, and policy and procedure creation. These bylaws must adhere to all Federal, State, and Municipal guidelines because if questioned, the law will supersede anything written by the organization (Colorado Nonprofit Association 2011, 5-9). An essential statute for reducing risks in adhering to federal policies is defining how documentation is captured, stored, and archived, especially in potential litigation cases (USC § 18-1519). Colorado also requires the documentation of articles of incorporation, Bylaws, resolutions, board meeting minutes, records of actions taken by the Board, accounting records,

current list of Board Members, and current list of members to be retained for up to three years (CRS § 7-136-101 et. seq.). APA Studio is also required to adhere to annual tax returns, report any unrelated business income, and file taxes via Form 990 (26 CFR 1.501(a)-1(d), IRS n.d.). The Studio also must provide a safe facility and equipment to avoid harm, or it will be found negligent via the organization's actions or the individual actions of a volunteer (Cornell Law School n.d.). Following these critical legal requirements will ensure the social club stays in good status and meets the requirements for nonprofit tax exemptions and protections.

Potential Litigation Risks

Negligence is commonly the statute used in personal and bodily injury claims and must be reported within two years of the incident (Cornell Law School n.d., C.R.S. § 13-80-102(a)). Personal Injury can include transgressions from bodily harm, emotional distress, and invasion of privacy (Cornell Law School n.d.) The Studio is liable for potential risks, including equipment failure, facility negligence, and inadequate safety protocols for instructors, volunteers, and members (Find Law 2022, McDuffey 2023). For example, The Studio supplies aerial arts equipment that positions the performer into the air via harnesses from the ceiling; if the suspension hardware fails, perhaps due to lack of maintenance or improper installation, it could result in bodily harm, including death (APA Studio n.d.).

There is also a risk of emotional harm and breach of privacy of the members and nonmembers in attendance. To explain, consensual touching and communication are necessary to perform safely when members, nonmembers, instructors, and volunteer performers/presenters are engaged in aerial arts. Suppose a person cannot consent for any reason, such as being under duress, intoxicated, or not over the age of eighteen. In that

scenario, the potential risk of emotional and bodily harm resulting in a legal suit against the organization is higher (Cornell Law School n.d.).

Existing Solutions for Risk Mitigation

APA Studio's mitigation tactics include liability insurance, a Member Liability Waiver and Release acknowledgment, a Code of Conduct Policy, an Anti-Harassment and Discrimination Policy, Bylaws, and a Privacy Policy (APA Studio n.d., APA Studio Interviews). The Studio also publicly shares an Educator's Code of Conduct, Photography Submission form, Disability and Accessibility Policy, Concerns and Accountability: Community Feedback Form, Board Member Code of Conduct Policy, and Volunteer assignments and contact information (APA Studio n.d.).

APA Studios has published Bylaws that outline voting operations, including how Board Members are selected and are trained on the Board Member's Code of Conduct (APA Studio n.d.). Within the Board Members Code of Conduct, a statement outlining conflicts of interest and prohibition against private inurement is included, and the document is available to the public (APA Studio n.d.). This document states that the Board Members have been informed of these policies annually. However, there is no statement that an individual acknowledgment is captured and kept on file to promote accountability and compliance.

Insurance Coverages

APA Studio also utilizes insurance coverage to protect its stakeholders beyond legal protections. They carry liability, death and dismemberment, anti-harassment, and social club-specific coverage (APA Studio Interview 2023). The Studio notes in its Bylaws that it will provide insurance and indemnity, or legal protections, to anyone involved with the organization and that "reasonable attorneys' fees" in defending a civil or criminal action, suit, or proceeding will

be paid by the organization” unless the person is found personally liable and will be required to repay any fees or fines covered by The Studio (ADA Studio n.d.).

Volunteer Board Members govern decisions ranging from fiscal to programmatic, and each affects the members of APA Studio. Members can bring lawsuits alleging wrongful decisions made by the other members and volunteers. In most cases, the plaintiff must document harm and damages directly attributable to the organization's alleged decision, action, or inaction (Herman n.d.) Liability for harm will review the Board or member(s) actions in good faith with ordinary diligence or the care taken when they act (Herman n.d.) Furthermore, Colorado has a volunteer protection statute to limit volunteers' personal and legal liability (Herman n.d., C.R.S. § 13-21-115.5). The Board Members are protected from liability by the state statutes, the statement of indemnity in the Bylaws, and the insurance coverage. In a lawsuit, the best defense in legal risk mitigation is obtaining insurance coverage that will protect the organization and volunteers from financial losses.

Ensuring Compliance

APA Studio utilizes organizational policies and procedures to adhere to laws and statutes; they have a straightforward volunteer onboarding and provide training and oversight. Sometimes, ensuring compliance must go beyond these existing tactics and supports. The Studio must create a more advanced documentation and archive procedure for sensitive data. APA studio should review the current injury reporting process and create an easy-to-follow guide for retaining injury claims and photos during the incident. A lawyer should review APA Studio's various policies and procedures to ensure adherence to current statutes and best practices.

Avoiding Negligence Claims

The APA Studio's liability for negligence is primarily responsible for adhering to the safety of the equipment used and the facility. Waiver and release of liability for equipment and facilities will only protect those over eighteen years of age, so recording membership ages and identities is a critical step in compliance (C.R.S. § 13-20-1204). The Studio's Waiver and Release Contract outlines that the participant assumes all risks and releases all use of equipment, products, and services provided, negligent or otherwise, from their choice to participate (APA Studio n.d.). The contract also contains an agreement of a "covenant not to sue" that essentially confirms that participants signing the contract will not be able to bring legal charges against the organization, including challenging the Waiver and Release Contract (APA Studio n.d.). The Studio notes that the participant must be nineteen or older to be bound by the terms and conditions of the Waiver and Release Contract (APA Studio n.d.). The Waiver and Release Contract is electronically issued through a secure online membership portal, and a volunteer host confirms member identity and age with a State ID upon check-in to an event (APA Studio Interview n.d.).

Data Privacy

Data integrity, privacy, and use are also protected by laws when collecting personal identification information. APA Studio has a Privacy Policy updated in 2020 that outlines the collection methods, use of information, security, and cookie statements. The Studio defines third-party involvement in advertising practices. The Privacy Policy includes various State and Federal protections: California Online Privacy Protection Act, Children Online Privacy Protection Act, Fair Information Practices, and the CAN-SPAM Act (APA Studio n.d.). There is a technology

committee with volunteers that adhere to these requirements. The volunteer training must include reviewing the Privacy Policy and onboarding for these consumer protections to ensure compliance.

Risk Mitigation Actions for APA Studio

APA Studio has a robust set of legally abiding documents already employed to mitigate legal risks. Going forward, a good practice will be to review the documents with its various committees and Board Members annually and update any terms to address current statutes. Volunteer training and handbooks are robust, and many resources exist to educate on safety and potential risks; however, the incident report instructions should comply with basic requirements for any organization and include photography documentation and a digital archival procedure. APA studio should consider having all Bylaws, Code of Conduct policies, Volunteer Handbooks, and training sessions documented and include an individual acknowledgment form and archival procedure to increase compliance and reduce legal risks to the organization.

Equipment maintenance is an unknown gap that may require ongoing procedures and documentation. Creating a list of regularly checked equipment and facility structures, repair dates and descriptions, and equipment replacements is valuable information to have on file in the event of a personal injury or negligence claim.

Although there is a Community Complaint form, there is also a webpage noting that the Concerns and Complaints Committee has been inactive and has not reviewed claims since March 27, 2022 (APA Studio, n.d.). The Studio should retire the Concerns and Complaints webpage if that committee is not being reinstated and address how feedback is reviewed and

responded to on the existing Community Feedback Form. A legal counselor is not kept on retainer, and a lawyer has not reviewed all the organization's documents (APA Interview n.d). The Studio should allocate funds from the annual budget to invest in contacting a lawyer to review existing public and internally facing documents to ensure legal compliance and procedures are in place and to validate them regularly.

Conclusion

APA Studio has excellent member resources and organizational policies that will ensure the longevity and sustainability of the organization. The adherence to Federal and State laws is evident in The Studio's Bylaws, Anti-harassment and Discrimination Policy, Privacy Policy, and Codes of Conduct policies. A key component of Federal compliance is meeting the requirements to maintain the 507(c) tax-exempt status through annual filings, allocation of funds, and collection of membership dues. A key component of State compliance is ensuring the age of participants is over eighteen, activities in the facility do not breach municipal laws, and the organization remains registered annually. The APA Studio desires to create a community of ethical practices to ensure that conduct while doing Aerial Arts remains safe and accessible to members. By mitigating a few existing risks, they will achieve their mission and remain a unique education and performance space provider for this community of artists.

References

USC § 18-1519

C.R.S. § 13-20-1204

C.R.S. § 13-21-111

C.R.S. § 13-21-115

C.R.S § 13-25-125.5 (2016)

§ 13-80-102(a)

APA Studio. n.d. "About Us" Website. Accessed on October 1, 2023. URL redacted.

APA Studio n.d. "Bylaws" PDF. Accessed on October 29, 2023. URL redacted

APA Studio n.d. Website. Accessed on October 29, 2023. URL redacted

- "Anti-Harassment and Discrimination Policy"
- "Board Members Code of Conduct"
- "Privacy Policy"
- "Community Feedback Form"
- "Concerns and Accountability"
- "Member Code of Conduct"
- "Privacy Policy"
- "Release Waiver"

APA Studio Staff Interview. 2023. "Zoom Interview – Founder Name Redacted, Volunteer Program Manager Name Redacted" Zoom. APA Studio. October 2, 2023

APA Studio Staff Interview. 2023. "Email Interview – Founder Name Redacted, Volunteer Program Manager Name Redacted" Zoom. APA Studio. October 17, 2023

Colorado Nonprofit Association. 2011. "Principals and Practices for Nonprofit Excellence in Colorado" Journal. 2nd Edition:5-9. University of Denver Library. Accessed on November 7, 2023. https://www.ucdenver.edu/docs/librariesprovider143/cdv-library/colorado-nonprofit-best-practices/pp_secondedition.pdf?sfvrsn=de204ab9_2

Coppolo, George. 1998. "Liability of Private Club Directors and Members" Law Article.

November 12. Accessed on October 5, 2023.

<https://www.cga.ct.gov/PS98/rpt%5Colr%5Chtm/98-R-1373.htm>

Cornell Law School. n.d. Law Dictionary. Accessed on October 25, 2023.

- <https://www.law.cornell.edu/wex/indemnify>
- <https://www.law.cornell.edu/wex/negligent>
- https://www.law.cornell.edu/wex/personal_injury
- https://www.law.cornell.edu/wex/age_of_consent

Find Law. 2022. "Colorado Negligence Laws" Law Article.

<https://www.findlaw.com/state/colorado-law/colorado-negligence-laws.html>

Herman, Melanie Lockwood. n.d. "Liability and the Board: What Governing Teams Need to Know." Article. Nonprofit Risk Management Center. Accessed on October 10, 2023.

<https://nonprofitrisk.org/resources/articles/liability-and-the-board-what-governing-teams-need-to-know/>

IRS. n.d. "Social Clubs" Webpage. Accessed on October 2, 2023. <https://www.irs.gov/charities-non-profits/other-non-profits/social-clubs>

McDuffey, Ty. 2023. "Elements of a negligence case" Find Law Article. Accessed on October 11, 2023. <https://www.findlaw.com/injury/accident-injury-law/elements-of-a-negligence-case.html>

Stanford Encyclopedia of Philosophy. 2022. "Theories of the Common Law of Torts" Definition. Stanford University. June 2, 2023. Accessed on Oct 27, 2023. <https://plato.stanford.edu/entries/tort-theories/>