

# Legal, Insurance Considerations

## Weigh Big For NSP Members

BY MARK D. OETTINGER

**S**kiing (or snowboarding) and emergency care competency are mainstays of patrolling, but these skills must be supplemented by an equally essential tool: an awareness of the legal and insurance considerations involved in these activities.

Because these issues should be foremost in every patroller's mind, the NSP's Eastern Division recently appointed an ad hoc committee to make recommendations to its members on ways to protect themselves in the event of injury or involvement in litigation. Formed in spring 1998, the committee's mission was to identify significant patrol-related risks, to assess the extent to which existing NSP insurance policies afford protection from those risks, and to recommend strategies for further reducing those risks.

In this endeavor, the committee concluded that every patroller should do the following things to manage patrol-related risk effectively:

1. Identify the patrol-related areas that pose significant risk;
2. Assess the extent to which the NSP insurance policy as well as the workers' compensation coverage (if any) and the liability policy (if any) at the ski area cover those risks; and
3. Determine what additional types of insurance are desirable, and explore their availability, terms, and cost.

This article sheds light on general tactics for accomplishing these tasks. The reader is cautioned, however, that personal risk management is precisely that...personal.

The risks that patrollers encounter vary widely. Furthermore, the extent to which patrollers need protection depends, in part, upon the extent of their net worth and the manner in which their assets are held. From state to state, applicable laws provide differing degrees of protection, in the form of Good Samaritan laws, Volunteer Protection laws, and rules regarding the partial exemption of assets from execution. For these reasons, it is essential for

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each patroller to undertake a risk analysis based upon his or her individual financial circumstances and upon the applicable laws of the jurisdiction(s) in question.

The opinions expressed in this article are those of the author only and do not constitute legal advice. The answer to any legal question depends upon the facts of the particular case and the law of the relevant jurisdiction. Therefore the reader is strongly advised against making any attempts to draw factual or legal conclusions from the opinions expressed in this article.

### THE RISKS OF PATROLLING

There are two broad categories of patrol-related risk: getting hurt and getting sued. With respect to getting hurt, the solution is

to have a combination of insurance coverages, including workers' compensation insurance, medical insurance, disability insurance, and possibly, business interruption insurance. The NSP's insurance policy does not provide coverage for a patroller who is injured during the course of performing day-to-day patrol functions. Area management usually provides this coverage, since patrollers are acting on behalf of the area. That being the case, patrollers should consider obtaining disability and business interruption coverage on their own, to supplement loss of income that may be only partly reimbursed by workers' compensation insurance.

The existence of workers' compensation coverage depends upon whether the injury occurred during the course of the patroller's duties at the ski area, and whether the patroller qualifies as an "employee" under the applicable state's workers' compensation statutes. Different states have very different case law and administrative policies regarding whether patrollers have workers' compensation protection. Paid patrollers generally are covered, but volunteer patrollers may or may not be. Each patroller should consult his or her patrol director or patrol representative and regional legal advisor to determine whether volunteer patrollers are covered by workers' compensation insurance in the particular state in question.

The issue of workers' compensation is one that has a tendency to pit patrol against management, for reasons that are generally beyond the scope of this article. Management pays money in insurance

premiums to cover volunteer patrollers, but in exchange for affording the coverage, limits its own potential liability to those volunteer patrollers. It is a complex issue, and because it varies from state to state, it is a subject about which NSP-wide generalization is impossible.

The risk of getting sued is covered by the NSP policy, as long as the lawsuit arises out of the patroller's teaching or administration of an NSP-sanctioned program. For example, if a patroller who functioned as a trainer/evaluator at a senior clinic is later sued because he or she negligently caused an injury to a senior candidate, coverage would likely exist. In fact, as long as the patroller was acting in furtherance of a formally sanctioned NSP program, he or she would be covered, regardless of the *capacity* in which the allegedly negligent act was committed...whether as an instructor, instructor/trainer, trainer/evaluator, or otherwise.

The NSP does not cover the patroller for "first aid errors and omissions" or other day-to-day patrolling negligence, since those services are not performed for, or under the direction of, the NSP. Because those services are performed for ski area management, NSP's plan does not cover them. The same is true if a patroller is sued for negligently opening, failing to close, mismarking, or *not* marking a trail. The NSP policy would not have a duty to defend these types of claims—which are among the most common—since there is no formally accepted NSP policy in these areas. In these cases, the patroller would have been working for management, not the NSP, when he or she performed the act, or failed to perform the act, that forms the basis of the plaintiff's claim.

Of course, given the right set of facts, a creative plaintiff's lawyer might include an allegation that the patroller's negligent act was performed in accordance with, or at least condoned by, formally sanctioned NSP policies and/or procedures. Such an allegation might force the NSP insurance carrier to defend, and if it were to be concluded that faulty NSP guidelines *did*

harm the plaintiff, the NSP carrier *might* be forced to indemnify the plaintiff's judgment against the patroller.

#### **NSP'S PRESENT COVERAGE**

While every NSP member should understand the insurance coverage he or she receives through the association, it is important to maintain a certain confidentiality about the scope and amount of this coverage. This is because a potential claimant who is aware of the existence of coverage is far more likely to bring suit. For these reasons, it behooves us not to discuss these issues with anyone who is not connected with the NSP.

It is impossible to definitively determine the existence or scope of insurance coverage for a hypothetical situation. Each incident is highly fact-specific, and seemingly small differences in the facts can

change the outcome of the existence or absence of insurance coverage. The first point of reference is the insurance policy itself. From a reading of our policy, it appears that the NSP as an organization, and its members who administer and deliver officially sanctioned NSP programs, will be defended and indemnified (up to the policy limits) in the event of a suit for personal injury or property damage arising out of failing to take a required action, or acting negligently, in the administration and/or delivery of those programs.

As stated, patrollers are only covered by the NSP when they are involved in officially sanctioned NSP programs. It is impossible to create a comprehensive list of those programs in the abstract, but they can be assumed to include those set forth in the *NSP Policies and Procedures* manual

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## 10 Questions To Ask Yourself When Assessing Your Patrol-Related Risk

1. Do you have health insurance?
2. Does your state require workers' compensation insurance for volunteer patrollers?
3. Do you have disability insurance?
4. Do you patrol for an entity that has liability insurance, and if so, what is its coverage?
5. Do you have a homeowner/renter's policy that covers patrol-related claims?
6. Do your patrolling activities qualify for "Good Samaritan" protection in the state where you patrol?
7. Are your patrolling activities covered by the federal Volunteer Protection Act?
8. What assets do you have to protect?
9. To what extent are your assets exempt from seizure under state law?
10. To what extent are your assets protected through joint ownership?

## Important Facts To Keep In Mind Regarding Patrol-Related Legal Liability

1. Most states have Good Samaritan statutes that protect volunteer patrollers from suits for "ordinary" (although not "gross") negligence, but only for the act of providing emergency care.
2. The federal Volunteer Protection Act does not protect you when you are providing patrolling services on behalf of a "for-profit" enterprise (i.e., most ski areas).
3. Most ski areas have liability insurance that will protect patrollers in the event that they are sued.
4. The NSP insurance policy does not cover day-to-day patrolling activity.
5. Most standard homeowner/renter's insurance policies do not cover patrolling activity.
6. Ski patrollers are rarely sued individually.

*continued from page 21*

and in its other publications. Examples would include the Outdoor Emergency Care, Senior, Certified, and Avalanche and Mountaineering Programs, including all of their instructor certification and recertification modules.

There's no apparent coverage for candidate screening and training because there are currently no formal NSP standards or programs in this area. For this reason, the national board of directors is considering the development of candidate screening and training standards (to be included in the *Policies and Procedures* manual).

There may be no coverage if the offending NSP patroller is found to have been "teaching outside the curriculum." This is a gray area, however, and one in which the insurance carrier might defend the case under a "reservation of rights." This means that the insurance carrier does not concede the existence of coverage but chooses to defend in order to protect its rights.

If the insured loses, the insurance company would likely then bring a separate action, this time against its own insured, for

a determination of whether there is coverage under the specific set of facts.

### SKI AREA INSURANCE PROTECTION

Most ski areas carry significant amounts of liability insurance. This means that the patroller will usually be defended in the event of a lawsuit, and that any adverse judgment will be paid, up to the limits of the policy. Even so, some ski areas do not have insurance. This is sometimes the case with smaller and less financially sound ski areas. Premiums are expensive and can sometimes seem less important than the electricity bill.

In another potential coverage gap, a patroller's service might not fall under the umbrella of a ski area. Some nordic patrollers engage in "free-range patrolling," serving territory that is not affiliated with a particular ski area. It is unlikely that there would be coverage under such circumstances, but limited benefits might be available to patrollers who free-range patrol in national parks or forests.

All insurance policies have limits. If your area *does* have insurance, determine its limits. This will allow you to ascertain what additional types of insurance you should

have, if any. Understand the delicacy of this issue, and inquire only through your local patrol's chain of command. Your patrol representative may have this information, but if that isn't the case, he or she should be willing and able to obtain it for you. Do not inquire directly of management.

Do not let your ski area's liability policy lull you into a false sense of security, however. Depending upon how that liability policy is written, even if it is required to defend and indemnify your negligence because you acted as an agent of management, the insurance company *may* have the right to look to you, in a subsequent action, for reimbursement. This is known as the insurer's "right of subrogation."

The insurance company would generally have a right of subrogation if you are not named as a direct insured of the ski area's policy. Under such a circumstance, the area's insurance policy may still afford you a defense at the outset, since the area (its insured) is responsible for your actions as an agent of management. But if the judgment that results is determined to be your fault and not that of the area (for example, the area would have only been at fault if it failed to train or equip you properly), then the ski area may turn around and sue you for reimbursement. For this reason, or if your area has minimal or no coverage, you may wish to obtain coverage through a homeowner or renter's policy. In that case, you should insist upon an express affirmation from your insurance agent that liability arising out of the type of patrolling in which you engage, whether paid or volunteer, is covered under the policy.

The Kane case is instructive on this point. (A patrol candidate, John Kane, was killed during a ski training exercise in 1995 at Bear Mountain Ski Resort in California. His family won a judgment against the NSP for damages based on the fact that the individual supervising the training was an NSP member, even though the exercise was not an NSP-sanctioned activity.) The ski area's insurance company settled with the

*continued on page 24*

continued from page 22

plaintiffs before trial for \$20,000. This left the NSP to defend alone, and eventually, to bear the brunt of a \$1.4 million verdict. Apparently, the ski area's insurance afforded little protection in this setting. One is left to wonder what might have happened if the suit had been against the area and the individual patroller for negligence in patient care. In such a situation, the NSP policy would not defend or indemnify the patroller, and if the area were to settle before trial, as it did in the Kane case, the patroller would have only been protected if her or she had a homeowner or renter's policy with significant limits.

#### OTHER PROTECTION

Many states have so-called "Good Samaritan laws" (see "Volunteer Protection Makes Legislative Headway," winter 1999). These laws typically limit the ability of an injured person to sue an individual who renders first aid without an expectation of compensation. The injured party is generally barred from recovering damages from the Good Samaritan in the absence of gross negligence. In other words, the Good Samaritan is protected from liability for ordinary negligence.

Statutes of this type are of significant comfort to the patroller who fears being sued for negligence in providing *emergency care* services. They are of little help, however, if the claim is couched in other terms, such as negligence in leaving open, failing to close, improperly marking, or failing to mark, a particular trail. Also, the argument can be made that even a "volunteer" patroller renders emergency care *with* an expectation of compensation to the extent that he or she receives free skiing and even family privileges or other benefits in exchange for patrolling. A crafty plaintiff's lawyer may be able to convince a judge to deny a patroller Good Samaritan protection by using this argument. After all, many states use precisely the same reasoning to reach the conclusion that volunteer patrollers are "employees" for purposes of workers' compensation.

There was a certain amount of anticipation surrounding the recent enactment of the federal Volunteer Protection Act. As adopted, however, that act does not appear to protect most patrollers, since it only protects volunteers who provide services to nonprofit organizations or governmental entities. Since most patrollers provide services to area management, they probably do not fall within the protection of this statute. NSP members who patrol at areas run by nonprofits (and there are some) *may* be protected by the Volunteer Protection Act. Also, patrollers, such as instructors and line officers, *may* be protected by the Volunteer Protection Act while performing duties for the NSP because it is a nonprofit association. If this is the case, it will have a highly beneficial impact on the risks that are underwritten by our NSP insurance carrier. If so, it should allow the NSP to negotiate a reduction in its insurance premiums, and/or perhaps to add directors' and officers' coverage at little or no additional cost.

Different states approach the limitation of patrollers' liability differently, and most of them afford significant protection. Most have some form of Good Samaritan statute. New York has expressly included volunteer patrollers in an addendum to the Volunteer Protection Act. Many states have statutes that make it clear that individuals who participate in the sport of downhill skiing assume its "ordinary and necessary" risks. Courts differ in their interpretation of such statutes, but the overall legal environment is one that protects the ski industry in general and patrollers in particular.

There are other protections as well, such as short statutes of limitation and out-right prohibitions against certain types of lawsuits (such as those brought by skiers who are injured while skiing beyond area boundaries). It is hard to generalize about the protection provided by these laws because the particular circumstances are state-specific, but patrollers should take *substantial* comfort in the fact that the legal system is heavily loaded in their favor.

The NSP is looking carefully at the

possibility of using releases, that is, obtaining a signed form from every individual participating in a specific NSP program that releases the association from responsibility in the event the participant is injured during the activity. This area of the law is still evolving in the courts, and the cases provide an increasingly clear picture of the manner in which releases should be drafted. There are many situations in which releases might be considered. For example, they are already in use in the Advanced Avalanche Course, where participants release the NSP and the Appalachian Mountain Club, the program's hosts, from liability.

The Kane case illustrates a situation in which candidates were required to sign a document releasing the mountain "and its agents" of legal responsibilities in exchange for free skiing privileges. That release was determined to be inapplicable to the facts of the case, but the reasons for that determination teach us something about the nature of releases, and how to draft them better. Releases should be written in simple language, should purport to release the appropriate parties, and should clearly identify the nature of the risks the participant is undertaking. In time, the NSP may adopt standardized releases for specific types of activity.

#### GENERAL CONSIDERATIONS IN SHOPPING FOR INSURANCE

In shopping for insurance, *caveat emptor* (buyer beware). Know what you are signing and buying, making sure that it offers the coverage you seek. Our legal system is based on the principle of "freedom of contract," so the insured party is covered only for what is specifically detailed in a contract. Protect yourself from holes in the coverage by being aware of what is and what is not spelled out in the contract. There is a premium on thoroughly understanding the proposed agreement. If it does not meet your needs, you should aggressively negotiate its key elements until it does provide the protection you require while serving as a

continued on page 68



*continued from page 5*  
 when the shock is delivered with monophasic technology. Consult the protocols for the specific equipment your area uses to develop the safest procedures for your patrollers relative to how far an individual should be from the patient during shock delivery. —Ed.

#### DUAL RULES

The evolving partnership of the National Ski Patrol and the Professional Ski Instructors of America (PSIA) has been widely endorsed by both organizations, and, as a member of both, I've applauded every step of this development and now believe it likely that the associations will merge in the near future.

The existing partnership has reduced administrative redundancy in our two organizations, but we still have considerable programmatic redundancy. In this, I think the NSP has exploited the partnership more effectively than PSIA. For example, the NSP Ski Enhancement Seminars and Ski Trainer Workshops have formalized PSIA's role in NSP ski training, but PSIA has yet to recognize NSP's Ski Mountaineering and Avalanche Programs as resources for PSIA tour leader training. A complete merger would reduce duplication

of programs, promote uniformity of training/testing standards, and make our distinct institutional strengths available to each association without requiring people to pay dues to two separate organizations.

With this in mind, we might consider the form that a merger would take. PSIA has traditionally recognized its principal mission to be educational, and in recent years NSP has for various reasons refocused its institutional mission from emergency services to education. There are many academic organizational models that might work for us—the university with its various schools and colleges, the college with its various departments, etc. One such scheme might work as follows: The two organizations could form the National Ski Academy with two programs, Emergency Services and Ski Instruction, and offer a modular curriculum comprising the following: Ski Skills, Outdoor Emergency Care, Ski Instruction, Movement Analysis, Chair Evacuation, Alpine Toboggan, Nordic Toboggan, Mountaineering, and Avalanche.

Candidates in both tracks would take the same PSIA ski skills tests (Level I for Level I instructors and basic patrollers, Level II for Level II instructors and senior patrollers, Level III for Level III instructors and certified patrollers). Ski instructor candidates at each level would complete training and testing in ski instruction and movement analysis; ski patrol candidates

in Outdoor Emergency Care. Alpine patrollers would complete the Chair Evacuation and Alpine Toboggan modules; nordic patrollers the Mountaineering and Nordic Toboggan modules. The Emergency Services Program (formerly NSP) would relegate ski training and testing to the Ski Instruction Program (formerly PSIA). Ski instructors would complete the (formerly NSP) Mountaineering and Avalanche modules for tour leader certification, the basic courses for Day Tour Leader and the advanced courses for Mountain Tour Leader.

Some of the objections to merger that I've heard in the past—including loss of organizational autonomy, incompatibility of missions, and conflicting volunteer (NSP) and professional (PSIA) organizational cultures—have been overtaken by circumstance: education is now the primary mission of both organizations, and professional patrollers now constitute a substantial proportion of NSP membership.

Nonetheless, merger will surely raise difficult questions surrounding governance and curriculum, and the devil, they say, is precisely in these kinds of details. But, such details seem trivial when weighed against expanding the benefits of programmatic partnership.

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#### LEGAL, INSURANCE CONSIDERATIONS

*continued from page 24*  
 patroller. Unless you are an attorney, you will probably want to consult legal counsel to help guide you through the process of translating your contract into plain English. A lawyer can also provide suggestions for the types of coverage you might need during your patrolling duties.

Any questions that remain after a thorough review of the proposed policy should be addressed to the agent who is offering the policy. If you have any questions about an existing policy, you should also conduct

a thorough review of it in the same way you would a new policy. If your current policy does not pass muster with regard to what you need for coverage, you should have your agent revise the policy so that it does.

Carefully assemble and pose your questions to your agent. If you still have significant questions based on his or her response, request the answers in writing so you can share them with your legal counsel for clarification. Alternatively, write a letter to the agent, ending with a request that the agent write you if there

are any provisions that you have misconstrued. In the event of a subsequent dispute over coverage, evidence of your understandings will not contradict the clear terms of the policy itself but may provide guidance if one or more contractual provisions is found to be ambiguous. Also, ambiguous provisions of a contract are generally construed against the party (in this case, the insurance company) that drafted the contract in question.

There are four basic variables in any insurance contract:

1. scope of coverage,
2. limits of coverage,
3. deductibles (and/or co-payments), and
4. premiums.

Scope of coverage is the most important issue because it controls the types of circumstances in which coverage will apply. For most patrollers, the most useful type of coverage will be a homeowner or renter's policy, if it can be structured to include coverage for "first aid errors and omissions" and other day-to-day patrol-related negligence.

Some homeowner/renter's policies *do* include this type of coverage, but be aware that many do not. Homeowner/renter's policies that do exclude patrol-related activities *may* offer a "rider" (supplemental coverage) for these types of risk, which can be separately negotiated at an additional cost.

Policy limits, which define the maximum amount of coverage for any one incident, are related to premium cost, and should only be set after one has done a careful analysis of one's risk exposure and the assets that one is seeking to protect. Your next concern should be your policy's deductible, or the amount you agree to pay out of pocket before the insurance company begins to pay (up to the limits of the policy) on an adverse judgment against you. The greater the deductible on your policy, the lower the premium you pay to the insurance company on a regular basis

for your coverage.

Cost is not the only consideration when shopping for an insurance carrier. Customer service is also very important, and it is best measured by how an insurance company treats its insureds when a claim is brought against a client. You can judge the quality of the company's performance in this area by asking it for the names of its insureds who were the subject of claims similar the ones you will be open to while working as a patroller.

When a claim *does* arise, or even when circumstances lead the insured to believe that a claim *may* be asserted, the insured has an obligation known as the insured's "duty of cooperation" to promptly inform the company of an occurrence that may give rise to the filing of a claim. If the insured fails to meet the obligations of his or her duty of cooperation, the insurance company may be excused from providing a defense and/or coverage. The purpose of this rule is to afford the company an opportunity to conduct a preemptive investigation of an event/incident that could potentially lead to a claim, and to preserve any evidence that is critical to the defense.

#### CONCLUSION

It is important not to exaggerate the risks we face. Historically, there have been very few instances of individual patrollers being sued. Typically, the ski area is the target. Furthermore, each state has laws

exempting certain assets from seizure by creditors. Exempt property is essentially that which is needed for basic subsistence, but many states allow debtors to shelter a considerable amount of property from seizure in the case of a lawsuit. Consult your state's laws to determine the extent of the legal protection of your assets.

In some states patrollers can find additional asset protection through the joint ownership of property. In many states, jointly owned property cannot be taken as payment of a debt for which a co-owner is not liable. Of course, joint ownership arrangements that are "in name only" may be disregarded by the courts. Furthermore, jointly owning property may have collateral consequences in a divorce or during the dissolution of a partnership, and should only be approached with advice of counsel.

Once everything is said and done with regard to insurance, the most important risk coverage a patroller can provide for him- or herself is to understand the scope and limitation of the job's duties and to maintain the highest possible levels of training, practice, and conduct. +

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#### NSP AND SCOUTING

*continued from page 28*

things as skiing, snowboarding, and, yes, even coming to the rescue of someone with a broken leg—children are eager students.

The rewards of working with youth who, in general, are interested in service to others is very rewarding. You might even enjoy the experience for the purely selfish reason that if you teach these kids about snowsports safety now, they might not wind up in your toboggan later.

And then there's the recruitment

angle. By helping scouts with their winter activity merit badges, you are introducing them to the NSP system and possibly planting the seed for a future in patrolling. After all, since scouting is based on youth leadership skills, helping others, and being prepared, many scouts have the interests and strengths of character that would make them valuable additions to patrols. Also, those who have been active in the scouting program for three or more years usually have a strong sense of community service

and possess elementary emergency care skills. Many scouts have gone on to join the NSP after being introduced to patrolling through outreach efforts such as this.

Within the Boy Scouts of America, the Venture Program has replaced the traditional Scout Explorer program. Many Venture crews are affiliated with agencies such as Emergency Medical Services units, civil air patrols, sheriff's departments, etc. Some Venture crews are developing special

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