MANAGING LEGAL RISKS

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Disclaimer

This presentation is intended to provide general information about estate planning and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. State laws vary and any attempt made to discuss laws of states other than Maryland is for general information to help the viewer better understand Maryland law. For advice about how these issues might apply to your individual situation, consult an attorney.
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www.umaglaw.org

Agriculture and the Law: Why It Matters
Agriculture is vital to the economic health of Maryland and the well being of its residents.

A new collaboration among three distinguished Maryland universities—the Agriculture Law Education Initiative—is committed to providing Maryland farmers with the information they need to prosper while complying with the complex network of laws and policies protecting the integrity of the state’s food system and environment.
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ALEI Resources Available

- Under Publications tab:
  - Directory of Attorneys for MSBA’s Ag Law Section
  - Overviews of:
    - Maryland’s Right-to-Farm law
    - Maryland Ag Leasing Laws
    - Labor Laws in MD.
  - More are in development
Question: How many of you actually want to talk with an attorney?
Overview

- Virtually every lawyer will tell you of clients to whom they have had to say—“if you had just come to me as you started, I could have helped guide you or helped you avoid [the farm’s current legal problem].”
Overview

- Agriculture, like any other business, requires specialized skills at time such as accounting and legal expertise.

- This presentation will walk through some strategies that an ag operation could consider adopting to limit legal risk

- Please remember elimination of 100 percent of legal risk is not possible, regardless of what others may tell you!
  - I can not stress this point enough
Overview

I. Lawsuit Prevention
II. Preparing for lawsuits
III. Follow the requirements of any permit/reg/statute
IV. Know an agricultural attorney
V. Liability Insurance
VI. Liability Waiver Checklist
VII. Business Organization Structure
Lawsuit Prevention

• Be willing to work with neighbors
  • Great way to avoid litigation

• Realize your neighbors may not know about ag and you may have to educate them

• Help your neighbors understand what you do in your operation and practices you utilize
Lawsuit Prevention

- Things to consider to make your neighbors aware of your operation:
  - Host a potluck or BBQ on your farm
  - Allow neighbors to walk around (but make sure areas they walk will be safe)
  - Consider setting up a Facebook page for the farm to give updates
  - When expanding operation consider holding a meeting to let your neighbors know how the expansion will impact them
    - Other businesses do this when moving into the area.
Preparing for a Lawsuit

- Keep good records – it is critical to a claim you are violating a statute, reg, or permit

- The first thing an attorney will ask you for is a copy of your records
Preparing for a Lawsuit

• What should you include in your records?
  • First thing, can never be too detailed, the more detailed the better

  • Activity and dates activity took place
    • For example: “Applied fertilizer on June 14”
    • Might list equipment utilized for activity and who did exactly.

  • List rationales for activity
    • For example: “Applied Round-up because of weed issues”
    • Don’t be afraid to snap photos – offers support for your rational

• Any permits or communications with regulators
Preparing for a Lawsuit

• Mentioned earlier, don’t be afraid to snap photos.
  • For example, if bugs are destroying your crop then take photos of the damage and if possible try to take photos of the bugs (if bug is big enough to see on photo).
  • Photos demonstrate the conditions you are dealing with and can help others understand why you took the course of action you took.
  • Plus most of us carry around a phone today with a camera on it, its easier today than was a few years ago

• One note on photos, make sure that the photos include a date stamp – may require you to find actually set the date and time on your camera or finding a kid that can
Follow the Requirements in any permit, law, or regulation

• This one goes without saying, right?
• State’s RTF law requires that you be in compliance with all 3 in order to use the RTF defense
• Violating one is just asking for trouble and puts a target on you
Know an attorney

• Question: How many of you know an attorney?

• Many of us probably know one that has handled a friend or family member’s divorce, real estate deal, or criminal matter.
Know an attorney

• But if you were a poultry farmer and a group claimed you violated permits would that attorney be able to help you?
  • Does he/she have specialized knowledge?
  • Does he/she know the proper experts to call?
  • Would you be paying this attorney to learn as they go?

• If you are a row crop operation and accused of killing a neighbor’s trees due to pesticide drift?
Know an attorney

• How to find an attorney that specializes in your issue?
  • Ask your neighbors or an attorney you know
  • Pay attention to the newspapers, maybe a similar case has made the news and the attorney was listed in the story (we like to talk to the press so it should be).
  • Contact county and state bar associations (Members of the Maryland bar are currently working to start an ag section of the bar)
  • Check out the America Ag Law Association’s website http://aglaw-assn.org/
    • Maintains list of members from around the country
    • Will eventually contain areas of specialization
    • Don’t be afraid that you may have to look at attorney out of state – would not be the first farmer to do that in Maryland
  • Finally, you can contact me – contact info at the end.
Know an Attorney

• Ask an attorney to conduct an audit of your operation. Let them look over the farm and see what they think are potential liability risks on the farm.

• Using an attorney should be viewed as form of insurance, the little bit you pay early on for an audit of the business may save huge amounts in litigation fees in the end.
Walk the Property

• Take an afternoon and look over the areas that people could be walking on your farm.
  • Are there places you need to fix or warn customers about?
  • Do you need to hang “No Trespassing” signs? (if you haven’t already done so).
  • Do you need to just hang a sign with a general warning of possible dangers? Such as Beware of Dog or Beware of Cattle.
Liability Insurance

• Carry some form of comprehensive liability insurance on your operation

• Talk with your agent to make sure areas you are concerned about are included in the policy
Liability Waiver

- Do you give tours of your farm operation? Do people knock on your door and ask to see your cow, poultry, vegetable operation, or the like?
- If your answer is YES you may have liability concerns about those visitors
- There is always a risk of injury no matter what activity you participate in on a farm
- You may consider having these visitors sign a liability waiver
Liability Waiver Checklist

• When creating your liability waiver, or better yet when you ask your attorney to help you, these are a few items you need to consider:

• 1. What type of property use and/or activities will the waiver cover?
  
  1(a). Define all activities in detail.
  1(b). State specifically the use permitted under the waiver.
  1(c). Consider what would be property uses outside the waiver.
Liability Waiver Checklist

2. Under what terms may the person or group enter your property?

2(a). Do they require a scheduled appointment? Can they show up unannounced? Do they need a guide/you with them at all times?

3. What are the names/groups of people participating in the activity?
Liability Waiver Checklist

• 4. Include a description of the land the liability waiver covers.

  4(a). Describe the boundaries and the size of the land.

  4(b). Describe the areas of the land that are off limits to visitors and safety zones around buildings, barns, pastures, and houses.
Liability Waiver Checklist

4(c). Choose a specified location of entry/exit and require that visitors check in and out at this certain location. State the location of entry and exit on the waiver.

4(d). Describe any specifics that may be particularly harmful about your property (ex: wild animals, sharp edges, poison ivy).
Liability Waiver Checklist

5. Include language that means guests will not sue or attempt to make a claim against the owner regarding their land use and activities. A statement such as, “The user agrees to *indemnify and hold harmless* the landowner…” is a good example.
Liability Waiver Checklist

• 6. If the person/group is under 18 years of age, make sure to include a guardian signature line. Consider noting that anyone under 18 years of age must be accompanied by an adult and that the adult “agrees to indemnify and hold harmless the landowner for injuries to the child.”

• 7. If your venture deals with hunting on your property, it is wise to incorporate firearm guidelines and require that all hunters have completed a hunter safety course.
Liability Waiver Checklist

8. It is always wise to prohibit alcohol consumption on your land during any of your activities.

9. Include in the waiver that the form will be construed under the State of Maryland laws.
Liability Waiver Checklist

• 10. Update your risk management plan:

  10(a). Talk with your insurance agent to make sure your insurance coverage covers activities that will take place on the farm.

  10(b). Determine if you need to incorporate a business structure into the farm, such as an LLC or a Corporation to help protect your operation.
Business Organization Structures

- Consider using a business organization structure in protecting your farm and personal assets
Business Organization Structures

• Business Organizations would include:
  • Partnership – an association of two or more individuals to jointly carry on a business. Each shares in the profits and loses of the partnership equally and each individual has the authority to bind other partners.
  • Limited Partnership – similar to a partnership, but allows for a separate class of partner who only provide capital and share in profits or loses but do not participate in management decisions in the business.
  • Corporation – is an entity formed under state law to act as a single person, separate from the individuals owning the business, and right to exist indefinitely.
  • Limited Liability Company (LLC) – is an entity formed under state law containing elements of a partnership and a corporation
Business Organization Structures

Have overviews of each structure available at http://www.aglaw.umd.edu/?tag=business%20entity%20series
Conclusions

• As I said earlier, there is no way to limit 100 percent of legal risks
  • The most you can hope to do is develop strategies that make your life easier if you are taken to court

• The point of the presentation isn’t for you to follow all my recommendations, but to start you thinking about things you can do in your operation that help to show you are following the law and give you ideas to protect your business.
THANKS
ANY QUESTIONS?

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