

USE OF PARTICIPANT AGREEMENTS – RELEASES AND RELATED ISSUES

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PARTICIPANT AGREEMENTS

This presentation contains general information and is not intended to provide specific legal advice.

Adventure and recreation providers and associated personnel should consult with legal counsel, experienced in recreational law, regarding matters specific to their business or operation, and aware of the laws in their jurisdiction.



WHAT IS A RELEASE?

- Release – An agreement, excusing liability, in advance, for future wrongs.
- It can stand alone, or be part of a larger document which may include a release, and other key provisions – a ‘Participant Agreement.’



PURPOSE OF WRITTEN AGREEMENT

More than just a tool to shift liability

- Protect provider from liability AND
- Provide important information to participant and parent



BIG PICTURE

- Agreement is only one part of your Risk Management Picture
- Not an overall panacea
- Most important overall focus:
Endeavor to run a quality & professional operation



PARTICIPANT AGREEMENT BASIC ELEMENTS

- Title
- Identification of the parties
- Description of activities & risks
- Acknowledgment and assumption of inherent & other risks
- Release, indemnity and agreement not to sue
- Other (e.g. law, venue, severability, full. ext.)
- Signature



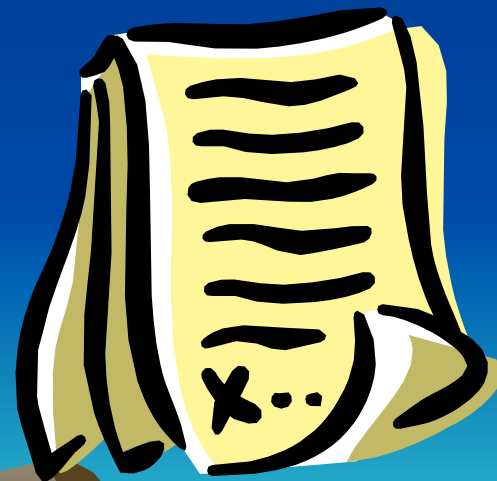
HOW DOES AGREEMENT PROVIDE PROTECTION?

- Can RELIEVE provider of duty of reasonable care – summary judgment
- Can STRENGTHEN chance for dismissal– Inherent Risk Doctrine*
- Can REDUCE ultimate liability – comparative ‘fault’ of provider and participant



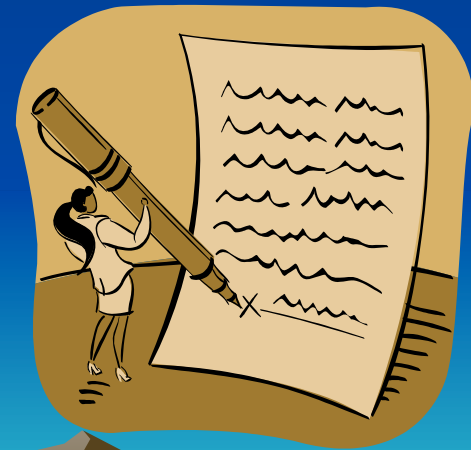
WHAT IT CAN'T DO

- Agreement can't (in most states) eliminate liability for:
 - Gross negligence, reckless, intentional or criminal misconduct
 - Violation of some statutes (i.e. CPA, ADA?)
 - Strict liability



ENFORCEABILITY

- Elements of an Enforceable Contract
 - Mutual ‘assent’ or agreement – a ‘meeting of the minds’ (no coercion)
 - **Consideration**
 - Competency
 - Contract ‘purpose’ not prohibited by law



ENFORCEABILITY

- Document containing “exculpatory language”

- Strict construction
- Review case by case
- Not a sure bet
- Generally, it must be:

- Fairly and voluntarily entered into
- Clear & Unambiguous (format, content)
- **No violation of public policy**



TIPS/ISSUES

- Me – excuse my negligence?
- Consult with attorney. Why?
- Different words used – meaning
- Statutes create unreleaseable duty
- Statutes require language in document (inherent risk laws)



TIPS/ISSUES

- **Minors and a written agreement:**



- Competency to contract (disaffirm/ratify)
- Ability to assume risks – signed agreement as evidence and ‘informational’ value
- Parent:
 - release of claims on child’s behalf (a few states)
 - release of parent/s’ claims & agreement of indemnity

TIPS/ISSUES



- State prohibition (e.g. Montana, Virginia)
- Federal prohibition: VAR
- Oral 'dismissal' by staff

TIPS/ISSUES

- Form 'manipulation' by participant/parent
- Electronic forms
- Foreign language speakers
- College/university



TIPS/ISSUES



- Cut and paste?
- Considerations of content and length
- One or more documents?
- Consistency with all materials!
- Form presentation (duress argument)

PARTING SHOTS

- Not a: “This is all I need!”
- Not a negative; view as a positive
- No substitute for running a professional operation
- Not a sure bet, but worth it



Case Law - Trends

Recent cases of interest.



CONTACT INFORMATION

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