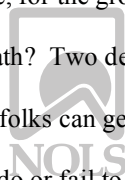


## FUNDAMENTAL LEGAL ISSUES

(WRMC, 2007 - Charles R. Gregg)

1. Perspective
  - a. While the subject is legal, the real issue is operational – running a quality program.
  - b. A quality program is one which:
    - 1) does what it says it is going to do regarding operations and outcomes
    - 2) manages its risks as a reasonable professional would in the same or similar circumstances.
2. The value of risk. The risk of risk.
  - a. We embrace risks, for personal growth and development.
  - b. When we put students at risk, we put the program at risk - its reputation and financial well being.
  - c. Risks can cause injuries and other losses. We tolerate (and expect) a sprained ankle, for the growth potential of the experience. Can we similarly justify a death? Two deaths?
3. So, because folks can get hurt, and make claims, and sue, we need to understand the legal implications of what we do or fail to do.
4. Protecting students and clients
  - a. Disclosure (going both ways, and consider the volume and importance of the information exchanged).
  - b. Understanding the environmental issues
  - c. Emergency action plans in place
  - d. Well-developed and understood policies and preferred practices
  - e. Suitable gear and staff which understands it.
  - f. Good records, including applications, medical, course logs, post accident, etc.)
  - g. Good administrative support
  - h. Good staff selection, training and supervision
  - i. Good student selection and supervision

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5. Protecting the program.
- a. A quality program
  - b. A risk management plan - (at least, alignment and management of risks, and informing participants)
  - c. An understanding of industry standards, and practices
  - d. An understanding of the program's policies and practices.
  - e. An understanding of the laws that apply to the program
  - f. Adequate insurance coverage
  - g. Effective allocation of liability, including releases and indemnities.
  - i. Wise use of professionals
  - j. Wise choice of the business entity

6. Contracts

a. Elements of a contract

- (1) clarity
- (2) no coercion
- (3) consideration
- (4) competency of parties
- (5) offer and acceptance
- (6) compliance with policy/statutes

b. How a contract is formed

- (1) expressed or implied
- (2) oral or written, images
- (3) by someone with authority

c. How broken (failure to perform as promised)

d. Damages (the loss of the benefit of the bargain)

e. Defenses to a claim of breach

- (1) lack of an element of an enforceable contract
- (2) breach by the other party

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- (3) impossibility of performance
- (4) contract calls for an illegal act or one which is against public policy, etc.

7. Negligence

a. Elements

- (1) duty
- (2) breach
- (3) loss
- (4) causal connection between breach and loss

b. Duty can be reduced or enlarged, including by:

- (1) a custodial or other special relationship
- (2) age, special needs
- (3) the activity is extra hazardous
- (4) the sports immunity doctrine
- (5) special statutes

8. Defenses to claims of negligence

a. Lack of an element

b. Inherency of the loss-causing risk

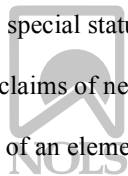
c. Assumption of the loss-causing risk

- (1) primary assumption (no duty of care is owed)
  - (a) risk, including, in active sports, negligence, was inherent; or
  - (b) risk was expressly assumed
- (2) secondary assumption (duty of care is owed).
  - (a) risk was apparent or understood
  - (b) student or client participates nevertheless
  - (c) produces a comparative fault analysis

d. Intervening cause

e. Release (waiver)

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9. Releases

- a. Must have all the elements of a contract (see above)
- b. Describe who is releasing whom and for what
- c. Most effective if part of a larger agreement (Participant Agreement?) which describes the activities and their risks, and may include an express assumption of risks, releases, indemnities and other matters
- d. Minors (generally, under 18 years of age) cannot enter into a legally binding contract, but may ratify after becoming an adult
- d. Parents may release a minor's rights, and indemnify against claims of minors, in only a few states.

10. Other defenses to claims of negligence:

- a. Immunities from suit, pursuant to state or federal law, including for: volunteers, staff, directors and officers of certain (usually not-for-profit) entities; and for government agencies and workers.
- b. Certain statutes, including Recreational Use Statutes. (Consult local laws.)

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13. Take-aways:

- a) Analyze and eliminate from your program the activities, places and people that present risks you cannot manage with confidence.
- b) Examine the descriptions of your activities and risks in your promotional and other materials. If there is a reasonable possibility of something happening that will surprise your clients, enlarge your descriptions to include that thing (or those things).
- c) Have your Participant Agreement reviewed by competent counsel to determine that you have covered adequately the following: a description of activities and risks of your program; an assumption of the risks, a release of you and your organization from claims, including for negligence; an indemnification of you and your organization against claims of third persons arising from the client's participation; and a provision that fixes the place of and the law applied to any suit brought against you or your organization.

Charles (Reb) Gregg writes and speaks frequently on matters of managing the risks of legal liability in adventure programs. He is general counsel to NOLS and to The Association for Challenge Course Technology, and serves on the Wilderness Risk Managers Committee and the Accreditation Council of AEE. Telephone: 713/982-8415. E-mail: [rgregg@gregglaw.net](mailto:rgregg@gregglaw.net). Web site: [www.rebgregg.com](http://www.rebgregg.com).

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## THE TROUBLE WITH MINORS

(WRMC 2007—Charles R. Gregg)

1. Minors (in all but a few states, persons under 18 years of age) represent unique opportunities and challenges in education and recreation programming.
2. Special risk issues associated with minors.
  - A. Unpredictable levels of development, attention and comprehension.
  - B. Medications, sometimes undisclosed
  - C. Misplaced expectations
  - D. Behavior issues
  - E. Coercion issues
3. Operations Issues associated with minors
  - A. Suitability
  - B. Sequencing
  - C. Supervision
4. Duties to minors
  - A. Duty of care, generally: To act as a reasonable professional would act under the same or similar circumstances.
    - B. In Loco Parentis. To act as a reasonable parent would act under the same or similar circumstances.
5. Protection from claims of minors
  - A. A minor cannot contract for a release, but on becoming an adult may affirm or ratify a release made during minority (including perhaps by mere participation.)
  - B. Assumption of risks
    - (1) Expressed assumption (usually in a Participant Agreement)

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(2) Primary assumption: the cause of the loss is an inherent risk of the activity.

There is no duty to protect from an inherent risk, including, in an active sport, the risk of simple carelessness (negligence) by a co-participant or, in some states, an instructor.

(3) Secondary assumption: a duty of care exists, and the minor, aware of the risks, chooses to participate anyway.

C. Inherency of risks (generally, age is not a factor)

D. Contributory fault of the minor

E. In some states a Parent or Guardian may release on behalf of a minor, and indemnify

against claims of a minor.

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### 6. Special issues



A. Marketing (Is the audience to be the minor? Parent?)

B. Privacy rights of minors.

C. How to deal with 18-20 year olds.

D. If parents disagree regarding a minor's issues?

E. State regulation, and Parens Patriae.

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