

Is it Really Worth the Paper It's Written On?

Releases and Related Agreements Part I: General Concepts*

You have probably heard the classic line from a client attorney or physician (or a member of your staff!): "It's not worth the paper it's written on." "So why do you use waivers and releases anyway?" The answer is simple: in many jurisdictions across the country, thoughtfully drafted releases and related documents used in an adventure and recreation setting do work to limit liability, as well as serve a variety of other important purposes.

Some Misunderstandings

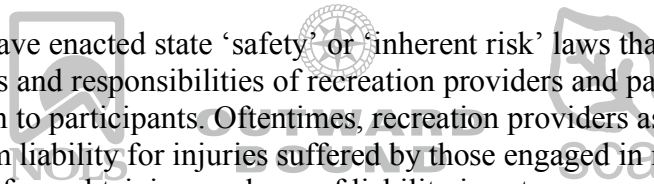
There may not be a topic more hotly discussed, and more thoroughly misunderstood, than the issues surrounding development and implementation of a written "participant agreement (Used, collectively, to refer to the variety of written forms — "releases" or related documents organizations may develop for use with clients and guests.)" for use with your clients, students or guests. First of all, what is a participant agreement? The answer is, "it depends." It depends upon, for example, what the recreation provider wants the document to encompass, whether the document is written to seek a signature from adults, minors, or both, and whether there are any restrictions or limitations on the breadth or language of the document (stemming from state or federal laws or case law). Why are these documents so talked about, and yet, so misunderstood? Consider the following:

- ❖ Many words are tossed around in the industry, often with little understanding of the legal or practical meaning or implication of these terms. Have you heard the words "release," "waiver," "assumption of risks," "exculpatory clause," "indemnify," or "defend?" How about "negligence," "gross negligence," "willful, wanton and reckless misconduct," or "inherent risks?" These words have distinct meanings within the context of these documents and pursuant to different jurisdictions' laws. However, oftentimes, these words are misunderstood generally and/or misused in a written participant agreement.
- ❖ Some recreation providers do not want their guests signing a document releasing them from liability for their or their employees' negligence. They want to stand behind their and their employees' actions and do not want to avoid their liability, reasoning that "If one of my staff is negligent, my organization should be held accountable." On this basis, they choose not to seek a release of their liability. Recreation providers taking this position may not fully understand the value and/or limitations in using these types of provisions in their written agreements.
- ❖ Many recreation providers believe that the only value in using a written agreement with their participants is the hope that it will ultimately protect them from liability. They miss

the important point that these documents can have great value beyond this 'liability insulating' potential.

- ❖ Case law varies from jurisdiction to jurisdiction and from case to case. That is, courts in different jurisdictions (states) may have different rules for enforcing these types of documents, and oftentimes, the facts of a particular case will influence the court's ruling. To the casual observer, there may be little consistency or predictability among different courts' rulings — even in the same jurisdiction. In addition, most courts will review very closely, “with a fine tooth comb,” any document that attempts to relieve a party from liability already allocated under the law. As a result, some documents will not be upheld or enforced, often leading to the conclusion that the documents are unreliable.
- ❖ Recreation and adventure providers assume that they can take their buddy's form, make a few changes, and create their own document, even if their buddy's operation is different and operates in a different state. When it doesn't work (the document doesn't hold up in court), people think that these forms are worthless.
- ❖ Many participant agreements contain lots of “legalese” — that is, legal terms and word combinations difficult for non-lawyers to understand (and some lawyers and judges!). This contributes to the confusion.
- ❖ Many states have enacted state ‘safety’ or ‘inherent risk’ laws that attempt to outline, in part, the duties and responsibilities of recreation providers and participants in the event of injury or death to participants. Oftentimes, recreation providers assume that these laws free them from liability for injuries suffered by those engaged in recreational activities, and that, therefore, obtaining a release of liability is not necessary or important. (In most cases, this assumption is incorrect.)
- ❖ Some recreation providers feel uncomfortable using a written form with their clients and guests. As a result, they apologize for using it, make statements discounting its value, or wait until the last minute to let their clients know that it must be signed. In other cases, they let the client cross out or delete certain parts of the written document. These actions can lead to problems in enforcing the document later on. Again, if the document is not enforced, the sentiment is that these documents “don't work.”
- ❖ Many recreation providers don't understand the law regarding minors (in most states, those under 18 yrs. of age), and how, if or when a minor can sign a participant agreement. In addition, they do not understand whether a parent can sign on the child's behalf. Again, state law varies greatly on these issues, contributing to the confusion.
- ❖ Many recreation providers believe that a written document can free them from all liability in the event of injury or death to a client. They believe it is an overall panacea, when, in fact, it isn't.

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These misunderstandings may leave many outdoor recreation providers exposed legally. Further, these misunderstandings and overall confusion prevent outdoor programs from taking advantage of the variety of benefits in using carefully prepared and appropriate agreements. When written poorly or used inappropriately, a participant agreement might not be worth the paper it's written on. However, when written and used well, it can be of tremendous worth to a program — and to its participants.

Just the Facts, Please

To help dispel the confusion, here are some important points:

A. The Information Exchange

An important take away: the participant agreement does not have to serve *only* as a vehicle for protecting the provider from potential liability. It can also serve as a tool to impart valuable information to the participant. Choosing to use a participant agreement with your clients and guests is more than simply attempting to avoid a lawsuit or minimize liability; it is part of running a professional operation. Running a professional operation includes considerations of fundamental fairness to participants while engaging in appropriate risk management practices.

We have written before about the value of the information exchange: that critical information flowing from provider to participant and from participant to provider ([Spring 2002](#)). This flow of information (or lack of it!) can influence the rapport and understanding developed between provider and participant both before and during the trip or course, and, importantly, when and if incidents occur. A provider imparts information to participants in various ways, one of which can be through the effective use of a participant agreement.

Information is powerful, regardless of which way it is flowing. When the organization has taken the time to provide valuable and accurate information from the beginning, there is a better chance of building good rapport with participants, and the potential for fewer incidents. Furthermore, well-informed participants — and those that have “bought in” to the experience (and understand both the rewards and risks, and, importantly, their responsibilities) — may be better prepared, psychologically, to deal with discomforts, injuries and accidents and less inclined to take legal action.

B. What Does it Mean?

The words you hear in conjunction with the use of a participant agreement *do* have distinct meanings. For example, a “written acknowledgment and assumption of inherent risks” (see below) is not a “release of liability.” A “release” and a “waiver” are different ways of describing the same concept. If an organization seeks to obtain a release of its liability, it is attempting to avoid its liability in the event of harm to a participant. In turn, in signing the document, the participant is “waiving” or “releasing” his right to sue the provider for negligence. “Exculpatory” language is, generally, any language that attempts to shift liability already allocated under the law. The bottom line is, consult with experienced legal counsel to assist you in understanding the

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meaning of these terms, in analyzing the law in your jurisdiction, and in drafting your participant agreement to accurately conform to the law.

C. What Does the Document Do?

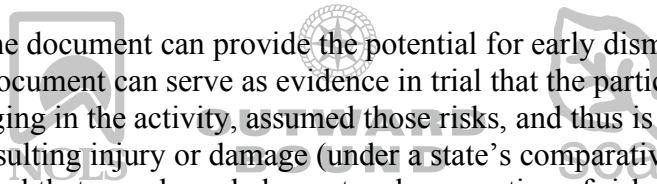
A participant agreement can be different things and serve different purposes. Absent legal restrictions, developing a document that has some key elements can usually serve an organization in a variety of ways.

Importantly, these documents can provide participants with specific information concerning the activities and some of the risks associated with the activities. Participants can then make informed choices about whether to participate. If they choose to participate, they do so with knowledge of the risks involved and with the understanding that they will be responsible for injuries or death resulting from such risks, and resulting from provider's ordinary negligence, if that language is also covered in the document.

The document can also serve to deter a party from filing a claim. As mentioned earlier, the document can assist in building a foundation of understanding and rapport between the organization and participant, about the activities, risks and participant's own responsibilities, that ultimately reduces the likelihood of a lawsuit. Sometimes the document's anticipated strength can also discourage a filing.

If a lawsuit is filed, the document can provide the potential for early dismissal of the case. If that is unsuccessful, the document can serve as evidence in trial that the participant was warned of the risks before engaging in the activity, assumed those risks, and thus is partially or wholly responsible for the resulting injury or damage (under a state's comparative fault laws). It is important to understand that an acknowledgment and assumption of risks is different than a release or indemnity agreement. Oftentimes, though, these two concepts are combined into one written document.

A participant agreement is oftentimes written to include an acknowledgment and assumption of "inherent and other risks." As we have discussed frequently, inherent risks are those risks, desirable and undesirable, that are integral to recreational activities. (Other risks may or may not be determined as inherent, but may be important to include in a document). In most jurisdictions, statutes or case law support the general doctrine that recreation providers have no duty to protect participants from the inherent risks of recreational activities, and no responsibility for injuries resulting from those risks. According to this "inherent risk" doctrine, courts in many jurisdictions (but not all!) agree that participants do not need to be informed about specific inherent risks in order to be held responsible for injuries resulting from those risks. The logic is, when participants voluntarily agree to participate, they impliedly assume the inherent risks of that particular sport or recreational activity. However, including a written description of some of the inherent (and other) risks and a provision outlining a participant's responsibility and express assumption of those risks, relays accurate and important information to the participant. In addition, it may ultimately influence a court in choosing to dismiss the case before trial, or provide evidence to support an assignment of all or a portion of the fault to the plaintiff under a



jurisdiction's comparative fault laws (See above. See the [Spring 2003 GT Law Review](#), for a discussion of the varying assumption of risk concepts.)

As mentioned above, a release of liability (one form of “exculpatory” language) is an attempt to shift liability already allocated under the law. Release language refers to that portion of a document wherein the provider shifts the responsibility for provider’s negligence to the participant. In other words, the language basically excuses the provider from liability for injuries or death resulting from provider’s ordinary negligence (the failure to exercise “reasonable care”). In most jurisdictions, a written document, if it meets certain conditions (as interpreted by a court), is effective to relieve a provider from liability for ordinary negligence. However, the document is generally *not* effective to relieve a provider from liability for gross negligence or willful, wanton or criminal misconduct (see our discussion of these concepts in the [Summer 2002 GT Law Review](#)). (A participant’s agreement to indemnify is an agreement to reimburse the provider for claims brought against the provider by a third party — another type of exculpatory language.)

It is important to note that there is oftentimes a gray area in the law between inherent risks and provider negligence. In other words, did an inherent risk, or provider negligence, cause the injury/loss? This can be an important reason to include a release of liability for simple negligence in the participant agreement.

In some circumstances you may be limited to an acknowledgment and assumption of risk type agreement. The National Park Service, for example, requires that those operating under a permit and engaging in activities with clients on those lands must use a standardized “Visitor’s Acknowledgment of Risk (VAR) form (or some similar variation)” with their participants, if they choose to use a form at all. A similar policy has been adopted by some Forest Service regions. Although this VAR form has value, as it contains an acknowledgment and assumption, by the participant, of the activity(s)’ inherent risks, it does not contain a release of liability for the provider’s negligence. Note that your courses or programs may cross more than one type of land (e.g., federal, state, private). As a result, some land managers may consider allowing you to use one written form that incorporates this restrictive policy. Work with your land manager and legal counsel to consider this possibility, if you choose. (See the [Spring 2002 GT Law Review](#), discussing these issues).

D. Work with Experienced Legal Counsel

It is critical that organizations wanting to use some form of a release with their clients and guests consult with experienced legal counsel, familiar with the laws in their jurisdiction, to assist them in drafting the document. Here are a few reasons (we will address these issues in more detail in Part II of this article, [Winter 2003 GT Law Review](#)):

1. Documents that contain any “exculpatory” or “liability shifting” language will generally be strictly reviewed by the courts. Courts usually enforce these documents on a case-by-case basis, and only if they meet certain conditions. In other words, these documents are

not a “sure bet,” and competent legal counsel can assist you in maximizing your chances that your particular document will ultimately be upheld if it is tested in the courts.

2. Unique state “inherent risk” or other laws may mandate requirements about agreement language, or have an effect upon the enforceability of the document.
3. Federal restrictions may apply for operations conducted under permit on federal lands (see above).
4. A state’s particular case law may require that these types of documents be in a certain format, use certain language, or be restricted in some other way.
5. Does the document say what it means to say? — Issues of clarity.
6. Issues regarding minors participating in your programs (see below).
7. The legal, practical and “informational” value of including a variety of other provisions or language in the agreement.
8. Insurance considerations. Does your insurance company have requirements about the type of agreement you will use with your participants? Do they understand if you are subject to federal permitting restrictions? Your attorney can communicate and coordinate with your insurance representative so that everyone is on the same page.

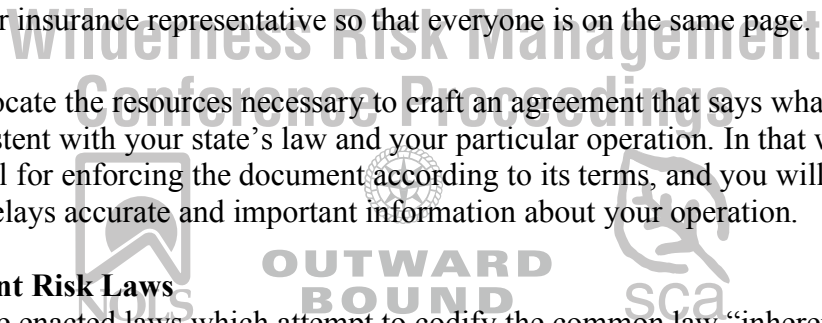
Bottom line, allocate the resources necessary to craft an agreement that says what you want it to say and is consistent with your state’s law and your particular operation. In that way, you’ll have the best potential for enforcing the document according to its terms, and you will have a document that relays accurate and important information about your operation.

E. State Inherent Risk Laws

Many states have enacted laws which attempt to codify the common law “inherent risk” doctrine. As stated earlier, the classic rule is that in agreeing to participate, a participant assumes the inherent risks of the recreational activity, whether known or unknown. The provider has no corresponding duty to protect the participant from these risks, and no liability for injuries resulting from these risks. State statutes define the scope of this “no duty” rule in the context of certain recreational activities (equine activities, skiing, baseball) or, in some cases, a wide variety of recreational activities. In most cases, these statutes *do not* extend to protect recreation providers from liability for their negligent conduct. In addition, some statutes require that certain language be included in any written document used with participants. Lastly, some jurisdictions (New Mexico included: see the *Berlangieri* case discussed in this issue) have ruled that the language of a state’s inherent risk law effectively prohibits those providers from obtaining a written release of their liability for negligence. Other jurisdictions cite other state statutes as rationale for prohibiting use of a release in some contexts. Legal counsel can and should review applicable state inherent risk or other laws in developing an appropriate participant agreement for your organization.

F. One Size Doesn’t Fit All

Resist the temptation to cut and paste your buddy’s form. Each individual or entity must balance the various aspects of their operation in making these business decisions and developing a form



consistent with their unique mission and operation. Don't go with Joe's form; wise use of experienced legal counsel (see above) is worth it to you.

G. Form Implementation

Educate your staff about the proper use and implementation of the participant agreement you choose. For example, don't let participants cross out words or provisions before they sign. In addition, don't wait until the last minute to inform your guests that they will need to sign a form. Obviously, if you offer day trips, your ability to give advance notice is different than that for a 3 week program signed up for months in advance. However, each of the above practices can impact or threaten the ultimate enforceability of the participant agreement. Legal counsel can assist in educating you and your staff about these form implementation issues.

H. Consistency of Information

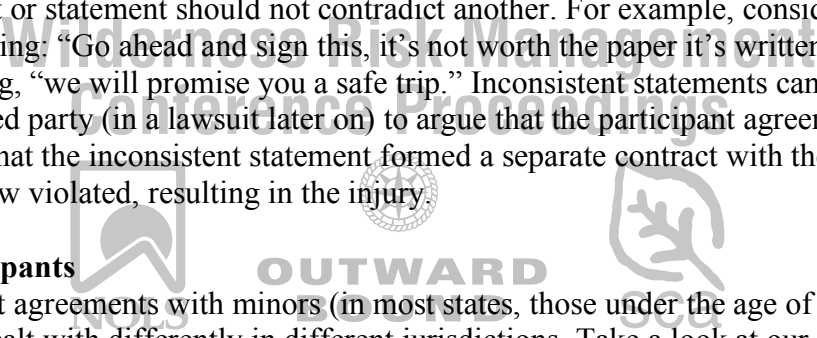
On a similar note, your brochure, website, video, pre-trip talk or staff comments, and other information distributed to clients, guests and the general public should be consistent with the language included in your participant agreement, and the agreement's meaning and intent. That is, one document or statement should not contradict another. For example, consider a guide's comment in passing: "Go ahead and sign this, it's not worth the paper it's written on anyway," or a brochure stating, "we will promise you a safe trip." Inconsistent statements can sometimes be used by an injured party (in a lawsuit later on) to argue that the participant agreement should not be enforced, or that the inconsistent statement formed a separate contract with the organization that was somehow violated, resulting in the injury.

I. Minor Participants

Using participant agreements with minors (in most states, those under the age of 18) is a tricky issue, and one dealt with differently in different jurisdictions. Take a look at our article "A Not So Minor Problem" ([Summer 2003 GT Law Review](#)), discussing these issues. A minor is not capable of releasing his or her own rights to sue for negligence in a pre-injury release form. (Minors are not competent to enter into contracts. If they do, the contract is "voidable" — that is, they can reject ("disaffirm") the contract when they reach adult age.) Further, in most states ruling on the issue, parents are not capable of releasing the child's rights on their behalf (Colorado, Ohio, Massachusetts, Connecticut and a few other states allow the parents release of the child's rights in certain circumstances). However, a minor is capable of assuming risks in many cases (this can be age dependent and influenced by state case law), and a parent is usually able to release their own rights in relation to injury to the child. Importantly, it is critical to employ competent legal counsel to assist you in determining how to craft a document, potentially, for both the parent and child's signature, containing appropriate language.

J. No Excuse to Relax!

Remember, the use of a written participant agreement is not an overall panacea. An organization that takes the position "I just need a release of liability and then I am good to go" is not considering the bigger picture. As we've said before, running a professional and quality program, and engaging in comprehensive risk management practices, are probably the most important ways to minimize your potential legal exposure. Developing a solid participant agreement for use



with your clients and guests is just one aspect of effective risk management practices — one “layer of the onion.”

Conclusion

Participant agreements can be and are “worth the paper they are written on” — both as insulation from some legal liability and as an important component of the information exchange equation you engage in with your clients and guests. However, in developing a participant agreement for use in your operation, understand what you are getting into, what a participant agreement can and can’t do, and work with experienced legal counsel to craft a document that conforms to applicable state law and is consistent with your mission and operation. See our next issue discussing the necessary and suggested elements of these agreements, factors that can affect their enforceability, and pitfalls to avoid in crafting such agreements.

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