

New Developments in Participant Agreements

This document may not be reproduced
without the consent of the author. 10/12

WRMRC



WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 776-6657 x3

Disclaimer

The following is intended to be general information only - not specific legal advice.

Consult with competent counsel familiar with your organization and the laws pertinent to its operations.

This document may not be reproduced without the consent of the author. 10/12

WRMRC



WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6222 x3

Likely sources of claims:

Breach of Contract: a broken promise.

Negligence: The failure to meet one's legal duty of care, resulting in an injury or other loss.

Our emphasis will be on negligence.

The duty owed:

Does a duty of care exist? Why?

Relationships, expectations, laws

What is that duty?

To refrain from causing, and in special relationships to protect from, unreasonable risks of harm.

The standard of performance:

“To act as a reasonable person (professional) would act in the same or similar circumstances (EXCEPT when a statute or common law requires a different degree of care).”

Note: reasonableness (not perfection); and objectivity.

Defenses to claims of negligence:

An element (duty, breach, harm causation) is missing. Duty is the key.

Eliminating or reducing the duty of care:

- Inherency of the loss-causing risk

- Expressed assumption of risk

- Release of claims

What is a Release?

For our purposes, a forgiveness, in advance, of a wrong.

It may stand alone but is more effective if part of a larger document –a “Participant Agreement”, for example.

WRMRC



OUTWARD
BOUND
SCA



WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6657 x3

This document may not be reproduced without the consent of the author. 10/12

What is the purpose of this (larger) agreement?

To inform the client of the activities, risks and respective responsibilities.

To protect the program from certain claims.

Legal requirements of the agreement (or any contract):

Consideration

Clarity

Competency

Conscionability (procedural and substantive)

No coercion

Other (special) requirements of the agreement.

It will be strictly construed.

It must not release a statutory duty.

It must conform to public policy.

Policy and statutory issues:

“Tunkl” factors, unfavorable to a release:
Essential or highly important activity;
appropriate for state regulation.

Unequal bargaining power (a contract of
adhesion).

Available to the general public.

Control in the service provider.

Federal lands restrictions

More policy and statutes:

- Releases of claims of negligence?
- Special state statutes, including FL, CO, NC, HW, NY, others
- Parents signing for minors
- Indemnity by “another responsible adult”?
- Limitations on claimant’s recovery? On an organization’s cost recovery?

Issues of form:

- Signing creates a presumption of validity.
- Readability – font, length, language, etc.
- Title.
- Translations.
- E-signatures and Biometrics.
- Roster and multiple agreements.

Issues of presentment:

Coercion /involuntary signing (or participation)

Inadequate opportunity to read and understand.

Misrepresentations/fraud

WRMRC



OUTWARD
BOUND
SCA

WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6657 x3

This document may not be reproduced without the consent of the author. 10/12

Defenses to a Release

It lacks an element required of legal contracts (clarity, coercion, etc.)

It violates a law, or public policy (the Tunkl factors)

It was induced by fraud.

The elements of the Agreement.

- Title.
- Parties
- Consideration
- Activities and risks (and their inherency).
- Acknowledgment and assumption of inherent and other risks
- Release.
- Indemnity (a promise to protect another from future loss or liability)
- Other –duration, law, venue, costs, ADR, medical, other

How does the agreement protect the program?

Reduces the program's duty of care (expressed assumption and release).

Reinforces the “inherent risk/no duty” rule.

Allows a court to compare “fault”.

Shifts liability (the indemnity).

Persons asked to agree might include:

Persons in the zone of danger- including participants, observers, etc.

A parent or guardian; other adult, for a minor child/? Others? Ratification?

The Colorado statute.

Persons to be protected might include:

All who might be exposed to claims.

The organization, owners, directors, staff.

Owners of premises?

Contractors? Volunteers? Other participants?

Don't over do it ("all persons associated"...e.g.)

What claims are covered:

The legal test: what is (should have been) reasonably contemplated by the parties.

“Any and all claims”. (Too broad?).

Negligence (must be expressed?)

Products, premises, professional services, contract claims?

Sources of claims covered:

Arising out of enrollment?

Arising out of participation in the activities?

Use of the premises? Equipment?

“All risks in any way related to.....”?

Are these agreements enforceable?

- Yes, in all but a few states.
- Not if signed by a minor and rarely if signed by a parent for a minor.
- Rarely for reckless or intentionally wrong acts.
- Probably not, if it wasn't prepared for you!

Representations – a threat to the agreement:

- Breach of contract: “you will have an opportunity to inspect”, “participation is optional”, “it will be safe”.
- Fraud (and negligent) misrepresentations: “We’ve never hurt anyone”, “all precautions have been taken”, “reasonable steps have been taken”
- Consumer protection statutes.

Words Matter

- “You my examine the course ...”
- “Our thoroughly trained staff...”
- “Every care and attention will be given.”
- “(Org.) is not liable for injuries not directly caused by its failure to take due care.”
- “We will be constantly monitoring.”
- “The dangers have been minimized”
- “Staff may make mistakes”.
- “You may die”.

Full (adult) Participant Agreement:

- Intro, parties, etc.....
- In **consideration** of being allowed to participate in _____, organized and conducted by the _____), the undersigned Participant acknowledges and agrees as follows:
- The **activities of (org) include**....These and other activities will expose the Participant to **certain risks and dangers, including** though not exclusively, the unpredictable forces of nature, the carelessness of (org) representatives, co-participants, and Participant, the failure of participants and others to follow instructions, and the failure of anchors, belays, holds, and equipment and structures, including climbing structures, used in the activities. Medical treatment may be delayed. **These risks are inherent in the activities**—that is, they cannot be eliminated without altering the nature of the activities and their appeal. **These risks may cause loss or damage to Participant and his or her property, and in extreme cases even death**, by reason of falls, striking or being struck by fixed or dropped objects or by other persons, overexertion and stress and other physical and emotional trauma associated with these activities.

Participant Agreement (cont' d):

- Participant represents, as a condition to participation, that he or she **is in good health** and fully capable of participating in the activities without causing harm to himself or herself or others, and is not, and during the activity will not be, under the influence of any chemical substance, including alcohol. Participant will voluntarily withdraw from the activity if there should be any medical or other condition that would cause Participant to be a danger to Participant or others.
- Fully understanding the above, Participant nevertheless voluntarily chooses to participate in _____ and to follow instructions and bring to the attention of the organizers any instruction or condition which Participant deems a danger to himself or herself or others. **Participant expressly acknowledges and assumes and accepts full responsibility for all risks of the activity**, whether or not described above, and inherent or otherwise.

- Further, Participant **agrees to release and hold harmless its members, officers, directors, staff and contractors (referred to herein as "Released Parties") from any and all liability, causes of action, claims and demands of every kind and nature whatsoever**, whether for bodily injury, death, property damage or other loss, which may arise in connection with Participant's enrollment or participation in the activities or the use of the organization's equipment or premises. Participant further **agrees to indemnify (that is, defend and protect by payment or reimbursement) Released Parties from any and all claims arising out of Participant's enrollment or participation in the activities**, or the use of the organization's premises or equipment, whether the loss is incurred by or caused by Participant, including a claim of a member of Participant's family arising from an injury, death or other loss suffered by Participant. **These agreements of release and indemnity include an injury, death or other loss arising in whole or in part from the negligence, or a claim of negligence (but not the gross negligence or intentionally wrongful conduct) of a Released Party .**

Participant agreement (end):

- This agreement is entered into by Participant voluntarily and is intended to be enforced to the fullest extent allowed by law **on behalf of Participant and his or her heirs, executors, administrators, etc.**
- This agreement will be effective from/for.....
- To the extent a claim of Participant is not upheld by a Court, **all costs and expenses, including for attorney's fees, incurred by a Released Party in connection with the investigation and defense of such claim shall be reimbursed to it by Participant.**
- Any dispute between a Released Party and Participant in connection with the activities **shall be governed by the substantive laws of the State of ____.** Any legal proceeding shall be filed and conducted exclusively in _____ County, _____ and I consent to the jurisdiction of the courts of that county.
- I have read and agree to the terms and conditions herein.

Participant Name (print)
Date

Participant Signature

A basic (adult) release clause:

“I hereby agree to release (and indemnify?) and not to sue _____ (“Released Parties”) with respect to any claim of injury, disability death or other loss to person or property suffered by me which relates in any way to my enrollment or participation in the activities of (organization) or the use of its premises or equipment. The claims hereby released include those of negligence, but not of gross negligence or intentionally wrongful conduct.”

Avoiding the dangling parent:

- a) “Parents of minors must sign below”,
or (better)

- b) I, parent or guardian, for myself and the
minor, agree to release, indemnify and
hold harmless _____ from any and all
claims brought by or on behalf of me or
the child the which are in any way related
to.....

Commonly heard complaints:

“(The document is) too long, scary, unfair, confusing.

“It encourages carelessness.”

“May I make changes?”

“May I sign electronically?”

“Your staff member said it’s not worth the paper it is written on.”

“May my (Teacher? Best friend’s mother?) sign?”

Some common problems:

Failure to specify venue (jurisdiction?) and applicable law

Parent to sign for self and child

Accurate title

Use of independent contractors

Forgery/misrepresentation re adulthood

Specificity regarding activities, risks, duration, parties

Ethical issues:

Why (how do you dare) ask to be released for your negligence?

Why should a parent be allowed to release a child's right to sue ?

Some Take-Aways

This is not a contest.

Strive for clarity - not too short, not too long

Check with your lawyer

These things work!

WRMRC



OUTWARD
BOUND
SCA

WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6657 x3

This document may not be reproduced
without the consent of the author. 10/12

Your action items:

1. Ask a few acquaintances typical of your participants and parents to read your Agreement and comment on its tone, clarity and readability.
2. Ask your staff to review the Agreement for accuracy of descriptions of activities and risks.
3. Consult legal counsel about applicable legal requirements.

And in closing....

Blue sky .

Questions.

Thank you!

rgregg@gregglaw.net
713/982-8415

This document may not be reproduced
without the consent of the author. 10/12

WRMRC



WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6657 x3

WRMRC



NOLS
OUTWARD
BOUND
SGA

WILDERNESS RISK MANAGEMENT CONFERENCE

www.nols.edu/wrmrc | (800) 710-6657 x3

This document may not be reproduced
without the consent of the author. 10/12

Duration of the agreement:

Must be clear re event or term.

Annual re-sign? Good until cancelled?

How to memorialize cancellation?

Special events require a different release?