

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

Releases and Related Agreements Part II: Elements of a Participant Agreement

*Part I of this article appears in the [Fall 2003](#) issue of the *GT Law Review*. Part I discusses important concepts pertaining to releases and related documents, and general notions of whether those documents are 'worth the paper they are written on.' Part II describes principle elements of such a document, and issues affecting their enforceability.*

The document that is the subject of this article — 'participant agreements' as we referred to them in Part I — will include information about anticipated educational or recreational activities and their risks, and the participant's acknowledgments and agreements relating to those matters. State laws pertaining to these elements will vary. We urge you to consult with qualified legal counsel familiar with the laws that will be applied to your documents and the activities of your program.

I. Introduction

Courts generally focus on two sets of characteristics in determining participant agreement enforceability: 1) whether the agreement contains the elements of an enforceable contract, and 2) whether the agreement can be enforced as a contractual release of liability. These factors have common ground and are oftentimes combined in the court's analysis.

The elements of an enforceable contract include 1) mutual agreement (a 'meeting of the minds'), 2) consideration, 3) legal competency (that the parties are 'competent' to contract), and 4) that the purpose of the agreement is not prohibited by law. Courts will also consider whether there is equality of bargaining power (including freedom from coercion).

Courts apply a second level of analysis to agreements containing a release of liability or 'exculpatory' language. Relief from liability for negligence, for example, may be sought in the assumption of risks (including the risk of negligence), in the release of liability for negligence, and in the indemnification (the defense and protection against claims, including for costs and attorney's fees). Because these agreements call for the forgiveness, in advance, of some level of misconduct, they are viewed with disfavor by the courts and will be carefully scrutinized. Therefore, in addition to determining whether the agreement contains the elements of an enforceable contract, the court will generally look to (some or all of) the following additional factors: 1) whether the agreement is clear and unambiguous, 2) whether the agreement is fairly and voluntarily entered into, and 3) whether the agreement violates public policy. Bottom line, these documents are not a "sure bet," and will generally be enforced on a case-by-case basis. However, the laws of most states allow these types agreements, thereby affirming the freedom of parties to contract as they choose. Moved this to the later discussion.

Public policy is an important consideration we have discussed in previous issues of the *GT Law Review*, and worth emphasis. (See our discussion of *Berlangieri*, [Fall 2003](#) *GT Law Review*.)

One state's philosophy, or attitude toward the rights of its citizens, may be quite different from that of another state. A state's "policy" may be found in its own laws. As we saw in *Berlangieri*, when the public policy of a state, as reflected in its laws, conflicts with citizens' efforts to make contracts, the policy will prevail. More specifically, if a state statute sets out a duty of care, most courts ruling on the issue have found that that duty may not be avoided by a contract. In *Berlangieri*, the issue was a service provider's statutory duties in the equine industry. In the earlier case of *Murphy v. North American River Runners*, (see [Fall 2003 GT Law Review](#)), the issue was an outfitter's statutory duty in the rafting industry. In the even earlier case of *Lee v. Sun Valley Company*, 695 P.2d 361 (Sup. Ct. Idaho, 1985), the Court invalidated a release on the basis of an outfitter's statutory duty.

In some jurisdictions, liability under other laws — like Consumer Product Safety statutes — cannot, as a matter of public policy, be effectively released in a participant agreement (or, as is the case under the Texas consumer law, is limited by statute). If the liability being released is for an 'essential services' (for example, the day care services provided in *Gavin*, [Summer 2003 GT Law Review](#)), the agreement will often be found void on public policy grounds. Lastly, as discussed in Part I of this article, as a matter of general public policy, releases are not effective, in most jurisdictions, to waive liability for more egregious misconduct, i.e., gross negligence or willful and wanton misconduct.

II. The Parts of the Agreement

A participant agreement includes at least the following elements.

1. Title

The title must be sufficiently accurate to avoid any confusion about the contents of the document. Courts, already antagonistic to agreements that attempt to eliminate or shift a service provider's responsibility for misconduct, might invalidate an agreement because of an inconsistency between the contents and the title. The argument would be that a party was misled by the title, and misjudged the significance of what he or she was signing. A fairly common title for the document we are describing is "Participant Agreement," with a subtitle describing the major components.

2. Parties

The parties — individuals and legal entities — should be accurately described. Include the nature of the legal entity: "a corporation," for example, or, more specifically, "a not-for-profit corporation organized and existing under the laws of the State of _____". Any party who is to be obligated by the terms of the agreement, or to whom some benefit will flow, should be named as a party. The initial description of the parties offers an opportunity to use only a shorthand reference thereafter: "Acme Rafting Corporation, referred to below as Acme," for example.



Wilderness Risk Management
Conference Proceedings

3. Consideration

Consideration is something of value that is exchanged for a promise made. A contract without adequate consideration may be found unenforceable. Although value moving between the parties is usually apparent, it is customary to state that value. Often, the “mutual undertakings of the parties” are described as the consideration. Consideration might be described as “the privilege (or the opportunity) to participate in the activities of X.” The participant makes the agreements for the consideration of participating in the program.

4. Description of Activities and Their Risks

While it may be possible to anticipate and describe the scheduled activities of the program, it is virtually impossible to describe all conceivable events and conditions that might be encountered, and their risks. In describing the activities it might be wise to explain that they may be planned or unplanned, supervised or unsupervised, and reasonably anticipated or not. States’ laws vary considerably regarding the precision with which activities and risks must be described. The rhetoric of the courts, however, is roughly the same: a person cannot assume, release or indemnify against a risk of which he or she is not aware. However, inherent risks — those which are so integral to an activity that, if they were eliminated, the basic and fundamental nature of the activity would change — are regarded by most courts as being so well understood by the community that a participant’s subjective awareness of such risks is not required. Some courts (including those described in court opinions previously reviewed in the *GT Law Review*, i.e., New York and Washington) continue to require some level of subjective knowledge of even the inherent risks. The language of the Courts varies in describing the extent of the knowledge required.

Regardless of how the risks are ultimately described, it is wise to include a “catch all” or “Mother Hubbard” provision clarifying that what you have described is not intended to be all-inclusive. Include travel, use of equipment, and use of related facilities, in describing activities and risks. And, as unappealing as it might be, you should include serious injury and death in your description of risks, if they are even remote possibilities.

Part of the challenge in deciding what to describe is anticipating the expectations of your audience/clients. Ten years ago it would not have been necessary to state, for example, that the provider would or would not carry certain technological aids. Today, participants often come with expectations that a recreation provider will carry, for example, electronic and other means of communication, or certain medical equipment. As a result, it can be important to disclose the fact that these items will not be available, or if they will be included, their limitations.

Other expectations may need to be addressed by disclosing, for example, that independent contractors will be used, and, if it is true, that members of your staff, or volunteers, are not trained professionals. The provider should also address issues regarding the availability of

medical care, and any unsupervised time. Again, try to anticipate what your clients expect and address those expectations accordingly.

Some risks may be identified as inherent. In fact, as we have discussed (see Part I of this article), those operating under permit on some federal lands are not allowed to be released for negligence. In those cases, the sole protection allowed from claims of a client lies in a Voluntary Acknowledgment of Risks (VAR) form, which covers only inherent risks. The provider remains vulnerable to claims arising out of negligent acts or omissions.

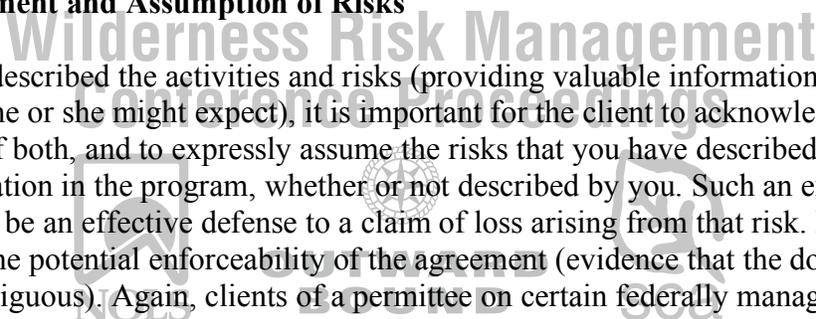
As urged above, it is important, at the conclusion of the description of activities and risks, to clarify that the description is not intended to be complete. If you have listed only inherent risks, to satisfy National Park Service requirements or otherwise, be clear in this regard. You and the local land manager may not agree on the inherency of certain risks that you have described. In any event, whether described as inherent or not, consider including staff and co-participant negligence as risks of the activity.

5. Acknowledgment and Assumption of Risks

After you have described the activities and risks (providing valuable information to your client regarding what he or she might expect), it is important for the client to acknowledge an understanding of both, and to expressly assume the risks that you have described, and all other risks of participation in the program, whether or not described by you. Such an expressed assumption may be an effective defense to a claim of loss arising from that risk. In addition, it can strengthen the potential enforceability of the agreement (evidence that the document was clear and unambiguous). Again, clients of a permittee on certain federally managed lands may be allowed to acknowledge and assume only inherent risks. A carefully drawn document, contemplating activities both on and off such managed lands, will bifurcate (split) this portion of the document (the acknowledgment and assumption of risks) in such a way that activities both on and off such lands are covered. Only inherent risks will be acknowledged and assumed with respect to activities on managed lands. ALL risks, inherent or otherwise, will be assumed for activities elsewhere.

6. Release

The purpose of the release portion of the agreement is to obtain the participant's agreement (or if allowed by law, a parent or guardian, who agrees for himself and on behalf of a participating minor) not to sue in the event of a loss arising out of the activity. The release should address at least negligent acts and omissions. Some states require that relief from claims of negligence be specifically referred to — that is, that the term “negligence” be used. Other states require only that it be clear from the agreement that the parties intended to include a release for negligence. “Any and all claims” might be found to include negligence, but don't count on it. Texas, for example, requires that negligence be specified, and that the reference to negligence be “conspicuous” — bolder type, larger type, or some other means of making this provision (which Texas law regards as unusual and harsh), prominent. As we have cautioned before, be sure you understand the requirements of your jurisdiction in this regard. The language of the release must



be carefully crafted, for the courts (as explained earlier) are quick to find confusion and ambiguity in the scope of the release.

Included in a consideration of the scope of the release are the people and entities intended to be released, and activities, occurrences and premises contemplated. The parties to be released will include the service provider, in addition to other related persons or entities. If the provider is a legal entity, for example, the released parties might include the owners of that entity, members of its board of directors or trustees, and employees or volunteers. Released parties may include owners of the premises upon which the activity is conducted, co-participants, contractors and “all others associated with the activity, or with the provider of the service.” Parties to be released may be referred to “individually and collectively” as “Released Parties”. Precise descriptions are essential. A court might refuse to protect a person or entity whose identity or relationship to the activity is not clearly expressed and understood by the party against whom the release is offered.

Be thoughtful and clear in your description of claims that are to be released. You might refer, for example, to enrollment or participation (in the described activity or program). Consider including associated transportation issues and the use of the provider’s equipment and facilities. If the activities are taking place at a site managed by a third party, consider including claims arising out of the use of those premises, or presence on that property.

In addition to seeking a release of liability for negligence claims, the agreement may seek release of products liability, breach of contract, breach of warranty, or other claims. State law varies regarding the requirements of a release of liability for some types of claims — a strict liability claim arising out of a product defect, for example. Be sure your description of the claims to be released conforms to applicable law. As mentioned above, few states allow a release of claims of gross negligence or willful and wanton misconduct, and none, to our knowledge, allow a release, in advance, of intentionally wrongful conduct.

As we have pointed out in previous issues of the *GT Law Review*, some states do not allow release of negligence claims, as a matter of public policy. At the time of this writing, Montana, Louisiana and Virginia do not allow agreements that relieve a party of liability for negligent conduct. Also, as described above, some states do not allow a service provider to be relieved of a duty that is statutorily imposed on that service provider.

7. Indemnity

An indemnity agreement is a participant’s agreement (or if allowed by law, the parent or guardian of a minor participant) to defend and protect the service provider (and others) from claims of third parties. While state laws vary regarding the scope of indemnities allowed, a service provider may be allowed to be indemnified against claims of a co-participant arising from the conduct of the signing participant, and from claims of the participant’s family members. (Remember that in most states, family members may have claims as a result of the participant’s injury or death.) A court will rarely allow the parent of a minor participant to indemnify the service provider against a claim of that child. (But see *Saccante*, [Winter 2003](#) *GT Law Review*.

See also *Childress*, [Fall 2002 GT Law Review](#), where the court ruled to enforce the signing parent's written agreement of indemnity against the claims of a non-signing parent.)

The indemnified parties may be the same as the "released parties," discussed above. Indemnities, like releases, are 'exculpatory' or 'liability shifting' provisions. As a result, as with releases, it is important to be mindful of varying state laws regarding the specificity of indemnity language, and any potential requirement to clarify that the indemnity extends to negligent conduct.

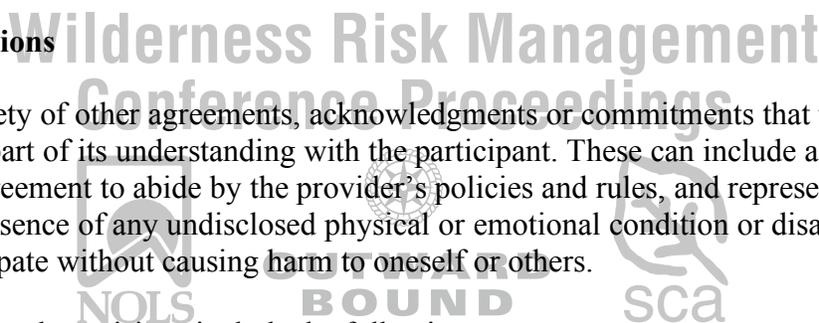
A participant agreement may combine the indemnity and the release protection into what might fairly be described as a tantalizingly brief recitation, such as: *Participant releases and indemnifies the service provider from any and all claims, by whomever brought, and of whatever nature, arising out of the activity or any associated event.* While such language may hold up in some jurisdictions, others may regard it as too broad. Courts have refused to enforce releases that they have found to be unclear, too wordy, too long, or too broad. The phrasing of release and indemnity paragraphs can also be found to be too terse, allowing the participant to argue that the agreement is confusing or unclear. *The issue, ultimately, is clarity and readability, not efficiency.*

8. Other Provisions

There are a variety of other agreements, acknowledgments or commitments that the provider intends to be a part of its understanding with the participant. These can include a photo release, participant's agreement to abide by the provider's policies and rules, and representations regarding the absence of any undisclosed physical or emotional condition or disability and the ability to participate without causing harm to oneself or others.

Common additional provisions include the following:

- a. Authorization to provide or seek medical care, including authority to exchange medical information with a third-party medical care provider, and the participant or family's commitment to pay or reimburse related expenses, including expenses of evacuation.
- b. An agreement that any dispute, if not negotiated to a successful resolution, will be submitted to some form of alternative dispute resolution — mediation or arbitration, for example. Your attorney can guide you through the considerations involved in agreeing to these alternatives to settling your differences with a participant.
- c. A provision that any suit, mediation or arbitration will be filed or conducted in a certain jurisdiction and in accordance with that jurisdiction's laws (being careful to explain that you do not intend to impact 'conflict of laws' laws that might apply the laws of another jurisdiction). Again, ask your attorney about the legal implications of such provisions in your jurisdiction.
- d. A provision (if your local law allows it) that you are entitled to recover your costs and attorney's fees in defending a claim, to the extent a court, mediator or arbitrator finds the claim invalid, or to the extent the claim is dismissed or withdrawn.



e. A “partial invalidity clause,” providing that if any part of the agreement is found unenforceable, the remaining portions will remain in effect. Consider this provision carefully, for there may be a provision of the agreement that is so critical to the relationship between the parties that, if it is found invalid, you are willing to have the entire agreement cancelled.

f. An “entirety clause” whereby the parties declare that the document is the entire agreement between the parties (if this is true) and cannot be amended except in writing, signed by both parties. Consider this provision carefully, because there may be other agreements that you have made with participants (medical forms, applications, etc.) that you consider important additional agreements between the parties.

9. Conclusion

The participant agreement generally concludes with a representation by the participant that he or she has read and understands the document, that it has been entered into voluntarily, that it is intended to be enforced to the fullest extent of the law, and that it is binding upon the participant, and his or her heirs, executors, etc. The effect of these concluding representations will vary from state to state, as we have explained.

10. Minors

As we discussed in Part I of this article, generally speaking, minors are not legally competent to contract and therefore cannot be legally bound to a written commitment they might make regarding an assumption, a release, an indemnity or other agreements. In a few states, a parent or guardian may enter into such agreements on a minor’s behalf. (See our detailed discussion of these issues in the Summer 2003 *GT Law Review* article ‘A Not So Minor Problem’; and in the [Fall 2003](#) *GT Law Review* issue for Part I of this article.) However, a minor is capable of assuming risks in many cases, inherent or otherwise (and a minor’s written agreement to assume risks, although not a legally binding contract, may prove to be valuable evidence). In addition, a parent is usually able to release their own rights in relation to injury to the child, as well as agree to other provisions in the agreement (see discussion in above-mentioned *GT Law Review* articles). Importantly, having both the child and their parent sign a thoughtfully crafted agreement can provide both legal and practical (information exchange) benefits. Again, it is critical that you employ competent legal counsel to assist you in crafting a document, potentially for both the parent and child’s signature, containing appropriate language.

III. Conclusion

Remember that participant agreements 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 a participant agreement can and can’t do, understand the sensitivity with which courts will examine these documents, and importantly,

work with experienced legal counsel to craft an agreement that conforms to applicable law and is consistent with your mission and operation. Consider carefully with your counsel, the impact of various provisions, and the importance of clear, concise language. A well thought out and carefully written participant agreement will benefit your clients and guests, as well as your operation.

Charles R. (Reb) Gregg
1415 Louisiana, 42nd Floor
Houston, Texas 77002
(tel) 713/982-8415
(fax) 713/659-1122
(e-mail) rgregg@gregglaw.net
(website) www.rebgregg.com

Catherine Hansen-Stamp
13245 Willow Lane
Golden Co 80401
phone: 303-232-7049/fax: 303-232-7079
reclaw@hansenstampattorney.com
www.hansenstampattorney.com

Reb Gregg is a practicing attorney in Houston, Texas, specializing in outdoor recreation law and general litigation. He serves as legal counsel to The National Outdoor Leadership School, The Association for Challenge Course Technology and numerous other recreation and outdoor adventure programs. He serves on the Accreditation Committee of The Association for Experiential Education and on the Wilderness Risk Managers Committee. Reb is a frequent writer and lecturer, and was identified as "Dean of the Outdoor Bar" in the July 2002 issue of Outside Magazine.

Cathy Hansen-Stamp is an attorney in private practice in Golden, Colorado. She consults with and advises recreation and adventure providers, recreational product manufacturers/sellers and related organizations on risk management and legal liability issues. Cathy speaks and writes on these issues, both regionally and nationally. She is a member of the Wyoming, Colorado and American Bar Associations.

"This article is reprinted with permission from the Law Review at www.snewsnet.com/lawreview. The Law Review is a SNEWS LLC company."