

# RELEASES REVISITED

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## Introduction

We continue to receive more questions on the subject of releases than any other. Clearly, releases and their use and limitations are topics that deserve continuing attention and refinement.

As used in this article, “release” refers to an agreement, standing alone or as a part of a larger document, which surrenders the right to sue specified persons or entities for certain claims which might arise in the future. Such agreements are known by various names, including waiver, release, and exculpatory agreement. The intent is to forgive a claim in advance of the wrong that might be committed.

Releases may provide protection from a variety of claims, including, in all but a few states, negligence. Only a few states enforce releases for negligence against minors (those under eighteen years of age, generally). If properly written and presented, a release is part of a larger document that describes the activities and risks and may contain other important information. Therefore, in addition to providing potential legal protection, the document can be an important means of informing campers, their families, third party users of the camp, and others of what may be encountered at the camp. Some families, in fact some camp directors, might feel that it is unfair for the camp to seek to be released from responsibility for carelessly harming a camper or visitor. A camp certainly has a duty of care to the young men and women entrusted to it. Although there is clearly justification for the use of a release—considering the murky line between inherent risks (no duty) and negligence (duty) and the prospect of frivolous lawsuits—the camp’s decision to seek a release of this duty is a legal, ethical, and managerial issue that must be resolved by camp management—including, perhaps, a discussion with the affected families and visitors.

With or without a release, the primary objective of a camp is to run a good program—not to avoid liability. A quality program is less likely to face legal liability issues than one which is casual about its promises and does not reasonably manage its risks.

## The Release as Part of a Larger Agreement

Whether the signer of the release is a camp family member or a visitor, the release will be more effective—in terms of both protection obtained and information deliv-

ered—if it is part of a larger agreement between the parties. This larger document may be the camp’s agreement with its regular campers, with an outside user group’s<sup>i</sup> participants, or some other document addressing the relationship of the camp to a person or entity coming to its premises. (A “use agreement” is an agreement between the camp and a visiting organization, or “user group”.<sup>ii</sup> A “participant agreement” is an agreement between the camp and a camper, user group participant, or any other individual, including parent/s of minors, who might arrange to use the camp). We focus here on releases contained in a camp’s participant agreements with individuals—campers, user group participants, or others.

The release provision consists of an adult participant or a camper’s parent (who agrees for himself or herself AND on behalf of the child) to a release of claims, including for negligence, against the camp, its owners, and others. The part or parts of the larger participant agreement which can add to the effectiveness of the release provision, depending of course, on applicable state law, include the following:

- 1) A description of selected activities and of the premises and environment;
- 2) A description of (some of) the associated risks, hazards, and dangers (“risks”);
- 3) Identification of the risks as inherent in the activities and environment—that is, risks that are a necessary and integral part of the camp experience and those which cannot be eliminated without changing the camp experience;
- 4) An acknowledgment and assumption of the inherent and all other risks of the camp experience. A parent may do this on behalf of a child. The child may (some consider an age limitation—twelve years and older perhaps) and adult participants should, declare that they understand and assume the risks;
- 5) An agreement by the adult participant (or parent/s of minors) to indemnify (that is, protect) the camp and other released parties from claims arising from participation.

Other important provisions and considerations are discussed below:

### **How Participant Agreements Containing Releases Might be Used**

Camps should consider use of participant agreements containing releases in those situations in which persons coming to the camp, for whatever reason, might suffer injury or other loss for which the camp could be held responsible. The camp will of course be thoughtful in its assessment of when to use these agreements. If the exposure is slight, or if collecting a release in a particular situation (a funeral? a wedding?) feels “not like our camp,” keep the agreement in your desk drawer, but understand that accidents can occur even in those situations.

Delivery persons and visitors merely inspecting or observing the grounds or camp activities, would not ordinarily be expected to sign releases. However, agreements containing releases would be expected from campers (and parents of minor campers), and from adult (over eighteen, generally) staff members with respect to losses that are not job related (free-time, on or off the premises, for example), and from any volunteer staff. In addition, consider these agreements for adult participants and parents of minor participants taking part in nontraditional camp experiences such as family reunions, conferences, corporate retreats, weddings, and other social functions.

The camp which offers its premises and staff to user groups will enter into an agreement with the user group that will spell out the terms of the rental or use.<sup>iii</sup> In that agreement, the camp and the user group will each agree to protect (indemnify) the other from claims arising from certain responsibilities, uses, activities, and circumstances. If the user group, for example, expects to conduct certain activities without the supervision or participation of camp staff, it would be logical for the user group to indemnify the camp against any claims arising from that activity. The camp, on the other hand, may be willing to accept responsibility for, and protect the user group from, claims arising out of the conduct of camp staff, or, hidden defects in the camp premises.

The scope of the indemnities is as broad as the parties are able to agree upon. A camp may be able to negotiate an indemnity from a user group or other third-party user that effectively protects the camp from ALL claims that arise out of that third-party use of the camp. If indemnities have been given by the user group, the camp may feel it can relax a bit regarding protection from user group participants. Use individual releases in these situations on a case-by-case basis, with input from the camp’s legal counsel.

Camps often overlook the benefits of obtaining releases from camp staff persons who might suffer injuries that will not qualify for workers’ compensation coverage—the use of the camp facilities while off-duty and accidents off camp premises in circumstances where workers’ compensa-

tion coverage might be in doubt. These matters should be discussed with local counsel familiar with employment law and the camp’s individual insurance coverages.

### **Legal Enforceability of Releases**

If you’ve heard the classic “releases aren’t worth the paper they’re written on,” you are not alone. Surprisingly, this often used, yet inaccurate statement, is commonly uttered by attorneys (who may be campers or camper parents)! Yes, releases can be found unenforceable and in a few states are not allowed at all. However, the use and enforceability of releases (including participant agreements containing releases) is alive and well in all but a few jurisdictions. Camps should understand the law in their particular jurisdiction, as case law and statutes vary. However, the following are some general principles.

Courts generally focus on two sets of characteristics in determining 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. Oftentimes, these factors are merged in a 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 enter into a 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 other exculpatory language). Because these agreements attempt to shift liability away from the camp, they are carefully scrutinized and generally viewed with disfavor by the courts. 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 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. Generally, releases used in the recreation context have passed the “public policy” test. However, most jurisdictions rule, as a matter of public policy, that releases are not effective to release a camp’s liability for conduct more egregious than simple negligence—such as gross negligence or willful or wanton misconduct.

Bottom line, releases are not a sure bet, and will generally be enforced only on a case-by-case basis in the jurisdictions where they are allowed. Although the laws of most states allow the use of releases, the enforceability issues emphasize the need for careful draftsmanship and wise use of legal counsel.

A note on legal competency: Competency relates to

an individual's legal ability to enter into a contract. For camps, the most common competency issue relates to minors. Using participant agreements with minors is a tricky issue, and one dealt with differently in different jurisdictions. A minor is not capable of releasing his or her own rights to sue for negligence in a pre-injury release form—basically, 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, Alaska, Ohio, California, Massachusetts, 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 and importantly, a parent is often able to release his or her own right to sue in relation to injury to the child.

Competent legal counsel can help you craft a document that deals sensitively with this issue, in accordance with applicable law. See our *Camping Magazine* article, "The What and the Why of Camp Releases" (Jan/Feb 2007), for further thoughts on these issues.

### **Other Important Issues**

#### *Other Provisions*

Consider other important provisions that might be included in a participant agreement containing a release of liability. These can include choice of applicable law and venue (the location for any lawsuit or other proceeding); severability (if one part of the agreement is found unenforceable, the remainder will remain in force); or other provisions. Importantly, if you choose not to include a release within your participant agreement, an agreement containing, among other things, a description of activities and risks, and an acknowledgment and assumption of risks, can still have important legal and practical value for your operation. Work with your legal counsel to consider these issues in the context of applicable state law.

#### *State Inherent Risk Laws or Federal Restrictions*

Many states have enacted laws which attempt to codify the common law inherent risk doctrine as it applies to one or more recreational activity/s. Generally, these statutes do not extend to protect camps or other recreation providers from liability for their negligent conduct and may have requirements that impact the content of agreements you may use with participants. Some jurisdictions have ruled that the particular language of a state's inherent risk law (or other laws) actually creates a duty which cannot be released. In addition, certain federal agencies restrict use of releases for those who operate under permit on some federal lands. Have camp legal counsel check your state's laws and the applicability of

federal restrictions (if you operate under permit or otherwise on federal lands).

#### *One Size Doesn't Fit All*

Resist the temptation to cut and paste another camp's form and use it for your camp. Each camp must balance the various aspects of their operation in developing a form consistent with their unique mission and operation, and their own state's laws. In addition, wise use of experienced legal counsel to assist you is worth it to your camp operation.

#### *Form Implementation*

Educate your staff about the proper use and implementation of the participant agreement you choose. For example, don't let those signing the agreement cross out words or provisions before they sign. In addition, don't wait until the last minute to inform participants that they will need to sign a form. Each of the above practices can impact the ultimate enforceability of the participant agreement. Legal counsel can assist in educating you and your staff about these issues.

#### *Consistency of Information*

Your brochure, Web site, staff comments, and other information should be consistent with the language included in your participant agreement. Consider a passing comment of a camp representative: "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 like these can sometimes be used by an injured party later on in a lawsuit against you.

#### *Put it into Perspective*

Remember, the use of a written participant agreement containing a release is not an overall panacea. A camp that takes the position "we just need a release and we're set" is not putting the release in its proper perspective. Running an overall quality program—which includes implementing prudent risk management practices and engaging in effective information exchange with camper families—is probably the most important way to minimize potential legal exposure. Developing a solid participant agreement for use in your operation is just one aspect of this approach—one "layer of the onion."

### **Conclusion**

Participant agreements containing releases 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 you provide to your camper families and other participants. 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 for your camp and work with experienced legal counsel to craft an agreement (or agreements) that conforms to applicable state law and is consistent with your mission and operation.

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#### Notes

- <sup>i</sup>'User Group' is the term used in the American Camp Association Standards (revised 2006) to refer to the variety of outside groups that may rent, lease or use a camp's premises and facilities.
- <sup>ii</sup> See footnote iii, for a discussion of legal issues and protection as between the camp and a user group.
- <sup>iii</sup> For a fuller discussion of these issues, see our 2005 *CampLine* article "Contracting Your Camp for Third Party Use: Legal and Practical Issues in Use Agreements."