

## Potential Legal Liability and Risk Management Strategies for Sexual Assaults and Sexual Activity

Managing incidents that involve sexual contact is a delicate but vital task. Contact can be consensual, nonconsensual, between staff, between staff and participants, or simply between two participants. The issues are much more sensitive when one party (or both) is a minor. This article is a general overview of the types of claims that can arise for employers and organizations. Specific suggestions for preventing and responding to such incidents are also included.

### Consensual relations

Many instructors in the outdoor industry are in their late teens and early twenties. Many programs also have participants who only a few years younger. Some programs spend considerable time in remote (even romantic) places in the backcountry with considerable time to get to know the other people in the group. These climates are particularly ripe for relationships to develop but every program should consider the possibility of sexual relationships occurring during a program.

At first blush, consensual sexual relations would not seem to be a matter of a company's or organization's business. After all, what two adults do in their private lives is their own business, right? In the ordinary case, that is generally correct. However, when sexual activity occurs between your employees and participants or between participants who are under your care—particularly minors—it is both appropriate and an obligation for you to get involved.

If the parties involved are both adults and truly engaged in a consensual relationship, the primary concern is a potential claim by another participant that the relationship distracted the employee from his<sup>1</sup> duties and thus resulted in him acting negligently. For example, if two instructors are involved in a romantic relationship and are working together (or if an instructor and a participant are involved), the employer faces the possibility of claims that the instructors were not properly performing their duties because they were distracted by the romantic relationship or, worse yet, that the instructors were not properly supervising the participants because they were alone together when they should have been supervising the group. Even if relationship did not *actually* result in reduced quality of services, an organization could nonetheless face the uphill battle of overcoming the *appearance* that the instructor was distracted or myopic. Having a policy that prohibits sexual activity on courses and one that precludes employees who are in a romantic relationship from working together will help avoid these problems.

Another potential dilemma is that one party (or her parents) may not agree that it was consensual. Obviously it can be extremely difficult to establish that both parties participated willingly. If one party is in a position of authority over the other, the issue becomes much more problematic as a minor or her parents can claim that the employee abused his position of authority and manipulated the participant. In the absence of a clear policy prohibiting exclusive relationships while participating in the program, this scenario could give rise to claims that the organization was negligent because it allowed the inappropriate contact to transpire. In addition, a consensual relationship may not create any difficulties while the two individuals are happily involved, but it may become problematic if the relationship sours.

If the consensual conduct arises between two minor participants, a parent may claim that the organization was negligent simply because that conduct was allowed to occur. Programs should have established policies for when, if ever, and at what age, co-ed sleeping is allowed and if so, under what conditions or supervision. Those policies should be communicated to the parents before the child comes on course. An organization also has a responsibility to care for any medical and psychological needs that arise as a result of a participant's sexual conduct. While the possibility of contracting sexually transmitted diseases or becoming pregnant exists for any relationship, minors presumably will be less capable of handling the responsibilities of using prophylactics and coping with the psychological issues that arise from sexual activity. Therefore, organizations must be prepared to respond to those needs.

### Sexual assaults

Every organization faces the possibility that an employee may sexually assault a participant. In addition, in many states, engaging in sexual activity with a minor is a crime, even if the minor claims to have willingly

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<sup>1</sup> For the sake of simplicity, parties are referenced by one gender. Such a reference is not intended to suggest that one gender is more apt to be in a particular role.

participated. As a result, “consensual” activity can lead to criminal charges of statutory rape. While an employer is typically not responsible for the criminal conduct of its employees (assuming the employee was not acting in the scope of his employment when the crime was committed), employers could nonetheless be liable on different theories. An organization could face allegations of negligent hiring (if it knew or had some reason to know that its employee might engage in this conduct) or negligent supervision of the employee (if it knew or should have known that the employee was involved in an inappropriate relationship). Even if an organization has not been negligent in connection with the actual assault, it could be liable if it is negligent in addressing the situation after it learns about it, namely if it fails to get the victim proper medical or psychological care. Finally, if the assailant was another participant, the victim could claim that the organization was negligent in supervising that other participant or providing for her safety. Organizations should conduct background checks to screen employees who will have contact with (or possibly even just access to) minors. Policies should be established for responding to a sexual assault. Such policies should include assessing whether the victim needs medical or psychological help and whether the organization should notify the authorities.

## Policies

Organizations need clear policies to address sexual conduct between staff, between staff and participants, and between two participants. The most conservative policy would be to prohibit any exclusive romantic relationship, even non-sexual ones, that could potentially (or perceivably) interfere with the employee performing his duties. Participants should also be told that no exclusive or sexual relationships are permitted. Policies should also address co-sleeping arrangements, in particular, the age under which (if any) participants are allowed to share tents or sleep co-ed under a tarp. Finally, organizations need protocols for responding to an alleged sexual assault, covering the aspects discussed above. In particular, you should consult with a medical advisor to determine what actions are appropriate when the parties have had unprotected sex.

## What to do if you find out about sexual contact between staff and participants or between participants

Romantic relationships are a very private matter but when a relationship has been initiated as a result of the employee’s access to a participant and involves a minor or when the relationship transpired on a trip where another participant was injured, you should inquire into the details *that are relevant to your potential liability and the employee’s compliance with your policies*. In general, that means you should find out how and when the relationship developed (to confirm it was during the course of employment), whether the participant was a minor, and whether the employee spent any time alone with the other person when he was “on duty” or any other way the relationship could have or perceivably could have interfered with his duties. You should also assess whether one employee is in a supervisory position over the other and consider the possibility of a sexual harassment suit. While employees are unlikely to want to share this information, if you have an established policy prohibiting such conduct, you will be able to explain your need for information not only to address your potential liability but also to determine whether the employee has violated your express policy.

If the participant is a minor, you should also determine whether the employee (or other participant) had sex with the minor. If so, you will need to know if prophylactics were used to assess the possibility of sexually transmitted diseases and/or pregnancy. Again, while these questions may feel invasive, an organization who stands *in loco parentis* (in the place of a parent) must assess the needs of the minor. In order to make that assessment, the organization must have some specific, detailed information. Consider contacting the minor’s parents to inform them of this inappropriate conduct. While that decision may not be warranted in all situations or may be a difficult phone call to make, it is the responsible and appropriate response, particularly if pregnancy or STDs are a possibility. As a public relations matter, it is also better to have a parent learn this information from the organization rather than her child.

## What to do if you find out a participant may have been sexually assaulted

If you learn that a student may have been sexually assaulted, you should immediately separate the victim and the alleged assailant. You will need to talk to both parties that are involved. The version of what happened may vary. In order to provide for the victim’s medical and psychological needs, you need to have very specific and very personal details about what transpired. It is imperative to understand whether the participant could have contracted a sexually transmitted disease or become pregnant. Therefore, you should ask the victim (and the assailant) whether they had sexual intercourse (of any type—oral, anal, or vaginal) and whether any prophylactics were used. Explain that you need to know these details to assess whether she needs any medical treatment. Do not simply ask her if she

wants to see a doctor. The organization, as the responsible party, needs to make its own assessment of whether she should consult a medical provider.

The psychological impact of the event on the victim may be obvious or may be obscured by denial, embarrassment, or a self-protective mode. Ask the victim if she would like to speak to a counselor about what happened. An independent third party who is a professional may be the vehicle the victim needs to begin to address the situation. Even if she declines, consider having a trained professional consult with her as soon after the incident as possible. You can simply explain that you would like for her to talk to a counselor because you are not trained to help her with this particular situation and you want to make sure she is getting the care she needs.

After your discussion (and the professional's) with the victim, you will need to determine whether the victim needs immediate medical or psychological care. You will also have to decide whether she wants to or is required to leave the program. If the victim is a minor, you should contact her parents. Be prepared to give the parents specific information about what happened, the child's physical and mental status, any plans for medical treatment or to have the child speak with a counselor, the child's location and the whether she is leaving the course, and when the parent can speak with the child directly. You should extend great efforts to unite the parent and child, including coordinating logistics and possibly paying travel expenses.

You should also consider whether local law enforcement officials should be contacted. State law may dictate when reporting is required so you should consult with a local attorney to understand any specific requirements. In the absence of such a requirement, you should decide when law enforcement will be notified or let the victim decide whether to contact law enforcement. Such a position is justified because of the intimate nature of a sexual assault charge and because a prosecutor is unlikely to press charges without the victim's cooperation. If the victim is a minor, she will most likely need to make that decision with her parents. However, some consider reporting to be a moral obligation, even if not a legal one. Because of the importance of this decision, organizations should consider these issues in advance of an incident and formulate a policy.

An additional complication arises when the alleged assailant is another participant. You will need to decide whether to remove that person from the program. It may not be clear that the alleged assailant did anything inappropriate—it could be a matter of miscommunication (in terms of consent) or a false accusation. Take great care in how you handle the alleged perpetrator so you do not face claims that you wrongly terminated that participant's course and/or caused the participant to incur additional expense to stay in a hotel and/or get an earlier flight home. Such decisions will have to be determined on a case-by-case basis.

While coping with sexual activity and sexual assaults is a delicate task, with proper planning and an appropriate response, organizations can be prepared to face this unique challenge.

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