



# LEGAL PERSPECTIVES ON RISK MANAGEMENT IN OUTDOOR RECREATION

**Peter C. Middleton, Esq.**

**303-628-3389**

[middletonp@hallevans.com](mailto:middletonp@hallevans.com)

and

**Ryan L. Winter, Esq.**

**303-628-3358**

[winterr@hallevans.com](mailto:winterr@hallevans.com)

No portion of this manual may be reproduced or distributed without the express written permission of America Outdoors Associations and the authors

## **Disclaimer**

The information given in this program is general and should not be construed as legal advice. Laws and the application or interpretation of laws vary from state to state, court to court, judge to judge and situation to situation. This program alerts you to considerations and concerns as you develop your own risk management plan. It informs you of options that may be available to your business. There is no substitute for competent legal advice as you establish and implement your own risk management plan. Consult with counsel in your state familiar with the laws and the industry. The information in this program also should not be construed as “industry standards” or “best practices” as every organization, person, activity, locale and situation may be different, requiring different standards and practices.

## **I. Introduction**

Risk is inherent in outdoor activities. The very essence of outdoor recreation would be fundamentally and dramatically altered if risk was eliminated. One could even argue that outdoor recreation cannot be undertaken at all without some level of risk. For these reasons, businesses advise customers of risks via their releases, safety speeches and in often in promotional materials or websites.

No one wants or expects a person to be injured or killed while participating in outdoor activities. Yet, the unexpected may occur and risks may become consequences. The successful avoidance of risks, facing and meeting challenges and overcoming fear, all add to the participant's enjoyment. For these reasons, taking on risk is an inextricable part of most outdoor activities.

Equally true: risk is inherent in business, especially the outdoor recreation business. As an organization, you are accepting business risks, which include or are impacted by the risks that your customers accept. The organization's risks include, among other things, the profitability, viability and indeed the very survival of the organization itself.

This section is about risk management for the outdoor recreation industry and the businesses and organizations in that industry. From a legal perspective, the primary risks relate to injury to participants, which in turn, create risks for the organization, its owners, managers and employees. The risks are managed through numerous operational methods, including careful selection and training of guides; the choice, maintenance and proper use of the right equipment; and controlling the site and timing of the activities. The best organizations manage risk by running top-flight operations where preparation, common sense and conscientiousness take precedence. You, the outdoor recreation business owners and managers, are the true experts in how to run the safest possible operations and in managing and mitigating risk. Attorneys, insurance professionals, consultants, industry organizations and peers provide guidance and assistance.

While there would be no better risk management than having no accidents, accidents happen. Therefore, effective risk management accepts the fact that accidents may happen and focuses on (a) minimizing accidents and reducing injuries and costs associated with such accidents; and (b) proactively limiting liability and obtaining as much legal and financial protection as possible, in the event an accident occurs. This section emphasizes what can be done to minimize accidents or the effects of accidents and to reduce or control costs. The goal of risk management is to protect your business and your employees from financial liability and setbacks, stress and worry.

## **II. Principals of Legal Liability**

### **A. The Legal System**

An organization needs to understand the legal system to develop and carry out effective risk management. First, an organization must understand that it cannot prevent lawsuits. All it takes to commence a lawsuit is a dissatisfied customer who thinks he or she has been wronged, seeks a monetary recovery, is able to prepare a complaint, and pay a filing fee. The costs and risk to the person filing a lawsuit are low (relative to the organization that is sued) and courts exist to enable the pursuit of a legal or "civil" remedy.<sup>1</sup> Add a plaintiff's counsel to the mix and you have

---

<sup>1</sup> In this program, we predominately address civil lawsuits; that is, a lawsuit brought by a private party against another seeking to recover monetary damages for injuries suffered by the plaintiff. A civil lawsuit is distinguished from a criminal or regulatory matter.

a recipe for expensive and perhaps less than “civil” litigation. No matter how frivolous or meritless a lawsuit may seem, it takes a significant amount of time and resources to resolve it.

If a participant in outdoor recreation, whether an adult or a child, is injured or killed while participating in an outdoor recreation program, our legal system permits, if not encourages, them to seek compensation for resulting damages, by making a claim or filing a civil lawsuit. It makes little difference if the entity is a commercial, educational or nonprofit organization (although a governmental entity may enjoy immunity or limited liability). The basis for any claim is generally that the organization, or its sponsor, employees or volunteers, did something wrong which results in injury or death. But to prevail, a plaintiff must prove the organization (through its agents) did something wrong or failed to do something that should have been done, and that the act or failure to act resulted in or contributed to the injuries or damages.

## **1. Preliminary Considerations**

A plaintiff is initially in control of the details of a lawsuit. Not only that, usually with the help of an attorney, the plaintiff possesses the ability to “work up” a case prior to filing a case, and without the organization even knowing that a case is being worked up. An organization should accept this reality and act accordingly by working up its own defenses as soon as possible.

A lawsuit may be filed either in federal or state court, depending upon the circumstances. Federal court jurisdiction is more restrictive, and requires either a claim based on federal law or parties being from different states (referred to as “complete diversity”) with a minimum monetary claim for damages (currently \$75,000). If there is a lack of complete diversity or the claim is not shown to be involving minimum amount, federal courts typically will not accept the case.

The plaintiff must choose a court serving an area in which at least one defendant resides or has its offices, or where the incident occurred. Loosely, this is referred to as “jurisdiction.” The court chosen within that jurisdiction is considered the “venue.” Venue may be appropriate in more than one court. It is possible for questions regarding jurisdiction and venue, and the state law to be applied in the case, to be chosen in advance. This is accomplished by including language in a liability release or waiver form, signed by the participant.

When a lawsuit is filed, the named defendants each must be “served” with a summons and a copy of the complaint in accordance with the law. This may be accomplished several ways, e.g., by giving copies to a defendant personally, leaving a copy with someone at a defendant’s home or place of business, or in the case of a corporation, serving a copy on the corporation’s registered agent or the state’s governmental office dealing with corporate affairs.

Once the organization has been served with a summons and complaint, the clock for a response starts ticking. The first thing to do, if not done already, is to obtain competent legal representation. An attorney may file a “Notice of Appearance” which ensures the plaintiff will thereafter keep the defendant’s attorney advised of all events related to the lawsuit. Eventually, a responsive pleading, which is often the “answer and affirmative defenses” or a motion to dismiss, is prepared and filed by the defendant’s attorney.

If a defendant does not file a timely responsive pleading (or at least a motion for extension of time), an order of default could be entered against the defendant(s) by the plaintiff. This means the plaintiff may automatically obtain a court order holding the defendants legally liable for the injuries and monetary damages suffered by the plaintiff. Once “default” liability is established, default judgment may be entered, and it can be difficult to undo. At that point, without a response by a defendant, the plaintiff may ask the court for an order awarding a specific sum in monetary damages. This step usually requires at least one court hearing where the plaintiff must present a plausible factual and evidentiary basis for the requested award of monetary damages.

It may be possible for a defendant to reverse or “set aside” an order of default or default judgment, but it is not a sure thing. Be safe - if you are ever served with a summons and complaint, do not delay in hiring an attorney and ensuring an answer or other responsive pleading or a motion for extension of time is filed on your behalf. This is your responsibility. This is not only important for avoiding a default judgment, but to protect your insurance coverage. For if you fail to take important steps to protect your own interests and to notify an insurer of a lawsuit, an insurer could argue that you have not cooperated in the defense to its detriment, and thus may have a basis to rescind coverage. For these reasons, you must ensure to communicate that “you have been served” to your insurance carrier, ensure you have competent legal representation, and ensure to respond to the complaint. Ignoring it will not make it go away, it will only make things worse.

## **2. Discovery**

Once the complaint and answers have all been filed and the defendants have “joined the party” so to speak, discovery begins. Discovery is the process of discovering relevant or potentially relevant facts related to the claims and defenses in the lawsuit. Depending on the jurisdiction, the parties may be required to make mandatory “initial disclosures” requiring identification of potentially relevant witnesses and documents. After initial disclosures generally the next step involves “written discovery,” which is the process of asking questions or asking for documents or admissions. The legal system refers to written questions as “interrogatories,” written requests for documents as “requests for production of documents,” and requests for admissions speak for themselves. An outdoor recreation defendant can expect to be asked who their employees are, who witnessed an incident, whether they have policies, procedures, manuals, reports, statements, etc. and to produce such documents.

Attorneys for the organization handle and perform much of the due diligence in responding to written discovery. They do this based on prior investigation(s), including previous statements, interviews and collection of important documents and other information, including their previous experience. Invariably, however, the attorneys need significant assistance from the client. The client must cooperate to answer its attorneys’ questions and to confirm certain facts. Plus, the client must typically sign off on interrogatories and approve the responses to other discovery.

Discovery is like the “meat and potatoes” of a lawsuit, with “depositions” serving as the meat. In this process, each side has an opportunity to take numerous depositions to question and examine witnesses who may have relevant knowledge regarding the issues in the case. One can think of a deposition as pretrial testimony under oath. Usually, but not always, it is the adverse party’s attorney who examines the witness or witnesses for the other side. For example, the

plaintiff's attorney takes the deposition of the defendant's representatives and the defendant's attorney takes the deposition of the plaintiff. A deposition allows each side's attorneys to find out what witnesses will say on the witness stand, what facts exist to support or refute the other side's case, and how those facts will be proven at trial.

While most lawsuits do not result in trial, most do result in depositions. The process for both preparing for and submitting to a deposition may last hours or even days, depending upon the complexity of the legal and factual issues involved in the case. As far as client participation in lawsuits go, depositions may be the most important aspect of discovery.

Depositions often create anxiety and require the most time and energy from the organization and its representatives. Many individuals in the rafting industry are not used to being interrogated and are not especially adept at speaking or articulating their duties and actions, which are in many ways intuitive or difficult to describe in words.

A court reporter takes down exactly what is asked and answered in a deposition, including all objections lodged. There is no judge that presides over depositions. As a result, the subject matter of depositions are broad and are governed by rules, customs, ethics and basic professionalism. Professionalism usually carries the day, but on occasion, an attorney for the other side can be nasty or overly aggressive. Being unprofessional should always be avoided because it does not reflect well and generally is counterproductive to the effective representation of a client. Generally, an attorney defending a witness can suspend a deposition only if the other attorney "harasses" the witnesses in some way. Although a witness may feel he or she is being harassed, rarely is it harassment warranting the suspension of a deposition.

An attorney defending the deposition has the right to pose certain objections, but that right is limited to discourage or prohibit "coaching." Also, there is no judge to rule on any objections, they are merely posed to preserve the objection or make a record. If not obvious, the attorney cannot answer the questions for the witness. During the deposition itself, the client or witness cannot rely on the attorney for help. This makes pre-deposition preparation and coaching extremely vital and important. Unsurprisingly, depositions often create anxiety for witnesses. A good attorney will help alleviate that anxiety by preparing you and making you feel more confident and comfortable with what is otherwise an uncomfortable process.

Depositions serve the following purposes, among others: (1) to find out everything they can about facts that are important to the case, good or bad; (2) to evaluate witnesses, determine whether they are credible and how they would present at trial; and (3) "lock in" witnesses and have potential ammunition for impeachment. When depositions are over, attorneys re-assess the case depending on the facts elicited and testimony given. Attorneys representing outdoor recreational organizations also summarize and report the depositions to their client's insurance carrier. The insurance carrier will use information learned to evaluate (or reevaluate) the exposure and settlement value of a case. In this sense, depositions are not only important for purposes of preparing for trial, but for settlement negotiations.

Overall, the deposition process can be a long, winding and exhausting process. The client has a huge role in depositions. The significance of depositions cannot be overstated.

### **3. Summary Judgment**

Unlike depositions, summary judgment is largely the function of the attorney. In some cases, one side, typically the defendant, will believe its opponent's case is legally insufficient and should be decided without a trial. In such a case, that side would file what most courts typically refer to as a "motion for summary judgment." Defendants (and their insurance carriers) would almost always prefer to obtain summary judgment and avoid going to trial, due to the uncertainties and expenses associated with a trial. However, legal standards and an overall presumption favoring jury trials will often discourage a judge from granting summary judgment. Summary judgment is hence "disfavored" by the courts and typically requires the movant to show that there is no "genuinely disputed issue of fact" to be entitled to summary judgment as a matter of law. If there is a factual dispute, summary judgment is usually denied, unless the disputed fact is immaterial. In basic terms, this means that if a plaintiff says that "Fact X" happened and a defendant says that "Fact X" did not happen, and assuming the fact is a material one, there would be a "genuine issue of disputed fact" to preclude summary judgment.

Even though summary judgment orders are not easily obtained, it is an extremely valuable legal tool for the defense of a case. It can often act as a significant hurdle that a plaintiff may find difficult to overcome, especially in jurisdictions that recognize and enforce liability releases or waivers. Summary judgment or even the threat of summary judgment provides great leverage to defendants in settlement negotiations. On the flip side, however, a plaintiff that survives a motion for summary judgment will have greater leverage in settlement negotiations going forward due to the uncertainties and expenses of a potential trial.

While summary judgment may be appealed, winning a summary judgment motion is a huge victory for the defendant and, in many cases, accelerates the complete resolution of a case. Meanwhile, denial of a summary judgment motion is a setback for the defense and can embolden a plaintiff, even though the judge is not taking any position as to the merits of the case, he or she is simply deciding whether a genuinely disputed issue of fact exists.

In the outdoor recreational context, the most common factual and legal basis for summary judgment comes from the "release" or the "waiver" which is sometimes referred to as an "exculpatory agreement." Virtually all states enforce some types of releases to some extent, but not without scrutiny and not without giving a plaintiff an opportunity to argue and, in some cases, conduct discovery to attempt to overcome the release. Outdoor recreation organizations must understand that releases, even valid and enforceable ones, do not prevent lawsuits. They only mitigate risks, they do not eliminate them.

### **4. Judgment, Appeals, Collection**

It should surprise no one that if an organization has sufficient liability insurance, a case will often result in a settlement, regardless of the legal or factual merits of the case. A settlement may happen at literally any time during the litigation process. However, a defendant could prevail on a summary judgment motion and the case could go to trial resulting in a judgment for either the plaintiff or the defendant. The trial, and entry of a judgment, does not end the lawsuit.

A defendant who finds himself or herself on the losing side of a trial will invariably disagree with the result, rue the fact that a jury found in favor of the plaintiff, and project his or her dissatisfaction onto the legal system, the judge (or even its own attorneys!). Yet no matter how strong the case may appear, nor matter how skilled the organization's attorneys may be, it is folly to think that victory is guaranteed. It is also inaccurate to believe the case is over and all hope is lost. The "losing" side in a trial still has protections, remedies and options.

First, at trial, if there are multiple defendants, there may be a division of liability among the defendants according to their roles in the events that resulted in the injury. If there is "joint and several" liability, each defendant is liable for the entire amount of the judgment, and the plaintiff may choose who to go after whoever has actual money to satisfy the judgment. Many, if not most states, however, have abolished the concept of "joint and several" liability as being unfair and harsh, and as a matter of public policy, make it so that a wrongdoer is only liable for his, her or its own percentage of fault. Depending upon applicable state law, the recovery of the plaintiff may be limited by "contributory" negligence (fault of the person who was injured or killed) or "comparative" negligence (fault of another party or even a non-party). This means if a plaintiff is found to have been negligent to some degree, his or her recovery may be reduced by the percentage of his or her fault, or in some cases, eliminated entirely, which depends upon the percentage of fault. For example, in some states, if a plaintiff is found to be 50% at fault or greater, he or she may be entitled to no recovery at all.

Once a judgment against a defendant is entered, the case is not over. As stated, with sufficient insurance, the insurance carrier may satisfy the judgment or pay for the costs of an appeal. An appeal could completely undo or modify the judgment. Execution of any judgment may also be stayed (postponed) via the filing of an appeal, along with a bond or surety. On the flip-side, though, a plaintiff also has the right to appeal. In this sense, litigation can seem never-ending, which is why each party has incentive to seek a resolution via settlement. An appeal can delay resolution for a year or even longer.

In the case where there is no or insufficient insurance to satisfy the judgment, and appeal rights are either exhausted or not exercised, a plaintiff must then take steps to collect. This may not be easy. As the expression goes, "there is no getting blood out of a turnip." On the other hand, some law firms are adept at the collection process. Some law firms specialize in collections. If your organization has appreciable assets, or if your organization has not followed corporate formalities, your organization's assets or even your own personal assets may be in jeopardy. Therefore, it is vital to insure and/or capitalize the corporation, insulate yourself personally from liability by utilizing the corporate form and following corporate formalities and take all appropriate precautions to prevent against financial calamity resulting from an adverse judgment. In the rarest of circumstances, the best relief for a defendant that has a large judgment rendered against it, may have to declare bankruptcy and go out of business. Proper risk management should prevent such a result.

## **5. Insurance and Indemnification**

A primary insurance policy is the most common and most effective method of protecting yourself and your organization against the potentially devastating financial impact of an adverse

judgment, in addition to defense costs and attorney's fees. Since a primary insurance policy may not cover an entire judgment, you also need to consider additional coverage through an excess or "umbrella" policy.

An outdoor recreation company must understand its insurance needs and what is covered by the applicable insurance policy (or policies). The organization must obtain the appropriate insurance policy and the right amount of insurance. Commercial general liability or "CGL" policies typically cover claims related to negligence. They typically do not provide coverage for intentional acts, "willful and wanton" acts or omissions, fraud or employment practices. Employer practices liability insurance or "EPLI" policies typically cover claims such as discrimination, wage disputes or other wrongful conduct in the context of employment. D&O (Directors and Officers) policies may cover certain acts and omissions of executives of a company, while E&O (Errors and Omissions) policies may cover advice or recommendations given to companies. E&O insurance is often considered to be similar or synonymous with "professional liability" insurance. Of course, injuries to employees are generally covered by workers' compensation insurance. An organization needs to understand the types of insurance it needs and the types it does not need.

The complexity of insurance and the numerous various insurance products available in the market make it extremely important to retain and consult with a knowledgeable insurance broker.

As it pertains to CGL policies, the question often arises: how much insurance should I get? The answer is it depends. Depends on what? Risk tolerance, ability to pay premiums, a basic understanding of the law governing damages in civil lawsuits, and the value of your assets and business. It is certainly possible to have too little insurance, but in some cases, it may be imprudent to have too much insurance. If you are going to err, err on the side of having "too much information," but proper risk management means having "just the right amount" of coverage. Every company is different. What might be right for you, may not be right for others.

When applying for insurance coverage, your broker should assist and guide you through the process. Insurance carriers will ask you to complete an application. Insurance carriers are generally interested in the same type of information, which includes but is not limited to:

- Basics, such as name, location, general description of the business, contact information;
- Whether it is a new or established business, and if established, years in business;
- Annual payroll and other information regarding staff;
- Insurance history, including prior carriers, sometimes prior claims and lawsuits;
- Description of your premises and/or offices;
- Precise services and trips offered (e.g., lodging, fishing, rafting, rock climbing, snowmobile, hunting) and whether you offer or rent equipment or guides;

Insurance carriers also often want assurances that you give safety talks, maintain trip logs, staff has first aid training, make no safety guarantees, have a system for accident/incident response and reporting, and have a liability release form. Applications may be anywhere between five to twenty pages. You should be accurate and complete when submitting an insurance application

because any misrepresentation potentially could form the basis for an insurance carrier to deny a claim or to cancel or decline to renew your policy.

Through planning, it may also be possible to shift to another party the ultimate financial liability in the event of a claim, lawsuit or judgment against you. One way may be through an indemnification agreement. If you are under contract with a sponsoring organization, you may be able to demand that you and/or your company be named as an additional named insured under the other organization's insurance policy, thus shifting financial responsibility away from your organization and at very least providing you with another financial safety net. You may also be able to negotiate contractual provisions whereby the sponsoring organization or some other entity agrees to indemnify you and hold you harmless in the event of a judgment against you. If a company has contractually bargained for indemnification, that company typically has an obligation to advise the other contracting party of the claim or lawsuit and make a formal demand for defense and indemnity related to that claim or lawsuit and to otherwise cooperate. It cannot sit on its rights and wait for the other contracting party to comply with its contractual agreement.

Regardless of whatever indemnity contracts or you have in place, and whether you are an additional insured and/or insurance "certificate holder" of another organization's policy, you still must put your own carrier on notice of a claim, and the sooner the better. It typically is the insurance carrier or the appointed counsel which will seek defense and indemnity on your behalf.

## **B. Potential Causes of Action**

### **1. Negligence**

The most common civil cause of action is one based on alleged negligence. This cause of action has four parts: duty, breach of duty, causation and damages. Negligence may be defined a little differently in every state, but a general definition is the following: "The failure to do an act, which a reasonably careful person would do, or the doing of an act, which a reasonably careful person would not do, under the same or similar circumstances."

One often hears the term "standard of care" in the context of an outfitter's duty to a client. The term refers generally to that level of conduct to which an outfitter must adhere in protecting the safety of clients. Unfortunately, practices may vary widely among outfitters, and there is often no consensus on exactly what constitutes the appropriate standard of care. This is a question on which you get competing expert witnesses, and the judge or jury must ultimately decide what was the applicable standard of care. What must be remembered, however, is that just because everyone else does one thing or another does not mean that that particular course of action is appropriate. An industry-wide practice may be a guide as to what is appropriate, but is not a guarantee and reasonable minds may differ as to what the industry-wide practices are. Common industry practices may be found to constitute negligent behavior regardless of the fact that they are "common." Arguing that "we do it the same way everybody else does" is not truly a defense, or at very least, not one that can be relied upon with any degree of confidence.

Whether a defendant acted negligently must be determined on a case-by-case basis. There is no bright line test for what constitutes negligence; it is a question of fact, which means the

question usually is decided by a jury, not a judge. Thus, it is difficult to defend against charges of negligence without incurring the stress and expense of a trial.

While waivers are heavily scrutinized by the courts, waivers generally act to at least raise the bar for liability. Although nearly every state permits claims of negligence to be waived through a liability release form so long as certain circumstances are met (e.g., that the waiver is clear and unambiguous and that the waiver was fairly obtained or entered into, etc.), almost no state permits a release to bar claims of willful, wanton reckless or intentional conduct. Whether “gross negligence” may be waived varies from from state to state (and sometimes judge to judge).

A general definition of gross negligence is as follows:

An act or a failure to act purposefully undertaken by a person knowing that his or her conduct was dangerous, and the conduct was done heedlessly and recklessly without regard to the consequences or to the rights or safety of others.

A general definition of willful and wanton or reckless misconduct is as follows:

The intentional doing of an act, or the intentional failure to do an act, in reckless disregard of the consequences, and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, result in substantial harm to another.

The lines distinguishing negligence from gross negligence, and gross negligence from willful and wanton or reckless misconduct, are far from clear. These issues often will be judged on a case-by-case basis, and is what makes a case difficult to resolve without a trial.

## **2. Contract or Breach of Warranty**

A second cause of action that might be found in the outdoor recreation context is one founded on an alleged breach of contract. This cause of action arises where a plaintiff contends there existed a contract between the plaintiff and defendant for the purchase of goods or services, the defendant breached the terms of that contract, and the plaintiff suffered damages as a result. An example of this might be where an outfitter advertises a trip as being fun and safe for the whole family, and while on a trip, one of the clients is injured or killed. The contention would be that the outfitter breached the contract between the company and the client by failing to provide a trip that was both safe and fun.

This is why liability release forms, in which a participant waives his or her right to sue for negligent conduct, are such an important tool for protecting an outfitter or guide. Without such a waiver, or the express or implied assumption of the risk of negligent conduct, it is difficult to avoid a trial on the merits of the plaintiff’s claims. There may often be a question if there was a contract, written or oral, between the outfitter and the client, and what were the terms of that contract. An outfitter must be careful to limit representations concerning the quality and safety of any trip, and should adequately warn potential clients of risks. Guarantees or assurances made in a brochure may increase your business, but may also substantially increase your liability exposure.

### **3. Consumer Protection, Fraud or Misrepresentation**

A popular theory being advanced recently in many lawsuits is one based on the general concept that the customer was misled regarding the activity or the services provided. A company may be accused of giving misleading information or not disclosing pertinent information which influenced a participant into doing something he or she otherwise would not have done. You should discuss with your insurance broker whether such claims are covered by your commercial general liability policy, and if not, explore the possibility of another type of policy that would provide such coverage.

### **4. Product Liability**

Another category of potential lawsuits in the outdoor recreation industry are those based upon product liability or a theory akin to product liability. In these cases, a plaintiff will argue that the equipment used by the outfitter was defective in some way, and that defect caused the injuries or damages suffered by the plaintiff. The alleged defect could be either in the design or the manufacture of the product. Inadequate warnings or instructions for the use of the equipment are also a potential source of products liability. Defendants in such cases can include both the seller and the manufacturer of the defective equipment. If you manufacture or modify equipment that will be used by your clients, you may be exposing yourself to potential products liability

## **C. Sources of Potential Liability**

Once you are aware of the common bases of potential legal liability, you can take precautions to avoid the more non-obvious occurrences which can give rise to legal liability.

### **1. Promotional Materials**

Sometimes, outfitters make careless representations in their promotional materials regarding the safety of the proposed activities, the ease of participation, the minimum levels of skill or physical fitness required for participation, or the predicted outcome of the activity. If the activity does not turn out to be “safe” or if a client is injured due to a lack of skill or physical fitness, those promotional materials become a basis for any of the potential causes of action noted above. There is a thin line between mere “puffery” or salesmanship and express or implied guarantees and misleading statements. Be realistic and consistent in the representations made in your promotional materials, and avoid the use of terms such as “safe” or “easy.” An appropriately worded brochure can be an important element in your effort to warn and inform your clients of the risks and realities inherent in participating in your company’s activities.

### **2. Employees – Hiring, Training, Supervision and Retention**

In most instances, an employer will be liable, under the doctrine of *respondent superior*, or vicarious liability, for the negligent acts of its employees and other agents. Therefore, you need to take great precautions to ensure your employees conduct themselves in a professional and competent manner, not only because it reflects on your organization, but because your employees essentially *are* the organization for purposes of liability.

*Hiring:* Implement a consistent process and consistently document the hiring process. Check references, ensure proper experience and background. If there are blanks on an employment application, ask yourself why are there blanks. Consider background checks. Consider whether or not you want a drug-policy. If you choose to do background checks or chose to have a drug policy, you must consistently follow those policies. Ask yourself and ensure you are ready, willing and able to consistently implement and follow such policies. Upon hiring an applicant, communicate expectations and document that you have communicated them to the new hire and that the new hire acknowledges those expectations and to be bound by them.

*Training:* Make sure your guides are fully and properly trained in all aspects of their work. Outfitters might assume that compliance with state or local laws or regulations pertaining to training or the number of hours of training of guides is sufficient. While it may be sufficient for purposes of regulatory matters, it may be insufficient in a lawsuit. The fact that an outfitter complied with laws or regulations does not insulate the outfitter from civil liability.

Outdoor recreation organizations should train guides beyond the mandatory minimum required by state and local laws and regulations. Organizations should train their staff not only on what to do and what not to do, but what to say and what not to say. Staff in the office should be cognizant and trained as to what occurs out in the field. Staff out in the field (or on the river) should be cognizant and trained as to what occurs in the office. Management should create a synergy, culture and environment where all employees are on the same page, so that the “left hand” knows what the “right hand” is doing. All employees should be trained so they have a general understanding of or appreciation for nearly all aspects of the business, whether it be marketing and promotion, customer satisfaction, handling phone calls, dealing with vendors, proper safety speeches and instruction, rescue techniques and incident handling. Of course, persons who answer phone calls and market or promote trips will not necessarily receive the same type or level of training as guides, and vice versa, but all staff should know each other’s roles so that a business’s operations, branding messaging, and day-to-day activities remain consistent.

Of course, if applicable law requires specific training, certification or experience level, document those requirements have been met. You should also document additional training so that you can show that your organization goes above and beyond what is required by law. You should periodically audit or at least spot-check your records to ensure they are accurate and up-to-date. CPR and other certifications can lapse. Logs need to be updated. Experience levels change. Make sure personnel files fully and accurately reflect the experiences and background of your employees. This needs to be done on a consistent, and not a haphazard basis. Specifically designate someone within the organization to be responsible for these tasks.

*Supervision and Retention:* Assuming your employees are fully trained and properly qualified, you must be concerned about the way in which they perform their duties. Many companies have established trip protocols and operational procedures which have been adopted to help ensure safe and successful activities. You must ensure your employees comply with such procedures at all times. If it were determined common safety practices were ignored or not followed, you may be liable for failing to properly supervise your employees. If it were determined that an employee repeatedly or routinely ignored or failed to follow common safety practices, and you do not terminate that employee, you may be liable for retaining him or her.

Things often become “second nature” and there is also a natural tendency to “set it and forget it.” Resist the urge to “set it and forget it.” Again, auditing or spot-checking is an effective way to ensure that your employees are performing their duties according to your expectations. Even the most experienced, skilled, trusted and valued guide you employ can make a mistake, fall into a rut, or deviate from company policies and procedures. In some ways and in some circumstances, they may be more inclined to deviate than a new hire may be, due to overconfidence or the fact they know you are not “looking over their shoulder.” For example, he or she may have, over time, developed a safety speech which deviates from the safety speech you expect to be given to participants. Of course, it is safe to say that new hires require a greater amount of training and supervision as a general proposition. The point is that *all* employees need to be supervised. Your policies and procedures should be reinforced and such reinforcement should be documented. No employee is immune from making a mistake and it cannot hurt to repeat the policy as a point of emphasis and as a reminder.

If one of your guides or other workers is an independent contractor rather than an employee, you may or may not be responsible for the consequences of his or her actions, depending on the circumstances. Therefore, you should assume and act as if you will be responsible if the contractor is doing something on the organization’s behalf, even if you are not controlling the methods and means of how they accomplish what they are doing.

### **3. Equipment**

Out-dated, worn or poorly maintained equipment can be the cause of equipment failure or an inability to adequately respond in an emergency. Your clients are relying on your judgment and abilities to provide suitable equipment for their activities. If technology has rendered some of your equipment obsolete, you need to upgrade that equipment. This can be of particular concern in the area of emergency communications, given recent advancements in telecommunications and global positioning satellite devices. You must be familiar with manufacturer’s recommended maintenance procedures and strictly comply with them. Establish standard procedures for equipment maintenance and, as appropriate, keep equipment maintenance logs.

It is also important that you are aware of manufacturer recommendations for the use of equipment, and that you comply with those recommendations. Do not push equipment beyond its designed capacity. Equipment modification can significantly increase your potential liability. If you plan to modify your equipment, consider obtaining the manufacturer’s recommendations regarding such modifications. If unauthorized equipment modification is an element of an accident, not only may there be an additional basis for liability on your part, your modifications may act to release the manufacturer from product liability, transferring the manufacturer’s liability to your own.

### **4. Medical or Other Screening of Participants**

“Screening” is often a polarizing subject as it relates to risk management. On some level, all would probably agree that an outdoor recreation organization needs to have some background medical information pertaining to those about to participate in the activity. For example, a rock climbing organization should know whether a participant has a broken arm or leg. Many disagree

regarding the scope and details of such information, especially when the information is medical or psychological in nature. Determining what background information to obtain from participants is one of the more difficult determinations to make in risk management. There is no clear answer.

Some organizations request participants to list their medical information. Some organizations request customers to simply say “yes” or “no” to a question of whether they have medical conditions. Some organizations request no information and simply request the customer to acknowledge and affirm that they are physically able to perform the activity. However, your organization handles “screening,” the organization should put itself in the shoes of the participant. A participant may not know whether a certain medical condition is worth noting. A participant may not understand fully what the activity entails from a physical standpoint and whether he or she is physically able to engage in it. A participant may be very uncomfortable disclosing health information and may go so far as to conceal a condition because they either (a) believe that the health condition is “none of your business”; or (b) the information will be used as a rationalization to prevent them from participating when he or she really wants to participate.

After asking those questions, you should ask yourself “what will we do with the information we receive?” There are literally thousands of “medical conditions,” some which may or may not impact whether a person can or cannot participate in an activity or whether accommodations need to be made. For instance, and depending on the activity, ask yourself what you would do if the participant discloses one of the following conditions:

- Heart attack (five years ago)
- Cardiovascular disease
- Anxiety
- Bee allergies
- Torn ACL and knee surgery (three months ago)
- Torn ACL and knee surgery (two years ago)
- Separated AC Joint – Grade III sprain (recent)
- Chronic obstructive pulmonary disease
- Carpal tunnel syndrome
- Back surgery

Disclosure of a medical condition may require a discussion with the participant. It may require you to discourage him from participating in the activity. It may require you to put your foot down and tell them that they cannot participate. The appropriate response depends on the circumstances and no clear-cut answer exists.

Nevertheless, at a minimum, you should have a plan and protocols in place in advance to provide guidance to those who encounter these situations, empower them to make the right decisions and the give them the confidence to handle the situation in a sensitive and appropriate manner. You need to be sure that you and your staff have the capability of understanding and coping with the information you receive. You must be able to interpret and utilize the information appropriately. Someone on your staff needs to be qualified to spot potential problem conditions and determine how to handle them.

Some outfitters may have the luxury of having physicians “on retainer” to advise them of what needs to be done if clients with certain medical problems seek to participate in their activities. When you become aware of potential medical problems among your clients, you need to have staff members qualified to monitor their condition and render appropriate medical treatment. Note that if you use medical information to determine the ability of clients to participate, you need to be sure there is a legitimate connection between the conditions you may be concerned with and an ability to safely participate.

There is a diversity of opinion on obtaining detailed medical information from customers in the first place. Some outfitters do not want to have such information, believing if they leave the decision to participate up to each client, it is the client and not the outfitter that will be responsible for any resulting problems. This attitude could be construed as willfully ignoring the potential risks to the safety of that customer, as well as the safety of other customers and guides, if that participant is unable to fully participate in required activities due to a medical condition.

Some feel the prudent approach to this problem is to obtain as much medical information as possible, face it head on and accept the resulting responsibilities. This attitude, while well intentioned, might lead the outfitter and its guides into a false sense of security or bias against those who disclose conditions. Most organizations and outfitters may not be able to afford to have a physician on retainer. Guides are (usually) not medical professionals and truly cannot predict with complete accuracy how a medical condition will impact the customer’s ability to perform the activity or react to an adverse situation. Guides may have extensive training and experience in first aid and rescue, but they can and often do misjudge customers’ abilities.

A perfectly healthy person can be terrible at the activity and exacerbate risks to themselves and other customers and the guides. On the other hand, a person seemingly healthy may have a latent cardiovascular issue and have a cardiac event such as a heart attack within seconds of falling into cold water or being put in a traumatic situation. A person who is mentally healthy and physically fit may panic at the first sign of trouble and put everyone in jeopardy. Meanwhile, a person with heart disease or who is obese may be proficient at the activity and be a tremendous asset on the trip. A person who discloses anxiety or depression, may be entirely cool under pressure and save a life. We tend to form biases when people disclose medical conditions. Those biases may or may not be accurate and helpful. They may also tend to be inaccurate and harmful. The lesson to be learned is that obtaining information is prudent...up to a point. The more important consideration is what to do with that information.

Whether or not and to whatever extent your organization collects medical information from participants, the participants should accept the risks of the activity in an informed fashion. What may be more information than the information you collect, is the information you provide the person participating in the activity. Advise them what the activity entails from a physical, emotional and psychological standpoint. Advise them the physical demands of the activity, and not only the physical demands of the routine aspects of the activity, but the physical demands of the activity if something goes wrong. Advise them of things that can go wrong and what your expectations are of them in those situations. If you properly inform the customers of the risks and how those risks are impacted by possible medical conditions, then you are empowered the customers to make the decision for themselves, rather than you making the decision for them.

### **III. Conclusion**

From a legal and practical perspective, risk management is ongoing and evolving, alternatively challenging, fulfilling and at times frustrating. It is both an art and science. Good risk management in operational practice translates to and is invaluable in the legal process, when an incident can become a claim and a claim may become a lawsuit. One aspect of risk management that becomes even more significant in litigation than perhaps in daily practice is documentation. Organizations and their representatives do not always document what they do and it is impossible and imprudent to document anything and everything. Be that as it may, you should strive to establish habits and practices to ensure proper documentation on important issues. Those who have been through civil litigation fully comprehend the importance of documentation. They have learned, sometimes the hard way, how documentation can make or break a case in a civil lawsuit. While civil litigation is stressful, time-consuming and poses risk to the profitability, viability and indeed the very survival of the organization, the silver lining is that it simultaneously provides valuable lessons, helping organizations improve operations going forward. We encourage you not to be afraid of litigation, or to let the litigation “tail” wag the operational “dog.” We encourage you to embrace the challenges posed by the legal system and be prepared for any claim or lawsuit that you may encounter. Consider the legal system (or the threat of the legal system) as motivation to continually strive to improve risk management practices.