

Contracting Basics: **WHY YOU NEED TO PAY ATTENTION TO THOSE CLAUSES YOU NEVER READ!**



Presented by:
Doug Stevens, Esq.
Lach Zemp, OBUSA

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Legal Disclaimer

This presentation is solely intended to help you understand the area of law, and it should not be interpreted as a substitute for professional legal advice about the topics we discuss. You should accept legal advice only from a licensed legal professional with whom you have an attorney-client relationship.

Polling the Room:



1) Raise your hand if you are responsible for reviewing and approving contracts?

2) How many of your organizations have a policy or process for the review and approval of contracts?

3) Are there specific types of contracts or contract clauses you'd like to know more about?

A photograph of a person rappelling down a steep, rocky cliff face. The person is wearing a red jacket and a yellow helmet, and is holding onto a rope. The background shows a clear blue sky and a snowy mountain slope.

Why is it important to read and understand your contracts?

- ▶ There is more to an agreement than the big-ticket items.
- ▶ Contracts address what happens when things go wrong between you and the other party
- ▶ Contracts address who bears financial risk if a third-party (or their property) is injured.
- ▶ Contracts can dictate what law will apply and where you'll have to go if there is a dispute.
- ▶ Contracts can dictate how disputes are resolved.
- ▶ Contracts can address the parties' respective responsibilities in a given relationship.

What we'll be covering:

- 1) What qualifies as a contract?
- 2) What kinds of contracts require what level of review.
- 3) A checklist and the meanings of important (and often overlooked) terms.





What qualifies as a contract?

- ▶ Any agreement between two parties where something of value is exchanged.

When should a contract be in writing?

- ▶ As often as possible: When there is risk to your organization's assets, finances, reputation, or the safety of others.

Isn't that all agreements?

- ▶ Pretty darn close!

Contract Categories based on level of risk to organization.

- ▶ Legal Review Essential
- ▶ Legal Review Highly Recommended
- ▶ Non-negotiable contracts, e.g. Rental Car Agreements.



Legal Review Essential

- ▶ Contracts involving the sale or lease of real property or businesses;
- ▶ Contracts for major construction;
- ▶ Financing/loan contracts;
- ▶ Contracts that potentially include access to or use of your intellectual property: trademarks, logos, brand, etc.;
- ▶ Contracts that include potential access to or use of sensitive, proprietary, or confidential organizational information.
- ▶ Contracts that include potential access to PII.
- ▶ Any contract in which
 - ▶ You don't understand what's written.
 - ▶ It's a new major relationship
 - ▶ Significant organizational funds/assets are being committed.
 - ▶ They are requesting your organization purchase insurance beyond what you typically obtain or that would have a large financial burden on you.

Legal Review Strongly Recommended

- ▶ Contracts that involve risk of death, injury, or harm to anyone or to property.
- ▶ Liability Waivers
- ▶ Contracts with subcontractors providing services that involve interacting with your clients/students/families
- ▶ Contracts with schools or other organizations whose students and chaperones will be participating in your program
- ▶ Contracts with international organizations or from states where you do not typically operate, and the proposed contract requires application of that location's laws
- ▶ Contracts where the duration of the contract is undefined or longer than a year.
- ▶ Contracts where your financial obligation/exposure is greater than \$???
- ▶ Any contract you download from the internet!

Important Terms: The Basics!



- ▶ The contracting parties . . . Do you have the correct name?
- ▶ The duration of the contract (aka “the Term”)
- ▶ Payment terms (not just the amount)
- ▶ The essential terms in the contract actually match what you thought you were agreeing to.
- ▶ State that contracting party is an independent contractor, responsible for paying employees/taxes.
- ▶ What standard for the quality of work or services provided?
- ▶ How can the contract be terminated? What happens from a payment perspective if it is terminated?
- ▶ What constitutes a breach and what happens if there is a breach?

Important Terms: Risk Allocation!

- ▶ Acceptance of Liability/Responsibility/Safety
- ▶ Indemnity
- ▶ Insurance . . . Consider:
 - ▶ Gen. Liability
 - ▶ Commercial Auto Liability
 - ▶ Cyber Liability
 - ▶ Builder's Risk
 - ▶ How much should they have?
 - ▶ Workers Compensation
 - ▶ Certificate of Insurance
 - ▶ Additional Insured Status
- ▶ Limitation of damages for breach or termination



Important Terms: Who is actually doing the work?

- ▶ Employees?
 - ▶ Workers Comp.
- ▶ Subcontractors
 - ▶ Who are they and what are their qualifications
 - ▶ Insurance
 - ▶ Responsibility for subcontractor's work
 - ▶ What is their scope of work and responsibilities?



Important Terms: Boilerplate terms matter!



- ▶ Protecting your IP
- ▶ Protecting proprietary information
- ▶ Child Protection Expectations
- ▶ Dispute resolution
- ▶ Jurisdiction/Venue Clause
- ▶ Choice of law
- ▶ Integration Clause
- ▶ Severance Clause
- ▶ Force Majeure
- ▶ Authority to execute

What is a Participant Agreement?

This is a key legal contract with your participants (and their parents/guardians) intended to:

- (1) advise them of the risks of being on your program and participating in the activities you offer;
- (2) obtain their acknowledgment and assumption of these risks;
- (3) formalize their waiver of liability against your company and its owners and personnel, and agreement to indemnify you. This document is an EXCULPATORY AGREEMENT! WHAT DOES THAT MEAN?

Here are Ten Tips to keep in mind for your Participant Agreement:

- (1) Be mindful of WHO signs these Agreements
- (2) Be mindful of WHEN they are signed;
- (3) Be mindful of HOW you present the Agreement to your students/parents and behave consistent with the Agreement;
- (4) HOW should your customers review and sign the Agreement (electronically?)
- (5) Be familiar with your State's (or Country's) Requirements (IT MATTERS!);



More Tips for your Participant Agreement

- (6) PRESERVING the Agreement;
- (7) Within reason, LIST ALL RISKS the participants may conceivably encounter on your Program (EDUCATE YOUR STAFF ABOUT THESE RISKS AND ENCOURAGE PARENTS AND PARTICIPANTS TO ASK QUESTIONS);
- (8) Be mindful of OTHER DRAFTING TIPS (Such as using PLAIN ENGLISH and USING LARGER AND BOLD FONT!);
- (9) INCORPORATE OTHER MISCELLANEOUS TERMS YOU WANT INCLUDED (Including a Media Release, Venue Selection, and an Equipment Disclaimer);
- (10) UPDATING the Agreement.

Questions?





Contact Information

Doug Stevens

dstevens@celaw.com

Direct line - 303-448-6728

Cell - 303-916-8582

Lach Zemp

lzemp@outwardbound.org

828-230-0986



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