

# Medical Screening in Adventure Programming —How Far Do You Go?

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## Introduction

As we have discussed in previous issues of the *Law Quarterly*, recreational activities necessarily involve inherent risks that entice people to participate, contribute to the thrill of the activity, and enhance the adventure experience. In the context of recreational activities, inherent risks are those risks that are integral to the recreational activities and that cannot be eliminated without destroying the unique character of the activity. Risks may be those that are desirable (e.g., moguls, whitewater) or those that are undesirable (e.g., falling rock or sudden, severe weather changes). Importantly, recreational activities — from rafting or horseback riding to rock climbing and bicycling — involve some degree of physical activity — greater than that involved in getting out of your car to attend a lecture at the local library.

To better manage risks of recreational activities, inherent or otherwise, many outdoor and adventure education organizations obtain information from prospective participants (and/or require participants to obtain a physician's examination), on various aspects of the participants' physical, cognitive and emotional health before these individuals are permitted to participate in their programs. This process is often referred to as 'medical screening.' Some organizations believe that they must try to obtain every possible piece of information from an individual in order to accurately assess whether the individual can 'safely' participate. At the other end of the spectrum are those organizations that believe it is best to obtain little or no information from individuals before their participation. The thinking here is that if an organization has no information about the individual's particular health issues, they will not be 'legally liable' if that individual has a problem while participating in their program. Most organizations are somewhere in between. What is the answer? How far do you go?

## The Issues

We have mentioned (in previous issues of the *Law Quarterly*) the concept of 'information exchange' and the impact that a candid information exchange can have on a program, both before and during the program, as well as in the event of an accident or injury. The information exchange is that critical information flowing from provider to participant and from participant to provider. A provider imparts information to participants through brochures, phone calls, releases, pre-trip talks, etc. A participant imparts information to the provider through applications, medical information forms and phone calls, etc. Information is powerful, regardless of which way it

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is flowing. Information exchange allows individuals to make informed choices about whether (and how) they would like to participate in the activities. Likewise, the organization needs information to make decisions about its participants and their potential needs (e.g., medical concerns, Americans with Disabilities Act [ADA] accommodation needs).

Acknowledging the importance of this information exchange argues against organizations obtaining no information at all. The thought that 'what you don't know won't hurt you' is probably not realistic or practical in today's world of adventure and recreational programs. Today's clients expect information to be exchanged, and they may be surprised when it isn't. Obviously, organizations need some information from participants to assist in understanding certain medical issues and, if relevant, to address potential ADA accommodation needs. One of the key purposes of the medical form is to obtain accurate information from the participant and/or his or her physician so that you and your staff can deal with any medical issues or related complications; make accommodations, ADA related or otherwise; and screen out (or refer to another program) applicants who, for medical reasons or otherwise, cannot or should not attend the program. (For example, the participant may pose a danger to themselves or others.)

A word about ADA access to programs. Many wonder whether ADA, Title III applies to all outdoor recreation and adventure organizations. A full discussion of the ramifications of the ADA is beyond the scope of this article. However, Title III of the ADA generally provides disabled individuals mainstream access to programs. A disabled individual is one who: has a physical or mental impairment that substantially limits one or more major life activity(s); has a record of such an impairment; or is regarded as having such an impairment. This can include individuals who, for example, are blind or deaf or who suffer from a psychological or mental condition. Privately run recreational programs are required to comply with the ADA if, among other things, they own, lease, lease to or operate a *...place of public accommodation...* that affects commerce. Title III prohibits entities that qualify, from discriminating against disabled individuals in the *...full and equal enjoyment of the goods, services, facilities, privileges...of any place of public accommodation.*"<sup>iv</sup> This can be a delicate area for outdoor programs, adventure outfitters and leadership schools. Qualifying organizations must consider allowing disabled individuals access to activities already infused with inherent and other risks.

Title III requires that disabled individuals be allowed access to mainstream programs (versus separate programs for the disabled) unless, generally, allowing access would result in an undue burden (e.g., excessive cost, training, etc.) on the entity; fundamentally alter the nature of the course (for the individual and others) or

compromise the safety of others attending the course. In making decisions about access, the program must consider reasonable modifications for the individual, including auxiliary aids or services. Programs must not use 'eligibility criteria' that screen out or tend to screen out individuals with disabilities, unless such criteria are *...shown to be necessary for the provision of...[those] services....*<sup>9</sup>

Organizations that must comply with the ADA (or with applicable state public accommodations laws) clearly need to obtain some information on a participant's health and medical conditions. Unfortunately, it is oftentimes difficult to discern at the outset whether an individual's 'condition' puts him/her in the protected 'disabled individual' category under the ADA. Importantly, many conditions may not qualify as ADA protected 'disabilities' but clearly present a medical or other screening concern, considering the activities, the geographic location of the program or other factors. For example, will the organization be administering prescription drugs for the participant or will those be self-administered? In any event, if someone is taking medication, it can be important to understand the potential side effects of medications, effects of a missed dose, potential effects of climate conditions, change in altitude, or possibly, increased exertion. Is someone allergic to bee stings? Are they diabetic? From both a risk management and a practical perspective, it can be extremely valuable to understand some of this information before an individual attempts to participate in your program. If the individual ultimately attends the program, the organization has had an opportunity to understand the issues, brief staff, and understand how they plan to deal with these issues in the field.

But what information do you seek? How much? Do you ask everything — trying to (and appearing to!) look into a crystal ball to foresee every possible consequence (considering potential health problems or physical disabilities) and then assuring that all participants will be free from harm? Of course not. You cannot afford to give the client the impression that, having screened and accepted them, you are guaranteeing an incident-free experience or providing a 'seal of approval' that they will be completely safe and that nothing will go wrong. Furthermore, from a practical perspective, no matter how thorough the screening, a program can never be sure that it has uncovered all potential health problems and concerns.

What about asking applicants to obtain a physician's exam? Some programs consider nature, location and length of activity, age and existing conditions in determining whether to require a physician's exam. In any event, if an exam is required, the examining physician should have some relevant information in order to identify potential problem areas and make decisions about whether s/he believes the individual is capable of participating. Consider including relevant information about the activities participants will be engaging in — for example, the nature and location of the activities, weather, altitude, level of physical exertion and other important information — so that the physician

can put the evaluation in the context of what the participant will be doing. Give the examining physician your e-mail and phone number, encouraging them (and participant) to contact your organization if they have any further questions about the nature of the activities or risks. Consider communicating with the participant or his/her personal physician if the organization has questions or concerns.

Many organizations require the participant to complete a 'self screen' and provide personal health and/or medical information. (If a physician's examination is required, the medical form can be addressed to all parties, such as the applicant, applicant's parents and the physician.) Here too, the participant (and parents, if the participant is a minor) should have appropriate information about the nature of the program, the activities, and attendant risks and hazards to understand the nature of what they need to disclose. Further, the applicant should understand the importance of honest and accurate disclosure and the implications of incomplete disclosure or flat-out misrepresentations. In addition, the participant should understand that s/he (and all participants) share in the responsibility for their own well-being.

Importantly, what do you do with the information you obtain? If the information is filed away on a shelf or in some obscure corner of your office, never to be seen again, the organization may face some serious problems. If you are obtaining information, you arguably have some obligation (legal and probably ethical) to deal with the information constructively. The information obtained should be distributed (with appropriate sensitivity to confidentiality issues) within the organization on a need-to-know basis and meaningfully evaluated by the organization (and/or its consulting physician). Further, appropriate information should be put in the hands of those in the field who may have to deal with a medical emergency.

If your organization does review the information, who is reviewing it? Does s/he have access to a consulting physician who can assist in evaluating the information? Generally, the reviewer should have some training to at least identify problems that may need to be referred to others. Physicians can assist organizations in establishing eligibility criteria (including medical issues) and in reviewing and evaluating medical information.

Obviously, there are no black-and-white answers here. However, consider the advantages to you and your participants of obtaining relevant information (but never, of course, providing or appearing to provide assurances of safety). Work with a consulting physician to understand the kind of information you will need (considering your program activities, location, level of physical exertion and other factors) to evaluate participants' ability to participate and potential limitations or other issues with their participation. Consider whether or under what circumstances it would be important to require a physician's exam. If you do require such an exam, give the physician enough information to make an informed assessment. By the

same token, advise participants (in the participant risk/release form, the medical form or elsewhere) that they have responsibilities to disclose relevant information and that they share in the responsibility for their own safety and that of the group. Furthermore, remind them that although your organization attempts to consider participant's health and well being, and related issues, your organization cannot assure participant's safety or eliminate the risks – whether those risks relate to a participant's health or physical condition, or, to the inherent or other risks of the activities.

Let participants and their physicians know that they are assisting in the decision-making process about whether participation may be appropriate, and consider having both the examining physician and participant sign off on medical or other health information provided. Staff should document conversations with the participant and/or their physician regarding issues and decisions to participate, whether ADA related or not. In close cases, it is valuable to go through the ADA-related steps/analysis to determine whether you can realistically allow the individual to participate, without, for example, compromising safety or fundamentally altering the nature of the program.

Consider your medical screening a partnering effort between the participant, his own physician and the recreational or adventure programming organization — all working together to understand the issues — but all understanding, through appropriate disclosure, that there are no guarantees of safety.

### Conclusion

Legal exposure can arise in a variety of areas where organizations engage in recreational and adventure activities. It can arise in situations where an organization has information, but has done nothing with it, or, where the organization has failed to obtain critical information. As we've said, the spectrum can run from obtaining a huge amount of information to obtaining little or no information from participants. However, it is hard to justify the 'head in the sand' approach, from a legal, ethical or practical perspective. Consider a place on the spectrum that allows you to obtain practical information that you can realistically evaluate, while reminding the participant of his/her responsibilities, and your organization's limitations.

Careful thought should go into the type of information participants need, so they can understand the activities, the risks, their own responsibilities and the organization's limitations. This can include information about the limits of an organization's attempts to obtain and evaluate medical and health information, and also information concerning the participant's responsibilities to disclose accurate information and to share in the responsibility for their own safety. In addition, careful thought should go into the kind of information your organization needs from applicants and incoming participants in order to assist in making practical decisions about participation. Wise use of professionals (consulting physicians, attorneys) as well as accurate Wilderness Risk Management

disclosure to participants and appropriate communication with participants and their personal physicians can assist in effectively dealing with these issues.

The type of information exchanged, when it is exchanged, and the manner in which it is exchanged can have a profound impact upon the course or trip, particularly if an accident or injury occurs. When the organization (including staff) has taken the time to exchange valuable information, they have a better chance of building good rapport with their participants and being prepared. Furthermore, well informed participants (and their parents!) may be psychologically more prepared to deal with discomforts, injuries and accidents — and less inclined to take legal action.

As always, laws vary from jurisdiction to jurisdiction, and we advise recreation and adventure education organizations to consult with legal counsel in regard to medical screening, use of risk and release forms and related risk management issues.

<sup>i</sup> See, 42 U.S.C. 12182, et seq. Title III covers not only access and design for buildings and other structures, but also disabled access to courses, trips and programs. Title I (not discussed here) provides disabled individuals access to employment opportunities if the individual can perform the essential functions of the job 'with or without reasonable accommodation' (See 42 U.S.C. 12111, et seq).

<sup>ii</sup> 42 USC 12102(2).

<sup>iii</sup> See 42 U.S.C. 12181 and 12182(a).

<sup>iv</sup> See generally, 42 U.S.C. 12182.

<sup>v</sup> See generally, 42 U.S.C. 12182. Many organizations develop essential eligibility criteria that focus on the physical and cognitive requirements for participation. This can assist organizations in determining whether individuals can participate, with or without modifications or accommodations.