ISSUES & SOLUTIONS FOR FITNESS FACILITIE

A Friendly Waiver?

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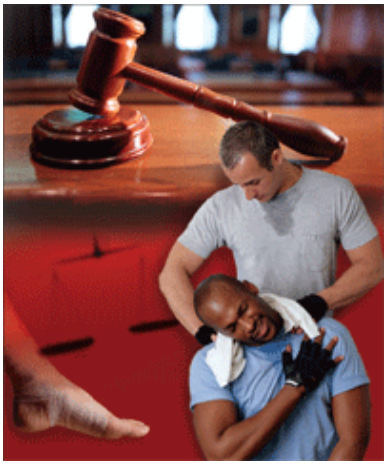
Waiver laws change, and so do waivers. Here's what you need to know to protect your facility.



RECREATION, SPORT AND fitness professionals have long been interested in liability waivers. For years, the general perception was that waivers did not work. Today, however, most professionals know that waivers can be effective, and can provide liability protection to the service provider. Yet, even today, many, if not most, professionals do not realize that waivers can protect the service provider from liability for injuries resulting from the negligence of the provider or its employees.

In Flores v. 24 Hour Fitness (2005), a waiver provided protection for 24 Hour Fitness from liability for an injury resulting from a broken cable on a weight machine. In Azad v. Mill Creek Equestrian Center Inc. (2004), a waiver protected when a novice fell off a horse jumping a fence. The court in Cimolino v. The Toluca Lake Tennis Club (2004) held that a waiver protected the club from negligence liability when a patron was injured riding a fitness cycle. A waiver protected a ski resort when a ski jumping patron landed on hard ground and suffered injury (Shepard v. Bear Valley Ski Company, 2005). When a patron fell from an allegedly unsafe running board at an exercise station and was injured, a waiver signed by the patron protected the facility from liability for negligence (Messier v. Sandra Label d/b/a Curves for Women of Plainfield, 2005). These are just a few of the cases from the last two years — the list goes on and on.

The fact is, while not all waivers successfully protect the service provider, in at least 46 states and the District of Columbia, a well-written, properly administered waiver that is voluntarily signed by an adult can provide recreation, sport and fitness providers with liability protection for ordinary negligence.

Updating state waiver laws

One reason many professionals are confused about whether waivers are effective is because waiver law is state law, so it varies from state to state. While a few states have either statutes or State Supreme Court decisions that prohibit the enforcement of waivers, courts in most states do allow the enforcement of such waivers. The courts in some of these states have lenient requirements for enforcement, while others have strenuous requirements that must be met. I have examined more than 800 recreation-, sport- and fitness-related waiver cases from every state, and have classified each state as to waiver law requirements (see Table 1).

How courts interpret waivers helps to determine how each state is classified. For instance, some states require that the waiver refer specifically to the word "negligence." In fact, one court recently ruled that the waiver has to refer specifically to the negligence of the provider. In other states, however, the word "negligence" is not necessary, and the phrase "any and all claims" is adequate. Some states require that the agreement include a listing of the inherent risks of the activity. Failure to do so can sometimes result in an unenforceable waiver. Waivers often fail because the language is too narrow. For instance, a waiver might be worded to protect against liability "while riding the horse." This agreement might not be enforced if the plaintiff was injured while mounting the horse, or if a horse kicked the plaintiff while the plaintiff was standing too close. Wording such as "in all phases of the activity," or "while in or about the premises" broadens the scope of the coverage considerably.

Remember, 1) even in the lenient states, some waivers fail; 2) even in the rigorous states, many waivers are enforced; and 3) the law in any of these states is subject to change at any time. Over the last three or four years, changes in waiver law have occurred in several states. Many changes have been minor, but others have been significant. A few of the more important happenings are presented in the sidebar, Significant Recent Changes in State Waiver Law.

Waivers for minors

It is well known that contracts and waivers signed only by a minor are voidable — that is, the minor can void the contract at any time. Obviously, a waiver signed under those circumstances would offer no protection for the service provider. The general rule has been that a waiver is a contract, and a minor cannot be bound by a contract whether it is 1) signed by the minor, or 2) signed by a parent or guardian on behalf of a minor (referred to here as a parental waiver). So, while the service provider contracting with a minor is bound by the contract, the minor is not. Thus, the waiver will not prevent the minor from taking legal action against a negligent service provider. The underlying rationale behind not enforcing contracts made by minors or by parents on behalf of minors is 1) in keeping with the public policy of protecting the rights of infants with respect to contractual obligations and 2) the public policy supporting the obligation of care owed by one person to another (minors) outweighs the traditional regard for the freedom to contract.

In the article titled Protecting Your Facility from Injuries to Minors (*Fitness Management*, September 2001, pp.50-57), I reported that parental waivers were enforceable only in California, Colorado and Ohio. However, many changes have occurred in the last four years (see Table 2). California and Ohio courts have continued to enforce parental waivers, and Colorado has passed legislation to that effect. Courts in Connecticut, Florida, Georgia, Massachusetts, North Dakota and Wisconsin have also enforced parental waivers, making a total of nine states in which service providers may reasonably expect parental waivers to provide liability protection.

Three main arguments constitute the rationale for enforcing parental waivers: 1) they allow organizations to provide more recreational activities for youth at a reasonable cost; 2) decisions regarding risk encountered by one's child involve the fundamental liberty interest of parents to make decisions regarding the rearing of their children (discipline, religious training, medical treatment); and 3) the law presumes that fit parents act in furtherance of the welfare and best interests of the child.

In addition to waivers, many service providers seek protection from liability by requiring that the parent indemnify the provider for loss suffered due to the minor's participation (referred to as a parental indemnification agreement). In so doing, the parent agrees to reimburse the provider for any expenses or awards incurred from a lawsuit by the minor participant, usually including investigative costs and attorney's fees. Thus, if the minor or someone on the minor's behalf sues the provider, the parent is bound to repay the provider. Courts in Connecticut and Massachusetts have upheld parental indemnity agreements.

A third tactic being used involves requiring the parent to sign a mediation and arbitration agreement, by which the parent agrees to submit any claim to mediation and arbitration, rather than filing a lawsuit. Most authorities agree that mediation and arbitration are preferable to the court system, since they are generally less combative and confrontational, involve less time, and legal expenses and awards are less. Courts in California, Hawaii, Ohio, Louisiana, New Jersey and Florida have upheld these parental mediation/arbitration agreements, while courts in Idaho, Pennsylvania and Texas have not.

Age misrepresentation by minors. One question that sometimes arises is, where does the provider stand if a minor claims to be of majority age, signs a waiver, is injured and sues the provider? A recent Pennsylvania case (Emerick v. Fox Raceway, 2004) helps to answer this question. A 16-year-old, wishing to enter a motocross race for adults, told officials he was 18 (the raceway did not enforce its picture ID requirement), signed a waiver, suffered injuries that rendered him a quadriplegic and filed suit against the raceway, alleging negligence in allowing him to race. The court held that the waiver was not valid since he was a minor. The court stated, however, that since it was foreseeable that a minor would misrepresent his age in order to race a motorcycle, the raceway had a duty to have an effective screening system. However, the court recognized that the minor was also at fault, and sent the case to trial so the jury could determine the comparative negligence of each party.

Participant agreement

Even though waivers are effective for adults in most states, providers are often reluctant to use them (or at least waivers that plainly state that the client is releasing the provider from liability for the provider's own negligence) because they are afraid the client will refuse to sign and go elsewhere. The average waiver does look pretty one-sided in favor of the provider. But what if the agreement was more balanced and provided benefits for both parties? That is one of the characteristics of the participant agreement.

The participant agreement is a document that combines a waiver, an assumption of risk agreement, an indemnification agreement and other protective language into one stand-alone document that is intended to provide maximal protection from liability for both the inherent risks of the activity and from the ordinary negligence of the provider. Where it is different from previous waiver formats is that it provides benefits for the signer, as well. Some of the benefits for the participant include the following:

1. It provides better rapport and understanding between the provider and client by showing that the provider is concerned about the safety and well being of the participant.

2. It gives the participant detailed information regarding both the rewards and the risks of participation, explaining some of the possible consequences of injury.

3. It helps the participant be better prepared, psychologically, for the potential discomforts that can result from participation.

4. It enables the signer to make a more informed decision as to whether participation in the activity is appropriate for that individual.

5. It provides important health information and permissions to act in the participant's best interest in the event of a medical emergency.

At the same time, the agreement offers language designed to provide maximal protection for the service provider.

The agreement has several important sections, none of which should be omitted:

Assumption of inherent risks. The assumption of inherent risks section is intended to help protect the provider from liability

for injuries resulting from the inherent risks of the activity. An inherent risk is one that is integral to the activity — one that cannot be eliminated without altering the nature of the activity or game (e.g., getting hit by a pitch in baseball, tearing a muscle in a group exercise class, rupturing a disc while weightlifting).

Generally, the provider is not liable for inherent risks, and needs no protection from injuries caused by these risks, so long as participation was voluntary and the participant was aware of and appreciated the risks. The assumption of inherent risks section informs the participant of the inherent risks of the activity, including the type of injuries that may occur and the potential negative consequences of such injuries on the health and lifestyle of the participant. It also secures an affirmation that participation is voluntary, and that the participant knows, understands and appreciates the risks of the activity. This part of the agreement helps to solidify the primary assumption of risk defense for injuries resulting from inherent risks, and may also offer some protection from ordinary negligence based on secondary assumption of risk or contributory fault.

Waiver of liability for ordinary negligence. The waiver section helps to protect the provider against liability for injuries resulting from the ordinary negligence of the provider, its employees and its agents. The waiver of liability relieves the provider of liability for injuries resulting from ordinary negligence, but does not generally provide liability protection for extreme acts such as gross negligence.

Many waivers fail because of poor wording. The following is an example of what the waiver language should look like:

In consideration of permission to participate in a horseback trail ride, today and on all future dates, I, on behalf of myself, my spouse, my heirs, personal representatives or assigns, do hereby release, waive and discharge [facility name] (including its officers, employees and agencies) from liability from any and all claims resulting from the ordinary negligence of [facility name].

This agreement applies to 1) personal injury (including death) from incidents or illnesses arising from horseback trail ride participation at [facility name] (including, but not limited to, in and around the stable and corral, mounting and dismounting, riding, while dismounted during the ride, during any instruction by the staff, and all premises including bleachers, the associated sidewalks and parking lots); and to 2) any and all claims resulting from the damage to, loss of, or theft of property.

Wording is crucial. Note that the waiver lists the parties who are releasing the provider, the parties who are released and that they are released from liability for the ordinary negligence of the provider (which is emphasized). Note also that the language encompasses personal injury and property loss, and that the waiver is not limited solely to injuries occurring on the ride itself.

Indemnification agreement. The indemnification agreement can provide added protection in many instances. In this agreement, one party agrees to be responsible for the losses incurred by a second party (even if the second party is at fault) due to an injury to the first party or a third party. For example, a parent might sign an agreement (parental indemnity agreement) to reimburse a fitness center for loss due to litigation resulting from a fitness center injury to the minor child in exchange for the opportunity for the minor to participate at the facility. Such indemnity agreements have been found effective in some states. The indemnity agreement can help protect when the injury results from inherent risks, as well as ordinary negligence, and sometimes provides protection when the waiver or assumption of risk agreement fail.

It is important to note, however, that indemnification agreements are traditionally agreements between two business entities. Courts in some states find indemnity agreements unenforceable when such agreements are between providers and participants (a business and an individual) where an individual is asked to indemnify a provider for the negligence of the provider. Also, some courts have held that

parental indemnity agreements are not enforceable.

Other important clauses. The inclusion of four other clauses is recommended for achieving maximal protection. They are a severability clause, a selection of venue clause, a covenant not to sue and a mediation/arbitration clause.

A severability clause is a statement within the document that says, in effect, that if any part of the document is held void, this will have no effect on the validity of the remainder of the document. Otherwise good waivers sometime fail when this clause is not included. It can be as simple as the following statement: *The undersigned hereby expressly agrees that this release and waiver is intended to be as broad and inclusive as permitted by the laws of the State of Missouri and that if any portion hereof is held invalid, it is agreed that the balance shall, notwithstanding, continue in full legal force and effect.*

When drafting a waiver or participant agreement, always include a selection of venue clause. Venue selection merely specifies in which state and county any future legal proceedings will take place. It serves to ensure that, if legal action does result, it will be in the local court rather than in a distant state. The following is an example of venue selection language: *I agree that if, in spite of this contract, legal action is brought regarding a claim, it must be brought in the District Court housed in [local] County, State, and further agree that the substantive laws of State shall apply in any action brought.*

A covenant not to sue is a contract that says the signer will not sue to enforce a right of action against the provider. Legally, it is slightly different from a waiver in that 1) the waiver eliminates the cause of action while the covenant not to sue does not, and 2) the waiver or release often releases joint tortfeasors, while the covenant not to sue generally does not. A covenant not to sue is included in many, if not most, waivers. At times, its inclusion seems pointless because courts generally tend to totally ignore the language. However, in a 2004 California case involving rappelling to the floor of a cavern, a woman signed a document in which she agreed to release, waive, discharge and covenant not to sue the service provider (*Bossi v. Sierra Nevada Recreation Corp., 2004 Cal. App. Unpub. LEXIS 1992*). The jury found that the waiver protected the provider from liability, and returned a verdict for more than $100,000 in damages on the defendant's cross-complaint for breach of the covenant not to sue.

One of the newest happenings in waivers is the inclusion of mediation/arbitration clauses. A mediation/arbitration clause is a statement by which the participant (or the parent of the participant if the participant is a minor) agrees to engage in good faith efforts to mediate any dispute that might arise. Any agreement reached can be formalized by a written contractual agreement at the time. The clause should also include an agreement to submit any unresolved dispute to binding arbitration. Language such as, *I further agree that if a legal dispute arises, I will attempt to settle the dispute through mediation before a mutually acceptable mediator whose name appears in the registry of names recognized by the [State] courts as qualified persons for mediation assignments. To the extent mediation does not result in a resolution, I agree to submit the dispute to binding arbitration through the American Arbitration Association in [State].*

As stated earlier, often, mediation and arbitration are preferable to the court system, since they are generally less combative and confrontational, involve less time, and legal expenses and awards are less. Before including either clause in the participant agreement, consult your insurance carrier.

Affirmations, assertions and authorizations. To maximize participant safety, it is important to obtain certain permissions and information related to the participant. These include 1) affirmations related to the health status of the participant, 2) authorizations regarding emergency medical care for the participant and 3) affirmations that the participant will follow all rules related to safety.

Some of the things that the participant affirms in the health status section include information regarding physical problems such as asthma, diabetes, anaphylaxis, epilepsy, heart disease or high blood pressure, as well as any other disabilities that might preclude participation in the activity. The participant should assert possession of sufficient skills, coordination and physical fitness necessary for safe participation.

The comprehensiveness of the health status statement should vary with the type of activity and the age of the participant. For example, older participants and more strenuous or risky activities may require securing more health information. Also, a physical examination may be recommended or required before participation in some activities.

In the medical care authorization, the participant should agree to allow first aid, CPR, AED (if available), emergency transport and the sharing of medical information. The participant should also agree to assume all costs of the care and transportation.

The participant should affirm agreement to follow safety rules. These may include wearing required safety gear, following rules of the activity, informing the provider of hazardous conditions, and to not participate while under the effects of drugs or alcohol. Participants should also agree that the provider has the right to terminate participation at any time the provider feels it is unsafe.

Final acknowledgements and signatures. There should be, immediately prior to the signatures, a conspicuous statement that includes an affirmation of having read and understood the participant agreement; having understood that he or she is giving up the right to sue in the case of injury due to the inherent risks of the activity or due to negligence of the provider; and voluntarily signing the waiver and participating.

Certain form should be followed in the signature area. It should include spaces for the printed name of the participant and the signature of the participant. It should also include space for the date. It is also a good idea, though not mandatory, to include the name, relationship and phone numbers of an emergency contact person. If the participant is a minor, the waiver should have spaces for the printed name and signature of either parents or guardians. For multi-page agreements, either require a signature at the bottom of each page, or make it clear that the signature applies to all pages of the document.

Recommendations

Minors. Should you use parental waivers, parental indemnity agreements and parental mediation/arbitration agreements with minor participants? The answer is “yes” in the states listed as enforcing them. In the other states (including those in which courts have addressed the issue and have ruled that such documents are not enforceable), there would be no harm in using the agreements. There is always a chance that they might be enforced, since state laws do change. One other option is to use an agreement to participate, which is, in essence, a detailed assumption of risk agreement. It was discussed in detail in Protecting your Facility from Injuries to Minors in the September 2001 issue of *Fitness Management*. It is effective with minors, but is intended to protect against liability for inherent risks, not negligence risks.

Do not rely solely on such documents. Purchase adequate liability insurance and institute an effective, ongoing risk-management program that focuses on the identification and elimination of risks.

Adults. Providers will be better protected if the broad participant agreement is used rather than the briefer, less encompassing waiver. The participant agreement, which contains a waiver, an assumption of inherent risks and other layers of protection, is enforceable in most states, and should be used in all. Even in the states in which waivers are not valid, it can serve as evidence that the participant was aware of and assumed the inherent risks of the activity.

Providers should be aware that waivers and participant agreements comprise an excellent first line of defense, can provide important protection, and should always be used by providers seeking maximum liability protection. Remember, however, that waivers and participant agreement are always subject to fail. Failure may be due to poorly worded waivers, faulty administrative procedures, changing opinions of the court or numerous other reasons. Therefore, it is crucial that you possess adequate liability insurance, and have an ongoing risk management program.

Table 1. Rigor Required for a Valid Waiver

LENIENT STATES

AL, GA, KS, MD, MA, MI, NE, ND, OH, TN

MODERATE STATES
CO, DC, FL, IA, ID, IL, MN, NC, NM, OK, OR, SC, SD, TX, WA, WV, WY

RIGOROUS STATES
AK, AR, AZ, CA, CT, DE, HI, IN, KY, ME, MO, MS, NH, NJ, NV, NY, PA, UT, VT, WI

NOT ENFORCED
LA, MT, VA

INSUFFICIENT INFORMATION
RI, PR

Table 2. Likelihood of Enforcement of Parental Waivers or Indemnity Agreements

INSUFFICIENT INFORMATION TO PREDICT

AK, AL, DE, IA, KS, KY, MD, MN, NV, NH, OK, OR, RI, SC, SD, VT, WY
VERY UNLIKELY TO ENFORCE

AR, HI, IL, LA, MI, MT, NJ, PA, TN, TX, UT, VA, WA, WV
FAIR LIKELIHOOD
IN, ME, MO, NE, NY
GOOD LIKELIHOOD
AZ, ID, MS
EXCELLENT LIKELIHOOD
CA, CO, CT, FL, GA, MA, NC, ND, NM, OH, WI

Significant Recent Changes in State Waiver Laws

Four states have made recent changes to their waiver laws that have significant implications.

Wisconsin: The Supreme Court ruled in Atkins v. Swimwest Family Fitness Center (2005) that a waiver was not enforceable because it was 1) overly broad, 2) it served a dual purpose (membership contract and waiver) and 3) there was no opportunity to bargain. The court did not make it clear if each of the factors was necessary, but, if opportunity to bargain is mandatory, this would negate the effectiveness and utility of most waivers in the state of Wisconsin.

Arizona: The Supreme Court (Phelps v. Firebird Raceway Inc., 2005) ruled that the Arizona constitution requires that the determination of assumption of risk is always a matter for the jury, and not for summary judgment. This would seem to prohibit a judge from declaring summary judgment based on a waiver, thereby requiring that waiver cases go to trial.

Colorado: In 2002, the Colorado Supreme Court (Cooper v. Aspen Skiing) overturned a lower court ruling allowing parents to sign waivers on behalf of minors. One year later, the Colorado legislature passed a bill (S.B. 03-253 [2003]) allowing parents to sign waivers on behalf of minors.

New Mexico: A New Mexico appellate court held that waivers were against public policy and unenforceable. A year later, the Supreme Court reversed that ruling (Berlangieri v. Running Elk Corp., 2003), holding that, while waivers are to be strictly construed, it would be inappropriate to invalidate all recreational waivers.