A Balancing Act On Paper

Waivers, disclaimers, exculpatory agreements, releases, agreements to participate, indemnity clauses, and "to hold harmless" agreements generally all seek to protect some entity-A from consequences suffered by entity-B (both having engaged in a common activity) under an "if things should go wrong" type of scenario.

In the health and fitness industry, the service provider (entity-A) usually enters into one of these aforementioned contracts with the client (entity-B) as a form of risk management typically from ordinary negligence defined as "the failure to use a level of care that a reasonably prudent and careful person would use under similar circumstances" (Chandler & Miller, 2013, p. 18). Gross negligence, defined as "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life and property of another" (Chandler & Miller, 2013, p. 18), is much more difficult to be insulated from even with a signed contract.

While many view such documents to be moderately effective at best, court rulings on a case-by-case basis are setting precedences both for upholding and nullifying the provider-client agreement (Brown, 1989). A well-written waiver or similar document "can protect service providers from liability, under certain circumstances, in 46 out of 50 states" (Miller, Young, & Martin, 2009, p. 133).

What are some of the differences between these contractual documents and what are the points of contention that generally weaken a case?

Waivers are an "intentional and voluntary surrender of a known right. It can be expressed or inferred. An expressed waiver affects a still unperformed duty. An implied waiver results when a participant's conduct demonstrates a clear and decisive purpose to waive legal rights involved" (Gifis as cited in Brown, 1989, p. 5).

Disclaimers are "a disavowance of responsibility, usually for some future injury to another" (Schubert, Smith, & Trentadue as cited in Brown, 1989, p. 5).

An exculpatory agreement "involves an acceptance of risk before the injury happens" (Brown, 1989, p. 5).

Releases, similar to an exculpatory agreement, is "entered into after an injury or civil wrong, also defined as a tort, has been committed" (Schubert et al., as cited in Brown, 1989, p. 5).

An agreement to participate is a "signed statement that the participant understands the dangers inherent in the activity or program" (van der Smissen as cited in Brown, 1989, p. 6). The participant acknowledges and understands the rules, procedures, and risks of the activity. This agreement includes the "assumption of risk" by the participant (Brown, 1989).

An idemnity clause is a statement that seeks to "protect employees and agencies from financial loss in the event of a judgment against them" (van der Smissen as cited in Brown, 1989,

p. 6). This clause does not protect an entity from the judgment itself, only from financial loss as a consequence of the judgment.

The "to hold harmless" clause "is one in which one person agrees to assume the liability and risk that may arise from the obligation, and protects and indemnifies the other party against having to bear any loss. A hold harmless agreement is designed to release one or more parties from legal liability. Hold harmless agreements may be unilateral, or may apply to both the contracting parties" (USLegal.com Definitions).

In the health and fitness industry, waivers, disclaimers, exculpatory agreements, and releases are most commonly used and referred to interchangeably (Brown, 1989). Generally in court (of course varying from state to state), these contracts between service provider and client are scrutinized for unconscionability, unclear or nonspecific language, failure to be transparent, failure to disclose risks, implied exoneration from ordinary negligence, and alignment with public policy (how does it align with generally acceptable public policies).

Unconscionability, as noted by Benson (2008), is when the "provisions are so one-sided that the contracting party is denied an opportunity for a meaningful choice" (p. 63). Simplified, one party clearly overwhelmingly and unreasonably benefits. There are two types of unconscionability: procedural and substantive.

Procedural unconscionability, "bargaining naughtiness" (Baker III, Grady, Rappole, 2012, p. 625), is when one entity posesses and utilizes their overwhelming advantage in bargaining power to influence the contract. The weaker entity arguably lacks "meaningful choice" upon entering the contract (Benson, 2008). These tend to be the "take it or leave it" contracts or "contracts of adhesion" (Baker III et al., 2012). Signing a contract under "duress" or "quasi-duress" constitutes procedural unconscionability. The difficulty with procedural unconscionability and unconscionability in general is that one has to prove and quantify "overwhelming advantage", "meaningful choice", and or "duress."

Substantive unconscionability refers to the overwhelming inequity and unreasonable nature of the terms within the contract--to the extent of bearing an oppressive nature (Baker III et al., 2012). This might include itemized terms or releases held "in perpetuity".

Terms of the National Collegiate Athletic Association (NCAA) student-athlete contract have been challenged as unconscionable. The study by Baker III et al. (2012) examines the difficulties in the NCAA contract. One must identify if the students have another viable and comparable option if they do not sign the student-athlete contract. Also, what is the unfair advantage?

The NCAA student-athlete contract must be signed in order for the student-athlete to be eligible to compete (Baker III et al., 2012). Baker III noted that NCAA's constitution, bylaws, and regulations stipulate that students may not participate in intercollegiate sports unless all the NCAA requirements have been met (Baker III et al., 2012). While there are other athletic alternatives to compete and play, none are really realistically comparable to the NCAA member institution (Baker III et al., 2012). It is likely that students signing the contract were not sentient

about the terms of fine print and legal ramifications. It is likely that forms were signed in a "cattle-call" group type environment that did not provide the student appropriate time to read the terms and seek legal advice. It is arguable that these conditions create "quasi-duress" and a "take it or leave it" situation (Baker III et al., 2012).

Arguments for substantive unconscionability contest the NCAA contract's waiver of the student-athlete's right to publicity in perpetuity essentially granting the university, athletic conference, and NCAA to use the student's name and likeness for promotional and commerical prospects (Baker et al., 2012). This may include trading cards, clothing merchandise, and extending to fantasy and video games (Baker III et al., 2012). The NCAA contract was not specific, and the ramifications were likely not presented to students in a transparent and fair way. The loss of the right to publicity could impact the student-athlete well beyond their athletic career, and without fair and reasonable compensation. One might argue that the loss of the right to publicity in perpetuity (without comparable compensation) goes against generally acceptable public policies.

Choice of wording, clarity, specificity, transparency and disclosure are important when forming any type of waiver or release as illustrated first by the case of Hewitt v. Miller (1974).

As noted by Brown (1989), Hewitt v. Miller is a landmark case because the waiver was upheld despite possible ordinary negligence. Hewitt signed a "Safety Affirmation and Release" releasing the diving school "from all claims arising out of death or injury to participants" (Brown, 1989, p. 6). Hewitt disappeared after his second dive and was never found. Upon examination of the document, the court found that the participatory risks were transparent and clearly presented, the intentions of the release form were clearly delineated and specifically mentioned "death" or "injury", and the signee properly indicated he understood the waiver's contents.

In Rosen v. LTV Recreational Development, Inc. (1978), Rosen bought a ski pass and signed a release including the clause, "I accept the existence of such dangers and that injuries may result from the numerous falls and collisions which are common in the sport of skiing, including the chance of injury resulting from the negligence and carelessness on the part of fellow skiers" (Brown, 1989, p. 8). While the clause mentioned "negligence and carelessness on the part of fellow skiers", it failed to specifically include the ski area and its employees (referring to "hazardous obstructions" on the premises) (Brown, 1989). The court ruled in favor of Rosen.

In Doyle v. Bowdoin College (1979), parents signed a release form for their son to participate in a floor hockey clinic. The parents sued Bowdoin College for injuries their son sustained due to negligence. While the release covered injuries sustained during the hockey clinic, no specific wording covered releasing Bowdoin due to injuries sustained from the college's negligence. The court ruled in favor of Doyle.

Along with unconscionability, use of language, and terms outlined in a waiver or similar document, some courts (varying from state-to-state and under specific case conditions) also scrutinize the waiver against "public policy" (Brown, 1989). How does the waiver align with public policies? Do the terms in the waiver impact the public in general (or should the public

have a vested interest in the decision)? If the issue between the plaintiff and defendant is deemed to be more "private" in nature (impact is contained to private sector), then even though the waiver may challenge public policies, the waiver could still be upheld as in Leidy v. Desert Enterprises, Inc. (Brown, 1989).

Legal details concerning waivers, disclaimers, releases, and similar documents vary from state-to-state. The goal of this survey was to present a few points to take into consideration when drafting such documents. Professional legal counsel is highly advised. Hopefully these points also help the signee be more aware of any such documents that request the signee to "give away" certain rights.

References

Baker III, T. A., Grady, J., & Rappole, J. M. (2012). Consent theory as a possible cure for unconscionable terms in student-athlete contracts. *Marquette Sports Law Review*, *22*(2), 619-650.

Benson, S. S. (2008). Pre-injury agreements to arbitrate health care disputes: Legally "shocking" or legally sensible? *Journal of Legal, Ethical & Regulatory Issues, 11*(2), 59-83.

Brown, S. C. (1989). The impact of case law on liability waivers. *Journal Of Sport Management*, *3*(1), 5-14.

Chandler, J., & Miller, J. J. (2013). Personal-fitness instructor: Gross negligence case. *JOPERD: The Journal Of Physical Education, Recreation & Dance*, *84*(7), 18-20.

Miller, J. J., Young, S. J., & Martin, N. (2009). To Use or Not to Use? The Status of Waivers in Intramural Sports. *Recreational Sports Journal*, *33*(2), 129-138.

To hold harmless. (n.d.). In *USLegal.com Definitions*. Retrieved from http://definitions.uslegal.com/h/hold-harmless/