

Guidelines for Writing or Evaluation Exculpatory Agreements

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An exculpatory agreement or waiver is an agreement between the provider of a service and the participant, signed prior to participation, which releases the provider from liability for subsequent injury to the participant due to ordinary negligence. The agreement, in essence, provides that the service provider will not be held liable for injuries caused by the ordinary negligence of the provider or its employees (van der Smissen, 1990 p. C44). Since an exculpatory agreement is a contract, its validity is governed by the rules relating to contracts. Such an agreement is strictly construed by the court since it negates usual benefits to an injured person. The cardinal rule in construction of written contracts is that the intent of the parties must control, and except for the case of ambiguity, this is determined by what the contract itself says.

The purpose of this article is to provide some general guidelines that one might follow in writing such an agreement or in evaluating such agreements currently in use. By way of disclaimer, this article is meant only to provide guidelines for persons dealing with exculpatory agreements and should not be interpreted as or considered to constitute legal advice. While well-written agreements signed voluntarily by adults are valid in most states, the laws governing the effectiveness of such agreements vary significantly from state to state (Cotten, 1993). In order to construct an agreement which would be effective in all states allowing the use of exculpatory agreements, these guidelines include suggestions that should meet the requirements in even the strictest states. In three states, Louisiana, Montana, and Virginia, exculpatory agreements are not valid.

Exculpatory agreements are found in two general types of format. First, there is the stand-alone exculpatory agreement where the agreement comprises the entire document. Second, there are instances where the agreement constitutes only a part of another document, such as membership agreements, rental agreements, entry forms, and rosters. Agreements in either format may be effective in protecting the service provider from liability for ordinary

negligence. The guidelines set forth in the next section refer primarily to the first format in which the exculpatory agreement comprises the entire document. The second format is addressed in the last section.

GUIDELINES FOR EXCULPATORY AGREEMENTS

The guidelines address three aspects of an exculpatory agreement: 1) requirements for a contract; 2) format and exculpatory language; and 3) other protective language.

Requirements for a Legal Contract: The first five guidelines relate to requirements for a legal contract or factors that might tend to void an otherwise legal contract. A contract that is against the best interest of the public is considered to be against public policy and is unenforceable. Reasons a contract may be against public policy include: 1) the business is suitable for public regulation, 2) the service is of great importance to the public, and 3) there is unequal bargaining power (*Tunkl v. Regents of Univ. of Calif.*, 1963). In general, however, exculpatory agreements protecting sport-related service providers from liability for their own negligence are usually ruled **not** to be against public policy because "No public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party . . ." (*Tunkl*, p 1563). A major exception to this is an exculpatory agreement between a school and the students of the school (*Wagenblast v. Odessa School District*, 1988).

1. Expressed in Clear and Unequivocal Terms.

It is important that the agreement clearly state that the signer is releasing the service provider from responsibility for injury to the signer caused by ordinary negligence on the part of the service provider or any employees of the service provider. One such example, upheld in court, is "Hereby releases, waives, discharges and covenants not to sue the promoters, . . . from all liability to the undersigned . . . for any

and all loss or damage, and any claim or demands therefor (sic) on account of injury to the person or property or resulting in death of the undersigned arising out of or related to the event(s), whether caused by the negligence of the releases or otherwise" (*Groves v. Firebird Raceway, Inc.*, 1994, p. 1388). It is crucial that the language of the agreement be simple, straightforward, and unambiguous. The service provider should say plainly what the provider means to say avoiding both legalese and "talking around the subject" (*Ferrell v. Southern Nevada Off Road Enthusiasts, Ltd.*, 1983; *Link V. National Association for Stock Car Auto Racing, Inc.* 1984; *Dombrowski v. City of Omer*, 1993).

2. **Valid Consideration.** One of the requirements of a valid contract is consideration (van der Smissen, 1990, p. C 62). It has long been established that the privilege of completing qualifies as consideration (*French v. Special Services*, 1958). A phrase such as *In consideration of my participation, I agree to . . .* indicates that the signer recognizes what is being received in exchange for releasing the service provider from liability.
3. **Parties to the Contract.** Several important points relate to the parties involved in a contract, particularly those involving exculpatory agreements. They are capacity to contract (generally relating to age), parties barred from redress, and parties protected by the contract.

Minors. The general rule is that a minor may disaffirm a contract made by the minor or by a parent on the minor's behalf. However, courts in three states (California, Georgia and Indiana) have ruled that exculpatory agreements signed by the parent or by the parent and the minor may not be disaffirmed (*Hohe v. San Diego Unified Sch. Dist.*, 1990; *Dekalb County School System v. White*, 1979; *Smoky v. McCray*, 1990; *Huffman V. Monroe County Community School*, 1991). Therefore, when the agreement is to be used with a minor, the acquisition of the parent's signature might increase the likelihood of the agreement protecting the service provider. A better procedure when dealing with minors might be to use an agreement to participate (Cotten, 1992). The agreement to participate describes the activity, the conditions for participation, and an assertion that the participant wants to participate. The agreement lays a foundation for the "assumption of risk" defense in which the participant has assumed the inherent risks

of the activity, but not those risks resulting from the negligence of the service provider (van der Smissen, 1990, D p. 47).

Parties Barred by the Contract. Obviously, the signer is relinquishing the rights of the signer to hold the service provider liable in the event of injury. However, the spouse or heirs may also file suit against the service provider when the signer is seriously injured or killed (*Nickell v. Speedway*, 1983). While the law varies by state, the majority of states provide that the loss of consortium or wrongful death claim of the spouse or heirs is derivative upon whether the signer has or would have had a valid claim. Additional protection may be gained by including a phrase in which the signer relinquishes, on behalf of self, spouse, heirs, estate, and assigns, the right to recover for injury or death (*Byrd v. Matthews*, 1990; *Conrad v. Four Star Promotions, Inc.*, 1985).

Parties Protected by the Contract. It is important to state clearly who is protected by the exculpatory agreement. Specifically list all who might need protection, i.e., the corporate entity, all employees, and all agents of the entity (*Doster v. C.V. Nalley, Inc.* 1957). Others to be protected might include other participants, volunteers, sponsors, advertisers, and owners of the property. List any that are appropriate and conclude the listing with a general inclusiveness clause such as and all others who are involved.

4. **Contemplation.** Use language that can be interpreted broadly when the court is determining what was meant to be included by the exculpatory agreement. Phrases that tend to broaden the scope include: 1) *in all phases of the activity* (*Bien v. Fox Meadows Farms, Ltd.*, 1991; *Malecha v. St. Croix Valley Sky Diving Club*, 1986; *Jones v. Dressel*, 1978), 3) *while using the equipment* (*Calarco v. YMCA of Greater Metro Chicago*, 1986), 3) *while on the premises* (*Doster v. C.V. Nalley, Inc.*, 1957), and 4) *any and all claims arising or of . . .* (*Schlessman v. Henson*, 1980). One example of effective wording used in a 1994 case (*Marshall v. Blue Springs Corp.*, 1994) is . . . *as a result of engaging in or receiving instruction in [scuba diving activities] or any activities incidental thereto wherever or however the same may occur . . .*
5. **Avoid Statements that Might Be Considered Fraudulent.** A fraudulent statement will invalidate a contract, thereby making the exculpatory agreement worthless. Any misrep-

resentation within the agreement, (i.e., qualifications, supervision provided) constitutes fraud. In one case, the exculpatory agreement falsely stated that the service provider had no liability insurance (Mertin v. Nathan, 1982). The court said that this constituted fraud and rendered the exculpatory agreement ineffective.

Format and Exculpatory Language: If the exculpatory agreement is to protect the service provider from liability for its own negligence, the agreement must be carefully worded and planned. It is crucial that ambiguity be avoided and that the intent of the agreement not be in doubt.

6. **Title.** It is important that the title of the agreement be descriptive, i.e., *Waiver; Release of Liability; Waiver, Release, and Indemnity Agreement* (Toth v. Toledo Speedway, 1989; Rudolph v. Santa Fe Park Enterprises, Inc., 1984). Titles such as *Sign-up Sheet, Roster, Application for Membership, Entry Blank, Receipt, and Sign-ion Sheet* are often considered deceptive and can affect the validity of the exculpatory agreement (Moore v. Edwards, 1942; Hobby v. Ramblin Breeze Rance, 1984).
7. **Print Size.** Court rulings from most states have not specified a minimal print size, however, the Civil Code in California generally restricts print size to 8- to 10-point type and suggests that "As a matter of public policy, the typeface size of the critical language in a release should be no smaller" (Link v. National Association for Stock Car Racing, 1984, p. 514). Certainly use of 8-point type or greater, while not required, would avoid the question of appropriate print size.
8. **Conspicuousness of Exculpatory Language.** Many courts have addressed the issue of conspicuousness of the exculpatory language, that is, the specific statement that the participant will not hold the service provider liable for the ordinary negligence of the provider. Procedures that might help avoid this issue include: 1) place important exculpatory language in a position that compels notice (Link v. National Association for Stock Car Racing, 1984); 2) make important exculpatory language stand out from the rest of the agreement by means such as bold lettering, underlining, use of all capital letters; 3) do not bury the important exculpatory language among other verbiage (Baker v. City of Seattle, 1971; Okura v. U.S. Cycling Federation, 1986); and 4) use of a notice such as CAUTION: READ BEFORE SIGNING before signature (Bien v. Fox Meadow Farms, Ltd., 1991).
9. **Proximity of Signature to Exculpatory Language.** The exculpatory language of the agreement should be near the signature. Particularly, avoid placing the specific statement that the participant will not hold the service provider liable for the ordinary negligence of the provider on a page different from that of the signature. This issue has been addressed in two cases in which the signature was on the first page and the exculpatory language was on the back of the page (Putzer v. Vic Tanney-Flatbush, Inc., 1964; Kubisen v. Chicago Health Clubs, 1979).
10. **Statement Affirming Having Read the Agreement.** Include a statement proximate to the signature in which the signer affirms having read the agreement. Courts have found such statements to increase the conspicuousness of the language and subsequently affect the effectiveness of the agreement (Conradt v. Four Star Promotions, Inc., 1986; LaFrenz v. Lake City Fair Bd., 1977).
11. **Use of the Words Ordinary Negligence.** It is prudent that the agreement include the words *ordinary negligence* incorporated in a phrase such as *waive any and all claims resulting from ordinary negligence by the service provider or its employees*. While it is true that only a few states require the specific use of the word *negligence* (Alaska, Florida, New Hampshire, New Jersey, New York, and Texas), other states interpret waivers very rigorously and urge that words with equivalent meaning be used so that the intent of the agreement will be clear (Arkansas, Arizona, California, Maine, Missouri, and Wisconsin). Thus the use of the word *negligence* will clarify the intent and reduce the likelihood of challenges to the agreement based upon ambiguity of language (Heil Valley Ranch v. Simkin, 1989; Gross v. Sweet, 1979; Lovas v. Dolphin Research Center, Inc., 1991; Rickey v. Houston Health Club, Inc., D/B/A President & First Lady Health and Racquetball Club, 1993).
12. **Include Specific Protection for Unique Situations.** Certain businesses have unique situations that may require protective language not commonly found in exculpatory agreements. For instance waivers in recent cases involving automobile racing have included the phrase ". . . acknowledges in INJURIES RECEIVED MAY BE COMPOUNDED OR INCREASED BY NEGLIGENT RESCUE OPERATIONS . . ." (Cadek v. Great Lakes Dragway, Inc., 1994, p. 423). A

waiver required by a bar for patrons desiring to ride a mechanical bull included a statement asserting that the signer is not under the influence of alcohol (*Van Tuyn v. Zurich American Ins. Co.*, 1984, p. 320).

13. **Specify the DURATION of the waiver.** Waivers are governed by the rules of contracts which state that a contract which does not specify duration may be terminated at will by one of the parties, courts in some cases (*Nimis v. St. Paul Turners*, 1994) have ruled against the perpetual nature of such contracts. Thus, it is safer to insure the ongoing nature of the agreement with such language as *for injuries now or in the future, which may hereinafter occur forever release and discharge, or I forever release.*
14. **Severability Clause.** A severability clause is a statement within the document which says, in effect, that if any part of the document is held void, this will have no effect upon the validity of the remainder of the document. In *Farina v. Mt. Bachelor, Inc.* (1995), where the waiver contained no severability clause, the court stated that whether a contract is divisible depends upon the intention of the parties. Language commonly used is illustrated by *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* (*Vergano v. Facility Mgmt. of Missouri*, 1995).
- Other Protective Language Within the Agreement:** The following non-exculpatory language is often found in exculpatory agreements. These do not exculpate the service provider from liability for ordinary negligence, but may help in clarifying the intent of the agreement, in shifting the liability to someone else, or help in establishing the "assumption of risk" defense in the event of injury due to inherent risks in the activity.
15. **Disclaimer.** A disclaimer is a statement in which the service provider asserts that they assume no responsibility or liability for injury resulting from the provision of the service. While this type of statement is optional in an exculpatory agreement, it could be beneficial since it might help reduce ambiguity as to the intent of the agreement.
16. **Indemnification Language.** An indemnification clause is used to shift the financial respon-

sibility of an award to someone other than the party being sued. (van der Smissen, 1990, p. C 42) One who agrees to indemnify a service provider assents to reimburse that service provider for loss due to the litigation. An indemnification clause is often included in exculpatory agreements using such language as 1) *agrees to indemnify*, 2) *hold harmless*, or 3) *save harmless*.

17. **Covenant not to Sue.** A covenant not to sue is an agreement in which the signing party agrees not to sue to enforce a right of action against the sport business.
18. **Selection of Venue.** Venue selection merely specifies in which state and county any legal proceedings will take place.
19. **Establishing the Assumption of Risk Defense.** Exculpatory agreements protect the service provider from liability for injury caused by the ordinary *negligence* of the provider or the employees of the provider. Injuries, however, often result from the *inherent risks* of the activity and the injured party subsequently seeks redress from the service provider is that the user assumed the risk. The assumption of risk doctrine is founded upon the premise that a ". . . plaintiff may not recover for an injury received when one voluntarily exposes oneself to a known and appreciated danger" (van der Smissen, 1990, p. D 235). For a successful assumption of risk defense, the defendant must show that the participation was voluntary and that the participant knew, understood, and appreciated the inherent risks of the activity (van der Smissen, 1990, p. A 238).

It is important to note that the general rule has been that waivers might include information warning the signer of risks in the activity, but that the waiver is valid without this information. The primary purpose for inclusion would be for the establishment of an assumption of risk defense. Some recent cases suggest that, in certain instances, this delineation of risks might be necessary for the waiver to be held valid. In *Coughline v. T.M.H. International Attractions, Inc.*, (1995) the court ruled that the waiver was not valid because the decedent was an inexperienced caver who knew little about the activity of spelunking. In *Maurer v. Cerkevnik-Anderson Travel, Inc.* (1994), the waiver was not upheld because the waiver was too general and did not alert the victim to the specific risks that she was supposedly waiving.

Nature of the Activity. Include a clear descrip-

tion of the activity, including such things as what the participant will be doing, fitness required, supervision provided, and specifically including the unpleasant aspects of the activity. The description should be detailed enough to clearly inform the participant of what to expect in the activity (van der Smissen, 1990, p. D 47). The length and detail required in the description depends upon the familiarity of the participants with the activity. Less description would be required for experienced softball players than for novice whitewater rafters. It is important that the agreement be in such detail as to provide evidence that the participant, regardless of experience, had sufficient knowledge, understanding and appreciation of the nature of the activity.

Warning of Risks Involved. Since one may assume only those risks of which one is aware (van der Smissen, 1990, p. A 246), it is important that the participant be aware of the inherent risks involved in the activity and the consequences of these risks. A representative list of those risks would help to show that the injury was a contemplated risk. Do not try to make a comprehensive list, but rather one that represents the broad scope from minor common injuries to the possibility of paralysis or death. Use phrases such as *Among the risks are ..., and ... including, but not limited to ...* Possible consequences or injuries should be presented in a similar manner (Schlessman v. Henson, 1980).

Affirmation of Voluntary Participation. Since the assumption of risk defense can be successful only if the participation was voluntary participation is desirable within the agreement. A sentence using such language as *I understand the inherent risks involved in this activity and am voluntarily participating in ...* is adequate.

Assumption of Risk Statement. Include a statement in which the participant expressly agrees to assume the inherent risks of the activity. Use language like *... I agree to accept all risks inherent in participating in the activity.*

EXCULPATORY CLAUSES WITHIN ANOTHER DOCUMENT

Although exculpatory agreements that are embedded within documents such as membership agreements, rental agreements, entry forms, and roster lists are less likely to be deemed valid and enforceable than those comprising a separate, stand-alone agreement (Johnson v. Rapid City Softball Assn., 1994), exculpatory clauses are often included in such documents. Since the function of the exculpatory clause is the same as that of the stand-alone exculpatory agreement, the same guidelines apply and it

is essential that the exculpatory language be clear and unambiguous. The clause, however, is generally much shorter than a stand-alone agreement and some of the guidelines listed, while no less important, are omitted for the sake of space. All guidelines listed in the section, **Other Protective Language Within the Agreement**, except for the disclaimer, are generally omitted. Since the exculpatory clause will not usually contain as much information as a stand-alone agreement and is often buried in the middle of other information (as in a membership agreement), the format of the agreement may be even more important than in the stand-alone agreement. It is crucial that the clause be conspicuous. The use of a descriptive title, large print, exculpatory language highlighted (bold print, capital letters, or underlined), and placement of the signature near the clause are steps that will help the clause stand up in court.

Exculpatory clauses or disclaimers are often included on tickets. While this is common practice, no cases have been found in which these attempts have protected the service provider. One of the reasons for the ineffectiveness of these disclaimers is that even if the purchaser had an opportunity to read the statement, the print is usually too small to read (Yates v. Chicago National League Ball Club, Inc., 1992).

SUMMARY

Well-written exculpatory agreements can successfully protect service providers from liability for injuries caused by the negligence of the service provider or its employees in most states. The key word in this statement is "well-written." Some guidelines have been provided which can be used in the preparation or the evaluation of exculpatory agreements. These guidelines have been drawn from case law from throughout the United States and should help in making exculpatory agreements more effective. It should be remembered, however, that these guidelines are not meant as a substitute for a qualified attorney.

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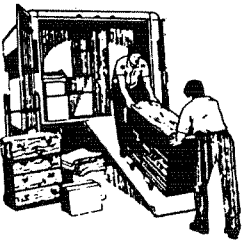
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