

Plain Language

Plain English in Amateur Sporting Activity "Waivers"

By Kenneth I. Gluckman

The recent surge in interest in physical fitness has coincided with the increasing tendency of Americans to file lawsuits. While the two are not directly related, the threat of litigation has affected the organizers of many amateur sporting activities. As a participant in many such activities, I have looked at several of the so-called "waivers" participants are required to sign. Most are two-or-three-sentence attempts to have the participant absolve the organizers and anyone else connected with the event of any possible liability under all conceivable circumstances. These are so vague and so overly broad that there is little chance they would be enforced in court.

I have also seen a waiver which was so long, complex and almost beyond understanding, that it must have been written by a bond lawyer. Few jurors would believe that anyone preparing to run a marathon would actually read, let alone comprehend, such a document.

Existing Waiver

I recently had an opportunity to do something about this situation. I was asked to revise a sign-up sheet for the Michigan affiliate of a national recreation organization which arranges bicycle, hiking, sailing and skiing trips. The sign-up sheet included this waiver:

We the undersigned hereby expressly release XYZ and the Michigan Region of XYZ, including their governing bodies, officers, workers, trip leaders, guides and members, whether professional or volunteer, paid or unpaid from any and all liability of any kind whatsoever in connection with this trip. We further agree to accept full responsibility for any XYZ equipment or any other equipment rented or hired, for use on this trip and make good any damage to same howsoever caused.

Although this waiver is brief and reasonably understandable it could be

improved. For example, it still uses archaic terms like "hereby" and "howsoever" and extremely broad language such as a release from "any and all liability of any kind whatsoever."

Suggested Revision

Recognizing the threat of litigation and believing that a revision of the waiver might reduce its litigation exposure, the organization had contacted another attorney. This was his suggested revision:

Each of the individuals signing this Activity Registration Sheet and Release ("Registration"), whether such individual is the Participant or the parent or guardian of a Participant under age 18, hereby severally represents, acknowledges and agrees on behalf of themselves and their child or ward as follows: (a) If the Participant signs this Registration he or she represents he or she has reached at least the age of 18 (b) I acknowledge that the sponsor of the Activity, XYZ ("Sponsor") is a non-profit corporation that would be unable to offer the Activity unless this Registration is executed (c) I acknowledge there may be risk involved in the Activity because of its nature, management or otherwise (d) I acknowledge that no representations regarding the safety of the Activity or the competence of the Leaders have been made to me (e) I agree that the proposed dates and Leaders may be changed and/or the Activity cancelled before or after it begins without any liability whatsoever except to return any deposit or unearned portion of the fee (f) I, upon request of the Sponsor, will pay to the Sponsor the cost of repair or replacement of all vehicles, equipment and other property of the Sponsor damaged by the Participant (other than reasonable wear and tear) or not returned by the Participant after having been issued to the Participant (g) I agree on behalf of myself and the Participant and our heirs, executors, personal administrators, and all others claiming an interest through me or the Participant, to release and forever discharge the

Sponsor, its affiliates, employees, agents and contractors, leaders, guides, members and governing bodies (whether or not professional or volunteer, or paid or unpaid, incorporated or unincorporated) from any and all claims, demands, liability or cause of action of any type (including, but not limited to, contract, simple or gross negligence, product liability, tort or otherwise) in law or equity on account of the death or any injury to me or the Participant or the loss or damage to my property or that of the Participant which may occur from any cause whatsoever in connection with or during the Activity. I further renounce any and all common law, equitable and statutory prohibitions against the waiver of the rights waived hereby. Notwithstanding anything to the contrary, this release shall not apply to any amounts which may be payable under any policy of insurance carried by the Sponsor. I acknowledge I have sufficient life, injury and property insurance on me, the Participant and our property and no representations have been made to me regarding insurance carried by the Sponsor (h) I agree not to institute any suit or proceeding to enforce a claim waived hereby, and if I do I agree to pay the costs of defense including the reasonable attorney fees of the party against whom such suit or proceedings are instituted (i) I am solely responsible for the cost of all medical care rendered to the Participant (j) I agree to defend and indemnify the Sponsor, its agents, leaders, members, employees, contractors and affiliates from all claims arising out of my actions and the Participant's actions as a result of and during the Activity. This Registration is to be governed by the law of Michigan. Any provisions, or the application thereof, which are ruled unenforceable by a court of competent jurisdiction shall be severed and shall not affect the remaining provisions.

Apart from grammatical errors and other readily apparent problems, it may be worth noting that when typed on a standard sheet of paper, this waiver left no room for the participants' signatures! A quick reading

reveals that it contradicts virtually every guideline of plain-English writing. Redundant wording ("represents, acknowledges and agrees"), archaic and legalistic language ("notwithstanding," "severally"), and strings of supposedly clarifying language appear repeatedly (governing bodies are released "whether or not professional or volunteer, or paid or unpaid, or incorporated or unincorporated" and the waiver also releases "the Sponsor, its affiliates, employees, agents and contractors, leaders, guides, members" in addition to the governing bodies).

Overall, this waiver is very difficult to read and almost impossible for a lay person (and many lawyers, no doubt) to understand. It simply fails to convey the information required to let the signer understand what he or she is agreeing to. On the plus side, it probably does include all necessary parties in fairly specific language and it would serve, if enforced, to protect the interests of the organizer.

But it is doubtful if this document would be enforceable. Certainly many jurors would not understand it, and would therefore not believe that the participant understand it. Furthermore, given the length and complexity of the language, it probably would not be hard to convince the jury that the release was never read at all and that this failure was excusable. Under these circumstances, especially if serious injuries are involved, it would be very difficult to establish that the participant knowingly waived important rights.

Adopted Revision

I developed a brief and simply written waiver which has been adopted by this organization. It reads as follows:

"I agree that XYZ and anyone associated with it will not be liable for any loss, injury or death related to this activity. I know that there is risk associated with this activity and I willingly accept that possibility. I know that the trip leader's sole function is to establish the itinerary and make other travel arrangements and that it is my responsibility to know and obey all laws and to ensure my own

safety. I am physically fit and able to participate."

I agree to pay for all reasonable costs relating to my participation including costs for transportation, equipment and medical care.

(If you are under age 18, a parent or guardian must sign this agreement for you.)

This waiver departs from the usual practice in that it states in positive terms what each party's responsibilities are, rather than attempting to set forth an exhaustive (and inevitably incomplete) list of what the sponsoring organization will not do. I think it is much easier to explain an agreement to a jury if the duties of both parties are spelled out simply and clearly. The document appears less one-sided, and the jurors can apply common sense to interpreting the obligations of each party.

Similarly, there is no attempt to provide an exhaustive list of the parties. The phrase "XYZ and anyone associated with it" certainly means more to the average person than a string of terms like "agents," "assigns," etc. It also avoids the risk that the most important party will be left out of the string, and because the list appears intended as all-inclusive, all be deemed to have been left out intentionally.

This waiver follows general principles of plain English writing. For example, it is written in the first and second persons, and uses everyday language. It can be understood easily by participants of normal intelligence. Equally important, it can be understood by jurors of normal intelligence, who will believe that the person signing it understood the language as well.

There are no guarantees in this, as in any other area of law. However, a clear and simple statement of the reasonable responsibilities of each party is more likely to be enforced than an attempt at overreaching, or a lengthy and incomprehensible attempt to detail every possible contingency. If the jurors understand the waiver provisions and the provisions are in line with common sense, the odds are increased that the protection sought will be achieved. ■

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"Plain Language" is a regular feature of the Michigan Bar Journal, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.

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