



**MJ INSURANCE**  
SORORITY DIVISION

## **Liability Waivers Position Paper**

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We are often asked about the worthiness of using liability waivers by our clients. In the past, under the advice of legal counsel, we have taken a somewhat ambivalent attitude toward encouraging our clients to have their members sign waivers or requiring that non-members participating in chapter events sign waivers as we were concerned that the waivers wouldn't stand up in court.

However, over the past several years, there has been a shift in case law that has caused us to reconsider our position on waivers and releases. This, coupled with the dramatic increase in liability incidents and claims among our clients, has caused us to re-evaluate our position. Our research and the advice of legal counsel now indicates that participant waivers/releases may be advantageous for our clients in two ways prior even to the test of court: 1) Waivers may help clients educate their members about the risks associated with various types of events; and 2) Waivers may prevent a lawsuit from ever being filed because the participant has acknowledged his or her assumption of risk.

We are now encouraging our clients to utilize participant waivers (both for their own members and for events sponsored by the Fraternity/Sorority with non-member participants) for the following types of events:

- Any athletic event
- Any "risky" event ([Link to risky events position paper](#))
- Any competition

We have developed a participant waiver/release template for our clients' use (attached). Please be sure to read through the waiver in its entirety and make necessary edits so that the waiver applies to your specific event. You will see examples and further information in the footnotes of the waiver/release template.

Once the appropriate waiver has been drafted by including the requested information in the template form, waivers may be distributed in paper or electronic format. If distributed and collected as hard-copies, chapters should either keep the paper copies or scan and save as an electronic file in

accordance with your organization's document retention policy. It's important that chapters not go to all of the effort of collecting signed waivers to simply dispose of them the day after the event as claims often come much later than that.

A potentially better option is to use a web-based liability waiver platform that will help your chapters create and distribute waivers to participants and then save signed waivers in a searchable database. There are a few websites that offer this. One such company that we recommend is [SmartWaiver \(www.smartwaiver.com\)](http://www.smartwaiver.com) as we believe that the waiver creation and distribution process is relatively seamless and pricing is reasonable and upfront.

For additional information, please refer to the article published in Fraternal Law (attached). Should you have any questions or concerns, please contact Estacia Brandenburg, JD, MJ Sorority Account Executive at [estacia.brandenburg@mjsorority.com](mailto:estacia.brandenburg@mjsorority.com) or 888.442.7472x7582.

## ENFORCEABILITY OF LIABILITY WAIVERS

Are liability waivers used by fraternities and sororities in the context of social events, particularly recreational activities, enforceable? The answer is that, like most other things in the law, "it depends." While the enforceability of liability waivers varies by state, and tends to be unpredictable overall, there are some general consistencies in the law that anyone wishing to utilize liability waivers should take into account when drafting one.

First, keep in mind that a waiver cannot release someone from liability for injuries caused by intentional misconduct. It is well settled that to contract in advance to release tort liability resulting from intentional or reckless conduct violates public policy. For example, the Supreme Court of Minnesota has stated that, "If the clause . . . purports to release the benefited party from liability for intentional, willful or wanton acts, it will not be enforced." *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920 (Minn.1982).

Second, avoid using language that attempts to explicitly release the party requesting the waiver from liability for injuries resulting from that party's negligence. While such waivers are not always struck down, they are more likely to be troublesome than waivers releasing a party from liability for injuries resulting from risks inherent in a particular activity, particularly those risks outside of anyone's control. For example, the Supreme Court of Connecticut has stated that, "[The] law does not favor contract provisions which relieve a person from his own negligence." *Hyson v. White Water Mountain Resorts of Connecticut, Inc.*, 829 A.2d 827 (Conn. 2003). And in *Sweeney*, the court commented that, "The law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and such agreements are subject to close judicial scrutiny." *Sweeney v. Hertz Corp.*, 740 N.Y.S.2d 19 (First Dept. 2002).

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Third, be aware that judicial enforcement of liability waivers is unpredictable. Not only are they generally disfavored as encouraging lack of care,<sup>1</sup> courts often strike them down under the generic guise of being "against public policy." Unfortunately, courts have been reluctant to offer meaningful guidance as to what exactly that means. They have chosen instead to utilize a case-by-case, totality of the circumstances approach because, "No definition of the concept of public interest can be contained within the four corners of a formula." *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963).<sup>2</sup> So no matter how

careful someone is in drafting a waiver, there is always the risk that the court will refuse to enforce it.

Fourth, realize that in construing a liability waiver, courts generally give the benefit of the doubt to the party against whom the contract is to be enforced. This means that if there is any ambiguity, or if the enforceability is a close call, the courts may choose to protect the party who signed the waiver. The Minnesota Supreme Court has echoed this tendency, warning that, "Exculpatory clauses are . . . strictly construed against the benefited party." *Yang v. Voyageaire Houseboats, Inc.*, 701 N.W.2d 783 (Minn. 2005).

Liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.

Fifth, make sure that the language used in a liability waiver is express and comprehensive so that individuals asked to sign such waivers clearly recognize what exactly they are agreeing to. The language "must be clear, unambiguous and explicit in expressing the intent of the parties." *Sweat v. Big Time Auto Racing, Inc.*, 12 Cal.Rptr.3d 678 (Cal.App.5.Dist. 2004). Use commonly understood words, short sentences, and the active voice.

Finally, liability waivers should be conspicuous so that they attract the reader's attention. They should not be buried in a long document or otherwise difficult to find.<sup>3</sup> The person against whom it is to operate should notice it.

While adherence to these guidelines will not guarantee that the liability waiver will be upheld if challenged, it increases the probability that the court will choose to do so.

• Elizabeth L. Hutton

<sup>1</sup> "Exculpatory agreements have long been disfavored in the law because they encourage a lack of care." *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006).

<sup>2</sup> See also *Hanks v. Powder Ridge Restaurant*, 885 A.2d 734 (Conn. 2005) ("The ultimate determination of what constitutes the public interest . . . must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations.")

<sup>3</sup> See *Leon v. Family Fitness Center (No. 107), Inc.*, 71 Cal.Rptr.2d 923 (Cal.App.4.Dist. 1998); *Sydlik v. REEIII, Inc.*, 195 S.W.3d 329 (Tex.App. Houston 2006); *Tamez v. Southwestern Motor Transport, Inc.*, 155 S.W.3d 564 (Tex.App. San Antonio 2004).