

MEMORANDUM OF LAW

DATE: November 3, 1992

TO: Virginia Towery, Risk Management Department

FROM: City Attorney

SUBJECT: Liability Waivers for City Employees

The City of San Diego offers a variety of programs for its employees through its Wellness Program. The programs are taught by Sharp Center for Health Promotion employees through the bond defeasance program and by volunteer public consultants and volunteer City employees.

You have asked if the programs should be discontinued, and if not, whether City employees who participate in the programs should be required to sign waivers.

There is no need for the City to discontinue these activities. They clearly provide a benefit for City employees. Whether a waiver is necessary will depend upon the nature of the program.

As a general rule, programs which contemplate no risk of injury, such as the classroom nutrition classes, would require no waiver. In other types of classes, such as exercise classes, where some risk of injury may be involved waivers are advisable.

It is commonly held misconception that waivers are not binding. However, the courts have consistently upheld the validity of waivers where they are not fraudulently induced and are sufficiently clear as to the risks being assumed. See, for example, *Madison v. Superior Court*, 203 Cal. App. 3d 589 (1988) (scuba diving); *Hulsey v. Elsinore Parachute Center*, 168 Cal. App. 3d 333 (1985) (parachute jumping) and *McAtee v. Newhall Land & Farming Co.*, 169 Cal. App. 3d 1031 (1985) (motocross).

The key point the courts have stressed is that the language of the waiver must adequately apprise the individual of the harm from which the provider is being released. For example, *Hohe v. San Diego Unified Sch. Dist.*, 224 Cal. App. 3d 1559 (1990), is a case involving a student who was injured from a fall while participating as a volunteer for a hypnotist at a school program. The court found that the release had not been fraudulently induced and was, therefore, not against public policy. The court held, however, that the release did not sufficiently apprise

plaintiff of the risk to which she was exposing herself. In this case the release and waiver focused on mental and nervous disorders, defamation, and broadcast rights, rather than on physical injuries. Since the plaintiff was physically injured, and was not apprised of the potential for that type of injury, the court concluded she had not waived her rights with regards to those injuries. Therefore, when creating a waiver and release form, it is imperative that all potential harms be considered.

I am attaching two types of sample waiver language that are clear, unambiguous and general in nature. The decision as to which waiver to use will be largely dependent on the type of activity involved. Each waiver may be altered to fit your specific needs.

Although Sample I may be too extensive for your purposes, it is a good example of the clarity necessary for a waiver to withstand a judicial challenge. The Sample II waiver is modeled on the waiver used by the San Diego Police Department ride-along program. If you would like to alter the language to better suit your purposes, I would be happy to review any proposed language. If you have any further questions, please feel free to contact me.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall

Deputy City Attorney

SAM:mrh:502(x043.2)

Attachments

cc D. Cruz Gonzalez

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TOP