



# “The Waiver” and COVID-19

Being confrontational is counter-productive.

BY LAWRENCE F. KOBAK, DPM, JD

**M**any podiatrists are afraid of two things right now: first, a patient suing for contracting “the virus” in their office; and second, an employee suing for contracting “the virus” in their office. “Authorities” are advising having the patients and employees sign a waiver to avoid this problem. This article examines the ramifications of such a strategy.

The psychology of signing a waiver potentially goes both ways. If the patient or employee is willing to sign, the feeling is that they are less likely to sue. Of course, asking your patients and employees to sign can make each group very suspicious that something is wrong with your practice infection prevention program.

## What Is a Waiver?

A waiver involves an act of or giving up a right to a claim against a party. In plain English, a person or corporate entity may sign a piece of paper giving up their right to sue for a reason. The person signing the waiver

cannot be coerced into signing the waiver. Nobody can say with 100% certainty if a COVID-19 liability waiver would be enforceable. As a general principal, most states will enforce a liability waiver from another person’s negligent behavior.

We are constantly exposed to waivers. You buy a ticket to go to the ballpark (in pre-COVID-19 times) and

were required to be placed on the cigarette packs. They claimed, and continue to claim, that the smoker was warned, and smoked the cigarettes anyway; do not blame us that you are dying of lung cancer, hypertension, stroke, etc. Prior to the warnings, they had no such defense. If you have a warning and you “come to the hazard”, that might insulate you, the owner, from liability.

## The psychology of signing a waiver potentially goes both ways.

on the back of it, the ballpark disclaims any liability for being injured by a foul ball. That does not translate into a blanket immunity from liability. You are not forced to read the back of the ticket with the waiver prior to purchasing the ticket. Many jurisdictions have held that the ballpark has an obligation to place netting in the most dangerous areas of the stands to protect the fans.

Speaking of dangerous, the cigarette companies welcomed the warnings that

What if a legally sophisticated waiver was drawn up by a fancy team of attorneys and you shove in your patient’s face to sign or you refuse to treat them? That will most likely not fly. If there is even a little bit of wiggle room on the terms of the waiver, the terms will be interpreted against the “sophisticated” party that drew them up. Also, a threat of no care and treatment if they did not sign the waiver could be found that

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WAIVER OF LIABILITY



*Waiver (from page 41)*

you abandoned your patient.

Three states—Virginia, Connecticut, and Montana—have refused to enforce liability waivers. Alabama will generally enforce a clearly written liability waiver. Interestingly, Washington, DC. does not allow a waiver for gross negligence or recklessness. Many states require that liability waivers be clearly written and easily understandable to all parties prior to the parties agreeing to the terms.

If you needed treatment on an emergency basis, and the podiatrist stated she would not treat you unless you signed the waiver, would that involve coercion? Probably. The waiver would not be enforceable. If the patient was not mentally competent or was a minor, their signature on a waiver would also be next to worthless. Do not bother.

Back in the 1980s, some podiatrists started having their surgical patients sign medical malpractice waivers. That was their way of attempting to solve the malpractice crisis. Other physicians also attempted this action. Time after

As if you did not have enough to deal with, let's examine practice guidelines and standards of care. The standard of care for a healthcare provider is what the average podiatrist, practicing in your area or similar area, under similar conditions, would do.

### Practice Guidelines

A practice guideline is a document that defines a generally accepted

you choose to require a waiver for your patients, you must decide how to do it. Are your patients told about the waiver prior to their coming to the office? That would be better as they would have notice—some time to consider if they want to agree to the waiver or not. Be prepared for some very contentious phone calls and patient ill-will. The nature of the waiver should be explained to each

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## Do not copy a waiver off the Internet and give it to your patient to sign.

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course of action. In this case, it would define a generally accepted course of action that a podiatrist or other healthcare provider should follow to prevent the spread of the COVID-19 virus in their office. The generally accepted guidelines in the case of COVID-19 are from the CDC. You may personally disagree with the CDC COVID-19 Guidelines, but you must deal with them. If you do not practice within accepted guidelines concerning

patient prior to obtaining their signature. There will be questions. Next to the patient's signature, best practice would dictate that the signature is witnessed by someone, perhaps one of your employees. Keep in mind that this will be using precious time that you, the doctor, will end up paying for.

Do not copy a waiver off the Internet and give it to your patient to sign. In different states and different settings, different wording is more appropriate. Please be the podiatrist, not the lawyer!

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## A practice guideline is a document that defines a generally accepted course of action.

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time, various state courts voided the waivers as a matter of public policy. Public policy is a doctrine that uses common sense and accepted public opinion on matters of health, safety, and welfare to protect the people. Most courts ruled that enforcing patient waivers prior to surgery did not serve to protect the citizens of that state.

Before we proceed, it is important that we determine exactly what would be the basis of the patient or employee suing you. Usually, the basis for a suit such as contracting a communicable disease in a medical setting involves negligence on the part of the healthcare provider—in our case, a podiatrist. Negligence is the failure to do something which the “reasonable” podiatrist should do or something the reasonable podiatrist should not do. These “to dos” and “not to dos” involve standards of care and practice guidelines.

this pandemic, you might be called upon to answer for your actions in front of your state board of podiatry.

Back to negligence. If the practitioner follows accepted practice guidelines concerning preventing the spread of COVID-19 in their office, could they still be successfully sued if one of their patients somehow demonstrably contacts the disease in the office? The answer should be no. If you had followed the guidelines, you would have acted in the generally accepted course of action of the average podiatrist in that locale and situation and be shielded from being found liable for negligence. Of course, that is for a jury to decide. An enforceable waiver would prevent the lawsuit from going near a jury; it would be dismissed.

### The Patient and a Waiver

If despite what you have read,

### The Employee and a Waiver

If one of your employees could prove being exposed to and catching the COVID-19 virus in your office where she/he works, the employee might be covered under workers compensation. Of course, that depends upon which state is involved. If you provide disability insurance, that too might cover an employee who was exposed in your office setting, depending upon the terms of the policy. If you intend to go the “waiver route”, first think of the tremendous ill-will generated in “asking” your employees to sign a waiver. Will your employees want to come to work for you if you seemingly care more about any liability than your employees' safety?

### Conclusion

By now, you have probably concluded that the author is not a big fan of relying on waivers to shield your liability in matters COVID-19. You

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would be correct. Your patients and staff are going to think you are taking short cuts with their safety. Take the time and effort into having your work-

ment room should be cleaned prior to each patient. Remove your instruments from a sterile pack, making sure your patient and staff see you doing this. Everyone that comes near your office should get the impression

You will want to make a lasting positive impression on both your staff and patients. That is the “take away” from this article. Use this as an opportunity to impress your patients and staff, not to alienate them with a confrontational piece of paper called a waiver. **PM**

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## Patients and staff will remember how you handled COVID-19 long after this pandemic.

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place in compliance with CDC Guidelines. Schedule appointments so that your patients can wait outside in the parking lot to be called on the phone by your front desk. Have hand sanitizer in each room of the office. Have your entire staff use masks. Require your patients to wear masks. Your masks should not be hanging from your ears.

Set an example. The bathrooms could be cleaned every hour with a signed log clearly visible. Each treat-

ment room should be cleaned prior to each patient. Remove your instruments from a sterile pack, making sure your patient and staff see you doing this. Everyone that comes near your office should get the impression that you are a “germophobe”. Your office must look and smell clean. If your office, in fact, is clean and disinfected, you will have a welcoming environment for your patients and staff. They will want to be there. They will tell others. Compare that to the adversarial waiver-signing scenario.

By setting an example of cleanliness, you have turned a negative situation into a positive one. Patients and staff will remember how you handled COVID-19 long after this pandemic.



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