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Foot Loose: Legal Liability Issues Relating to Barefoot Exercise

By Alexander "Sandie" Pendleton

Christopher McDougall's bestselling book *Born to Run,* and the extensive discussion therein regarding the reported benefits of barefoot running, have helped to ignite a new exercise trend (craze?). Fitness center owners are being asked if members can exercise barefoot, or are just seeing members working out barefoot in areas of the facility where, until recently, no one wanted to do so. What to do? Should your facility prohibit barefoot weight lifting? What about barefoot running on treadmills? Leaving aside the aesthetic issues associated with barefoot exercise, here are some questions to think through from a risk and liability management standpoint:

1. Does the law in your area require that footwear be worn in your facility?

You want to ensure that your facility is operated in accord with all applicable state and local laws. Although signs stating "NO SHIRT, NO SHOES, NO SERVICE" are ubiquitous, very few municipalities or states actually have laws or regulations prohibiting persons from being barefoot in public (and those regulations that do exist often apply only to employees, not patrons). Before permitting barefoot exercise in your facility, you should know whether your locale is one of those rare areas that have laws or regulations applying to customers in public places.

2. Would it be "reckless" or "gross negligence" to allow barefoot exercise in your facility?

Generally, courts in most states enforce well-drafted waiver-of-liability agreements entered into between recreational-opportunity providers and adult participants, when the injury in question was caused by "ordinary negligence." However, it is also generally true that courts will ***not*** enforce waivers when the provider's actions exceed ordinary negligence. Different states use different terms to describe this beyond-ordinary-negligence standard; some call it "gross negligence," while others use the term "reckless" or "wanton" behavior (there's also another level above that—harm caused intentionally—but that is another topic).

Discussions regarding the difference between ordinary negligence and worse kinds of behavior fill lots of law books and judicial decisions. Generally, it can be said that the level of culpability "beyond ordinary negligence" involves a conscious disregard of an unreasonable and substantial risk of serious bodily harm to another. An online search conducted when this article was originally prepared (summer 2010), did not reveal any reported cases addressing the question of whether a gym that permitted barefoot exercising engaged in *gross negligence, reckless behavior* or *wanton behavior*. That is not surprising, given the newness of the barefoot running/exercise trend.

You should find out how courts in your state define the terms "reckless" or "wanton" behavior, or "gross negligence," but given the usually high standards that courts typically set for those two terms, and the fact that there are reported/recognized benefits to barefoot running, it seems unlikely that courts or juries will conclude that permitting barefoot exercisers would constitute recklessness or wanton behavior, or gross negligence, on the part of a facility.

3. Do you have a waiver of liability that would cover barefoot exercise?

If you operate in a state that enforces waivers as to ordinary negligence, you probably already are asking your members to sign waiver agreements, or membership agreements containing waiver terms. If your waiver terms are well-drafted, they probably contain some discussion of some of the risks associated with exercising in your facility, and ask the patron to agree to either assumption of risk terms, or a waiver with knowledge of the risk, or both. If you are going to allow patrons to exercise barefoot, you should have your current wavier agreements reviewed (by us, or some other lawyer familiar with this area of the law), to determine if those are well-drafted and up to date, and whether the waiver would cover injuries caused due to barefoot exercising. You should especially do this if your facility is in one of the many states (such as, for example, New York, Wisconsin and California) that are strict when it comes to waivers.

4. Do the rules of your facility need to be updated?

Many rules for facilities that we have drafted or reviewed have a provision indicating something like "proper footwear" is required outside of all pool and locker room areas. What do your facility's rules say? If you permit barefoot exercising, you want to ensure that your facility's rules are consistent with that policy. You don't want to be in a position where someone is injured while barefoot at your facility, and the person's lawyer is able to point to inconsistent policies or a failure by your facility to enforce its own rules. As part of your policy review, you should also consider equipment usage, and whether permitting barefoot use of equipment like weight machines and/or treadmills, would be contrary to the manufacturer's warranties or warnings, or would jeopardize your facility's ability to obtain contribution or indemnification from the manufacturer in the event of an injury.

5. Do staff procedures at your facility need to be updated?

Does your facility have a written policy or procedure designating who is responsible for inspecting certain areas or equipment of the facility, and how often, and that requires staff to document that the procedure was followed? If not, you may want to consider that. The failure to have and/or follow such a procedure can result in liability. For example, a recent California appellate case involved a fitness center patron who slipped, fell and was injured, when her foot became stuck on "something sticky" on a treadmill. The patron indicated that she had been at the facility for 85 minutes before she was injured, and during that time period, no employee of the facility came through to inspect (and then clean or put out of service) the treadmill upon which she was later injured. The court of appeals in that case held that a busy facility's failure to inspect (and then discover and cleanup the sticky substance), in the 85 minutes before the patron was injured, could be found to be negligence on the part of the facility. There are similar "slip and fall" decisions in other many other states—including Wisconsin—indicating that, for example, a store's failure to have and follow a procedure regarding inspecting for and cleaning up spills on floors constitutes negligence on the part of the store. So, if you are going to allow barefoot exercise in your facility, you should think through the issue of whether you should modify how frequently your staff is required to inspect and clean surfaces with which bare feet may come into contact.

6. What to do? Should your facility have a Separate "Barefoot-Exercise Waiver"?

If you are ever called upon to defend in court a claim made by an injured patron, you want to be able to explain to the judge and jury how you acted reasonably, so as to operate your facility in a safe and responsible manner. That should be one of the goals of your risk management program. So, before you decide to allow barefoot exercising throughout your facility, in addition to the above issues, you should think through the injury risks, equipment warranty issues, insurance issues, financial issues (risks and benefits of being a club that permits barefoot exercising), and the legal risks associated with barefoot exercise.

Additionally:

- If you decide to permit barefoot exercising, and your current waiver would not cover that, we suggest that you should have, and ask patrons to sign, a separate barefoot waiver, rather than trying to incorporate those terms into the membership agreement (unless your facility is in a state that would not enforce such a standalone agreement). Your barefoot waiver form (like all waiver forms) should be prepared, or at least reviewed, by a lawyer who is knowledgeable about this area of the law. An important part of that waiver form should be an intelligent, concise discussion of the risks associated with a patron's choice to exercise barefoot. While many of those risks may be remote (for example, the potential for exposure to things that can cause serious diseases, such as the MRSA bacteria, or the HIV virus), your waiver should at least identify them briefly. If a claim later arises, having such language provides your lawyer with the tools needed to let him or her explain to a court that the injured/complaining barefoot exerciser made a knowing, intelligent, informed decision to exercise barefoot, despite having knowledge of the associated risks.

- If you decide to permit barefoot exercising, and use a separate barefoot wavier form, you should consider updating your facility's rules, so they indicate something like the following:

Barefoot Exercise: Barefoot exercise is not encouraged in the facility. Patrons who choose to exercise barefoot in the facility may be increasing their risk of injury due to a variety of factors. Barefoot exercise is permitted only if the participant has previously signed the facility's Barefoot Exercise Waiver of Liability form.

- From a staff procedures standpoint, think through the issue of whether your facility, if it is going to permit barefoot exercise, needs to alter the procedures it has for floor and equipment cleaning, or

how often cleaning occurs. While you're at it, ensure that you have in place a system for recording that the schedule was not only created, but also followed (document, document, document).

Conclusion

There is never a dull moment in the fitness industry, and there is always some new exercise trend. Barefoot exercising is the latest such trend, and with it come inevitable risks and legal issues. Facilities that take a reasonable and proactive approach to such developments, should be able to both accommodate the desires of barefoot exercisers, while at the same time protecting the facility from undue legal and financial exposure. If we can assist you in developing your facility's new waiver agreement, rules or procedures, contact us.

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About Pendleton: Alexander "Sandie" Pendleton is a shareholder with the Milwaukee law firm of Pendleton Legal, S.C. Sandie has over twenty years of experience counseling clients involved in sports and recreational activities, including power sports activities, and is a frequent speaker and writer on recreational liability issues.

About Pendleton Legal, S.C.: At Pendleton Legal, S.C., we continue to believe the right to the "Pursuit of Happiness" is a right worth preserving. Our S/F/R Team (Sports, Fitness & Recreation Team) guides and fights for businesses and organizations that provide recreational opportunities and products, so that our clients are not overwhelmed by liability that might otherwise threaten their continued success (or even existence). Preserving the right is often not an easy or simple task, but we know this mission is an important one to our clients, and to the future of a free society. In addition to our S/F/R services, we provide legal expertise across the numerous areas of law encountered by businesses and organizations in the normal course of their day-to-day operations and growth. If you would like to explore whether we can help your organization achieve its mission, contact us**.**