Civil Actions - Professionals and Courts Struggle to Agree On Industry Standards

By Andrew Cohen
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Put yourself in some uncomfortable shoes for a moment. You're the owner of a recreation center, and you and your architect have been sued for negligence with regard to the design and supervision of your gymnasium. Under questioning by the attorney for the plaintiff (a 16-year-old girl who was left paralyzed after a collision with a gym wall), an expert witness recounts the dimensions of your gym and gym wall padding, and declares that neither meets the recognized standard for safety.

Your jaw tightens and, eyes (and spirits) dropping, you scribble on your notepad and slide the message in front of your lawyer: "What standard?"

This is perhaps a fanciful scene — after all, you're aware of all the relevant standards, aren't you? — and yet, it occurs more frequently than you might think. Because confusion surrounding standards is often present among newcomers to the field of sports architecture and program administration, the same confusion reigns, when a case is brought to trial, among every person connected with the proceedings.

Well, almost every person. Expert witnesses brought in by both sides will voice with complete certainty the existence or general acceptance of a certain industry standard — something that frustrates a number of professionals specializing in sports law.

"I remember a case involving a person who fell off a treadmill, and a witness for the plaintiff kept saying that such and such was the standard for fitness center design," recalls Herb Appenzeller, editor of the newsletter *From the Gym to the Jury* and a recognized authority in the field of sports law. "When I got up there, I said to the judge, 'If you turn to this book that he's been citing, you'll see this is in no way a standard.' We won our case hands down. That witness is an attorney, and he's a friend of mine, but he was way off base on that one."

Attorney Gil Fried, an associate professor at the University of New Haven and a frequent expert witness, says it's the dearth of meaningful government regulations in the sports industry that leads to the practice of citing alleged standards from books or magazine articles that may be inaccurate or not actually adhered to by facility architects or owners. "I've worked on a number of cases where the other side has said, 'This is the standard,' " he says. "My response is, 'Prove it.' Just because one organization says something is a standard doesn't make it a standard."

In one paraplegia case that hinged on the slipperiness of a gym floor allegedly caused by improper air circulation, Fried called the editor of the book cited by opposing counsel to ask him

where the book's figures for humidity and temperature came from. It turned out that they had been taken from a book about the design of office buildings, which Fried points out differ significantly from gymnasiums in their engineering, heat load and type of ventilation system used.

"Upon examination, the opposing expert was not able to prove that the defendants had violated a specific industry standard for gymnasiums," Fried says. "I suppose his assumption was that if something is published, it is a standard. I maintain that unless a government entity has adopted a standard or at least 70 percent of people in the industry follow it, it's not a standard."

Almost by definition, courts set standards. Lower courts, it is true, often rule similar cases in contradictory ways, because of subtle differences in argument and laws that vary from jurisdiction to jurisdiction. But once a higher court rules on a particular issue, a precedent has been set that other courts are hesitant to overturn.

Since courts rule on — and sometimes reject — legislation, they can have a greater impact on the setting of standards than can lawmakers. However, legislatures also do their part. A good example would be in the area of automated external defibrillators. Over the past six years, a number of state legislatures have passed AED-related laws and, although more of these laws encourage broader availability rather than create new regulatory restrictions, they have become the basis for a new standard of care in some high school gyms and health clubs.

There is a larger class of standards of care, legally speaking, that don't quite meet the "must do" threshold — recommendations (or guidelines), and beneath those on the flow chart, best practices. Recommendations are suggested practices — not things you must do, but things that (it is believed) you should do because they will benefit you, the consumer or both. A court of law might not hold you liable for failing to do something you weren't required to do. A best practice doesn't even meet that low threshold; it's just an example of one way that people do things. If enough people follow a best practice, though, it can become recognized as a standard of care, and then it is up to an organization to codify it as a standard, or a judge or jury to find a facility owner negligent — and here we are, back in court.

A judge, it should be noted, will often accept a determination of a "recognized standard" that falls somewhere between a government regulation and Fried's 70 percent rule. Just as a dictionary includes recently coined words once enough people use them, standards become standards by joining the industry vernacular. Steve Tharrett, president of Club Industry Consulting and lead editor of the second and third editions of the American College of Sports Medicine's *Health/Fitness Facility Standards and Guidelines*, notes that the very first of 21 standards (and 36 guidelines) listed in the book's third edition — the need to perform pre-activity cardiovascular risk screenings — came about in a somewhat organic fashion, helped along in no small part by the book's early editions, in which it was included as a "standard" even though it was not yet a standard practice.

"Everybody agrees that a pre-activity screening is the right thing," Tharrett says. "Do 100 percent of fitness centers in the industry do it? No, probably more like 80 percent now. But when the first edition of the book came out, maybe 10 percent did it. So one of the by-products of setting

standards is they actually improve the delivery of service in the industry."

This fluidity in the general adherence to standards means that a judge adjudicating a case must research actual industry practices, just as each side's expert witnesses are claiming to be doing. Professor Paul Anderson, associate director of the National Sports Law Institute at Marquette University, says a "common practice standard" can indeed hold weight in court, since the judge will be looking to determine the level of duty that one could expect of a "reasonable" person or organization. It's the judge's call — and yet, Anderson says, "judicially imposed standard" is not really an accurate description.

"I've been working on a lot of Title IX cases, and most lawyers know and could easily show that virtually every high school in the country violates Title IX," Anderson says. "Does that mean we'll have eight billion lawsuits? No. Because until you have someone who complains about it and can show there's been some harm, it doesn't matter whether people violate a standard — that's not the point. Until someone makes a deal out of it, the standard is just there, and people have to decide whether to follow the standard or not."

Standards — or recommendations, or best practices — are the work of a range of organizations, from independent bodies such as ASTM International and the Consumer Product Safety Commission (CPSC) to sports or fitness organizations such as ACSM and the National Federation of State High School Associations (NFHS). In addition, professional sports leagues may have standards that the various franchises are expected to follow — for example, rules delineating the height of the glass or the hanging of nets in hockey rinks to protect against flying pucks, or the specifications on backstop screens in ballparks. Although some organizations write standards as a way of boosting the credibility of their members, most write them in response to a present problem or in anticipation of a future one (the National Hockey League's current netting standards were a direct response to the 2002 death of 13-year-old Brittanie Cecil, a spectator at a Columbus Blue Jackets game).

Beyond the obvious concern — the possibility that one organization will set standards that contradict another's — there exists more than a little distrust of other, less altruistic motivations that lead to the adoption of certain industry standards.

It is no secret that suppliers of equipment and facility components have an influence over the writing of standards; indeed, ASTM International's 30,000 technical experts (producers, consumers, government officials and academicians) tilt heavily toward those representing the manufacturing sector. Fried, a former ASTM member, is critical of that bias, noting as an example an ASTM standard that calls for chain-link fences a minimum of 6 feet high to completely surround baseball fields.

"It would seem to make sense, right?" Fried asks. "But how many fields can you think of that actually have it? It wasn't the sports safety division of ASTM that developed this, but the fencing industry. Who knows how they came up with it? Isn't it potentially self-serving, so they can sell more fencing?"

A glance at the leadership of ASTM's Committee F14 on Fences shows eight committee officers,

seven of whom represent fence producers and suppliers (the committee's spring meeting is held in conjunction with the American Fence Association trade show). The eighth committee officer, Art Mittelstaedt of the Recreation Safety Institute, told the ASTM's *Standardization News* in August 2003 that the standard "has its origins in the safety of the player as well as the spectator. The height of outfield fences at 6 feet avoids impact to the kidney and head areas of the body to outfielders. It provides a visual barrier and contains fly balls as well as denoting home runs. The sideline fencing protects the spectators from line drives and other hits to the bleachers."

Christine Sierk, ASTM's staff manager for technical committee operations, calls the standard-writing process at ASTM "completely open and transparent," noting a host of procedural safeguards that include many hallmarks of the United States' bicameral system of government, replete with subcommittees (unanimous subcommittee approval is required to send a standard to the full committee for discussion and vote), vetoes and veto overrides requiring a two-thirds majority. Sierk rejects the notion that a process this "democratic" can be unduly influenced.

"A company can have 12 people on the main committee and one voting member of each subcommittee, but each company only gets one vote on the main committee," Sierk says. "There's also a rule that we cannot have more producers than combined consumers and general interest members. It cannot be manufacturer driven — this is not a consortium."

Sierk notes that anyone can come to ASTM to propose a new standard or suggest changes to an existing one. That's what the father of Kevin Dare, the Penn State pole-vaulter who died in a fall in February 2002, did, and today Committee F08 on Sports Equipment and Facilities has one approved standard for pole-vault landing systems and two proposed standards for pole vault base pads and box collars still under consideration. That sort of public involvement has been part of ASTM since its formation in 1898 as the American Society for Testing and Materials, when passenger advocates came together with an admittedly larger contingent of steel manufacturers and railroad barons to bring about the standardization of steel rails across the country's railroad system. "We have a guy whose only job is to review membership," Sierk says. "There are very strict rules we have to abide by; our standards truly must be the result of industry consensus."

Professor Todd Seidler, coordinator of the graduate program in sport administration at the University of New Mexico and a consultant on sports and recreation facility planning and risk management, says one thing that troubles him about the process is the fact that committee members are often called upon to vote on subcommittee proposals that are completely outside their area of expertise (Sierk says that committee members are encouraged to abstain, with comment or without, in such circumstances). Yet, echoing Fried, Seidler concedes that his problem with standard-writing bodies such as ASTM might have more to do with perception than reality.

"They came out recently with a standard for wall padding, which I think is a very good standard, but it was all the manufacturers who were voting on it. If they were to create a standard that called for double the amount of padding they suggest now — well, the thing is, I think most places do need to double the amount of padding that they have," Seidler says, laughing. "But again, would such a standard be developed because there is a need, or just because of greed on the manufacturers' part? I'm a little suspicious of it."

An industry has to be ready to accept a new standard. That doesn't just mean that facility owners are amenable — it also means that the technology is there to support the standard. Going back to the example of AEDs, 10 years ago there was no standard requiring or guideline suggesting that that particular piece of equipment be purchased. But times change — slowly — and now, like fire extinguishers, the AED is a standard piece of equipment in public spaces such as airports and hotels.

If there has been widespread resistance to AED standards in fitness center settings (and there has), it is not because fitness center owners don't recognize the potential health risk to club members engaged in vigorous exercise. It is that a standard must be calibrated to match the will of the people who might adopt it at this moment in time. Set the bar too high and club owners will resist compliance. And, counterintuitive though it may seem, a judge will have a harder time finding a club where a member collapsed and died on the basketball court negligent, because the prevalence of AED use in the industry falls short of what could be considered an "accepted standard."

This is essentially the predicament that ACSM found itself in when, in 1992, it published its first edition of *Health/Fitness Facility Standards and Guidelines* to fierce opposition. "There was evidence that, because clubs were getting more into the health-care arena, if we didn't standardize, the government would do it for us," Tharrett says. "At first, ACSM assigned people to lead this project who were not industry people but scientists, so it became kind of an unreal document. Not that it was bad, but it was too far-reaching in comparison to where the industry was or where it was prepared to go."

Although its committee members were practitioners rather than equipment manufacturers (as befits a set of standards devoted to program operation rather than facility design or equipment specification), ACSM by the book's second edition (1997) had essentially adopted the ASTM model, with standards proposed by subcommittees, rough standards drafted and made available for public comment, endless revisions and, eventually, standards on which there was widespread consensus. The most important alteration to the process, however, was that where the first edition featured more than 300 standards, the second settled on six broad standards (example: management should provide proper supervision of the facility) and then delineated a host of guidelines that could help a facility owner meet the umbrella standard. By the third edition, released in October 2006, the number of standards had reached 21.

"I don't know that there's ever 100 percent consensus, but as long as your target audience is involved and you give them the chance to provide feedback and input — and you don't try to push the envelope too fast — then the process seems to work more effectively," says Tharrett. "The third edition gets used a lot in club-related lawsuits, by defendants as well as plaintiffs, and in universities as a teaching tool. It has begun to represent a real consensus in the industry."

Recommended Reading

The National Federation of State High School Associations has a problem: The safety of its athletes is of paramount importance, but the majority of high schools feature facilities that don't measure up to modern notions of safe play environments. Setting a standard for, say, the minimum allowable distance between a basketball court and cinderblock walls that surround it

would either render 20,000-some gyms obsolete or, if older gyms were grandfathered, a meaningless standard that few schools meet.

The organization's recommendation for court boundaries, therefore, takes heed of this reality — to the detriment of safety, risk management experts say. The NFHS — and, it should be noted, the National Collegiate Athletic Association — recommend 10 feet of space around the court's perimeter, but term a minimum 3 feet of space "acceptable."

The practical result of such a recommendation is that many facility architects, especially those less familiar with the specific requirements of sports activities, opt for the "acceptable" 3-foot distance over the "recommended" 10-foot distance, saving tens of thousands of dollars in construction costs but putting athletes at risk of injury and owners at risk of a catastrophic-injury lawsuit. Experts knowledgeable about out-of-court settlements (few such cases ever get to trial) say that gym-wall collision cases occurring in gyms with 10-foot buffer zones are routinely thrown out by judges, whereas those occurring in gyms with the minimum 3 feet of space cost school districts an average of $1.5 million.

Herb Appenzeller and Todd Seidler, two longtime authorities in sports law and risk management, have approached the NFHS in an effort to get its rules committee to remove the dual-distance recommendation or provide an explanation of safety and the importance of proper gym-wall padding. "As long as that's in there, plaintiffs are going to use that as the basis of their claim," says Appenzeller.

The problem goes beyond this one particular example, Seidler adds. " 'Standard' and 'recommendation' are used interchangeably in court, and we need to define the difference between them," he says. "People say something is a standard just because it's in a rule book, and I have to disagree. I have had to challenge that often as an expert witness."

law & risk standards

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