PART III

THE CLUB AND ITS MEMBERS
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Chapter 1
Membership Application

The completion and submission of your club’s membership application is the initial step in becoming a member of your club. Although the individual may or may not eventually become a member, this is your first opportunity to obtain needed information about the applicant and establish the ground rules for the relationship between the prospective member and the club. The membership application form may be short and is often seldom reviewed by the club’s manager or board, but it is a crucial document in the establishment of the relationship between the member and the club, which may last for many years. You need to consider the below matters when preparing or revising your membership application.

Inconsistencies and Ambiguities

Who is the member? One area with potential for problems is the lack of specificity as to who the member really is. It is frequently confusing as to whether the member is one spouse or the other or both spouses or a corporation or the person using the membership paid for by a corporation. Even though the club’s Bylaws may clarify these questions, inconsistencies and ambiguities may cause problems for the club.

For memberships held by a married person, clarify on the application which of the spouses is the “member.” This is especially important with member divorces where both spouses may be claiming ownership of the membership. If your club has
corporate memberships and a corporation is purchasing a corporate membership, clarify that the corporation is the member and that the employees are merely the persons designated to have the usage privileges. If a corporation is merely paying for an individual membership clarify that the employee and not the corporation is the “member.” If your application is clear on the identity of the member, then your other membership documentation can refer back to the application and allow the club to rely on the application to resolve any dispute.

Since a club’s application for membership is a relatively short document, it should not take you long to complete this type of review. A few minutes may be time well spent. Remember, you will probably be the person to whom the board looks to explain, “How could this have happened?” when an inconsistency or ambiguity is brought to its attention.

**Information About the Prospective Member**

Most applications will require the member to fill out standard information such as name, address, telephone numbers, sponsors, other club affiliations and names of the spouse and children. A thorough application will also require the driver’s license number of the applicant and perhaps even credit card information.

Why do you need the driver’s license number? If the occasion should arise where a member’s check is returned for insufficient funds, most states require you to provide the driver’s license number of the check writer in order for the district attorney’s office to assist in the collection effort. Providing a driver’s license when writing a check is common practice. However, the opportunity to collect such information seldom arises when a member writes a check to the club. Although requesting this type of information may seem intrusive, applicants for membership rarely complain. It’s a great relief to be able to access this required information if the situation presents itself in the future.

Why get credit card information? More and more clubs are allowing members to pay their accounts by credit card. The application is as good a place as any to get the proper billing information. Another increasingly common practice is to bill the member’s credit card to collect past due balances. In order to do this, the application must contain a pre-authorization from the member. Some states may have specific disclosure requirements for pre-authorized credit card charges. It is therefore
prudent to consult local legal counsel to determine if this proactive approach requires specific disclosures or if it is prohibited by law.

If your club performs a credit check on applicants for membership, it is recommended that you obtain permission from the applicant. This can be accomplished by merely adding a sentence to the effect that the applicant grants to the club permission to perform such credit worthiness check, as it deems appropriate.

The Contractual Relationship

In many instances, the membership application is the only document that a member signs. Members usually receive copies of the club’s rules and regulations and Bylaws, but they seldom “sign” to acknowledge this. Thus, it is important to include a provision in the application where the member agrees to be bound by the club’s Bylaws and rules and regulations. This is especially important in non-equity clubs where state corporation laws may not bind the members’ rights and obligations to the Bylaws. Without an express agreement in the application or the terms of the state corporation laws, you could be in the unenviable position of arguing that the terms of the Bylaws were merely implied.

It is reasonable to believe that the club’s Bylaws will be amended and changed as circumstances warrant. Accordingly, this possibility should clearly be stated. A thorough provision regarding amendments should state that the member recognizes that circumstances may warrant the modification of or the amendment to the club’s Bylaws. The member further recognizes that in certain instances such modifications or amendments may adversely affect the prior rights, privileges and obligations of the member, but that the member agrees to abide by the club’s Bylaws, as they may be amended from time to time. It is important to understand that the reference to amendments does not give a club free reign to make any change it wants. Changes that alter the fundamental nature of the membership may be viewed as being unenforceable unilateral amendments.

Another contractual matter to address is how account payments are allocated. The membership application should state that all payments are first applied to unpaid monthly dues and then to food, beverages and charges for other services. Courts are somewhat reluctant to require payment of monthly dues, especially if the individual argues he or she has not been using the club. However, if it is the agreement between
the parties that all payments are to be applied first to the payment of monthly dues, courts are less willing to modify an agreement between the parties.

**Statutory Requirements**

Many states require a membership application to contain specified disclosure text. This is especially relevant for clubs with exercise equipment or programs. In the 1980s many states enacted “Health Spa Statutes” that were designed to address the fly-by-night health clubs that would take in members’ money and then close the facility and leave town. Unfortunately, many of these laws were drafted broadly enough to arguably cover country clubs. Therefore, it is prudent to know what the laws require and make sure your application complies.
Chapter 2
Club Bylaws

General

The club’s Bylaws are the single most important document in establishing the policies and procedures of the club and how it is to operate. It can legally establish a contractual relationship between the members and their club.

Since case law regarding the rights and obligations of members and the club is an evolving situation, your club’s Bylaws should be reviewed at least every two or three years. Because areas such as membership categories do not change frequently, the review does not have to be a time consuming process. It is primarily undertaken to ensure that the club’s policies and procedures are in line with recent case law. The Board may elect not to take any action, but they should at least be aware of any potential liability.

Member Definition

As was mentioned in the discussion of the club’s application, it is crucial that the club’s Bylaws make it abundantly clear who the member is. The Bylaws and the Application need to consistently define who the member is. Persons who are not the member but who have usage rights (i.e., spouses, children and corporate designees)
should not be referred to as the “member.” Rather, the Bylaws should define such persons with designations such as “Spouse”, “Children”, “Designee”, and the like.

**Membership Rights**

The Bylaws should describe the rights and privileges of each membership category. It is useful to define the various facilities of the club (i.e., golf course, tennis facilities, swimming pool, fitness facilities and clubhouse) for purposes of identifying the facilities that a member may use. The Bylaws should also define who has usage rights under the membership. The membership needs to be clear whether the membership just has privileges for the actual member or do privileges extend to the member’s family? If family privileges are available, the Bylaws need to define what the family is. Does it include children? If so, what are the age limitations and must the children be single or living at home?

**Corporate Memberships**

Many clubs have corporate memberships. There is no “right” or “wrong” as to whether a club should have such a membership category. However, the club should be aware of the potential consequences of having such a membership category. There are two distinct issues. First is the consequence on the club’s tax-exempt status if the club is, in fact, tax-exempt. Secondly, the impact this membership category may have if the question of whether the club is truly a “private club” arises.

The tax exemption provided under §501(c)(7) of the Internal Revenue Code extends to social and recreational clubs only. This, almost by definition, means that the members must be individuals. Artificial entities, such as corporations and partnerships, are not within the contemplation of the statute. The Internal Revenue Service has consistently held that if a club has any of the artificial entities as members, then, to that extent at least, the club is dealing with the general public. This means that the gross income from the fees, dues, charges and assessments from these members is unrelated business income. Such unrelated business income may adversely affect the club’s tax-exempt status, depending on the amount of such income when combined with other unrelated business income. The argument could be made that such income is a nontraditional source of income, which may lower the amount of income the club could have without losing its tax-exempt status.
Corporate memberships may also affect whether a club can enjoy the First Amendment freedom of association protection for truly private clubs. To be successful in obtaining this protection, the club must show its social character. Having corporations as members will be difficult, if not impossible, to explain. Corporations and partnerships are businesses and, therefore, do not have the social characteristics needed to be a member of the club.

There certainly are instances where businesses pay a member’s club dues and charges even though the business is not the member. This payment by a corporation or other business entity may not adversely impact the club’s tax-exempt status. Since an individual is the member, the gross income realized from such member is not unrelated business income. This does not mean however, that payment of these amounts by a nonmember, i.e., a corporation, may not have to be explained. If the character of the club as a truly private club is being attacked, the club may have to explain why a social club would permit a business entity to pay the charges of one of its members. The business would only be interested in advancing business needs rather than social needs, and therefore, the club must not be purely “social or recreational” in nature. This being the case, some clubs do not permit corporations or business entities to pay a member’s club account.

**The Selection Process**

One of the most crucial tests in determining whether a club is a “truly private club” and, therefore, exempt from the jurisdiction of various governmental agencies, is the membership selection process. Governmental agencies have frequently argued that the fact that a club did not have a history of declining membership applications strongly suggested that the club was not selective. Courts have held, however, that if the membership selection process is a rigorous one, individuals who would not meet the membership criteria may well have not elected to apply for membership when declination was inevitable. Additionally, the selectivity criteria should be related to the social character of the club.

The point is not what process your club should use, but that it should be well documented in the club’s Bylaws. If the occasion should arise where the process is called into question, all requirements for admission into the club should be set forth in the
club’s Bylaws. Make sure that the entire process your club follows in determining whether an individual will be admitted as a member is in the membership admission section of your club’s Bylaws.

Divorce and Separation

Almost every club has had the situation in which married members of the club divorce, which causes discord within the club. Frequently, the member does not want his or her spouse using the club during the pending divorce.

Situations such as those discussed above call for the potential situation to be addressed in the club’s Bylaws. The Bylaws should state that if discord is created in the club during the divorce proceedings by either the member or the spouse of the member, including the failure to pay all amounts owing to the club, the club has the right to suspend the membership until the divorce is final, in accordance with the club’s disciplinary procedures. The Bylaws should also clarify that both spouses are jointly and separately liable for the charges incurred by the spouses during the divorce.

The Bylaws should also state that the membership is not divisible for any reason, including separation or divorce. Furthermore, the Bylaws should provide that a membership may not be transferred to another individual, by court order or otherwise, unless such transfer is accomplished in strict compliance with the club’s Bylaws; assuming the club has some transfer policy. Since each person must go through the membership admissions process, you do not want a court awarding the club membership to a spouse that has not been approved for membership. Provisions such as these can give the club the flexibility it may need when a complicated divorce arises.

Grievance Procedures

Usually courts leave the discipline of members by their club or association up to the organization. However, it is not uncommon for members who have been suspended or expelled from a club to claim the club’s disciplinary procedures violated the member’s constitutional right of due process.

Although courts may differ as to what is needed to meet this due process requirement, a few minimum requirements are consistently found. The club’s grievance
procedure should give the member notice of any hearing concerning possible disciplinary action. The notice should be given well enough in advance so that the member has the opportunity to prepare any oral or written response he may deem necessary. A minimum of 15 days’ notice is recommended. The member to be disciplined should also be advised in the notice of the charges that have been brought against him. Finally, the member should be given the opportunity to be present at the disciplinary hearing and the opportunity to be heard.

There have been some cases that also require that the member be given the opportunity to confront those who have made the charges against him. Most clubs do not go to this extent, but your board should be aware that the failure to provide this right to the member may deny him of the due process that the constitution requires. Another thing your board should be aware of is that care should be given to ensure that during deliberation nothing is discussed by the board or Grievance Committee other than those circumstances or events specified in the notice.

For example, if some member of the board or Grievance Committee is aware of other circumstances not listed in the charges, those situations should not be discussed or even mentioned. The reason for this is that since a member is to be given notice of the charges, if the governing body may have given consideration to circumstances not contained in the notice of charges, then the member’s due process would have been denied. It is almost impossible for the governing body, or anyone for that matter, to prove a negative. In other words, although they discussed something negative about the member that was not contained in the charge, it did not influence their decision. Such discussions have been held to violate the member’s right to due process.

All clubs should conduct a thorough review and discussion of the club’s grievance procedure to ensure that it provides the club’s members with due process.

**Member Delinquencies**

There are a couple of recommended areas for consideration by the board when reviewing the club’s disciplinary procedure for delinquencies. The first is to provide that any complaint is to be submitted to the club manager. The club manager and/or the president of the club should decide if the matter is to be referred to the board or
Grievance Committee, as the case may be. If the club manager and president fail to submit the complaint to the appropriate governing body within 30 days, it shall be deemed a finding by the club manager and president that the charges lack sufficient merit to proceed. Having this step in the grievance procedure permits the club to effectively deal with complaints that have no merit without involving more than a minimum number of people.

Another recommended provision for consideration is to give the club manager the right to initiate a complaint. Usually the club manager is aware of most problem members within the club. Sometimes a member may regularly be rude to club staff or other members, but no one will file a complaint. In the case of rudeness to the club’s staff, this can be a real problem. Frequently, the staff has only the club manager to protect them from unruly members.

Another potential problem with suspending or expelling members is their continued use of the club’s facilities as a guest of a member. It was not the fact of the membership that caused the problem, but rather the presence of the individual at the club. Therefore the Bylaws should have a provision stating that if a member is suspended from the club, he may not use any of the club’s facilities either under his own membership or as a guest of another member during the suspension. Likewise, if a member is expelled from the club, his expulsion should permanently bar the individual from admittance to the club, including admittance as a guest of a member.

Any suspension or expulsion policy should specifically state that the member’s family, who would also be entitled to use the club’s facilities by virtue of the member’s membership, shall be excluded from the club’s facilities during the period of the suspension or permanently, in the case of expulsion, unless such family member obtains a membership in the club in his own name.

**Delinquency, Posting and Late Charges**

Every club has a policy to address members who fail to pay their club dues and charges in a timely manner. Since the club’s statement is due upon receipt, most clubs’ Bylaws state that accounts that are unpaid within 30 days are considered delinquent. Clubs should also consider provisions to address frequent delinquencies. Each club usually has one or two members that are always delinquent in paying their club account. However, they always pay before any disciplinary procedures are taken against them.
A frequent delinquency provision may read as follows: “Any membership that becomes frequently delinquent, which is defined as more than 30 days late four times during any 12-month period, may be suspended or canceled. Any such suspension or cancellation does not prejudice the right of the club to collect the indebtedness.” This additional leverage for the club can improve the collection of accounts receivable.

More and more clubs are allowing members to pay their accounts with credit cards. One of the positions of this practice is that it can give the club a ready source of funding for past due accounts. As discussed in the Membership Application section, the Membership Application and the Bylaws can contain provisions authorizing the club to charge past due amounts to the member’s credit card on file. Clubs need to check with their local counsel to determine if there are any specific notification or disclosure requirements.

One additional item to note with credit cards is the practice of credit card surcharges. Generally, surcharges for the use of credit cards charged by clubs will be either a breach of the club’s credit card processing agreement or a violation of state law. Clubs need to understand the limitations before adding a surcharge or giving non-credit card paying members a discount. Generally, using words such as “may” in club Bylaws instead of “shall,” as was done in the frequent delinquency provision above, gives the club more flexibility in dealing with individual situations.

In the area of delinquent accounts, however, it may be wise to use both permissive and mandatory style wording. Many clubs post the names of delinquent members. In many cases this is a very effective collection procedure. If your club does post the names of delinquent members, make sure you treat each delinquent member the same. Do not let the circumstances of a particular member let you deviate from your club’s posting policy. If you are selective in the names of which members you post, you may find yourself having to explain why one member was not afforded an exception to the rule while others were.

Some may argue that the posting of members’ names may expose the club to a claim of libel. In order for a member to prove libel, the following elements are required:

- The club must have used written defamatory language;
- The defamatory language must be “of or concerning” the member;
• The club must have published the defamatory language to a third person; and
• There must be damage to the member’s reputation.

At first glance, it may seem easy to prove a case for libel under the above require-
ments. After all, the club would have written the member’s name on a delinquent
list; the writing is certainly “of or concerning” the member since the member’s name
is specifically listed, the club published the list to its other members when the list
was posted on the club’s bulletin board, and the reputation of the member has been
damaged. Therefore, all of the elements seem to have been met. However, truth is a
complete defense to such an action assuming the member’s account was delinquent.
Accordingly, as long as the information is accurate, the member’s action would
likely have little success.

In order to minimize the club’s exposure, you should check each account balance
carefully immediately before the members’ names are posted to ensure that any
payments that have been received are reflected. Secondly, the account balance
should not be posted because any discrepancy in the amount believed to be owed
could later be grounds for litigation. Posting the name alone should accomplish the
club’s objective.

Frequently, you will hear the argument that it is unlawful to post the names of delin-
quent members. It is true that the local convenience store could not post the names
of people who have written checks on bank accounts with insufficient funds – that
would be public publication of debtors. Your club, however, is not a “public” place.
Therefore, it is not covered by the general rule against public publication of debtors.
Some clubs, however, elect not to post the names of delinquent members because of
the potential for litigation. As with most things, there is no right or wrong. One club
may find posting to be an effective collection procedure, while another may not find
that to be the case.

As stated earlier, if your club elects to post the names of delinquent members, the
club’s Bylaws should clearly spell out the club’s ability to post the names of delin-
quently members and the procedure for posting. Finally, the procedure contained in
the Bylaws should be strictly followed.
You should consider whether a late charge for delinquencies is appropriate. Most statutes that do apply usually provide that a late charge may be imposed on the debtor as long as it is reasonable in amount. The purpose of the late charge is to offset the cost of the club in having to re-bill unpaid amounts. In most cases, the phrase “a reasonable amount” is not defined. This, however, is not always the case and you should check with your club’s counsel to ensure that a maximum amount is not specified in your state’s statutes.

Additionally for clubs with corporate memberships, it is important that the Bylaws and the applications make it clear that both the designee and the corporation are jointly and separately liable for payment on the designee’s accounts.

**Personal Property**

A claim of alleged theft of members’ property is something most club managers have experienced. The Bylaws should state that the club is only responsible for items of personal property specifically left in the care of the club and for which a receipt has been given to the member. Other than this, the club should clearly state that it assumes no responsibility for the safekeeping of valuables. This bylaw provision should also state that any storage facilities or lockers provided to members are offered solely as a convenience to the members. The club does not guarantee the integrity of any lock and lockers are not intended to prevent unauthorized entry.

Since family and guests of members will also be using lockers, etc., these provisions should extend to the member’s family and guest. The Bylaws should also provide that the member agrees to hold the club harmless from any claim made by a guest or family member for lost or allegedly stolen property. Indemnification provisions should be reviewed by the club’s counsel, as state law controls the effectiveness of these provisions.

**Personal Injury**

Just as members should release the club from any liability for lost or allegedly stolen property, the members should release the club from any injury to them while using any of the club’s facilities due to the club’s negligence. Frequently the argument is made that such releases are not valid, since they violate public policy.
Although the legality of exculpatory clauses, such as releases from negligence, are determined by the laws of the state in question, most states hold that they are valid unless they violate a public policy interest of the state. That being the case, the question is whether public policy considerations preclude the enforcement of them. Although there is no strict formula that can be used in determining if a clear agreement violates public policy, the more certain characteristics are found in the relationship, the more likely the agreement is to be found invalid.

Factors that courts often consider are:

- Whether the agreement concerns a business generally thought suitable for public regulation;
- The entity or person seeking exculpation is engaged in a service that is of great importance to the public;
- The entity seeking exculpation holds itself out as willing to perform the service for any member of the public seeking it, or at least members of the public coming within certain established standards;
- Because of the essential nature of the service, the entity or person seeking exculpation possesses a decisive advantage of bargaining strength against members of the public seeking the service;
- In exercising its superior bargaining strength, the entity or person seeking exculpation has such a provision and grants an alternative for the party to pay additional reasonable fees to obtain protection against negligence;
- The person seeking such services is placed under the control of the seller of those services; and
- Whether the injury or loss was reasonably contemplated by the release.

Although it is true that private clubs are regulated in various degrees by the state in which they are located, the regulations that are imposed on private clubs are seldom safety regulations relating to the use of the club’s facilities. Nor is there any administrative agency to regulate the private club industry. So, this first criterion is most likely missing. Furthermore, although membership to a club and the use of its facilities have important medical and health benefits, private clubs are not necessary as a matter of public policy.

Clubs are a good idea and contribute to the health of the individuals involved, but they are not essential to the welfare of the state or its citizens, such as would be the case with schools, hospitals and housing. Therefore, the second element most likely
is missing. Clubs do not perform their services or make their facilities available to the public. By definition the public is excluded. Since the public is excluded, the state could have no legitimate public policy concerns.

Although it could be argued that a club has a bargaining advantage over the member, this is not really true. In making such a determination, the courts look to see whether there are reasonable alternatives to the individual.

Although private clubs are important, an individual could obtain similar or, in some cases, even better facilities somewhere else. Therefore, if the prospective member does not like this provision of the contract between himself and the club, he could have sought similar facilities elsewhere. If a club were to have this type of language, it is true that the members would have to abide by it and do not have the opportunity to modify the exculpatory language. However, the real issue is not this fact, in and of itself, but rather the disparate bargaining power of the parties and essential nature of the services being provided.

As discussed above, the services and facilities of a club are not essential and the bargaining power is not so disparate as to trigger this factor. The last factor of control is clearly present. The member does voluntarily submit to that control. However, this is not like a school, hospital or public housing where the options available to the person in question are limited. The member has numerous alternatives available to him, the most important of which is not joining the club. The last criterion becomes harder to satisfy as the nature of the loss or injury increases.

Therefore, this type of language in a club’s Bylaws has a great deal of merit and should seriously be considered for addition to the Bylaws. As with other provisions in your club’s Bylaws, you will want to have your club’s counsel draft this language. It is worth the effort to lessen the likelihood of liability to your club from claims for personal injury.

**Redemption or Refunds of Memberships**

Redemptions or refunds of memberships can be a very complex and careful attention must be given to the provision that creates the redemption or refund rights. Following is a listing of issues that need to be addressed.
How much is the redemption or refund? The Bylaws must clearly state what portion of the amount paid by the member as either an initiation or assessments is refundable. It is recommended that the refund right is coordinated with the Membership Application so that there is no inconsistency between the two. Also, if the refund amount is based on a percentage of the initiation, the Bylaws need to clearly define whether the initiation amount to be used in the calculation is the amount paid by the member or the then current initiation amount at the time of redemption or refund. Additionally, there are potential state and federal securities law issues related to payments which may be in excess of the amount actually paid by the member. See the below Securities Issues Section for a more thorough discussion of the securities law issues.

When is the member entitled to a redemption or refund? The Bylaws need to clearly state the timing of the payment. The Bylaws also need to establish the priority and procedure for members wanting to receive a redemption or refund.

It is also advisable that equity clubs review their applicable state corporations’ laws to determine if there are any statutory requirements for membership redemptions. Such laws may prescribe the amount of timing and other requirements for redemptions, especially upon the dissolution of the club.

Transfers
The Bylaws should clearly state whether the memberships are or are not transferable. If membership is transferable, it is advisable that all transfers must be handled through the club. A question a club should address is whether members need to pay dues following resignation and prior to the transfer. If they must pay dues, the Bylaws should clearly state for how long. The Bylaws should address the potential problem of members tendering their resignation just to “save a spot” on the resigned list.

Death of a Member
In the event of a member’s death, you want to ensure that your club’s Bylaws cover certain issues that are likely to arise. The first item is the member’s unpaid club dues and charges. The Bylaws should state that the heirs, successors, assigns and the estate of the member are liable, to the extent permitted by law, for all dues accrued and charges incurred by the member prior to his death. Assuming the club permits
the assignment of the membership to the spouse of a deceased member, such assign-
ment may be delayed until the member’s club dues and charges have been paid.

Also, if your club permits such an assignment, you may consider having a provision
in the Bylaws that state as a condition precedent to the assignment of the member-
ship to the surviving spouse, all dues and charges accruing after the member’s death
must be paid timely. This provision protects the club from the loss of this income
stream during the probate of the member’s estate.

Upon a member’s death, the membership legally resides in the member’s estate until
it passes to the appropriate assignee, if any. Since the membership resides in the
member’s estate, the club does not want the executor of the estate or a trustee taking
the position that he may use the club during the probate of the member’s estate. To
protect against this possibility, a provision in the Bylaws should state that no
membership shall be for the benefit of a member’s heirs, successors, assigns, legal
representatives, executors or administrators, except as expressly set forth in the
club’s Bylaws.

Your club may also want to include a provision allowing the transfer of a deceased
member’s membership to a child of the member. Such a provision should give a
limited period of time for the transfer right and after such time the right automati-
cally expires.

Amendments and Revisions

Bylaws should clearly set forth the procedure for amendments and revisions. In
equity clubs the votes needed for approval should be set forth. Clubs may want to
consider certain provisions (i.e., large assessments), which require a super majority
approval. In non-equity clubs, the owners should maintain control over amendments
but such owners may want to consider certain provisions that require member
approval. Non-equity club owners should also be aware that material changes to
fundamental rights of the members may be seen as a unilateral change of a contract
and are therefore unenforceable.

Management, Voting Rights and Elections

The Bylaws must set forth who has the right and obligation to manage the club. In
equity clubs this will usually be the President and Board of Governors. The Bylaws
should also set forth the club’s officers and committees and the rights and
responsibilities of each. In non-equity clubs, the Bylaws should state that the owner has all right and obligation to manage and control the affairs of the club and that all profit and loss is for the account of the owner.

The Bylaws should also set forth which classifications are entitled to vote and the matters which require a vote. Equity clubs need to be aware that state law may impose voting, quorum and approval percentage requirements. The voting provisions need to specify the required notice and the required quorum.

**Securities Issues**

All clubs need to be aware of the potential securities laws concerning membership programs. Non-equity clubs need to be particularly concerned with the member’s ability to make a profit off the membership. The ability to make a profit in some circumstances characterize the membership as an investment and consequently the membership program would need to be registered as a securities offering. In all circumstances it is advisable that the Bylaws and the Membership Application include text whereby the member acknowledges that the membership is being purchased for recreational or social benefit and not as an investment.
Chapter 3
Club Rules and Regulations

General

While the club’s Bylaws are the single most important document in legally establishing the policies, procedures, structure and authority of the club, the club’s rules and regulations are important in establishing the day-to-day operations for the club for the enjoyment of its members. Once established, all actions of the club and its members should be strictly governed in accordance with these documents.

The club’s rules and regulations are designed to protect the rights and privileges of the members and to protect the club’s property. They are not meant to be restrictive, but rather to acquaint members with the services available to them, the acceptable mode of conduct and the proper utilization of the club's facilities.

The club’s rules and regulations should also be “reader-friendly” and workable for both management and the membership of the club. The nature of a club will basically dictate the contents of the club's rules and regulations. However, there are some issues that should be addressed.
Be certain that your club’s rules and regulations have been adopted pursuant to the authority contained in the club’s Bylaws or Articles of Incorporation. If proper authority is not granted in these documents, the club’s Bylaws should be amended accordingly. Also, as mentioned in the discussion of the club’s application form, be sure that the member acknowledges the right of the club to amend the rules and regulations from time to time, even though such amendments may be to the disadvantage of a particular member:

**Reservations**

The rules and regulations are the proper place to address the club’s facilities reservation policies. Such policies may include golf tee time advance reservation timeframes and court advance reservation timeframes. A club may also want to add to such provisions as a cancellation policy and the penalties for no shows.

**Usage Rules**

The rules and regulations are also the proper place to address general usage rules. Areas to address are hours of operation, restrictions on usage by children and accompanied and unaccompanied guest policies.

**Alcoholic Beverages**

It is important that the rules and regulations state that the club intends to comply with all federal, state and local laws pertaining to the sale and service of alcoholic beverages. This includes not only restricting the serving of alcoholic beverages only to permitted hours, but that the serving of alcoholic beverages to minors is strictly prohibited. Members should also be reminded that instances of intoxication on the club’s property will be subject to appropriate disciplinary action.

Most members are probably aware of the substantial liability that may be placed on the club for serving anyone the club knows or should have known was intoxicated. Therefore the rules and regulations should clearly advise the members that club employees may refuse service of alcoholic beverages to any individual they feel is intoxicated or on the verge of being intoxicated. Most employees are instructed to assist intoxicated individuals in finding someone to drive the individual home or place them in a taxicab to go home.
Damage to Club Property and Lost or Stolen Property of Members

Members should be aware that they will be responsible for any club property that is removed, damaged or destroyed by a member, a member’s family, a member’s guest or the guest of a family member. Having this rule can save your club significant sums of money in the case where a member’s guest or family member causes damage to the club’s property. It is also recommend that the rules and regulations state that costs and expenses incurred by the club by virtue of any such damage may be charged directly to the member’s club account.

In addition to, or in lieu of the club’s Bylaws, the club’s rules and regulations should also clearly state that the club is responsible only for those items of personal property specifically left in the care of the club and for which a signed receipt has been given to the member. The rules and regulations should also address lockers, as they present a common opportunity for theft. The rules and regulations should state that lockers are provided solely for the convenience of members and their guests and that property of any value should not be left unattended by the member. All property of a member or a member’s guest that is left unattended is done so at the risk of the member or guest. The member should further agree to hold the club harmless from any claim made by his guest or family member for lost or allegedly stolen property. As discussed in the Bylaws section, the exact language for the indemnification provision should be reviewed by the club’s counsel, as state law controls the effectiveness of these provisions.

Gambling

It is important for members to understand that not only is gambling illegal, but it may jeopardize the club’s alcoholic beverage license, as well as other types of licenses the club may have. Clubs should not sanction any gambling, including gambling on the golf course. Calcuttas and parimutuels and any similar type of betting should not be organized, operated by or participated in by club committees, members or management.
Employees

The club’s rules and regulations is a good place to discuss the relationship between the members and the club staff. This would include a statement that members are not permitted to reprimand club staff and any incivility should be reported to the club manager. Likewise, members should be advised that they may not request personal services from club staff, such as leaving the club’s premises on an errand for a member.

Tipping should also be addressed. Most clubs do not permit tipping, except in situations such as locker room attendants, valet parking attendants, etc. For the convenience of your members, a gratuity is usually automatically added to the member’s check for food and beverage. Although the percentage should be stated, it should be made abundantly clear that this is done solely for the benefit and convenience of the member and that the member may increase or decrease the amount so indicated at his or her sole discretion.

Not only does this language clarify how gratuities are handled by the club, but it also gives you an opportunity to have in print language that may prove beneficial on a sales-and-use tax audit. Some states take the position that since gratuity is automatically added to the member’s check, the member had no discretion in the transaction. This being the case, the examining agent could take the position that the gratuity is merely a portion of the total cost of the transaction and the sales tax applies to the gratuity portion as well.
Chapter 4
Discrimination in the Club

Civil Rights Act of 1964

Any cause of action or claim based on discrimination of any kind must have as its basis some federal or state statute, since there is no common law principle for documentation. The most widely known statute is the Civil Rights Act of 1964. This federal statute was adopted to rectify racial discrimination in the United States. When this statute was up for discussion, Congress was limited as to what it could do since the First Amendment to the Constitution gives to each person freedom of association. This means a person is free to select those with whom he wants to associate and no one can force him to associate with anyone not of his choosing: This is a right of exclusion.

This freedom of association does not extend to public gatherings. The concern at the time of the First Amendment centered on religious groups, families and similar intimate social gatherings. Therefore, the Civil Rights Act of 1964 prohibited discrimination based on race, color, religion or national origin in places of public accommodation. The Civil Rights Act established a right of inclusion. Private clubs were not within the definition of “a place of public accommodation.” Excluding private clubs from the statute made it constitutionally sound by not infringing on a person’s First Amendment right.
Congress did not attempt to define the term “private club” in the Civil Rights Act. It left this up to the courts to decide. Whether a club is or is not a “private club” within the constitutional sense of the word depends on the particular situation of that club. It is important to note that the Civil Rights Act did not include within its prohibition discrimination against a person based on that person’s gender, sexual preference or marital status. No claim for discrimination based on these reasons can be brought under federal law.

**Public Accommodations Statutes**

By the mid 1980s, discrimination against women and homosexuals, not only in the workplace but in other settings as well, became the subject of much discussion. However, the federal government did not introduce any legislation to protect these groups from discrimination, as it had for minorities. Therefore, states and some local governments started to enact their own statutes and ordinances. These are commonly referred to as Public Accommodation statutes. They prohibit discrimination not only on the basis of race, color, religion and national origin, but also gender and in some cases, sexual preference and marital status.

Unlike Congress, however, the states and local governments that have passed Public Accommodation statutes have attempted to define a “place of public accommodation.” By doing this they have by exclusion defined the term “a private club.” In other words, a club can only be a “private club” if it does not meet the definitional terms of a place of public accommodation.

Presently, 39 states and the District of Columbia have Public Accommodation Statutes. Georgia, Mississippi, Alabama, Arkansas, North Carolina, South Carolina, Virginia, Texas, Nevada, Arizona and Hawaii are the states without such statutes.

In addition to general public accommodations statutes, some states have enacted anti-discrimination laws specifically designed to address gender inequity in clubs. These statutes tend to focus on equality in usage rights such as prime time tee time reservations and access to facilities.

Although these statues and ordinances vary from jurisdiction to jurisdiction, most have been patterned to varying degrees after the ordinance passed by the city of New York. When this ordinance was passed, its constitutionality was brought before the
U. S. Supreme Court. The New York ordinance stated that if a club had more than 400 members, provided regular meal service and received funds from nonmembers, the club was not a private club. Although the U. S. Supreme Court upheld this ordinance as being constitutional, many have misinterpreted the holding.

The court did not say that if a club met the forgoing criteria, it was a public accommodation. All the court held was that it did not have a specific club before it to consider, and there may be a club in the city of New York that met the criteria set forth in the ordinance that was not a private club in the constitutional sense of the word. Therefore, the ordinance was not unconstitutional since it may be correct as applied to some given club. Basically, the court was saying that it is a case-by-case test and that it is possible a club meeting this criterion may not be a private club. If called into question, however, the burden is clearly on the club to show that the club is a truly private club even though it meets the criteria set forth in the ordinance or statute.

Other Anti-Discrimination Statutes and Legal Theories

Another mechanism used by some states to regulate discrimination in private clubs is to provide that if a club discriminates based, inter alia, on sex, the state will not issue the club an alcoholic beverage permit. These are powerful statutes; even though a club could show it was a truly private club, it would still not receive an alcoholic beverage license. Alcoholic beverage licenses are state-issued and states therefore set the parameters for their issuance. This concept also applies to a private club applying to be treated as a tax-exempt club. The Internal Revenue Service will not grant an exemption from federal income taxation to a social or recreational private club that discriminates based on race.

Since many state and local governmental authorities have not passed Public Accommodation statutes or ordinances or do not have a state statute that denies an alcoholic beverage license to a private club that discriminates on the basis of a member’s sex, some members of the board and some club managers think that their club is not subject to a claim of sex discrimination. This, however, is not necessarily true. There are other avenues a member may take to “get to the court house.”

As mentioned in the chapter on club Bylaws, clubs frequently do not clearly define who the member is. Often the Bylaws can be read so as to inadvertently include the
spouse of the member as a member in her own right, and in the same membership category as her husband, e.g., golfing member. This ambiguity permits the spouse to take the position that she is a golfing member by virtue of the definition in the Bylaws and, as such, she cannot be deprived the privileges afforded a golfing member. Under this theory to preclude the usage by the spouse could be a breach of contract.

Another situation that may give rise to a claim for gender discrimination is when the club is part of a residential development. Most states have Fair Housing laws. The purpose of these statutes is to prohibit discrimination in housing. In many cases the prohibited discrimination includes gender discrimination. Frequently the statute will provide that if there are recreational amenities associated with the housing development, discrimination is not permitted in those recreational amenities. This approach has been used to mold a legal theory for gender discrimination when the state or local governmental agency did not have a Public Accommodation statute.

Thus, the fact that your club may not be in a state or city that has a Public Accommodation statute or ordinance does not mean that a claim cannot be brought against the club. The club manager and board must be aware of where a potential claim for sex discrimination may arise. Is there a men’s only grill, does the club have preferential tee times for men, etc.? If any potential for sex discrimination exists, the hoard should be aware of it and at least discuss what course of action it would consider taking should the situation arise.

An example of how a club with family memberships successfully dealt with gender discrimination was through issuing different types of memberships. Each family received a gold and a silver membership. The husband and wife could decide, among themselves, who was to be the gold member and who would be the silver member. In order to divert any compaction problems on the golf course, only gold members could play before noon on the weekends. It turned out that almost all gold members were the male members, but there was no discrimination by the club as to who could or could not play at those preferential tee times. In states with golf-specific discrimination laws, the gold or silver designation may not be effective as such laws typically preclude barring either spouse from tee time privileges.
Although dealing with gender discrimination can be difficult for a club, discrimination based on sexual preference or marital status can be even more difficult. If your state has a prohibition against discrimination based on sexual preference or you are anticipating such a statute, you may want to consider changing your club’s definition of a family membership, if your club has such a membership. Club’s that have such a category usually state that the individual applying for membership and his spouse become the members. If this type language is used, then the club would be obligated to accept same sex couples – all other things being equal. If the membership language is changed to read, “the applicant and his married spouse,” then denying a family membership to a same sex couple might be permissible. Since under this provision the club would not grant a family membership to a heterosexual couple that was not married, denying such a membership to a homosexual couple that was not married could not be taken as discrimination based on sexual preference.

Of course, if your state has a prohibition against discrimination based on marital status, the foregoing provision would not be acceptable. Not many states have passed Public Accommodation statutes that include marital status as one of the protected classes. Although not mandated, many clubs have decided to give “significant others” the same privileges a spouse may enjoy. Although this is clearly something for consideration, the club may want a limit on the number of “significant others” a member may designate in a given time period.

Discrimination within the club will continue to be an issue that clubs must address. These issues must be reviewed and discussed and, hopefully, resolved before a crisis reaches the club.
Chapter 5
Sexual Harassment

Sexual Harassment by Members

The subject of sexual harassment between employees was discussed in Part I, The Club and its Employees. When one thinks of sexual harassment, it is usually in the context of an employee and a fellow worker. Although it is from this situation that a claim for sexual harassment usually occurs, this is not always the case. Sexual harassment may also arise through the actions of a member of a club.

There are two types of sexual harassment: quid pro quo and hostile work environment. It is this latter form that usually applies when a club member is involved. Hostile work environment sexual harassment occurs when an employee is the target of unwanted sexual advances such as sexual gestures, the request for sexual favors or other verbal and physical conduct of a sexual nature. Unlike quid pro quo sexual harassment, which is generally committed by fellow employees or supervisors, the threat of job endangerment is irrelevant in hostile work environment sexual harassment.

What you must do as the club manager is no different than if the sexual harassment claim is made by an employee against a co-worker. The specific steps you should take are discussed more fully in Part I, The Club and its Employees.
Often, boards are uncomfortable dealing with these types of situations and it’s tempting to render the occurrence an isolated incident or something that was probably misconstrued by the employee. The tendency of many boards to not deal with these matters in a prudent and timely manner can put you, as the club manager, in a very difficult place. The employee will be looking to you to solve the problem, while you are waiting on the board to decide what, if anything, it will do regarding the problem.

The first recommendation when one of these situations arise is that you remove the employee that has made the claim from that place or those places in the club in which the employee is likely to come in contact with the member who is allegedly responsible for the sexual harassment. Then let the club’s president know of the allegation and request permission, if that is necessary, to contact an attorney as soon as possible.

If the president of the club or another more appropriate person in your particular situation is hesitant to contact an attorney, remind him or her that a possibility exists that not only the club, but also the individual members of the club’s board of directors, could be named in a sexual harassment lawsuit. The awareness that the individual members of the board may be named parties in such a lawsuit will usually greatly increase the board’s appreciation of the problem.

The club may wish to retain an attorney that specializes in this area, and serious consideration should be given to retaining an attorney that is not a member of the club. If the attorney is also a member and it is mutually concluded between you, the club’s president and the attorney that the claim has no merit, there is a greater possibility that the employee may assert an objective investigation was not performed. If the attorney, as well as the others involved in the investigation, has a relationship with the club, there is the possibility that others may perceive the investigators as having a bias in favor of the club. Who the club retains will, of course, be up to you or the president of the club.
Whatever you do, do not let the tendency of a board to ignore a claim of sexual harassment against a member go without appropriate action on your part. Although the club may be lucky, if appropriate action is not taken, there is the likelihood that the member against whom the complaint was lodged may make the same or similar unwanted advances in the future. If it is discovered that a complaint was made against that member at some earlier date and appropriate action was not taken, the club will have to explain its lack of a prompt and thorough investigation, as is required by the law, when a subsequent claim of sexual harassment is made.
Chapter 6
Your Club and the Americans with Disabilities Act

General
The Americans with Disabilities Act of 1990 ("ADA") gives broad rights to individuals with disabilities. The impact of ADA on the club and its employees, which is covered by Title I of the ADA, was discussed in Part I - The Club and Its Employees. Another area about which you need to be knowledgeable is Title III of ADA, dealing with the rights of disabled individuals in places of public accommodation.

As we have already discussed, the right of exclusion as provided in the First Amendment to the Constitution butts up against the right of inclusion that is sought by the Civil Rights Act, as well as the ADA. When enacting the ADA, Congress took the same approach it took in the Civil Rights Act. Namely, it excluded private clubs from coverage under the ADA and left to the courts the job of defining the term “private club” in the constitutional sense of the word. In fact, the regulations under the ADA merely provide that private clubs exempt under Title II of the Civil Rights Act of 1964 are also exempt from the ADA. Although private clubs are exempt, you should be aware that as with state Public Accommodation statutes, the club will have the burden of proving it is a “truly private club.”
Although private clubs are exempt from the ADA, there are certain situations in which the ADA may apply to your club. If your club has a golfing tournament that permits the public to attend, then, with respect to the golf course at least, the club is a place of public accommodation. The same is true if you hold a function at the club in which members of the public may attend, such as a community fundraiser or benefit.

To the extent any portion of your club's facilities may be open to the public, that portion or portions of your club's facilities will come under the jurisdiction of Title III of the ADA. Under Title III, all new club facilities that may be open to the public and are designed and constructed for occupancy after January 26, 1993, must be “readily accessible to and usable by” individuals with disabilities.

“Readily Accessible To and Usable By”

The term “readily accessible to and usable by” is a term of art. It does not mean that every portion of your club's facilities must be accessible, but only those portions that may be used by the public. The term does contemplate, however, a “high degree of convenient accessibility.” This standard means that the following areas should be made accessible if those portions of your club's facilities are to be “readily accessible to and usable by” individuals with disabilities:

- Parking areas;
- Routes to and from the facility;
- Entrances;
- Bathrooms;
- Water fountains;
- Public and common use areas; and
- Goods, services and programs offered at or in those portions of the club.

For example, if your dining room holds a community function that is not restricted to members and their guests, your club's dining room would have to have the following features for it to be “readily accessible and usable by” individuals with disabilities:

- All doors and doorways into the dining room and bathrooms would be sufficiently wide to allow the passage by individuals in wheelchairs;
• The dining room and other areas for the public function would be fully accessible;
• Emergency alarms would include flashing lights; and
• There would be handrails on stairs and ramps.

To be “readily accessible and usable by” individuals with disabilities, new facilities
to which the public may have access must be built in strict compliance with the
ADA. There is an exception for structural impracticability, but this exception applies
only in rare circumstances where the unique characteristics of the terrain prevent the
incorporation of accessibility features.

The ADA requirements for new construction are quite extensive. Examples of the
requirements include:
• Every restroom to which the public may have access must be accessible.
  Where there are five or fewer stalls, at least one stall must be accessible;
• The floor of the clubhouse to which the public has access must have at least
  one accessible public telephone;
• At least half of the entrances to the club through which the public may enter
  must be accessible;
• There must be an accessible route from public transportation stops, parking
  spaces and public streets to the accessible club entrances; and
• Five percent of all fixed tables in your dining room must be fully accessible to
  people in wheelchairs. Also, two-thirds of the total dining room eating area
  must be accessible to disabled individuals. (This applies if the public may have
  access to your dining room.)

Alterations

Alterations to your club in areas to which the public may have access must be made
in a manner that ensures the altered portions of the club are readily accessible to and
useable by individuals with disabilities. One question that is frequently asked is,
“What is the difference between an alteration that requires compliance with the
ADA and maintenance that does not require compliance?”
An alteration is any change that affects or could alter the usability of the club or any part of it. Alterations include:

- Remodeling;
- Renovation;
- Rehabilitation;
- Reconstruction;
- Historic restoration;
- Changes or rearrangement in structural parts or elements; or
- Changes or rearrangement in the plan configuration of walls and full-height partitions.

Cost is not a factor when making the determination as to whether or not an alteration has occurred. For example, if you move a door from one location to another it would be considered an alteration, even though there may be little cost associated with the move. Projects that would fall into the category of maintenance include replacing the roof on your clubhouse, painting or wallpapering, asbestos removal or changes to the mechanical or electrical systems in the club.

**Path-of-Travel**

In working within the ADA guidelines, you will often hear the phrase “path-of-travel.” If an alteration includes a primary function, it must include such changes as are necessary to ensure that the path-of-travel to the altered portion of the club is readily accessible to and usable by disabled individuals.

A primary function is the activity for which the facility is intended. Alterations to your clubhouse would be an example of a primary function. The path-of-travel that must be made accessible is defined as a continuous, unobstructed way of pedestrian passage by means of which the altered areas may be approached, entered and exited, and which connects the altered area with an exterior entrance to the club and other parts of the club. If there is an alteration, the path-of-travel also includes the rest-rooms, telephones and drinking fountains serving the altered area in the club.

There is an exception to this mandatory change to the path-of-travel and that is when the cost of a path-of-travel alteration is disproportionate to the cost of the overall alteration. Under the ADA, the cost of path-of-travel alterations is considered
disproportionate if such costs exceed twenty percent of the cost of alterations to the primary function area. Costs that are included in the path-of-travel alteration include the cost of creating accessible restrooms, costs of installing accessible telephones and the costs of relocating inaccessible drinking fountains.

In making the determination of what costs should be incurred in making the necessary alterations to the path-of-travel, priority is to be given to those elements that will provide the greatest access, in the following order:

- An accessible entrance;
- An accessible route to the altered area;
- At least one accessible restroom for each sex or a single unisex restroom;
- Accessible telephones;
- Accessible drinking fountains; and
- Where possible, additional accessible elements, such as parking, storage and alarms.

**Modification of Policies, Practices and Procedures**

The ADA also requires your club to make reasonable modifications in its policies, practices or procedures, “when the modifications are necessary to afford goods, services, facilities, privileges, advantages or accommodations to individuals with disabilities.” If, however, the modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations, then those alterations need not be made. For example, a club policy that prohibited animals on the club's premises would have to be modified to exclude service animals, such as guide dogs.

**Architectural Barriers**

In addition to modifying policies, practices and procedures, your club must also remove architectural barriers in those portions of the club to which the public may have access. However, not all barriers have to be removed. Removal is required only where removal is readily achievable, which means it is easily achievable and able to be carried out without much difficulty or expense. The removal of barriers includes:

- Installing ramps;
- Making curb cuts in sidewalks and entrances;
- Repositioning shelves;
• Rearranging tables, chairs and other furniture;
• Repositioning telephones;
• Installing flashing alarms;
• Widening doors;
• Installing accessible door hardware;
• Installing grab bars in toilet stalls;
• Repositioning the paper towel dispenser in a restroom; and
• Creating designated accessible parking spaces.

Whether any of the foregoing items are readily achievable is to be determined on a case by-case basis. For example, the cost of one or more of the above items may be small to a company like General Motors, but could be a real financial hardship for a particular club. In making the determination as to whether a particular measure is readily achievable, the following factors may be considered:
• The nature and cost of the action needed;
• The overall financial resources of the club
• The effect of the action on expenses and resources; and
• The impact of the action on the club's operations.

In the removal of barriers, the Justice Department has established the following priorities:
1. Access to the club from public sidewalks, parking or public transportation. These include:
   • Installing an entrance ramp;
   • Widening entrances; and
   • Providing accessible parking spaces.
2. Access to areas where the services are made available to the public. These include:
   • Rearranging tables;
   • Widening doors;
   • Providing brailed and raised-character signage;
   • Installing visual alarms; and
   • Installing ramps.
3. Access to restroom facilities. These include:
   • Removal of obstructing furniture and/or vending machines;
   • Widening of doors;
   • Installation of ramps;
   • Providing accessible signage;
   • Widening toilet stalls; and
   • Installation of grab bars.

4. Any other methods necessary to provide access to the club's services and facilities.

**Golf Course**

The federal Architectural and Transportation Barriers Compliance Board recently adopted new guidelines for ADA compliance in recreational facilities including golf courses. The guidelines apply to new courses or to existing courses when they are altered. The requirements address four main areas: accessible routes, practice ranges, tee boxes and greens.

The general accessible route requirement is for a handicap accessible route through the golf course or for “golf cart passage” through the golf course. The “golf cart passage” guidelines recognize that most golfers and handicap golfers are motorized golf carts. Golf cart passages must be at least 48 inches in width. Where there are curbs or other man made barriers along a golf cart passage, there must be a minimum 60 inch opening at intervals not to exceed 75 yards for access to the fairway.

Practice tees must be connected by handicap accessible route or by a golf cart passage. At least five percent of teeing stations, but in no event less than one station, must be handicap accessible.

The new rule for tee boxes is that when there are one or two teeing grounds, at least one needs to be accessible. Where there are more than two teeing grounds, at least two must be accessible. Additionally, the forward teeing ground must always be accessible, except when terrain makes compliance infeasible. To be “accessible,” a teeing ground must be designed and constructed to allow a golf cart to enter and exit the teeing ground.
Putting green guidelines require the green to be designed and constructed so that a golf cart can enter and exit the green.

**Lenders and Building Codes**

Although your club may not have to make the changes discussed under Title III of the ADA because the public is not permitted access to your club, you may find that when the club begins to make alterations those changes must, nevertheless, be made to meet the ADA requirements. Most lenders will require, as a condition to lending funds to an alteration or renovation project, that the requirements of Title III of the ADA be met. The reason for this is that if for some reason there were a default and the lender took possession of the premises, that lender may want to change the use of the facility. If the requirements of Title III of the ADA were not met, then the lender would be obligated to spend additional funds in order to make the premises accessible to the public.

In addition to lender requirements, many local building codes are being modified so as to require compliance with the ADA, regardless of whether the facility is a place of public accommodation or not. Therefore, to some extent at least, whether or not your club would be considered a place of public accommodation for purposes of Title III, it may still have to take into consideration Title III of the ADA when something more than ordinary maintenance is being planned.
Chapter 7
Miscellaneous Relationships that Require Your Attention

Locker Theft

Locker theft is a problem that many clubs face from time to time. The potential liability of your club once a theft has occurred and what should be done to minimize the risk of theft is something about which you should be knowledgeable. There are two primary theories used in attempting to hold your club liable for a theft from one of your club’s lockers.

First, it can be alleged that the club negligently hired an untrustworthy employee. This theory is viable only if there is evidence that (i) the club did hire an untrustworthy employee without an examination of his background, and (ii) the untrustworthy employee committed the theft. Fortunately, since it must be shown that the untrustworthy employee committed the theft, this theory is seldom successful, as in most cases the identity of the thief is unknown.
Occasionally, however, there is some evidence an employee committed the theft, and so the club must have proof that it checked all of the employee’s references and verified that, in fact, the club did not hire an unworthy employee, i.e., an individual with a criminal record. The absence of such proof of a reasonable investigation of a potential employee’s background may attach liability to the club.

The second and more common theory used in attempting to hold your club responsible for a theft from a locker is to claim that the club failed to take reasonable steps to ensure that members’ valuables were adequately protected from theft. This theory is viable only if (i) the club had a duty to provide a safe place for the keeping of valuables, and (ii) the club did not take all reasonable steps to ensure the safety of a member’s valuables.

The club can attempt to disclaim any duty. Signs in boldface print should be posted on all lockers stating something similar to the following:

“The club assumes no responsibility for the safekeeping of valuables. The lockers are provided merely as a convenience and are not intended to prevent unauthorized entry for the purposes of theft or vandalism.”

As was discussed earlier in this Part, your membership documents should also provide for a disclaimer of any and all responsibility for any valuables. Additionally, in situations where a permanent locker lease exists, the agreement should state that the club’s insurance does not cover personal property in the locker. The locker lease agreement should also provide that each member specifically acknowledges that the locker is being provided solely as a mere convenience and the club is in no way guaranteeing or accepting any responsibility for the safekeeping of any items of value placed in the locker.

Although clubs should write a disclaimer of responsibility, the language should be reviewed by the club’s counsel, since the validity of these provisions is governed by state law. Discussed earlier was a situation in which a state held that such provisions did not violate public policy and were effective. Other states are very stringent on the requirements that must be contained in the disclaiming language.
A third and more novel theory may also be claimed. This theory is that the club implied, by offering the use of a locker, that its premises were safe. This implied warranty theory may be raised under the Deceptive Trade Practices Act of several states.

Minimizing Risk
The following are some suggestions on how to minimize the risk of thefts:

• **Registration.** All members and guests should be required to sign in upon entry into the club and sign out upon exiting the club. Such a procedure prevents accusations that almost anyone can enter and leave the club’s premises unnoticed. Furthermore, if there is a sign-in procedure, the universe of possible thieves is limited to the employees, members and guests present at the club at the approximate time of the theft.

• **Access to Keys and Combinations.** Be sure you limit access to the list of locker combinations and locker keys. In clubs where linens are laundered and placed in members’ lockers, access should be limited to you and to one other person, such as the athletic director. This may seem like a common sense approach, but in many clubs where the combination list was readily available for anyone to see. It is typical in these cases for a member or guest to accuse a locker room employee of using a master key or a locker combination to effectuate the break-in. This is generally the case when there is no sign of visible tampering with the lock on the locker.

If your club can affirmatively show that the locker room employee had no access to the master keys or the locker combinations, the accusations leveled against such personnel lose their effect. In those instances where employees must have access to change and launder items directly from the lockers, it is suggested that access be strictly monitored and limited to select employees. Further, members should be made aware of the access by employees and informed that no valuables should be left overnight.

• **Employee Reference Checks.** The backgrounds of all locker room employees should be thoroughly checked, particularly for criminal convictions.

• **Unauthorized Visitors.** All means of access to locker rooms, e.g., fire escapes, should be electronically wired or monitored by a camera to ensure that third parties may not enter or leave unnoticed.
• *Master Wall Safe or Safe Deposit Boxes.* The club can offer members and guests the use of a wall safe or other secure place for the keeping of valuables while the member or guest uses the club’s facilities. The master safe is relatively inexpensive to install, but the club must implement a procedure to ensure that the proper owner of the valuables is identified and an accurate and complete itemization of valuables occurs at the time of receipt. Such a procedure will prevent claims of valuables being lost or stolen while in the club’s possession and prevent claims that valuables were returned to the wrong party.

The safe deposit box method short circuits the need for a safekeeping procedure, but the cost of safe deposit boxes is often prohibitive. The problem with this approach is that it increases the chance of liability in the event of a theft or loss, since the club will take the valuables into its care, custody and control. In addition, the trustworthiness of the club’s employees remains an issue if either of these methods is utilized.

**Errant Golf Balls**

Errant golf balls have become a more serious issue for clubs over the past few years. In the past, it was pretty clear that only in unusual situations would a club be liable for damage done to either a person or his property caused by an errant golf ball. The most common example was where a tee box or fairway was adjacent to a public street. In this case, the public had no realistic choice but to drive by a potentially dangerous situation and the club owed a duty to the general public to use reasonable means to protect them from errant golf balls. This was usually accomplished by fencing, berms, netting, etc.

As the game of golf has become more popular and our society more litigious, additional consideration must be given when developing a golf course, especially when homes are built adjacent to the golf course. Attention must also be given to potential situations on the course that may increase the likelihood of an errant golf ball striking another golfer.

There is no hard and fast rule as to who is liable. There are a number of different parties that may be responsible. These include the club, architect, builder, golfer, homeowner, homebuilder and developer. Each situation is unique; the only constant is that the applicable law is generally the law of nuisance and negligence. For a club, there may be liability if the golf hole creates an unreasonably dangerous condition or an unreasonable nuisance.
For example, if a particular golf hole has a hard dog leg that “just begs to be carried,” your club may very well owe a duty to those adjacent property owners to discourage golfers from hitting that drive when they are most likely to end up in a neighbor’s yard. The potential for damage to people and property may be apparent. If there are such golf holes at your club, signage should be placed at the tee box recommending that a golfer not attempt to hit a shot he is most likely not to carry.

In addition to these apparent dangerous situations caused by the design of the golf course, you may have certain golf holes that seem to attract golf balls into neighbors’ yards. If this is the case, you may want to consider planting trees, constructing beams or other means to lessen the likelihood of golf balls being hit into the yards.

It is advisable that these measures should be a part of the maintenance and care of the golf course. Care should be taken about making these alterations immediately after a complaint by a neighbor. Generally speaking, the homes adjacent to the golf course will have been built after the golf course is open for play. This being the case, the location of a home and the protection of the owner’s property is something the owner should take into consideration when planning the construction of his home. The club may not have a duty to modify its golf course to accommodate the design and location of a subsequently built home. However, although a duty may not exist, it can be created. There is a general principle of law that if a party undertakes a duty that he did not have, then he becomes bound to carry out that duty in a prudent manner.

If a neighbor having his home adjacent to your golf course complains about golf balls entering his yard and your club undertakes an action to correct the situation by means of fencing, netting, berms, etc., then the club may have assumed a duty it did not have. If that is found to be the case; then the question arises as to whether the club carried out that duty to protect the neighbor’s property from errant golf balls in a prudent manner. In effect, this could possibly mean a jury second-guessing as to whether the measures your club took were reasonable and sufficient. Had the club never undertaken that obligation, it may not have had to justify its actions.

Also, the question arises as to whether, when you undertook this duty to protect a neighbor’s property, this duty extended to all the adjacent homeowners. The question may arise, “If you took corrective measures for the benefit of Mr. Jones, why not take
corrective measures for Mr. Smith?” So, before your club undertakes an action to “be a good neighbor” by agreeing to take corrective steps, discuss the plans with the club’s counsel.

The area of errant golf balls that has seen the most significant change has been with respect to the club’s liability to golfers for them being hit by an errant golf ball. The rule has been that if a golfer was struck by an errant golf ball while playing golf, no one is liable unless intentionally or recklessly caused. The courts would say that the golfer that was struck by the ball “assumed the risk” of being hit by an errant golf ball when he commenced playing the game.

This rule, however, has begun to change in the past few years. Several courts have taken the position that clubs owe a duty to its golfers to provide a reasonably safe golf course. This duty to the golfers is a duty to minimize the risks without altering the nature of the sport. Although this is somewhat ambiguous, it is incumbent upon you to review the design and maintenance of your golf course to determine whether the course minimizes the risk of injury without altering the nature of the sport.

An example of where a golf course was liable to a golfer for an unsafe golf course is where the golf course had a stand of trees separating two adjacent tee boxes in order to “catch” errant golf balls hit from one of the tee boxes. One of the trees became diseased and was removed. This removal left a large opening through which the errant golf balls could now pass. As you would expect, an errant golf ball went through this opening and struck a golfer on the adjacent tee box. The club was found liable.

It is advisable that you, the club’s golf professional and the club’s course superintendent walk the golf course with an eye for areas that may be more likely to permit an errant golf ball to strike another golfer. If any such areas exist, then corrective actions can be discussed. This should be done on a regular basis and documented. The advantage of doing this, in addition to perhaps finding and correcting a potential area for liability, is that you will be in a position to show that the club does realize it has a duty and that it carries out that duty in a reasonable manner.
Lightning Strikes

Lightning strikes are always a concern to clubs. Generally, a club is not liable for injury to a golfer should he be struck by lightning. Lightning strikes are viewed as an act of God. Acts of God are all events which result purely from the forces of nature and which cannot be reasonably prevented. The rationale for the lack of liability is two pronged. First, lightning obviously cannot be prevented. Second, it is not reasonable to require a club to protect golfers from lightning. The risk of lightning is usually so remote and the danger so readily apparent, there is no duty to protect or warn golfers.

Although your club generally will have no liability for lightning strikes, it may have exposure in several situations. There can be liability when there is an additional cause of the injury. There will be liability if the injury would not have occurred “but for” the additional cause. In other words, the club may be found liable in the following manner. The club was in some manner negligent and the injury would not have occurred without the club’s negligence. A few examples of how the club’s negligence could create liability for a lightning strike follow.

Faulty Protective Devices

Your club may have liability if a faulty protective device helped cause the injury. For example, lightning jumping off an improperly installed or maintained lightning rod and striking a golfer could give rise to liability. The theory is that the injury would not have been caused without the club’s failure to install or maintain a reasonably safe lightning rod.

Numerous Lightning Strikes

Your club may also breach its duty if it has a history of unusually frequent lightning strikes and it fails to have an adequate warning or protective devices, such as shelters or lightning rods.

Negligent Operation of or Misrepresentation About Warning Systems

Your club might increase its duty if it creates a false sense of security through a sophisticated detection or warning device, or through misrepresentations to golfers about lightning safety. For example, your club may create a false assumption that golfers are safe from lightning unless your club notifies them otherwise. This is a dangerous situation. If the club fails to operate the warning/detection device properly or if it fails to notify golfers, it may be subject to liability. This is not to say that detection/warning
devices and warning golfers are not good practices. They are if done properly and consistently. Above all, a club cannot make or allow a representation that all is safe until the horn sounds. Lightning is just too unpredictable to make such assurances. In fact, a club that implements these practices should make it very clear to its golfers that no system can guarantee protection from lightning. Golfers must first rely on their own warning devices, their eyes and ears, and take cover when they see lightning or hear thunder.

Releases

Releases have been discussed several times throughout this Part. However, those previously discussed referred to releases and hold harmless provisions in membership documents and lockers. Frequently, a club will take their members to events that are held off the club’s premises. Things such as bus trips to sports events, plays, etc., are common. Likewise, the children of members may take bus trips to camps or other similar outings. It is most important to obtain a release from the members before permitting anyone to participate in one of these types of activities. The club can benefit from preparing “form” releases based upon the type of activities the club often has. These preprinted forms can be done in various colors for the various activities. Requesting a member to sign a simple one-page release is easy to do and quite effective.

Releases should be used for activities held at the club as well. For example, golf or tennis camps, swimming classes, etc., are events that call for the use of releases prior to permitting participation. Again, the use of preprinted color releases facilitates obtaining releases from the participants. If a release is signed immediately before a specific event is undertaken, it is much more effective than a general release found in the club’s Bylaws, etc. This does not mean that the release language should not be in those documents — only that having the general release language followed by a specific release immediately prior to the event can be an effective defense for the club.

As has been stated numerous times, the effectiveness of releases is governed by state law and you should have your club’s counsel draft the release language to be used by your club.
Spikeless Alternatives

Spikeless alternatives have become the norm for golf shoes. In fact, many clubs now only permit those type golf shoes on their golf courses. The mandatory requirement and the advent of a new piece of golfing equipment raises the question of the club’s liability should a member slip or otherwise injure himself while wearing a mandated spikeless alternative.

Most will agree that the spikeless alternative is an asset to the game of golf from both an agronomic and playing quality standpoint. This, however, does not mean that spikeless alternatives are not a potential liability. Depending on to whom you talk, the spikeless alternatives may give reduced traction. The slippage caused by the reduced traction is why some tour players have stayed with metal spikes.

Loss of traction, as it may relate to a golf swing, is one thing, but loss of traction that may result in a slip and fall is something else. It is this concern about potential liability to a golfer that has caused some clubs to defer from implementing a ban on metal spikes. Although there is and should be a concern about the potential for liability to a club, the liability issue will turn on whether the club has acted in a prudent manner.

Although no one can give you a list of “things to do” to free your club from liability, there are some things that you should at least consider. Inaction is not the answer. Since surfaces such as damp wood can be slippery, those dangers can be alleviated by treating the wood with aluminum oxide or covering the surface with some material to reduce the slippage factor. In addition, clubs frequently post notices in the wet areas of locker rooms regarding metal spikes and the potential for slippage. It is this type of action on the part of your club that will show the club is using its best efforts to provide a reasonably safe place in which to play golf.

It is advisable that you, the golf professional and golf course superintendent should go over the golf course looking for potential high risk areas where spikeless alternatives may be hazardous. Travel the same path the golfers are most likely to take. Do this at various times of the day and seasons of the year. Make written notes of what you find and the changes, if any, you make. In this way, if a golfer decides to make a claim against your club, there will be a written history of what the club has done in fulfilling its duty to its golfers.
Finally, be flexible when circumstances warrant. For example, if your club has a ban on metal spikes, permit metal spikes if a particular need is shown. If a member has recently had a hip replacement and feels that the additional traction of metal spikes are needed to reduce the chance of a slip and fall, grant the request. Not only has the club protected itself against a claim in this particular situation, but it will also reflect well on the club should a member bring a claim against the club at a later date.

The answer to the liability issue may be determined by how the club actively responds to the potential liability.