1993

Advising Fraternities and Sororities (part 3)

Association of Fraternity Advisors

Scholarship:

Financial:

Alumnae:

Membership Retention:

Other:

Be it further resolved, that all association members and an executive officer of general fraternities and sororities be made aware of this resolution.

[Adopted December 1, 1990]

Resolution on Expansion Within the Greek Community

Whereas, planned and reasonable growth of the Greek community is a desirable objective; and,

Whereas, expansion may result in the overextension of institutional resources, thereby overtaxing the ability of institutions of higher education to provide support for and service to new groups; and,

Whereas, insufficient growth of the Greek community can negatively impact the individual student's educational experience; and,

Whereas, it is the responsibility of all concerned to provide a positive educational experience for students; therefore,

Be it resolved, that institutions of higher education should develop fair processes, policies, and/or guidelines for planned and reasonable expansion which respect the rights and needs of individual students, campus organizations, alumni, general fraternities and sororities, and institutions of higher education; and,

Be it further resolved, that such processes include the development of objective criteria which reflect the special needs of the institution of higher education and selection processes which consider the impact of campus presentations on fraternity and sorority financial and staff resources; and,

Be it further resolved, that the processes emphasize clear, consistent, and timely communication with all parties; and,

Be it further resolved, that the campus Greek advisor should educate all campus governing bodies about students' rights to associate and the methods used for determining expansion readiness of the institution of higher education; and,

Be it further resolved, that the general fraternities and sororities be strongly encouraged to respect the expansion processes and decisions, to work cooperatively on their expansion efforts, and to educate their undergraduate and alumni/ae members about the importance of their role in the decision-making process when it has been determined that expansion should take place; and,

Be it further resolved, that all association members and executive officers of each fraternity and sorority be made aware of this resolution.

[Adopted December 1, 1990]

Exhibit A

Chapter Evaluations and Recommendations (to be completed by the chapter consultant)

Please evaluate areas of concern to the chapter where the Greek advisor or other university resources might be of assistance. Listed below are possible areas for recommendations for improvement. Return this report to:

Advisor

_____

Title

_____

Address

_____

_____

I will follow up on your suggestions. If you have any questions or wish to discuss the chapter, please feel free to call me at this number:

_____

Rush:

_____

_____

_____

New Member Education Program:

_____

_____

_____

Leadership:

_____

_____

_____

AFA Statement of Support of Racial Understanding and Acceptance

The development and maintenance of good relationships between the NPHC and its members, and the fraternities of the NIC, NPC, and the advisors and members of AFA, involves more than just an organizational communication problem. The underlying issue is respect. As hazing and chemical abuse are perceived as being created by the lack of educational opportunities, the same may be said for interracial understanding and acceptance.

The fraternities and sororities, both historically black and historically white, and their overseeing organizations, have worked to eliminate the ignorance and its aftereffects in a number of areas, including hazing and chemical abuse. It is our recommendation that the issue of interracial understanding and acceptance be included with the other issues as high priorities.

Educational programs, initiated at both the national and campus levels, have influenced the hazing and chemical abuse problems. It is our feeling that educational programs for the students, AFA members, and the leadership of Greek letter organizations will increase understanding and acceptance among all Greek organizations. In addition, these programs will assist our students in developing skills and relationships which will be beneficial to our society long after they leave our institutions.

[Adopted December, 1983]

Joint Resolution of the Association of Fraternity Advisors and the National Interfraternity Conference Regarding Rush Restrictions as a Disciplinary Sanction

Whereas, general fraternities and host institutions believe in a shared set of principles as outlined in the rituals of general fraternities and mission statements of colleges/universities; and,

Whereas, host institutions and general fraternities agree on the need for adherence to these high standards of ethical behavior and accountability for their violation; and,

Whereas, institutional codes of student conduct, Interfraternity council/judicial board policies, and general fraternity conduct codes should insure due process and contain specific written provisions for the use of educational and developmental sanctions, as well as those which are punitive in nature; and,

Whereas, sanctions which are educational and developmental will enable undergraduate chapter leaders, college/university officials, and general fraternity personnel to address cases of inappropriate behavior, redirect organizational attitudes, and ensure long-range stability; now, therefore,

Be it resolved by the Association of Fraternity Advisors and the National Interfraternity Conference:

1. Communication and cooperation between general fraternities and host institutions are essential if each is to fulfill its goal of holistic education and personal development of students.
2. In matters of chapter discipline, host institutions and general fraternities should work together in an integrated approach that considers recent chapter history, chapter self-disciplinary procedures and sanctions, and human development. Where possible and appropriate, educational, developmental, and punitive sanctions should be jointly agreed upon and jointly imposed.
3. Restrictions on rush when used for disciplinary purposes are neither educational nor developmental and therefore are not an acceptable sanction for men's fraternities.

[Adopted December 8, 1987]

Resolution on Heterosexism Within the Greek Community

Whereas, an understanding and appreciation of the diversity of peoples of the campus and the world community is one of the goals of the student development co-curriculum on the college campus; and,

Whereas, the Greek community is a vital part of the student development co-curriculum and is maintained to promote and engage students in an ongoing process of personal and group development; and,

Whereas, heterosexism, defined as behavior which makes individuals the target of oppression, harassment, or discrimination based upon their homosexual or bisexual orientation, is directly counter to the ideals of the educational experience and must not be tolerated or permitted; now, therefore,

Be it resolved, that the Association of Fraternity Advisors strongly encourages the campus Greek professional to implement sexual orientation awareness, education, and sensitivity programs for the Greek community; and,

Be it further resolved, that the campus Greek professional, or the appropriate authority, be strongly encouraged to challenge Greek chapter or member behaviors or attitudes which are heterosexist in nature; and,

Be it further resolved, that each men's and women's fraternity and sorority be strongly encouraged to implement sexual orientation awareness, education, and sensitivity programs on all membership levels and to develop appropriate responses to heterosexist behaviors; and,

6. Support and programs available
7. Governance and authority
8. A referral to a comprehensive policy document
9. Expectations of the system and of the institution.

Resolved, that the AFA communicate this resolution to chief student affairs administrators at host institutions and to appropriate student personnel associations.

[Adopted December 3, 1981]

AFA Policy on Coeducational Fraternities and Sororities

The Association of Fraternity Advisors insists upon the retention of social fraternities and sororities as single-sex organizations. The strength and purpose of the fraternity and sorority experience lies in the opportunities it holds for personal development. One critical issue during this stage of life is developing identity. The single-sex fraternity or sorority fosters one's identity by providing an environment which can best address the different developmental needs of each sex. A complete fraternity or sorority program will also provide the opportunities for interaction with the opposite sex, thus responding to other developmental needs of college students.

Administrators at colleges and universities are working to better the quality of chapter life for fraternities and sororities with equal vigor. The recent trend on university and college campuses of having one professional work with both groups has resulted in a more integrated approach to Greek life.

It is fraternity and sorority law which dictates that chapters be single-sex. The AFA believes that members of an organization should always have the chance to alter the constitution and bylaws when rules are no longer responsive to the needs of members or serve the goals of the organization. National fraternities and sororities allow for this change through a parliamentary process which must be respected. Furthermore, accepted housing options (all men, all women) offered by Greek chapters should not have interference.

[Adopted December 3, 1981]

AFA Guidelines for Extending Assistance to Faltering Chapters (Sororities)

In order to better inform the undergraduates, parents, alumnae, advisors, and national organizations, the following statements are offered as guidelines when working with sorority chapters which are in difficulty:

Development of recommended guidelines for universities to follow when working with critical or weak chapters could include the following:

A. *University Commitments*
1. Provide clear and specific chapter status reports to national officers, including specific statistics on membership and chapter operations. Use comparative data for a five-year period.
2. Provide chapter evaluations to visiting national officers (Exhibit A).
3. Provide guidance to the national fraternities in developing plans and programs to help chapters resolve their problems.
4. Provide any existing university requirements for continued recognition to chapters and national officers.
5. Offer any available resource within the university to help in resolving chapter problems. Provide lists of resources to the local chapter.
6. Provide a yearly evaluation of chapter based on Exhibit A.
7. Have a six-month evaluation meeting with critical chapters. Summarize in writing results of the meeting.

B. *National Organization Commitments*
1. Communicate in an open manner with university, alumnae, and chapter.
2. Provide reasonable and objective criteria and goals to the chapter.
3. Provide statement on closing policies to university, alumnae, and chapter.
4. Provide written documentation to university of visits, communications, and results when working with weak chapters (Exhibit A).
5. Provide trained personnel to work with the chapter (i.e., resident advisor or at least regular visits by consultants and district officers).
6. Work with the Panhellenic advisor to implement the plan of action (payment plan, seminars, etc.) in order to remedy the situation.
7. Advise the university and Panhellenic advisor of any probation imposed on the chapter and the reason for probation.

Ethic Statement Regarding the Closing of a Chapter for Non-Disciplinary Reasons

There is no way to remove a chapter without causing hurt and disappointment on the part of every person involved. It is necessary that universities and national organizations work together in insuring that all persons involved have been treated fairly, objectively, and honestly. A clear definition of the role of each area involved in a faltering chapter is necessary to assure a fair solution to the problem of chapter success.

[Adopted December 2, 1983]

AFA Resolution on Greek Advising

Whereas, fraternities and sororities have been an integral part of American higher education for over 200 years and have enjoyed a resurgence in popularity and viability during the last decade; and,

Whereas, fraternities and sororities have contributed positively to the traditions and quality of campus life and enriched student life during that time; and,

Whereas, fraternities and sororities offer opportunities for student development through their commitment to brotherhood/sisterhood, scholarship, service, and leadership; and,

Whereas, fraternities and sororities provide a bond and involvement for students which have been shown to positively affect retention rates among members; and,

Whereas, fraternity and sorority management entails diverse areas of operations such as housing, dining, alumni relations, recruiting, and risk management which demand local support beyond the undergraduates to succeed; and,

Whereas, most colleges and universities have recognized the need for professional support to effectuate student development potential and have employed full-time professionals in residence halls and student activities; and,

Whereas, fraternities and sororities have been able to more successfully develop their potential as living–learning environments and healthy organizations with full-time advisors at their host institutions; therefore,

Resolved, that the Association of Fraternity Advisors encourages colleges and universities to provide a professional staff member to serve as Greek advisor, whose time spent in Greek affairs is commensurate with the needs of students and chapters on their campuses.

Resolved, that the Liaison Committee of the Association of Fraternity Advisors shall communicate this resolution to all appropriate student affairs associations and to chief student affairs administrators of the host institutions.

[Adopted December 8, 1980]

AFA Resolution on NPHC Sororities and Fraternities

Whereas, NPHC sororities and fraternities are forming more and more chapters on "predominantly white" campuses; and,

Whereas, NPHC sororities and fraternities are treated differently from the more traditional sororities and fraternities; and,

Whereas, institutions of higher education have traditionally been in the forefront of social change; and,

Whereas, the Association of Fraternity Advisors recognizes the responsibility and integrity of each campus for the administration of Greek Affairs; therefore,

Resolved, that the Association of Fraternity Advisors recommend to the chief student affairs administrators and all campus Greek advisors on all campuses that have Greek systems that **all** (non-honorary or professional) fraternity and sorority organizations be treated in the same manner by encouraging that:

1. **all** such organizations follow the local institution's colonization policies,
2. **all** such sororities be members of the college Panhellenic council, and
3. **all** such fraternities be members of the local interfraternity council.

Resolved, that the Association of Fraternity Advisors notify all appropriate chief student affairs administrators, national fraternity organizations, and national sorority organizations of this resolution.

Resolved, that the Association of Fraternity Advisors be prepared to lend clarification, support, and encouragement to all campus Greek advisors in the implementation of this resolution.

[Adopted December 8, 1980]

AFA Institutional Relationship Resolution

Whereas, fraternity/sorority membership has been an integral part of student life in American higher education for over two centuries; and,

Whereas, fraternity/sorority membership is dedicated to the educational process through its development of brotherhood/sisterhood, citizenship, scholarship, leadership, and services; and,

Whereas, the local institution with its resources and responsibility for all students can have the most impactful influence on the quality of chapter life; and,

Whereas, brotherhood and sisterhood can be best translated into positive experiences when expectations are stated, resources made available, and direction provided; therefore,

Resolved, that the Association of Fraternity Advisors encourages all colleges and universities to formulate statements which articulate the institutional relationship to Greek letter organizations. Such statements should include but not be limited to:

1. Description of the system
2. Historical relationship
3. The educational role of fraternities and sororities
4. Conditions and responsibilities of affiliation
5. Housing and facilities

AFA Policy Statement on Alcohol and Drug Use

Statement of the Issue

The Association of Fraternity Advisors encourages each college, university, and national organization which has under its auspices the advising of undergraduate fraternity and sorority organizations to provide these groups with an educational program which outlines the consequences of alcohol and drug abuse.

The Association of Fraternity Advisors, realizing that alcohol and drug abuse have become two major societal problems, believes that it is the responsibility of those persons charged with the advising of fraternity and sorority members to provide programs dealing with alcohol and drug education. Fraternities and sororities, as social laboratories, provide an environment which presents the reality of peer pressure to follow the norm of alcohol use both in formal and in casual settings within a fraternity or sorority house or meeting area, whether on or off campus. We also recognize that the consumption of alcohol is generally an accepted aspect of society, and although we do not condemn its use, the abuse of alcohol is a reality within many fraternity/sorority systems. All who are involved in fraternities and sororities are faced with the challenge of teaching the responsible use of alcohol to its members, not only as a behavior to be learned for its own sake, but as an obligation to secure the mental and physical health of its members now and in the future.

From their inception in Raleigh Tavern, fraternities have carried the image of providing an atmosphere conducive to the social use of alcohol. Throughout the years both the fraternity and sorority systems have offered a socially controlled setting where drinking activities were monitored by members and through this mechanism created safeguards against the on-going abuse of alcohol. As peer pressure is certainly a reality to drink, peer pressure provides strong moderating forces as well. The rights to use alcohol will not disappear among college students. The fraternity and sorority offers that supportive atmosphere that is capable of teaching the appropriate, i.e., moderate, use of alcohol.

The majority of fraternities and sororities consciously construct an image which encourages a disproportionate emphasis on the use of alcohol. This image, along with the peer pressure and minimal supervision, creates an expectation among current and future members that drinking is an expected behavior.

AFA Policy on the Use of Alcohol and Drugs

Fraternities and sororities have the potential to influence positive change on any of their members. The choice to use alcohol among fraternity/sorority members reflects the widest range of value orientations. What must be preserved is an environment in which the fraternity/sorority can assess the role alcohol plays in its organization and then, if appropriate, plan a strategy for change, whereby its members can feel free to make those rational choices to use alcohol or not and to understand the gravity of that choice.

The policy of the AFA relative to the use of alcohol in fraternities and sororities is as follows:

1. Greek advisors must be aware of the realities of alcohol use and abuse in their respective systems.
2. All Greek advisors should have a fundamental understanding of alcohol abuse prevention strategies, especially those specifically designed by several national fraternity and sorority officers for use in their chapters.
3. Among the advisor's responsibilities is the necessity of making fraternities and sororities aware of the legal liabilities, ramifications, and facts of alcohol use as related to the fraternity and sorority.
4. A very effective behavior modifier is the instrumental use of peers as educators. Advisors should actively pursue the use of the peer educator model to aid in the on-going prevention of alcohol abuse within fraternities and sororities.
5. It should be strongly encouraged that Interfraternity and Panhellenic councils remove the use of alcohol in all chapters from a rush function. As a tool of competition, alcohol has no legitimate place in the rush process through which future members are attracted and upon which each may choose his or her future life-long affiliation.
6. The Association of Fraternity Advisors encourages that all events utilizing the use of alcohol be in accordance with all local, state, federal, and university and college laws or regulations. We also hope that such functions ensure an atmosphere conducive to living and learning and that the possession and consumption of alcohol should not infringe upon the privacy and peace of other individuals.
7. The Association of Fraternity Advisors encourages the enforcement of all local, state, federal, and university and college laws and regulations in regard to drug usage.

[Adopted December, 1980]

Resolutions and Position Statements

by M. Carolyn McFarland, University of Denver

In this chapter of the manual are compiled "Statements of Position" and/or "Resolutions" that have been adopted by the Association of Fraternity Advisors. These particular declarations have been identified from among the many in its history that the Association has agreed upon as most relevant to this manual. They serve to identify important issues in the fraternity world and represent the Association's perspective on those issues.

Fraternity and sorority advisors are encouraged to refer to the NIC and FEA directories for resolutions and statements of importance to those organizations.

AFA Resolution on Hazing

Whereas, the members of the Association of Fraternity Advisors strongly believe in the principles of integrity, human dignity, and the worth of individual; and,

Whereas, the members of the Association of Fraternity Advisors strongly believe in the principles of the fraternity movement; therefore,

Resolved, that the Association of Fraternity Advisors is strongly opposed to hazing in any form.

Resolved, that the Association of Fraternity Advisors encourages and supports the members of the Association in their endeavors to eliminate hazing from their campuses.

Resolved, that the Association of Fraternity Advisors encourages and supports the efforts of the national fraternities in their endeavors to eliminate hazing from their chapters.

[Adopted November 30, 1979]

AFA Policy Statement on Hazing

Statement of the Issue

One of the most controversial legacies left to the modern fraternity or sorority by past generations is the tradition of physical, psychological, or emotional testing of its potential members as a rite of passage to full membership.

The historical results have left a blemish on a record of otherwise fundamental successes and outstanding achievements rightfully attributed to American fraternities and sororities.

The placing of another in a situation which renders them open to physical or psychological harm is an anathema to any concept of brotherhood or sisterhood. Yet throughout the fraternity and sorority world, hazing arises when reason is clouded by tradition, loyalty is equated with subservience and/or where the ideal of brotherhood and sisterhood must be proven through the degrading of the individual.

AFA Policy on Hazing

The Association of Fraternity Advisors solicits the assistance of the national organizations and their officers, college and university administrators, and the undergraduate chapter members and alumni/ae in developing programs which are constructive to the fraternity/sorority education of the proposed new members and which forbid the practice of hazing.

It is the responsibility of the fraternity/sorority chapter and primarily its leaders in conjunction with their national organizations, where appropriate, to protect its pledges, associate members, members, or other persons associated with them, from any hazing ceremony, activity, or practice conducted, condoned, or encouraged by current members of the chapter, alumni/ae, or other fraternity/sorority associate. The Association of Fraternity Advisors further believes that not only is it the responsibility of the university, college, and national officials to enforce the various laws, rules, and policies against hazing, the Association encourages that each of these bodies be prepared to provide examples of positive pledge/associate member programs which include alternatives to hazing.

The advisor should play an active, positive, and consistent role as an educator to the Greek system, in assessing current practices and exploring educationally constructive ceremonies of induction while reinforcing administrative procedures to review on behalf of the respective college or university. The Association of Fraternity Advisors also encourages that each university, college, and national organization adopt an official policy on hazing and hopes that at the same time, hazing practices as well as the program suggested in the latter paragraph be given to each chapter. The latter information should also be communicated to the alumni/ae organizations of each group.

In encouraging such positive and educational programming, the Association hereby takes the position of being unequivocally opposed to any practice of mental or physical hazing of actives or pledge/associate members in pre-initiation, initiation, and post-initiation ceremonies or activities.

[Adopted December, 1980]

Community Service

Substance Abuse Issues Facing the Greek Advisor

further assistance with this matter, campuses can consult AFA and the BACCHUS and GAMMA Alcohol Policy library for samples of alcohol policies that fit the demographics of their institution.

The most successful and powerful way to facilitate dramatic change in an organization's enculturated attitudes and behaviors about substance abuse comes with system-wide change involving all Greek chapters. This process is slow and difficult, making the role of the campus fraternity/sorority professional essential during this time. The student leaders behind this change will need the advisor's support as well as the support of the fraternity and sorority headquarters. During times of major change, all constituencies involved need to be informed and kept up to date. Input should be solicited from chapter members, advisors, chapter officers, council officers, alumni/ae, other campus administrators, inter/national fraternity and sorority staff members, and other parties that may be affected. Keeping them involved in the process will help ensure their commitment to the changes.

Addressing the problem of substance abuse on the organizational level requires much work, attention and patience. Nevertheless, those who have experienced positive changes will attest to the value of their efforts. All across the nation, Greek communities are changing their attitudes and habits about drug and alcohol use through educational workshops, the implementation of system-wide alcohol policies, a focus on wellness, and a renewed commitment to brotherhood and sisterhood.

Conclusion

Substance abuse issues can affect many areas of a Greek advisor's job. Many resources and approaches must be utilized to tackle the many facets of this complex issue. Through educational programming, policy enforcement, and individual and organizational intervention, we hope to make students more aware of the consequences of their behaviors regarding substance use. As we implement these strategies, we hope to observe our impact on students' attitudes and habits. Our ultimate goal is for students to make more informed decisions about the role alcohol and drugs will play in their lives and to feel empowered to change the norms of their Greek experience, endorsing a healthier and safer environment.

professional must intervene. Each scenario will be different but there are some general assumptions which can be made to guide intervention procedures. Naturally, the approach will depend on whether the matter involves an individual with a substance abuse problem or whether it entails a problem facing a group such as a chapter or the Greek community.

Individual Intervention

Because the campus fraternity/sorority professional interacts with such a large population on the campus, problems facing individuals within the Greek community are often brought to his/her attention. This does not mean that the advisor should be an expert on all such crises. When dealing with an individual who may have a problem with substance abuse, the Greek professional will want to take actions which will most help that person. He or she should be aware of the danger signs and behaviors that may indicate alcohol or drug abuse in order to be better prepared when such circumstances arise. Some of the danger signs include substance use to avoid problems, overcome shyness or build confidence, missed classes or poor academic performance due to substance misuse, memory loss, use of substances alone, defensiveness concerning drinking behaviors and changes in social habits and friendships. Once the advisor has adequately assessed the situation, the most suitable course of action can be determined. The most appropriate procedure may be to refer the individual to the substance abuse prevention office, health or wellness center and/or counseling services on campus. If this person's behavior resulted in a policy violation or if it created a problem at a chapter function, the campus fraternity/sorority professional should hold this person accountable for his/her actions, and work with the chapter to do the same through the chapter standards or judicial board. When handling such matters, it is important to remember their sensitive and confidential nature. If the advisor has a personal relationship with the individual, she or he may wish to follow up with him/her at a later date, but becoming too involved may create a difficult burden.

Organizational Intervention

The campus fraternity/sorority professional will also encounter situations in which a Greek organization as a whole appears to be suffering from substance abuse. Usually in these cases, the chapter has created and passed down values, attitudes and behaviors which foster the abuse of alcohol (and sometimes other drugs as well). Organizational substance abuse can be detected by several indicators: repeated non-compliance with alcohol and drug polices; focus on alcohol at many or all chapter functions; other related problems such as vandalism, disruptive behavior, violence and/or low group self-esteem; or a combination of these factors. Sometimes the entire Greek community has been socialized with these unhealthy norms. What then is a Greek advisor to do?

To affect long-term positive changes in regard to this problem, the culture of the group must be altered so that substance abuse is no longer the norm. In order to tackle this complex task, the campus fraternity/sorority professional must take a comprehensive approach. Examine the current values and rationale associated with the usage behavior. Many studies indicate that Greeks have a "group" problem due to the high degree of peer influence. If such peer pressure has created the current norms, why not use this peer pressure positively to promote healthier attitudes and practices regarding the use of alcohol and drugs? Once the advisor has identified those individuals within a chapter or Greek community who are dissatisfied with the current state of affairs, their beliefs and behaviors can be utilized to create a new atmosphere.

One method that may help alter current norms is the development of new guidelines for the consumption/distribution/serving of alcohol at chapter or Greek functions. This allows Greeks to work together in a constructive manner and specifically address the issue of substance abuse. This can be a powerful experience because students will engage in interactive discussions that assess their current norms, the reasons for change, and the type of changes they would like to implement. In effect, these student leaders are promoting a healthier environment by evaluating their current norms and assessing their value in their lives, and consequently establishing new standards that will become a part of a new social atmosphere for their group. When students are empowered to facilitate change, it is embraced much more openly than when they feel it is forced upon them by administrators and their "national". Moreover, as Greeks set rules for how alcohol will be served, they will also be establishing guidelines for appropriate behaviors regarding alcohol use. This permits them to set the standards for the type of social atmosphere they want, and in essence, revamp the culture of their chapter and/or Greek community. The final aspect of this process is to develop a mechanism to administer consequences for those who fail to uphold the new standards of the community. For

implementing educational workshops and opening the door for change among their peers. Also, National Collegiate Alcohol and Drug Awareness Weeks offer Greeks an opportunity to utilize campus leadership and resources to educate their membership about substance abuse issues. Students should also be encouraged to implement non-alcoholic programs as a part of their social calender. These functions allow students to focus on healthy group interaction without alcohol playing a part.

Educational efforts within the Greek community often follow the format of peer education programs. Peer education programs often use positive peer pressure as a mechanism for addressing key issues and have been effective in changing problem attitudes and behaviors which surround and sustain these issues. Other student affairs professionals at an institution may be interested in creating a peer education program as well. The substance abuse prevention office or student health service on a campus can be consulted for assistance in this area. The BACCHUS and GAMMA Peer Education Network can also assist in this area. Of course, AFA is another valuable resource the Greek advisor can utilize. In particular, the annual conference, *AFA Perspectives*, this manual, newcomer programs, and the membership services committees are all in place for learning and gathering ideas from other professionals. Moreover, the informal networking is invaluable, and AFA colleagues can support and assist in implementing your educational goals. Alumni/ae advisors can also be an excellent resource and they can assist chapters in implementing their educational programs. However, remember that alumni/ae may also need to be educated before they can effectively educate their members.

Policy Enforcement

Enforcing policies regarding alcohol consumption is another aspect of the job of the Greek advisor that relates to substance abuse whether it be university policy, federal, state or local laws. It is important to be well-versed in these rules and regulations in order to adequately inform students when addressing any of their questions. A thorough understanding of the federal Drug-Free Schools and Communities Act of 1989 and its impact on fraternities and sororities is also essential (the report on this topic prepared by Phi Gamma Delta International Fraternity is a good resource).

It is also important to ensure that inter/national fraternity policies regarding alcohol consumption (such as FIPG, Risk Management Guidelines) are upheld. The Greek advisor's exact role in terms of enforcing the polices of the Greek organizations will depend upon how a particular institution defines the job expectations and responsibilities. Given the University's interpretation of this role, in order to be most effective it is important for the campus fraternity/sorority professional to have a good working relationship with the fraternity and sorority headquarters. If a strong partnership exists between the university and the inter/national Greek organization, everyone can work together to assess situations and determine the most appropriate manner in which to sanction a chapter when and if need arises.

When imposing sanctions, it is essential to make students aware that there are consequences and risks associated with their behaviors. This step is imperative as young adults often falsely perceive college as a time with little responsibility and few consequences. When polices are violated, we have an opportunity to articulate our expectations that they must uphold the principles, values, rules and regulations of the community to which they belong - which includes their institution, their Greek community, their inter/national fraternity or sorority, and their surrounding city or town. Sanctions which are educational in nature, which get at the heart of the problem, and which may allow students to honestly assess their environment in terms of the potential dangers associated with current practices are believed to be more beneficial than strictly punitive measures. Moreover, as we uphold these polices relating to alcohol consumption, we are also setting norms for appropriate use of alcohol.

The use of illicit drugs is unacceptable, and we must hold accountable those who violate these policies. Drug use is often considered more "dangerous" than alcohol use because such substances are illegal for all ages, the side effects of many illicit substances are unknown, and much smaller doses can be lethal. Again, the campus fraternity/sorority professional is encouraged to educate students about the health risks and policies associated with drug use as well as the consequences of violating university and fraternity regulations regarding the use of these substances.

Intervention

Given the predominant role that alcohol and other substances play on the college campus, situations will arise in which the campus fraternity/sorority

Substance Abuse Issues Facing the Greek Advisor

by Cathy Early, Washington University in St. Louis

Campus fraternity/sorority professionals spend much of their time handling substance abuse related issues, and these issues affect our role as educator, standard setter, policy enforcer, disciplinarian, counselor, and programmer.

As attitudes continue to change, people are no longer willing to tolerate the "Animal House" image which has pervaded Greek life for so long. Society, in general, has increased the pressure on higher education to address substance abuse problems as evidenced by the Drug Free Schools and Communities Act, more restrictive campus and fraternity alcohol policies, and the emergence of FIPG (Fraternity Insurance Purchasing Group) as a major force in Greek life. As societal influences continue to change the behaviors that are deemed acceptable, the Greek life professional will surely have to devote vast amounts of time ensuring that the Greek community reflects more positive norms. With preparation, this transition may not be so much arduous as enjoyable.

A study conducted by the University of Michigan's Institute for Social Research (Johnston, O'Malley & Bachman, 1991) indicates that 75% of college students have used alcohol in the past 20 days and 43% have experienced binge drinking, 5 or more drinks in one setting, in the past two weeks. These figures have remained fairly constant over the past several years and should alarm the Greek life professional. Greek advisors named "alcohol abuse" the number one problem chapters face, and "drug abuse other than alcohol" as the fourth most prevalent problem and concern (Winston Jr. & Hughes, 1987).

In the face of these alarming numbers, colleges and universities have intensified the attention devoted to these issues. Ninety percent of institutions report an increase in their alcohol education and prevention efforts since 1988, and 92% have educational and prevention efforts for illicit drugs (Anderson & Gadaleto, 1991). As the role of the Greek advisor is affected by these trends, he/she must be prepared to effectively address problems and concerns related to substance abuse.

Role of the Campus Fraternity/ Sorority Professional

When it comes to working with students and Greek organizations in relation to substance abuse issues, the campus fraternity/sorority professional must approach the problem from many different angles as the issue is complicated and multi-faceted. In the following paragraphs we will examine the role of the campus fraternity/sorority professional in the areas of education, policy development and enforcement, confrontation, and intervention, in an effort to provide methods which may elicit positive, directed change in patterns of substance abuse, both at the individual and organizational level.

Education

Education is a powerful, positive, and proactive way to facilitate change and highlight concerns for discussion. By educating students, we provide the information, resources, and values which will allow them to make more informed, thoughtful decisions. Through education, we can provide the tools necessary to create a safer, healthier environment. It is recommended that the Greek advisor implement a broad-based approach to substance abuse education which addresses the issues related to substance abuse such as sexual abuse, vandalism, self-esteem, risk management, and liabilities. This enables the student to see the bigger picture, the implications of certain behaviors and attitudes, and how and why these seemingly separate issues are related. Educational efforts in which the Greek community has addressed substance abuse have also proven to be effective. This takes students beyond their individual chapter perspective through the impact of a community-wide educational program which is more far-reaching. It also allows students to work together on a Greek issue which, in turn, enhances interfraternal relations and cooperation.

To assist in educational endeavors, the campus fraternity/sorority professional need only turn to the plethora of resources available to him/her. The inter/national fraternities and sororities have developed and refined a variety of programs dealing with substance abuse, as well as related issues, which may be useful. The National Interfraternity Conference (NIC), National Panhellenic Conference (NPC), and the National Pan-Hellenic Council (NPHC) are also good sources to consult, especially for community-wide programming ideas. The BACCHUS and GAMMA Peer Education Network serves as an exceptional resource in this area and can provide a list of available programs, manuals, and other educational materials. They can also assist in establishing BACCHUS and GAMMA chapters on a campus. Such student-run organizations can be extremely useful in

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ORGANIZATIONS, Continued

National Student Campaign Against Hunger and Homelessness
29 Temple Place
Boston, MA 02111
617/292-4823

PUBLICATIONS

Guides

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State Compacts for Community Service: A Guide to Establishing Statewide Coalitions of College and University Presidents (1993). Providence, RI: Campus Compact.

Walsh, J., Walker, S., and Nozaki, R., eds. (1991). *Community and Volunteer Service: A Resource Guide for Community Colleges.* Providence, RI: Campus Compact.

Internet

Service Learning Listserv
To subscribe, send e-mail to:
listproc@csf.colorado.edu
Your message should read:
subscribe service-learning "your name"

Who Cares! on line at
http://www.whocares.org/

General

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Resources

There are many organizations to assist in development of service programs. They offer memberships, conferences, resources, advice and other assistance. In addition, there are countless publications to assist you in dealing with the multitude of questions which arise in developing and running service programs. We have compiled only a brief listing of helpful resources. The information regarding addresses and phone numbers is accurate as of 2/97.

ORGANIZATIONS

Adopt-A-School
National Interfraternity Conference
3901 W. 86th St. #390
Indianapolis, IN 46268-1791
317/872-1112 Fax: 317/872-1134
e-mail: NICINDY@iquest.com

AmeriCorps
Corporation for National and
Community Service
1202 New York Ave., N.W.
Washington, DC 20525
800/94-ACORPS

Break Away: The Alternative Break Connection
6026 Station B
Nashville, TN 37235
615/343-0385
e-mail: brakaway@ctrvax.vanderbilt.edu

Campus Compact: Project for Public and Community Service
Box 1975
Brown University
Providence, RI 02912
401/863-1119

Campus Outreach Opportunity League (COOL)
1101 15th Street, N.W. 2nd Floor
Washington, DC. 20036
202/797-6800

Into the Streets
386 McNeal Hall
University of Minnesota
St. Paul, MN 55108-1011
612/624-4700 Fax: 612/625-5767

Make a Difference Day
Hot Line: 1-800-416-3824
e-mail: diffday@aol.com

National Society for Experiential Education
3509 Hayworth Drive, Suite 207
Raleigh, NC 27609
919/787-3263

National Wildlife Federation/Campus Ecology
1400 16th Street, N.W.
Washington, DC 20036
202/797-6800

National Youth Leadership Council
1910 West County Road B
Roseville, MN 55113
612/631-3672

Partnership for Service-Learning
815 Second Avenue, Suite 315
New York, NY 10017
212/986-0989

Points of Light Foundation
1737 H Street, N.W.
Washington, DC 20006
202/223-9186

Project America
596 Pepperidge Tree Lane, Suite 890
Kinnelon, NJ 07405
201/812-1717 Fax: 201/785-2453

Student Coalition for Action in Literacy Education
University of North Carolina
CB#3500, Room 013 Peabody
Chapel Hill, NC 27599
919/962-1542

United Way of America
701 N. Fairfax Street
Alexandria, VA 22314-2045
800/UWA-2757

Youth Service America
1101 15th Street, N.W., Suite 200
Washington, DC 20005
202/296-2992

plify the values inherent in our mottoes, creeds and campus mission statements.

"Never doubt for a moment that a small group of thoughtful, committed citizens can change the world; indeed it is the only thing that ever has."
-- Margaret Meade

Nuts & Bolts of Community Service

1. Survey the participants:
   - The survey should include questions on the participants' interests, skills, and availability.
   - Determine how many committed volunteers you will have before proceeding.
   - Let the volunteers know what is expected of them. Develop a contract between the organizers of the project and the volunteers, signed by both.
2. Find out what the community needs:
   - Make phone calls to community agencies or mail surveys to a variety of agencies asking what assistance is needed.
   - If you have a volunteer office on your campus, utilize them for finding out community needs. Volunteer offices usually keep data on various volunteer opportunities and needs.
   - Contact your local United Way. United Way is the umbrella organization for many service agencies and can provide information and contacts for area agencies.
3. Decide on the type of project:
   - One-time projects could take a day or just a couple of hours. The number of participants will be a factor in deciding on one-time projects. Agencies have a difficult time accommodating large groups. A variety of agencies could be served at one time for an "Into the Streets" plunge experience with large groups.
   - Long-term projects entail a commitment to volunteer on a regular basis over an extended period. Weekly tutoring is an example of a long-term project.
4. Choose an agency or agencies:
   - Use the participant surveys and community needs to narrow down what type of volunteer work your group can and should participate in.
   - Remember to utilize the volunteer office, if there is one.
   - Make sure the volunteer work chosen is engaging, challenging and meaningful.
5. Make contact with agencies:
   - Be prepared to articulate the following:
     - The number of volunteers
     - Times that volunteers are available
     - Interests and skills of the group
   - Be prepared to ask them the following:
     - How many people can be utilized at one time?
     - What type of work will the volunteers be doing?
     - Who will be working with the volunteers?
     - If supplies are needed, who provides them?
6. Provide orientation and training:
   - Ask the agency to give volunteers a brief orientation of their agency and the clients they serve prior to the first scheduled work period.
   - Based on the type of volunteer work and skills of the volunteers, determine how much training is needed. Then develop and implement a training program.
   - If the agency does not provide someone to delegate and oversee the work of volunteers, choose someone from the group to assume that role.
7. Evaluate and Reflect:
   - Hold a reflection session with the volunteers within a few days of the project.
   - For long-term projects, provide reflection opportunities on a regular basis. These can be in the form of group discussions, or individual thought or journaling, or both.
   - Provide feedback to the agency and ask for feedback from them.
   - Recognize the efforts of volunteers by providing certificates, press releases to hometown newspapers, letters from university president or other "pats on the back" for their work.

"I shall pass through this world but once. Any good therefore that I can do or any kindness that I can show to any human being, let me do it now. Let me not defer or neglect it, for I shall not pass this way again." -- Mahatma Gandhi

Service Learning

Fraternity and sorority contributions are very important in both of the above areas. As fraternity/sorority affairs professionals, we have an obligation to help the students with whom we work develop throughout their college experience. To these ends, we can take service one step further to encourage students to reflect on their experience and process what they learned from it. This is known as service-learning.

service-learning, n., -- a method by which students and participants learn and develop through active participation in thoughtfully organized service.

For a project to be considered service-learning, it must encompass the following tenets:

- Encourage students to learn and develop through active participation in meaningful service experiences that meet actual community needs and are coordinated in collaboration with the school and community.
- Provide structured time for thought, group processing or journaling about what he/she did and saw during the actual service activity.
- Provide students with opportunities to use newly acquired skills and knowledge in real-life situations within their communities.
- Enhance what is taught in school by extending student-learning beyond the classroom and into the community, and help foster the development of a sense of caring in others.

"True efforts to serve the community require activity in the mind -- not just activity in the hands." -- Brown Community Outreach Brochure

Why Do We Serve?

For others. We serve to assist those in need and help make the community in which we live or go to school a better place. Through service we also witness and hopefully begin to understand experiences and backgrounds different from our own, whether based on culture, economic status, educational level, physical ability, age, and/or gender.

For ourselves. "The heart is happiest when it's beating for others." Often overlooked are the benefits that volunteers receive: leadership skills, a sense of accomplishment, increased self-esteem from contributing to something important, better definition of personal values, attitudes and beliefs about the world, and experience in working with real people and solving real problems, just to name a few.

"I am convinced that my life belongs to the whole community; and as long as I live, it is my privilege to do for it whatever I can. For the harder I work, the more I live."

-- George Bernard Shaw

The Role of Service in the Fraternity and Sorority Experience

Effective community service experiences produce tremendous benefits for our chapters, systems and individual members. The following four points highlight those areas in which service projects can be most beneficial.

Educational Tool

If we truly see ourselves as educators, it is our responsibility to continually seek out and create opportunities to foster student learning. Well planned service experiences incorporating all elements of the service-learning model are the key to success. While this process may be time consuming, the results are tangible and measurable. Meaningful service experiences teach skills and shape perceptions that last a lifetime.

Chapter Building

Providing opportunities for individuals to work together toward a common goal is one of the fastest routes to fostering a sense of brotherhood, sisterhood and community. While the structured group exercises we so often utilize can be effective -- the value of a shared service experience can be priceless.

Interfraternal Relations

Difficult relations between campus chapters can be the source of nightmares for the campus advisor. Involving an IFC, Panhellenic, NPHC or Governing council task force in formulating and participating in joint service projects can lead to a greater sense of understanding and support between chapters. This proactive approach to developing positive interfraternal relations provides students with a more united sense of understanding, pride and accomplishment.

Public Relations

Well-supported and publicized service projects are critical to achieving a respectable level of rapport with faculty, administrators, non-affiliated students and community neighbors. Service activities provide the opportunity for us to practice and exem-

Community Service

by Tracy Maxwell, University of Wisconsin-Whitewater
Jamie Gray, Bowling Green State University
Donna Brecker, Saint Joseph's University
Felicia Curland, Bradley University

Introduction

It has been said that "man would rather spend himself for a cause than live idly in prosperity." Surely this is truer now than it has been in some time. In the 1930s the CCC (Civilian Conservation Corps) instilled the idea of national service as an obligation, even a privilege: putting something back into the country in exchange for all the benefits we receive from living in this democratic society. National service has been promoted by several of our nation's leaders from President Kennedy with the founding of the Peace Corps, President Bush's Points of Light Foundation, and AmeriCorps, created by President Clinton.

Certainly, fraternity and sorority members have always given generously to support national and local philanthropies adopted by their organizations. However, it seems lately that fraternity and sorority members are giving more of themselves than ever before. These students are volunteering their time to serve in soup kitchens, tutor young children, build homes for the less fortunate and clean up campuses and highways by "adopting" a spot. Numerous Greek Weeks are focused on, or at least contain, some aspect of service to the campus or community, whether it be donating profits from an event, sponsoring a blood drive, running a carnival for area children, or organizing a system-wide day of service. On the national level, fraternities and sororities are sponsoring "Into the Streets" programs for conference attendees and/or making donations to local service agencies, in addition to continued support of national philanthropies. Campuses are creating community service centers run by full-time staff members, and more and more students are participating in alternative Spring breaks.

The upside of this increased volunteerism is the tremendous benefit; not only to the recipients of the service, but to the volunteers, themselves. People gain a deep sense of satisfaction from helping others and feel as if they have contributed in some way. Students who have gone on alternative Spring break trips have often said the experience changed their lives. It can be difficult for us to understand how rewarding volunteering is until we do it, and then there is no doubt. This chapter will assist you in developing a strong community service program within your fraternity and sorority community. It will discuss the role played by chapters, governing councils, inter/national organizations, and campuses; provide resources you can turn to for more help; discuss the service learning model of student development; list examples of successful projects and programs from across the country; and provide a nuts and bolts checklist you can use to get started.

"I don't know what your destiny will be, but the one thing I know; the only ones among you who will be truly happy are those who have sought and found how to serve." – Albert Schweitzer

Service Defined

When people think of service, many thoughts come to mind: raising money for a charity, volunteering at a local agency, and assisting members of the community. Because service comes in so many forms, common definitions have been developed to distinguish between types of service.

volunteerism, n., -- time and energy donated to hands on assistance (e.g. tutoring school children, visiting a nursing home, picking up trash on a highway). This is commonly referred to as "community service" on college campuses and within fraternities and sororities.

philanthropy, n., -- fund raising and monetary donations for a charity or specific cause. This is what fraternities and sororities are most often associated with and the kind of "service" for which they are generally known.

"Everybody can be great because everybody can serve. You don't have to have a college degree to serve. You don't have to make your subject and verb agree to serve. You only need a heart full of grace, a soul generated by love."

– Dr. Martin Luther King, Jr.

allows broader damages, such as damages for emotional or physical distress and punitive damages, that are generally not available for breach of contract.

III. PERSONAL LIABILITY FOR ALLEGED DISCRIMINATION UNDER FEDERAL AND STATE LAW

These claims are not based on contractual rights, but on the alleged violation of rights created or recognized by statute, i.e., civil rights statutes.

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination on the basis of race, color, religion, sex and national origin. It regulates the conduct of employers. "Employer" is defined to include "any agent" of such an employer [42 U.S.C. sec. 2000e (b)]. The courts define a supervisor as one who serves in a supervisory position over the plaintiff and exercises significant control over the plaintiff's hiring, firing or conditions of employment.

Under Title VII, most courts have ruled that plaintiffs may not maintain an action against individual supervisors, but the employer is generally liable.[1] However, personal liability of supervisors, particularly in sexual harassment claims, has found some favor with a minority of federal district courts and a few federal circuit courts as well.[2]

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[1]Birkbeck v. Marvel Lighting Co., 30 F.3d 507 (4th Cir. 1994); Busby v. City of Orlando, 931 F. 2d 764, 772 (11th Cir. 1991) (supervisor in public agency can only be sued in official capacity); Miller v. Maxwell's International, Inc., 991 F. 2d 583, 587 (9th Cir. 1993); Grant v. Lone Star Co., 21 F.3d 649, 651-3 (5th Cir. 1994); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (supervisor in public agency can only be sued in official capacity); Garcia v. Elf Ato Chem North America, 28 F.2d 446, 451 n. 2 (5th Cir. 1994); Sims v. KCA, Inc., 28 F.3d 113 (10th Cir. 1994); Sparks v. Pilot Freight Carriers, Inc., 830 F.2d 1554, 1558 N. 4 (11th Cir. 1987); Crawford v. West Jersey Health Systems, 847 F. Supp. 1232 (D.N.J. 1994); Pommier v. James L. Edelstein Enterprises, 816 F. Supp. 476 (N.D. Ill. 1993); Johnson v. Northern Indiana Public Service Co., 844 F. Supp. 466, 470 (N.D. Ind. 1994); Lowry v. Clark, 843 F. Supp. 228, 230 (E.D. Ky. 1994); Wilson v. Wayne County, 856 F. Supp. 1254 (M.D. Tenn. 1994); Weiss v. Coca Cola Bottling Co. of Chicago, 772 F. Supp. 407, 410-11 (N.D. Ill. 1991).

[2]Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986); Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989), vacated on other grounds, 900 F.2d 27 (4th Cir. 1990) [but see Birkbeck v. Marvel Lighting Co.--cited in note 1, in which 4th Cir. distinguished Paroline without overruling it]; Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986); Harvey v. Blake, 913 F.2d 226 (5th Cir. 1990) (if acting as agents of the employer); Gaddy v. Abex Corp., 884 F. 2d 312, 318-19 (7th Cir. 1989) (if supervisors have decision-making authority); Zaken v. Boerer, 964 F.2d 1319, 1322-24 (2d Cir. 1992); Cross v. Alabama, 1994 WL 42403 *13-14 (11th Cir. 1994); Lamirande v. Resolution Trust Co., 834 F. Supp. 526 (D.N.H. 1993); Guyette v. Stouffer Chemical Co., 518 F. Supp. 521, 525-6 (D.N.J. 1981) (sexual harassment case); Magnuson v. Peak Technical Services, Inc., 808 F. Supp. 500, 512 (E.D.Va. 1992) (if supervisor controls aspects of compensation or terms and conditions of employment); Showalter v. Allison Reed Group, Inc., 767 F. Supp. 1205, 1210-11 (D.RI. 1991) (if supervisor has authority to hire or fire); Domm v. Jersey Printing Co., Inc., 871 F. Supp. 732 (D.N.J. 1994); Vodde v. Indiana Michigan Power Co., 852 F. Supp. 676 (N.D. Ind. 1994); Haltek v. Village of Park Forest, 864 F. Supp. 802 (N.D. Ill. 1994); Douglas v. Coca Cola Bottling Co., 855 F. Supp. 518, 520 (D.N.H. 1994); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784 (N.D. Ill. 1993); Jones v. Metropolitan Denver Sewage Disposal Dist., 537 F. Supp. 966, 970 (D. Colo. 1982); Jendusa

* The presenters would like to thank Donna J. Donati (Detroit office), and Ronald E. Baylor and Louise B. Wright (Kalamazoo office) of Miller, Canfield, Paddock and Stone, and Robert H. Pritchard of the University of Florida Office of General Counsel for their contributions to portions of this paper.

II. WHY WOULD A DISGRUNTLED PLAINTIFF SUE A COLLEGE OR UNIVERSITY ADMINISTRATOR PERSONALLY?

A. An Eye For An Eye; Personal Ill Will

Plaintiffs often harbor little bad feeling toward the college or university, but instead blame all of their difficulty on their supervisor or the administrator who made the decision which impacted them. It is always satisfying to sue the villain.

B. Tactics/Strategy

Plaintiff's lawyer typically wants more than one defendant:

1. Divide and conquer. Counsel may hope to pit defendants against each other.

2. Getting To Know You/Discovery. Named parties are easier to depose than witnesses. Subpoenas are then not needed, mileage fees do have to be paid, and the plaintiff can ask leading questions.

3. Dragnet/To Err Is Human. Not knowing where the real culpability may lie, plaintiff's counsel have been known to sue many defendants to be sure the guilty party(ies) is/are included.

4. Feet Of Clay. The best run institution in the world may be made to look as bad as its worst supervisor or administrator (e.g., careless, drastic, backbiting, selfish, arrogant, bigoted). Personalities of the decision maker are at the heart of many litigated disputes.

5. Fear And Honor. The fear of being sued and the ethical obligation to vigorously advance the plaintiff's interest combine to encourage many plaintiff's lawyers to "sue everybody in sight," and advance all possible theories of liability. This is especially true when the plaintiff's lawyer is inexperienced or unsure that he/she has a case.

6. Money Makes The World Go Around. Some theories of liability make more sense, or have more jury appeal, when asserted against an individual. These include sexual harassment, discrimination, slander, and many others. Tort law

NACUA/NASPA
Student Affairs Workshop
Student Issues 2000
October 20-22, 1996

ADVISING UNIVERSITY ADMINISTRATORS ON HOW TO RECOGNIZE, REDUCE, OR AVOID THE RISK OF PERSONAL LIABILITY*

By:

Thomas P. Hustoles
Miller, Canfield, Paddock and Stone, P.L.C.
Kalamazoo, Michigan

Pamela J. Bernard
University of Florida

And

Barbara A. Lee
Rutgers, The State
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I. INTRODUCTION

These materials are intended to serve two purposes. First, they were originally prepared as a training manual for presentation to college and university administrators on the subject of recognizing and reducing or avoiding personal liability for the decisions they make. In this vein, they can be used by college counsel as an outline for such training sessions for administrators. One time-tested way to elevate concern for institutional liability is to focus administrators on their exposure to personal liability.

Second, for presentation to this audience, the authors have added numerous references to case citations and other reference materials as a starting point for counsel to examine these issues when they arise on your campus.

The topic of criminal liability is not covered in these materials, but will be covered briefly in the oral presentation. More often than not, federal regulatory statutes include both civil and criminal penalties. With seemingly increasing frequency, the Justice Department and other federal agencies have sought criminal sanctions. Such prosecutions give rise to the complex questions of when and whether institutions ought to defend and indemnify employees who are the subject of criminal prosecutions arising out of actions they purportedly took in the course of their employment. This subject will also be covered briefly in the oral remarks.

Session #6: **Difficult/Troubled Students in the Residence Hall**

Speakers: *Carolyn Palmer*, Bowling Green State University

Outlines on this Disk

Session #7: **Personal Liability Issues: "Am I Liable?"**

Speakers: *Pamela J. Bernard*, University of Florida
Thomas P. Hustoles, Miller, Canfield, Paddock & Stone (Northern Michigan University and Western Michigan University)

Outlines on this Disk
pb&th.wpd

Session #8: **NCAA Compliance and Reporting Requirements**

Speakers: *Andy Geiger*, The Ohio State University
Barbara Snyder, The Ohio State University

Outlines on this Disk
geiger.wpd
snyder.wpd

Session #9: **Harassment Issues**

Speakers: *Steven J. McDonald*, The Ohio State University
Rodney Peterson, University of Maryland

Outlines on this Disk

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Indianapolis, Indiana

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qualified privilege is lost if the statements are not made in good faith or if the statements are published beyond the scope of those with a need to know. A statement made by an employee's supervisor to a department head performing an evaluation would be protected by a qualified privilege if the department head needed the supervisor's input regarding the employee prior to the evaluation. However, a statement made by the supervisor to one employee regarding the evaluation of another employee would not be protected by a qualified privilege, since the employee has no need to know.

5. Opinion. A statement which is merely the expression of an opinion is not actionable as defamation. Expression of opinions is protected by the First Amendment. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). But see Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990), in which the Supreme Court denied that an "opinion privilege" existed, and that, if the plaintiff was a public figure, "statements on matters of public concern must be provable as false before liability attaches." And opinions that imply that the speaker is asserting facts that are not true are not protected as opinion (Milkovich). See Sigal Construction Corp. v. Stanbury, 586 A.2d 1204 (D.C. Ct. App. 1991).

6. Short Statutes of Limitation. Most states require that plaintiffs bring defamation actions within a short period of time from when the alleged conduct took place, typically one year.

For a discussion of defamation liability for faculty and administrators, see Frances Bazluke, Defamation Issues in Higher Education (National Association of College and University Attorneys, 1990).

d. Defamation In The Employment Context -- Your Liability as a Supervisor. Special considerations are appropriate when supervisors take certain actions regarding employees, including investigations, termination, communicating to outside parties, and disseminating written information.

Investigating An Employee. If you believe an employee is guilty of some sort of wrongdoing and decide to conduct an investigation, be very careful what you say to other employees and to whom you say it. Remember that only those with an absolute need to know should be informed of your suspicions. For example, when interviewing other employees, do not name the suspect unless it is absolutely necessary to disclose the name to that particular employee. If you

may be difficult to prove at trial. The burden of proving that the statement is true is on the individual claiming it as a defense, and is generally a jury question.

2. Consent. One who publishes a defamatory statement with the consent, express or implied, of the person to whom the statement refers is not subject to liability for defamation. For example, in Kraft v. William Alanson White Psychiatric Foundation., 498 A.2d 1145, 1149 (D.C. App. 1985), the court held that a student's defamation claim arising out of faculty members' evaluation of his clinical work was not actionable because, by enrolling in the program, the student had implicitly consented to the intra-school publication of the evaluations. The "consent" defense may be claimed if, when former employees or their prospective employers seek references, a written, signed release from the former employee which has been reviewed by an attorney is required before information is provided.

In Sophianopoulous v. McCormick, 385 S.E.2d 682 (Ga. Ct. App. 1989), a professor sued his department chair for sending memoranda critical of the professor's performance to the AAUP. Since the professor had initially contacted the AAUP and the chair was responding to the AAUP's inquiry, the court ruled that, by involving the AAUP in the dispute, the plaintiff had consented to publication of the information.

3. Absolute Privilege. Certain privileges or immunities also provide a defense to defamation. If publication is required by law or if the statement is made in a legislative or judicial proceeding, an absolute defense exists (e.g., the Michigan Supreme Court has held that statements made by an employer to the unemployment insurance commission about an employee seeking employment benefits are absolutely privileged). An absolute privilege means that the publisher cannot be held liable for the statement under any circumstances.

4. Qualified Or Conditional Privileges. If the statement is made in good faith and is necessary to protect the public interest, a qualified or conditional privilege exists. This kind of privilege protects the publisher from liability for defamatory statements so long as they are made in good faith to persons with an absolute need to know. For instance, an administrator has a qualified privilege to make statements regarding a former employee to a prospective or present employer. See McConnell v. Howard University, 621 F. Supp. 327 (D.D.C. 1985), modified on other grounds, 818 F.2d 58 (D.C. Cir. 1987). A

hatred, contempt, or ridicule, or causing her or him to be shunned or avoided, or injuring her or him in business or occupation. Slander is the publication of defamatory statements by spoken words or physical gestures; libel is the publication of such statements by written or printed words.

b. Elements For Liability. Four elements must be satisfied to establish liability:

1) a false and defamatory statement of fact which is communicated to a second person about a third person;

2) the publication must be unprotected by legal privilege;

3) fault, amounting at least to negligence by the publisher (i.e., the speaker or writer); and

4) damages -- harm caused by the communication or publication.

Damages to a plaintiff's reputation are presumed when a supervisor or administrator disparages an employee's work performance or the employees lack of integrity in performing the job or otherwise disparages the employee's trade or profession. Damages are also presumed when a supervisor or administrator accuses the plaintiff of a crime involving moral turpitude or of having a contagious disease such as herpes or AIDS. In such cases, while damages may still be contested, the necessary "element" of damages will be presumed.

c. Defenses. There are several defenses against defamation claims, including truth, consent, privilege, qualified privilege, opinion, and short statutes of limitation. Officials of public institutions may be protected by the doctrine of government immunity (see Staheli v. Smith, 548 So.2d 1299 (Miss. 1989) (dean who recommended against tenure for plaintiff found protected by qualified government immunity because evaluation was a discretionary function and within the scope of his authority).

1. Truth. Truth is an absolute defense. You are not subject to liability if your statement is true, no matter how unfavorable it is. For instance, a statement that a former dean was "nothing" at the School was not actionable because the remark was truthful insofar as the dean no longer had any relationship with the school. However, "truth"

b. Because, prior to the enactment of the Civil Rights Act of 1991, monetary damages for mental anguish and emotional distress were not recoverable under Title VII, the tort has been claimed in federal court to provide relief for emotional damages resulting from egregious sexual harassment. The present cap of $300,000 for compensatory and punitive damages in Title VII and ADA cases could still encourage plaintiffs to file emotional distress claims. In Howard v. Best, 484 A2d 958, 987 (D.C. App. 1984), the court held that the conduct arose out of and in the course of employment where the alleged acts of a dean toward a faculty member had taken place during faculty, administrative, and other professional meetings. Even in the face of reprehensible behavior, however, the strict limiting parameters of the tort apply. Glasgow v. Georgia Pacific, 103 WN2d 401, 408, 693 P.2d 708 (1985).

c. These claims may be barred, however, by workers' compensation statutes, which may be the exclusive remedy for medical or psychological consequences of sexual harassment. Compare Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317 (7th Cir. 1992) (claim barred by workers' compensation statute) with Ford v. Revlon, 734 P.2d 580 (Ariz. 1987) (state worker's compensation statute does not bar tort claim for intentional infliction of emotional distress in sexual harassment case).

4. Negligent Infliction of Emotional Distress

Unlike intentional infliction of emotional distress, this tort does not require a showing of extreme or outrageous conduct. A plaintiff need only show that the employer failed to exercise ordinary care not to cause the employee to suffer foreseeable emotional distress. See, for example, Payne v. General Motors Corp., 5 Indiv. Empl. Rights Cases 1081, (D. Kan. 1990), aff'd mem., 943 F.2d 57 (10th Cir. 1991).

5. Defamation--Libel/Slander

Generally, administrators run little risk of personal liability for defamation arising out of their employment, because of a qualified privilege. However, such litigation has become more common. Administrators who participate in the evaluation of faculty members and/or students may be subject to liability for defamatory communications.

a. Definitions. Defamation is a statement which tends to lower an individual's reputation in the community, exposing her or him to public

the job; 2) a person to whom the administrator owes a duty of protection is injured; and 3) there is a causal connection between the injury and the employment of the unfit person.

In negligent hiring cases, the plaintiff must demonstrate that the employer knew or should have known of the applicant's unfitness. In negligent retention cases, the plaintiff must demonstrate that the employer knew of the employee's misconduct or lack of fitness, but retained the individual anyway. This theory is particularly applicable when an employee alleges sexual harassment by a supervisor and the employer, although on notice of the alleged harassment, fails to take sufficient corrective action. See, e.g., Malorney v. B&L Motor Freight, Inc., 496 N.E. 2d 1086 (Ill. App. Ct. 1986) (employer of long-distance truck driver could be held liable for sexual assault on hitchhiker because employer had not ascertained that employee had been imprisoned for a similar offense prior to being hired).

2. Negligent Supervision or Evaluation

Although this tort is not as widely recognized as the tort of negligent hiring or retention, several jurisdictions have permitted recovery under these theories. See, for example, Giles v. Shell Oil Corp., 487 A.2d 610 (D.C. 1985) (negligent supervision).

3. Intentional Infliction of Emotional Distress

a. Intentional infliction of emotional distress is found where one engages in extreme and outrageous conduct, that goes "beyond all possible bounds of decency" and is regarded as "atrocious, and utterly intolerable in a civilized community," and intentionally or recklessly causes severe emotional distress to another. Proof of this tort requires shocking, outrageous conduct intended to humiliate and distress plaintiff. Merely exercising your rights as an employer or supervisor, or even discharging an employee, will usually not result in liability under this tort unless the conduct is "outrageous." See, for example, Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (former vice president demoted to custodial position and harassed by new supervisor stated claim for intentional infliction of emotional distress). See also Agis v. Howard Johnson Co., 355 N.E. 2d 315 (Mass. 1976) (waitress whose manager who discharged staff in alphabetical order to ascertain who had misappropriated cash could maintain a cause of action).

party, and the other party sustains harm or incurs monetary damages as a result of the breach.

2. Wrongful Interference With Contract

Administrative personnel may be personally liable to a faculty member or other employee for interfering wrongfully with his or her employment contract by inducing the faculty member or employee to breach it. The theory is also applied when a supervisor or manager causes the discharge or resignation of an employee or interferes with an employee's work performance. See Cronk v. Intermountain Rural Electric Ass'n., 765 P.2d 619 (Colo. Ct. App. 1988) (discharge) and Trimble v. City of Denver, 697 P.2d 716 (Colo. 1985) (performance).

3. Wrongful Interference with Prospective Contractual Advantage

This tort may be committed by "bad-mouthing" a former faculty member or employee to a future or potential employer, thush interfering with the likelihood of subsequent employment. See In re: IBP Confidential Business Documents Litig., 797 F.2d 632 (8th Cir. 1986), cert. denied, 479 U.S. 1088 (1987).

C. Common Law Tort Claims

These include all tort claims and remedies not created by statute or contract but recognized or created by courts. In most states, when a tort has been committed by a institution, both the institution and the agent through whom it acted are generally liable for any injury. Thus, an administrator would typically be subject to personal liability for conduct, during his or her employment, that constitutes a tort.[6]

1. Negligent Hiring or Retention

The courts in 30 states have recognized a tort claim of negligent hiring or negligent retention of an unsafe employee. Basically, the administrator is held to a duty to use reasonable care to hire safe and competent employees. Such a claim is established where 1) the administrator knew or by a reasonable investigation should have known of the employee's or applicant's unfitness for

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[6]For cases and authorities on personal tort liability for school and college administrators and faculty, see Annot., "Personal Liability of Public School Teacher in Negligence Action for Personal Injury or Death of Student," 34 A.L.R. 4th 228 (1984 and periodic supp.); Annot., "Personal Liability of Public School Executive or Administrative Officer in Negligence Action for Personal Injury or Death of Student," 35 A.L.R. 4th 272 (1985 and periodic supp.); Annot., "Personal Liability in Negligence Action of Public School Employee, Other than Teacher or Executive or Administrative Officer, for Personal Injury or Death of Student," 35 A.L.R. 4th 328 (1985 and periodic supp.).

G. Whistleblower Claims under State Law

As a general rule, courts construe claims alleging discharge or adverse employment decisions as a result of reporting illegal activity to be claims against the employer or institution, not claims against the administrators who discharged the plaintiff. State law, however, may be interpreted as providing for individual liability. For example, New Jersey's whistleblower law, the Conscientious Employee Protection Act, defines an employer as:

> Any individual . . . or any person or group of persons acting directly or indirectly on behalf of or in the interest of an employer with the employer's consent . . . (34 N.J.S.A. 19-2(a)).

This language could permit a court to find that any agent of the employer, such as a supervisor or manager, was individually liable for violation of the law.

V. PERSONAL LIABILITY FOR CONTRACT OR TORT CLAIMS IN THE EMPLOYMENT CONTEXT

A. Breach of Contract Claims

1. Administrators are not generally liable for breach of an employment contract or other contracts entered into by the institution. Such claims run against the institution, not the individual administrator. The administrator is not a party to the contract and is not liable for its breach.

2. An administrator may be liable for contract claims based upon a contract he or she executed with the college or university, or for contracts the administrator executed without authority on behalf of the college or university. See W. Kaplin and B. Lee, The Law of Higher Education, 3d ed. (1995), pp. 131-2.

3. Administrators may be personally liable under the theory of "promissory estoppel." Such a claim arises where an administrator makes a promise to another, the other person acts based upon a reasonable justifiable reliance on the promise, and the person incurs an injury or loss as a result of the broken promise. See Grouse v. Group Health, 306 N.W.2d 114 (Minn. 1981).

B. Contract Related Tort Claims

1. A "tort" is a private or civil wrong or invasion of a right, independent of contract, for which the court will provide a remedy in the form of damages. A tort claim may arise when one breaches a legal duty it owes to another

Section 1981 is not an employer-specific statute like Title VII, and it was amended by the Civil Rights Act of 1991 [Pub. L. No. 102-166, 105 Stat. 1071 (1991)] to prohibit not only discrimination in the making of employment contracts, but "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship" [24 U.S.C. sec. 1981(b)]. As a result, plaintiffs have been more successful in expanding the defendant pool to include officers and executives. Courts are divided as to supervisors. In Willis v. Safeway Stores, 17 FEP Cases 102 (N.D. Texas 1978), the Court dismissed plaintiff's claims against her manager personally. Because there was no contract between plaintiff and her manager, the court found that she had no § 1981 claim. In Garcia v. Rush Presbyterian St. Luke's Medical Center, 80 FRD 254 (N.D. Ill. 1978), the court allowed an Hispanic plaintiff to sue the hospital as well as its directors and officers "who formulate and execute the discriminatory employment policies," on a tort theory of wrongful interference with contractual rights. In Manuel v. International Harvester Co., 502 F. Supp. 45 (N.D. Ill. 1980), the court allowed suit against individual employees "who determined that plaintiff would be eliminated from his position".

Under sec. 1983, every "person" acting under state law who deprives another of any rights, privileges or immunities secured by law "shall be liable to the party injured." Although the doctrine of qualified immunity protects administrators or supervisors who act in good faith [Wood v. Strickland, 420 U.S. 308 (1975)], a knowing violation of an individual's civil rights can result in personal liability. See, for example, Wulf v. City of Witchita, 883 F.2d 842 (10th Cir. 1989) (police chief could be personally liable for damages flowing from officer's termination for writing a letter critical of the department); Gierlinger v. New York State Police, 15 F.3d 32, 34 (2d Cir. 1994) (failure to properly investigate a sexual harassment complaint resulted in personal liability).

F. State Civil Rights Statutes

The risk of individual liability under state law varies. You must look to the definition of "employer" under your state's statute to determine whether it includes or infers individuals or agents of the employer.

In Michigan, for example, the Elliott-Larsen Civil Rights Act defines an "employer" to include "agents" of the employer. The courts have construed this language to mean that individuals, who are found to be "agents" of the employer, can be held personally liable for damages. See Yedla v. Electronic Data Systems, Inc., 764 F. Supp. 90 (E.D. Mich. 1991); Kelly v. Drake Beam Morin, Inc., 695 F. Supp. 354 (E.D. Mich. 1988); Haslam v. Pepsi Cola Co., 117 LRRM 2950, 2953 (E.D. Mich. 1984). In Jenkins v. Southeastern Michigan Chapter American Red Cross, 141 Mich. App. 785, 799-80 (1985), the Michigan Court of Appeals found that "if a person has responsibility for making personnel decisions for the company, he is an agent within the statutory definition of an employer."

C. Age Discrimination in Employment Act (ADEA)

The ADEA prohibits discrimination in employment based on age. Like Title VII, the legislative history of the ADEA is silent as to "individual liability", but the prohibitions in the act are directed toward employers, not other employees. An "employer" is defined as "a person engaged in an industry affecting commerce" with at least a certain number of employees and includes "any agent of such a person" [29 U.S.C. sec. 203(d)]. Courts have differed as to whether the individual liability of supervisors or administrators is contemplated by the ADEA, on grounds similar to those upon which individual liability under Title VII has been determined.[4]

D. Equal Pay Act Claims (EPA)

The Equal Pay Act prohibits discrimination in pay based on gender. The EPA definition of employer appears to be broader than either Title VII or ADA: "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to the employee" [29 U.S.C. sec. 203(d)]. Nevertheless, courts have refused to impose liability on individual defendants whose conduct violates the EPA, whether or not they acted on behalf of the employer.[5]

E. 42 USC § 1981 and 1983-- Civil Rights Act of 1866

Section 1981 bars intentional racial discrimination in employment (and many other areas). The Act protects against racial discrimination, Runyon v. McCrary, 427 U.S. 160, 167 (1976), and includes reverse discrimination. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 285-87 (1976). It has been extended to religious or national origin discrimination. Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987) (Jewish national origin/religion); St. Francis College v. Al-Khazraji, 481 U.S. 604 (1987) (Arab national origin). Liability may not be imposed without proof of intentional discrimination. General Blg. Contractors Assn. v. Pennsylvania, 102 S.Ct. 3141 (1982).

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[4]Courts have interpreted the ADEA as permitting individual liability for supervisors in Price v. Marshall Erdman and Associates, Inc., 966 F. 2d 320, 324 (7th Cir. 1992) (if supervisors have decision-making authority); Koen's v. Board of Elementary School District 102, No. 93 C 2568, 1993 WL 532472 (N.D. Ill. 12/21/93); Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) (by implication); House v. Cannon Mills Co., 713 F. Supp. 159 (M.D.N.C. 1988); Elias v. Sitomer, 60 Fair Empl. Prac. Cases 758 (S.D.N.Y. 1992); Wanamaker v. Columbian Rope, 60 Fair Empl. Prac. Cases 764 (N.D.N.Y. 1990). The majority rule, however, appears to be that no individual liability will be found: Birkbeck v. Marvel Lighting Co., 30 F.3d 507, 510-11 (4th Cir. 1994); Miller v. Maxwell's International, Inc., 991 F. 2d 583, 587 (9th Cir. 1993); Friend v. Union Dime Savings Bank, 24 Fair Empl. Prac. Cases 1307 (S.D.N.Y. 1980); Strait v. Freedom Chevrolet-Geo-Pontiac, Inc., File #1:93-CV-311, 1994 U.S. Dist. LEXIS 4841 (W.D. Mich. 1994).

[5]See Miller v. Maxwell's International, Inc., 991 F. 2d 583, 587 (9th Cir. 1993); Marshall v. Miller, 873 F. Supp. 628, 631-2 (M.D. Fla. 1995); Pommier v. James L. Edelstein Enterprises, 816 F. Supp. 476 (N.D. Ill. 1993); Martin v. Easton Publishing, 478 F. Supp. 796, 799 (E.D. Pa. 1979).

If the supervisor is a public official, it is generally accepted that the supervisor cannot be individually liable for damages under Title VII. Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990).

For analysis of individual liability issues, see Christopher Greer, "'Who, Me?': A Supervisor's Individual Liability for Discrimination in the Workplace," 62 Fordham Law Review 1835 (1994); see also J. P. Furfaro and Maury B. Josephson, "Liability of Supervisors," 210 N.Y.L.J. 3 (1993) and Scott B. Goldberg, Comment: "Discrimination by Managers and Supervisors: Recognizing Agent Liability under Title VII," 143 U. Pa. L. Rev. 571 (1994).

B. Americans With Disabilities Act (ADA)

Like Title VII, the ADA defines employer as "a person" with a minimum number of employees and "any agent of such person" [42 U.S.C. sec. 12111(5)(A)]. The Act is aimed at employers and "covered entities," not individual supervisors or administrators. Because the ADA's language is modelled upon Title VII's language, however, courts in those districts and circuits that permit supervisors to be found liable as individuals also find that the ADA also permitted individual liability.[3]

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v. Cancer Treatment Centers, No. 94 C 2211, 1994 WL 604126 (N.D. Ill. 11/4/94); Barger v. Kansas, 630 F. Supp. 88, 90 (D. Kan. 1985); Kelly v. Richland School District, 463 F. Supp. 216, 218 (D.S.C. 1978); Kolb v. Ohio Dept. of Mental Retardation and Developmental Disabilities, 721 F. Supp. 885 (N.D. Ohio 1989); McAdoo v. Toll, 591 F. Supp. 1399 (D. Md. 1984) (higher education case); Wanamaker v. Columbian Rope Co., 60 Fair Empl. Prac. Cases 764 (N.D.N.Y. 1990); Bridges v. Eastman Kodak, 800 F. Supp. 1172 (S.D.N.Y. 1992); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802 (C.D. Ill. 1994); Hanshaw W. Delaware Technical & Community College, 405 F. Supp. 292, 296 (D. Del. 1975); Doe v. William Shapiro, Esq., P.C., 852 F. Supp. 1246 (E.D. Pa. 1994) (supervisors are agents of employer and thus can be sued just as the employer can).

[3]Courts have interpreted the ADA to permit liability of individual supervisors in EEOC v. AIC Security Investigations, Ltd., No. 92 C 7330, 1993 WL 427454 (N.D. Ill. 10/21/93); Bishop v. Okidata, Inc., 864 F. Supp. 416 (D.N.J. 1994); Janopoulos v. Harvey L. Walner & Associates Ltd., 835 F. Supp. 459 (N.D. Ill. 1993) (partner in law firm is both supervisor and employer); Schallehn v.

Central Trust and Savings Bank, #C 93-4088, 1995 U.S. Dist. LEXIS 2086 (N.D. Iowa 1995); Howe v. Hull, 873 F. Supp. 72 (N.D. Ohio 1994). Courts have refused to hold supervisors personally liable under the ADA in Ostendorf v. Elkay Manufacturing Co., 1994 U.S. Dist. LEXIS 19414 (N.D. Ill. 1994); Vodde v. Indiana Michigan Power Co., 852 F. Supp. 676 (N.D. Ind. 1994); Haltek v. Village of Park Forest, 864 F. Supp. 802 (N.D. Ill. 1994); Thompson v. City of Arlington, Texas, 838 F. Supp. 1137 (N.D. Tex. 1993) (public employees are liable only in their official capacity); Crawford v. West Jersey Health Systems, 847 F. Supp. 1232 (D.N.J. 1994); Lei v. Brown, No. 94-7776, 1994 U.S. Dist. LEXIS 1114 (E.D. Pa. 1/26/94); Abdullah-Johnson v. Runyon, Civ. Act. 94-5240, 1995 U.S. Dist. LEXIS 3233 (E.D. Pa. 1995); McClelland v. Nevada Dept. of Prisons, 3 Am. Dis. Cases 1230 (D. Nev. 1994); Zatarain v. WDSU-Television, Inc., 3 Am. Dis. Cases 1801 (E.D. La. 1995); Dunham v. City of O'Fallon, Mo., 65 Fair Empl. Prac. Cases 1801 (E.D. Mo. 1994); Strait v. Freedom Chevrolet-Geo-Pontiac, Inc., File #1:93-CV-311, 1994 U.S. Dist. LEXIS 4841 (W.D. Mich. 1994).

- Once the university decides to operate a facility, such as a swimming pool, the courts have held it may assume a duty to provide adequate safety measures, such as lifeguards, and provide any warnings as to dangerous conditions. Brown v. Florida State Board of Regents, 513 So.2d 184 (Fla. 1st DCA 1987).

2. Duty to student-athletes recruited by the University.

   - Adequate emergency medical service should be available to a student-athlete engaged in a college-sponsored athletic activity. Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993).

   - Fisher v. Northwestern State University, 625 So. 2d 1308 (La. Ct. App. 1993) (University under no obligation or duty to provide adult supervision for cheerleading squad).

3. Duty to protect students from unreasonable risks of harm arising out of course instruction or activities.

   - Teacher-student relationship creates a duty to protect student from foreseeable and unreasonable risk of harm arising in connection with course activities, whether off campus or on campus. Delbridge v. Maricopa County Community college District, 893 P.2d 55 (Az. Ct. App. 1994).

   - However, where student has equal knowledge and ability to avoid potential harm, duty may not exist. Niles, 473 S.E.2d at 173 (Directed verdict rendered in favor of university in claim brought by doctoral student injured when chemicals mixed in metal container exploded).

D. Duty of care for off-campus field trips.

1. The extent of liability may depend upon whether the event is institution sponsored and whether the class is required or elective. Obtaining well-drafted waivers and releases can substantially reduce the risk of liability. See Terry v. Indiana State University, 666 N.E. 2d 87 (Ind. Ct. App. 1996).

2. If the university or college plans and organizes the trip, some courts have held the university or college is under a duty to take reasonable

property damage or personal injury. Such a theory could be asserted to dismiss a negligence or malpractice claim brought against a university or college.

For an excellent treatment of faculty and staff liability in the contexts of faculty-staff advising--regarding theories of negligence, misrepresentation and contract, and defamation in the context of academic evaluation/peer review, see "Academic Advising and Defamation in Context of Academic Evaluation," by Vence L. Bonham, published as a chapter in **Am I Liable?** (NACUA, 1989). Some of the cases cited by Mr. Bonham will be discussed in the oral presentation at this conference.

VI. OTHER AREAS OF LIABILITY INVOLVING STUDENTS

I. NEGLIGENT SUPERVISION: What is the duty of care owed to a student of a University?

A. In general, the university does not have a duty to the student absent a special relationship between the parties creating such a duty. Unlike with high school students, college administrators do not stand in loco parentis to adult college students. Niles v. University of Georgia, 473 S.E.2d 173 (Ga. Ct. App. 1996). However, a student is an invitee to whom a university owes a duty of reasonable care. Id.

B. Numerous cases have held that the university is not responsible for the actions of a student, including consumption of alcohol, merely because the activity occurred at a university sponsored event or on university premises. Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Ct. App. 1981); Rabel v. Illinois Wesleyan Univ., 514 N.E.2d 552 (Ill. App. Ct. 1987).

C. Instances that create a special relationship:

1. Premises liability.

- Generally, courts have held that a university or college has a duty to exercise reasonable care to protect students from reasonably foreseeable assaults. Most courts have construed this to require the existence of known dangers that are ignored by the college or university. See Klobuchar v. Purdue University, 553 N.E.2d 169 (Ind. App. Ct. 1990). However, this duty does not generally involve liability for threats of third parties on off campus properties such as fraternity or sorority houses. Leonardi v. Bradley University, 625 N.E.2d 431 (Ill. App. Ct. 1993). But c.f. Furek v. University of Delaware, 594 A.2d 506 (Del. 1991).

reasonable expectation or fear of an imminent touching. Assault and battery claims occasionally arise in sexual harassment cases, and may also be seen from time-to-time in other cases (e.g., football coach punches out unwanted guest who interrupts practice -- we are not making this up).

V. ACADEMIC ADVISING AND EVALUATION

A. Educational Malpractice.

Courts have been reluctant to allow claims attacking the quality of educational services provided. Paladino v. Adelphi University, 454 N.Y.S. 2d, 868, 873 (App. Div. 1982). This has been put succinctly by one court which noted that "the plaintiff's complaint [must] not be that the institution failed to perform adequately a promised educational service, but rather that it failed to perform that service at all". Ross v. Creighton Univ., Supra, 957 F. 2d at 317. See also, Woodruff v. Georgia, 304 S. 2d 697 (Ga. 1983) (rejecting negligence action for failure to supervise student's graduate studies); but c.f., Andre v. Pace University, 618 N.Y.S.2d 975 (New York, City Court 1994) (Cause of action for breach of contract, rescission, breach of fiduciary duty, educational malpractice, and unfair and deceptive business practices properly asserted where university held out computer course as appropriate for those without a math background but course materials required substantial knowledge of mathematics).

B. Breach of Contract.

1. The basic legal relationship between a student and a University has been held to be contractual in nature in which the catalogues, bulletins, circulars, and regulations of the institution made available to the student become a part of the contract. Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992). A university or college will be required to comply with the procedures and processes set forth in the university catalogues and other publications. Lyons v. Salve Regina College, 565 F.2d 200 (1st Cir. 1977), cert. denied, 435 U.S. 971 (1978).

2. However, to state a claim for a breach of contract, the plaintiff cannot merely allege the education received was not good enough, but must identify a particular contractual promise the University failed to honor. Ross, 957 F.2d at 416-17.

C. Economic Loss Rule.

Although unable to uncover any reported cases, several states, such as Florida, have a legal doctrine referred to as the "economic loss rule," which bars the bringing of tort claims when the subject matter of the dispute is contractual in nature and there is no

6. Invasion Of Privacy

Most states have adopted some sort of invasion of privacy theory as a common law tort. There are four categories of invasion of privacy claims:

a. Appropriation of another person's name or likeness, usually for commercial advantage. It is generally not applicable to the employment setting.

b. Placing someone in a false light, attributing conduct, beliefs or characteristics to an individual that are false.

c. Public disclosure of private facts, in which an individual makes public information about an individual that is not of legitimate concern to the public, such as an individual's HIV status or a psychiatric diagnosis (see, for example, Bratt v. IBM Corp., 785 F.2d 352 (1st Cir. 1986) (employee could maintain a cause of action against managers who discussed his psychiatric diagnosis). Truth is not a defense to this claim.

d. Intrusion upon another's seclusion, which includes searches of a locker, desk, or one's person, as well as the asking of questions about an employee's private affairs. The tort is established if a reasonable person would find the intrusion highly offensive. See, for example, K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W. 2d 632 (Tex. Ct. App. 1984) (locker search was invasion of privacy because employee had reasonable expectation of privacy) and Soroka v. Dayton Hudson Corp., 1 Cal. Rptr. 2d 77 (Cal. Ct. App. 1991) (questions on psychological screening test that sought personal information and were irrelevant to job performance could present an invasion of privacy; preliminary injunction against their use granted).

Liability for this tort can be avoided if the employer or supervisor notifies employees that their desks or lockers are subject to search if there is a legitimate business reason for the search. For most colleges and universities, it would be difficult to establish a justification for searching employees' persons, lockers or desks.

7. Assault/Battery

A supervisor or administrator may be personally liable for assault or battery on a college or university employee, invitee, or guest. A "battery" is any unwanted "harmful" touching of plaintiff's person. "Assault" is any threat or

a prospective employer, "I would be happy to talk to you about Mr. Smith, but I can't do so without a written release." If the former employee refuses to sign a written release, the prospective employer is on notice that there may be problems or that the employee has something to hide.

Written Information. Be especially careful when putting anything in writing. Do not put the reasons for an employee's termination in writing and send it to anyone unless it is absolutely necessary. A written statement is often the catalyst for a lawsuit. For example, if an employee is terminated for wrongdoing for which there are no witnesses (such as, an employee who is terminated for sexual harassment when nobody saw him but the circumstantial evidence points to sexual harassment), a letter stating that "this is to confirm that we have terminated you for sexual harassment," which is copied to several administrators and the chair of the faculty senate, may cause the employee to file suit. If you want to confirm a termination in writing, the letter can state "this is to confirm that you were terminated on November 1, 1994 for the reasons discussed in my meeting with you on that date." If sensitive information must go in an employee's personnel file, place it in a sealed envelope marked "Confidential: To be opened by the Director of Human Resources Only (or some appropriate official)." That way, other employees with access to personnel files will not see the information. If you feel that you must write a letter to the employee or to a prospective employer about a termination, have it reviewed by college or university lawyers before you mail it.

e. Summary Of Tips To Avoid Liability

1) Follow Mark Twain's axiom: "when in doubt, tell the truth."

2) Obtain consent or a release whenever possible.

3) Qualify subjective statements by expressly noting that they are your opinion.

4) Tell only those who have an absolute need to know only what they absolutely need to know.

5) Think before you speak or write, and when in doubt, say as little as possible.

need to reveal details, make sure that the party understands the need for confidentiality. It is no defense to say "some employee who works as a secretary in admissions who usually wears a black jacket and who lives in Homer but who shall remain nameless." Make sure the employee cannot be identified unless it is essential to identify the employee to a particular person. Do not interview the employee or witnesses in a public area where you might be overheard. Do not discuss the particulars of the matter with supervisors or employees unless you need their input. Whenever in doubt as to need, do not name or otherwise identify the employee or the specific circumstances.

Terminating An Employee. Be careful who is involved in the process and what they are told. Do not have other employees (except at least one appropriate supervisory witness) present at the time of the termination. Limit the supervisors present at the time of the termination to those who were involved in the termination decisions. Use as few supervisors as possible. Do not put the reasons for the termination in a letter to the employee and then copy the entire department or faculty. If all a clerical employee in payroll needs to know is to stop sending an employee a paycheck, do not tell that employee the reasons for the termination.

Communicating to Outside Parties. When giving references, give only the employee's name, dates of employment, and job title, unless you have a written, signed release from the employee which has been reviewed by an attorney. Do not say untrue good things about an employee without a release. Do not lie and say the employee was a great worker when, in fact, the employee was terminated for sexual harassment. If the employee has the same problem at the next job, the next employer might sue you for giving a false reference. Furthermore, you could be vulnerable to a future suit by unknown third parties. For example, if ABC College fires an employee for embezzlement, and a supervisor at ABC College gives XYZ University a glowing recommendation to hire the fired employee, ABC and the supervisor could be sued by XYZ after the employee absconds with XYZ's money. If you believe that there is particular information which the prospective employer ought to know (i.e., the employee was fired for embezzlement and is now applying for a position at another college as Vice President for Finance; or the employee was fired for sexual harassment of students and is now applying for Dean of Students at another college), do not give out the information without a written, signed release. However, you can tell

ACHIEVING COMPLIANCE WITH TITLE IX

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I. Introduction

A. Recent trends in litigation

II. Reasons for lack of voluntary compliance

A. Ineffective administrative enforcement

1. Lack of resources

2. Lack of commitment

3. Lack of effective remedies

B. Ineffective private enforcement

1. Mootness problems

2. Remedies

3. Effect of *Grove City College v. Bell*, 465 U.S. 555 (1984) until the Civil Rights Restoration Act, Pub.L.No. 100-259, § 3(a), 102 Stat. 28 (1988), codified at 20 U.S.C. § 1687

APPENDIX E

Sample Letter to Employee Regarding Defense and Indemnification

_____, 1995

Dear _____:

It is my understanding that you have been named as a defendant in the above referenced lawsuit which alleges that the University, by and through you, _____.

It is the University's policy to defend and indemnify employees who become parties to legal proceedings by virtue of their good faith efforts to perform their University work responsibilities. I have enclosed a copy of our policy for your review and reference. My assessment of this matter is that it is applicable to your situation. I request that you read the policy carefully and that you treat your involvement in this litigation as a serious matter.

A joint defense will be conducted on behalf of you and the University.

You can choose at any time to employ your own legal counsel at your own expenses, instead of using the counsel selected by the University in these matters. If you choose to do that, you need to so advise the Office of the General Counsel.

If you choose to have the University defend and indemnify you, please sign the statement below and return this letter to the General Counsel, keeping a copy for your reference. Your signature will indicate your agreement to the terms of the policy and your commitment to cooperate fully with your University-appointed attorney throughout this litigation. It also will affirm, for our records, that your actions which are the subject of this lawsuit, were performed in good faith and in fulfillment of your duties as a University employee.

If you have any questions about the University's policy on defense and indemnification, the litigation or nature of the joint defense, please contact the Office of the General Counsel.

Sincerely,

_____

Receipt and acceptance
acknowledged by:

the applicable standards of conduct set forth herein. This determination will be made by a committee of three employees appointed by the President. No members of the committee may be a party to the action, suit or proceeding.

D. For indemnification to be provided:

1. The individual must have acted in good faith and in a manner that he/she reasonably believed to be in the best interest of the University, and

2. With respect to criminal action or proceeding, the individual must have had no reasonable cause to believe that his/her conduct was unlawful.

E. Indemnification for the expenses of defense may be in advance of the final disposition of the action, suit or proceeding. The individual to be indemnified may be required to furnish a general, unsecured obligation to repay the University if it is ultimately decided by the University, wholly at its discretion, that the individual is not entitled to be indemnified.

F. Indemnification will be made only to the extent that the individual is not made whole for his/her losses and expenses from all other sources, including insurance. In no case will indemnification be in an amount which, when combined with the indemnification from all other sources, exceeds the actual amount of expenses, including attorneys' fees, judgments, penalties, fines and amounts paid in settlement.

G. Indemnification will not take place for any of the following:

1. A breach of duty of loyalty to the University.

2. An act or omission not in good faith or that involves intentional misconduct or a knowing violation of the law.

3. A transaction from which the individual derived an improper personal benefit.

4. An act or omission that is grossly negligent.

Approved by Board of Control
Dated:_____

APPENDIX D

SAMPLE INDEMNIFICATION POLICY

ABC University Indemnification

I. PURPOSE

The purpose of this policy is to establish guidelines for the indemnification of those individuals who have an action, claim, or proceeding brought against them as a result of their good faith performance of duties on behalf of, or at the direction of, the University.

II. APPLICATION

This policy applies to the following individuals or classes of individuals:

A. Members of the Board of Control.

B. Employees, including officers, faculty, staff, and student employees.

C. Students performing duties on behalf of and under the direction of the University.

D. Volunteers as authorized in advance and in writing by the President or authorized representative.

III. POLICY

A. Except as prohibited by law, (and subject to paragraph II.C. above, in the case of students) the University will indemnify individuals against whom an action, claim or proceeding is brought or threatened as a result of their good faith performance of duties on behalf of, or at the direction of, the University.

B. This indemnification will be against expenses, including attorneys' fees, judgments, penalties, fines and amounts in settlement actually and reasonably incurred by the individual in connection with the action, suit or proceeding.

C. This indemnification will be made only as authorized in a specific case upon application by an individual and after a determination that indemnification is proper in the circumstances and the individual has met

5. Otterbacher v. Northwestern University, 838 F. Supp. 1256 (N.D. Ill. 1993).

An associate director's age and sex discrimination claims against his individual supervisor survived his failure to name the supervisor as a respondent in his Charge filed with the Equal Employment Opportunity Commission because the supervisor had adequate notice of the Charge and thus had an opportunity to voluntarily conciliate the plaintiff's complaints.

6. Corum v. University of North Carolina, 330 N.C. 761; 413 S.E.2d 276 (S. Ct. N.C. 1992).

A Vice Chancellor did not have immunity from plaintiff's section 1983 money damages claim against him in his individual capacity where plaintiff produced evidence indicating that the Vice Chancellor had the improper motive of stifling debate when he removed plaintiff from his position as Dean of Learning Resources at Appalachian State University. Nor did the Vice Chancellor enjoy immunity from plaintiff's state constitutional claim against him in his official capacity. The two Universities plaintiff sued were dismissed on all counts.

7. Bagg v. University of Texas Medical Branch of Galveston, 726 S.W.2d 582 (Tx. Ct. App. 1987).

The employee's federal constitutional and state law breach of contract claims for damages and equitable relief against the University, arising out of his termination allegedly for economic reasons, were dismissed under the doctrine of sovereign immunity, but the claims for damages against his individual supervisors, insofar as they allegedly acted beyond the scope of their official duties, survived.

APPENDIX C

Cases Holding Administrators Subject To Individual Liability

1. Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994).

   The court of appeals upheld a jury verdict finding that the President, Chancellor and four trustees of the City College of New York were liable for violating the free speech rights of a department chair whose term they shortened in response to a speech he gave criticizing the public school system and making derogatory remarks about Jews. The Chair was reinstated. The award of punitive damages against the six defendants was remanded because of inconsistent findings by the jury.

2. Chonich v. Wayne County Community College, 973 F.2d 1271 (6th Cir. 1992).

   The Board of Trustees Secretary, who wrote a letter to the NAACP with copies to 17 others, including several state and local officials, accusing university officials of plotting to lay off blacks and women, did not enjoy qualified immunity from libel claims for damages where the defamatory potential of the Secretary's statements was obvious.

3. Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988).

   Plaintiff was a resident in a surgical residency training program and alleges she was sexually harassed and dismissed from the Program because she is a woman. The court of appeals held that supervisors in the Program could be held individually liable under section 1983 for the actions of their subordinates where they had good reason to believe that the subordinates' complaints about the plaintiff were tainted with gender bias, but the supervisors nevertheless relied on those complaints.

4. Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986).

   The court of appeals reversed the trial court's dismissal and concluded that members of a tenure review committee may be held individually liable for race discrimination under section 1981 of the United States Code if they intentionally caused the College to discriminate or if they "authorized, directed, or participated" in the discriminatory conduct when they did not recommend an Arabian member of the faculty for tenure.

C. Conflict of Interest

Sometimes the theories advanced by the plaintiff require separate counsel for the college or university and yourself. These include 42 U.S.C. Section 1983 claims where the qualified immunity defense available to individual defendants may be at odds with defenses available to the college, and sexual harassment suits, where the employer's defense is often at odds with that of the accused harasser. If you have acted in good faith within the scope of your employment, and the college or university has a reasonable basis to believe that you have done so, or that you are wrongfully accused, the college or university is likely to pay for your lawyer in addition to its own.

D. Releases

Whenever you believe you are engaging in conduct which could lead to liability (e.g., disclosing horrible facts about your former employee to another college; supervising students on a technical rock climbing trip that is a volunteer activity; hosting a college or university function where alcohol is served), consult with your college or university attorney, and ask whether a release would be appropriate. Do not rely on forms you borrow from colleagues. For an excellent review of this topic, see "Liability Releases in the University Setting," by Pamela J. Bernard, published as a chapter in **Am I Liable?** (NACUA, 1989). A sample form release drafted by Ms. Bernard is included as Appendix A. This is intended as a general sample only, and should not be used without consulting with your college or university counsel.

E. Good Faith, Scope of Employment, and Common Sense

If you act in good faith (i.e., have a reasonable basis for what you do, and are not motivated by malice, specific intent to harm, etc.), and within the scope or your employment (i.e., your conduct is a generally accepted practice for similarly situated administrators and does not knowingly violate a law or policy and is not done with specific intent to harm someone), and you generally exercise common sense, you will have taken reasonable precautions to avoid personal liability.

IX. FOR FURTHER READING

See the bibliography entitled "Additional Selected Resources" reproduced from **Am I Liable?** (NACUA, 1989; pps. 97-100) and attached as Appendix B.

Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978); City of Oklahoma v. Tuttle, 471 U.S. 808, 85 L.Ed.2d 791, 804, 105 S.Ct. 2427 (1985).

Protected Constitutional rights include the right not to be deprived of property without due process of law. A public employee whose contract cannot be terminated without "just cause," has a "property" interest in his employment, of which he cannot be deprived without Due Process, including notice and hearing before the termination. Cleveland Bd. of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). A probationary public employee has no "property interest" in his employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Likewise, employment decisions or policies based on religion or race may violate the First or Fourth Amendment and give rise to §1983 liability.

Individual government officials are clothed with a "qualified Immunity" from liability under §1983. Thus, the individual will not be liable unless the conduct violated "clearly established Constitutional rights," of which a reasonable person in defendant's position would be aware. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); David v. Scherer, 468 U.S. 183, 104 S.Ct. 3012, 82 L.Ed.2d 139, 147 (1984).

VIII. SOME PRACTICAL CONSIDERATIONS RELATIVE TO PERSONAL LIABILITY

A. More Often Than Not, The Deep Pocket Will Pay

If you have acted in good faith within the scope of your employment, then in almost all cases the college or university will pay any damages awarded against you, even if they were awarded against you in your personal capacity.

B. College Or University Insurance/Indemnification

If the statement in V.A. above does not give you comfort, please be assured that most (if not all) colleges and universities have broad insurance coverage for claims against themselves and their employees and will indemnify employees (i.e., hold harmless and pay the claim) and defend (i.e., hire a lawyer to represent) employees. Exceptions to these general principles include outrageous conduct by yourself, including criminal conduct, and intentional acts outside reasonable bounds of your scope of employment (e.g., sexual assault of a student or employee). Ask the appropriate person on campus about insurance coverage for your actions and indemnification policies.

Hill, 546 N.W.2d 151 (Wis. 1996). Some states, such as North Dakota, have abolished state sovereign immunity altogether with respect to ministerial acts. See Burr v.Kulas, 532 N.W.2d 388 (N.D. 1995).

3. Most courts employ a somewhat stringent test in determining what is ministerial. Kimp, 546 N.W.2d at 155 (task is ministerial only when the duty is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion).

4. Some states have a "compelling and known" danger exception to public employee immunity. Kimp, supra. This exception is similar to the "gross negligence" exception employed by other states.

5. Even in those states where sovereign immunity is provided to employees without exception, factual questions can arise as to whether the actions were within the scope of the employee's employment, particularly in cases where a claim for an intentional tort such as defamation or assault and battery is brought. See Jung-Leonscynska v. Steup, 782 P.2d 578 (Wy. 1989) (whether claim against professor for assault and battery by yelling and shaking fist at student involved act within scope of professor's duties was jury question). What constitutes "scope of employment" or "scope of duties" sufficient to justify immunity will vary from state to state. In general, it is those acts which the governmental employer requests, requires, or authorizes a public employer to perform.

You must look to the law of your state for the extent to which you are immune from certain liability.

B. 42 U.S.C. §1983 (Federal Civil Rights Act): Applies to Government Officials and Entities Who Cause Violation of Constitutional Rights.

Section 1983 provides that "every person" who, "under color of law," causes a violation of Constitutional rights, shall be liable to the party injured," in a lawsuit or other proper proceeding. Personal liability under Section 1983 has frequently been imposed on municipal and agency officials for their wrongful conduct under color of law.

There is no vicarious liability under §1983; that is, the agency or municipality will not be liable merely because an employee or official acting in the course of his employment wrongfully injures someone. Municipal liability only attaches if "an official custom or policy" is the moving force behind the Constitutional deprivation.

6. Have adequate security measures been taken with respect to the residential premises?

VII. CONSIDERATIONS UNIQUE TO PERSONAL LIABILITY IN THE PUBLIC SECTOR CASE

In evaluating personal liability issues, there are certain considerations unique to the public sector. By way of illustration only, two of the more significant considerations are briefly addressed here -- state governmental immunity statutes may provide protection from tort liability; and civil rights claims under 42 USC §1983, do provide a federal fountain of liability claims against state and local governments and public officials and employees.

A. Governmental Immunity May Be A Defense To State Law Tort Claims Against Supervisors.

1. State law may provide governmental immunity for tort claims. For example, in Michigan, a state statute provides:

> "Without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . shall be immune from tort liability" if:
>
> (a) The employee is acting in the course of his or her employment;
>
> (b) The employee is acting or reasonably believes he or she is acting within the scope of his or her authority;
>
> (c) The governmental agency is engaged in the exercise or discharge of a governmental function, defined as an activity authorized by law; and
>
> (d) The employee's conduct does not amount to gross negligence. "Gross negligence" is defined to mean "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

2. States allow tort claims to be brought against employees in their individual capacity under varying circumstances. Numerous states permit an action to be brought against a state employee when the employee negligently performs a ministerial duty as opposed to a discretionary function. See Walker v. Univ. of Wisconsin Hospitals, 542 N.W.2d 207 (Wis. Ct. Appeals 1995); Kimp v.

d. The backgrounds of the employees hired should be reviewed.

2. Camps.

a. If the minor is on campus for camp activities, the greater the university's involvement in the camp, the greater the potential liability. The following are variations of the university's potential involvement:

- Not involved in operation but merely provides use of university facilities under contract, such as when the camp is run by a sports apparel and fitness company that contractually uses the facilities.

- Camp is run by athletic coach who is under contract with the university.

- Camp is operated jointly by the university and another entity.

- Camp is operated by the university.

b. To the extent the university is involved in the operations of the camp, the following areas should be of particular concern:

1. Does the staff have the adequate training to supervise the campers?

2. Is the staff trained to handle medical emergencies and have they been trained as to who to contact and what to do in the event of a medical emergency?

3. Are staffers adequately screened to weed out those with questionable or criminal backgrounds?

4. Are risk activities like water sports adequately supervised to ensure campers have adequate skills?

5. Has all of the equipment and all playing surfaces been inspected to ensure they are in an adequate and safe condition?

precautions for the safety of the participants, even if it is an elective event. Hores v. Sargent, 646 N.Y. S. 2d 165 (N.Y.S. Ct. App. 1996) (Community college owed duty of care to student struck by dump truck while on bicycle trip organized and planned by employees and members of community college's Office of Student Activities).

3. Matters of particular concern that should be considered are:

   a. Safety of transportation along with relevant insurance coverage.

   b. Premises liability/security of premises.

   c. Supervision of inherently dangerous activities.

   d. Availability of emergency medical care.

   e. Adequate warnings for dangerous conditions.

E. Underage students on campus.

1. What is the extent of the university's duty to supervise minor students or invitees on campus?

   a. When a minor is invited to participate in university activities on campus, courts have held that the university assumes a custodial role similar to that assumed by a high school. Graham v. Montana State Univ., 767 P.2d 301 (Montana 1988), but, c.f., Evans v. Ohio State University, 1996 WC 421863 (Ohio App. 10 Dist. 1996) (4-H does not assume the type of parental rights, duties or responsibilities over its members that the term in loco parentis contemplates).

   b. In fulfilling the duty to adequately supervise minor students, universities should be cognizant of potential liability for the negligent hiring, supervision, or retention of those employees hired to carry out that function. Dismuke v. Quaynor, 637 So.2d 555 (La. Ct. App. 1994).

   c. Any indication of inappropriate conduct or behavior on behalf of an employee who comes in contact with the minor students should be thoroughly addressed.

the school district for negligent hiring and supervision. *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438. Institutions may assume a duty to supervise students to whom they would otherwise have no obligation, whenever they attempt to prohibit or control "inherently dangerous activities." For instance, the Delaware Supreme Court found that a public university's pervasive regulation of hazing during the fraternity rush weak created a duty to protect students from injuries suffered as a result of hazing. Under this doctrine, the court upheld a damages award to a pledge who was permanently scarred when a fraternity member poured a lye-based oven cleaner over his head as part of a hazing ritual. *Furek v. Univ. of Del.* (Del. 1991) 594 A.2d 506. The student who poured the liquid was held to be 7% at fault, with the remaining 93% of the damages to be paid by the university.

Similar results could emerge in the context of student internships where the university is likely to have assumed a duty to control and supervise its interns.

Credentialing/Licensing Issues

Most students enroll in internship programs in order to complete the requirements for a credential or some other professional license. Whenever completion of an internship is required to obtain a license or credential, the sponsoring institution must be prepared to handle the complaints of students who were unable to become licensed because they were not allowed to complete their internships. There is little case law guidance concerning the denial of an opportunity to complete an internship. However, general principles developed in cases involving the denial of a degree are applicable.

There are two major credentialing problems frequently encountered in internships. First, student interns often complain that they were unable to obtain credentials because they relied on the erroneous advice of school officials. These cases frequently allege that the sponsoring institution has committed breach of contract, fraud, or educational malpractice. If the students did in fact receive erroneous advice, they may well prevail on a breach of contract claim.

Second, student interns frequently challenge university decisions to deny them internship opportunities or to disclose damaging facts to licensure bodies. The university usually argues that either action was justified based on the faculty's assessment of the student's unsuitability for professional licensure. In response, student interns allege that the university is barred from taking such actions on estoppel, due process, or breach of contract grounds. Once a decision is final, a student might also bring a defamation action.

We will now consider each of these possible causes of action in turn. For detailed overview of these issues see Perry A. Zirkel and Paul S. Krugel, *Academic Misguidance in Colleges and Universities* (1990) 56 West's Educ. L. Rptr. 709.

- *Breach of Contract*

The relationship between the student and his institution is generally recognized as contractual. The express elements of a contract are specified in a school catalogue and other

- The volunteer assumed the duties of the pastor during the latter's illness; the volunteers' efforts were "essential" to the conduct of the school.

- The school itself was responsible for making the transportation arrangements; it was not an outing arranged informally by the volunteer.

An institution may be liable for the tortious conduct of student interns, even when they are acting outside the scope of their internships. In these cases, the institution's own negligence is at issue, not the negligence of the intern vicariously imputed to the college. These claims generally take one of two forms.

First, liability could be predicated on the theory of negligent hiring/negligent retention. Many state courts have recognized the duties of employers to protect their employees and third parties from injuries caused by employees whom the employer knows, or should know, pose a serious harm to others. See *Medina v. Graham's Cowboys, Inc.* (N.M.App. 1992) 827 P.2d 859; *Connes v. Molalla Transp. Sys. Inc.* (Colo. 1992) 831 P.2d 1316. This duty was breached when an employer fails to investigate applicants by checking references, if such an investigation would have revealed the traits which led to the injury of others. This doctrine could apply to internships where institutions fail to screen students for placing them in internships with significant public contact. See *Ann., Liability of Educ. Instn. for Hiring or Retaining Incompetent or Otherwise Unsuitable Employees* (1988) 60 A.L.R.4th 260.

For example, a student volunteer, acting at the request of a college basketball coach, caused a fatal automobile accident by running a red light while traveling to an airport to pick up a basketball recruit. The court found that the student was an agent of the institution, even though he was neither formally employed nor paid for his services. The jury awarded the injured recruit $2.26 million in damages. *Foster v. Bd. of Trust. of Butler Comm. Coll.* (D.Kan. 1991) 771 F.Supp. 1122. Key factors in assigning liability included:

- University policy required drivers on official business to be licensed and insured.

- Student had a license suspended for traffic violations. Student's car was unregistered and uninsured. A routine investigation would have revealed this.

- Institution had a duty to check the driver's license and insurance status prior to engaging the student on its behalf.

Continuing to employ a student or maintain his or her internship after his or her unsuitability becomes evident could also give rise to liability under a negligent retention theory. For an example of how an educational institution can be hit with huge damage awards by ignoring warnings about employee misconduct see Amy Pyle, *L.A. Schools Ordered to Pay $1.2 Million to Molested Boy, L.A. TIMES,* Sept. 19, 1996, at A1.

As second theory an injured complainant may rely upon is negligent supervision. For example, a student who was sexually molested by a teacher was allowed to pursue a claim against

The general rule is that students are not "agents" of their universities. However, student interns may be considered employees of their institution for the purposes of assigning liability under the principles of agency law. For example, medical student interns are almost always considered agents of their institution. See *Christensen v. Des Moines St. Coll. of Osteopathy* (Iowa 1957) 82 N.W.2d 741. In 1957, the Iowa Supreme Court rejected a medical school's claim that it was not liable for the negligence of student interns because they were "independent contractors" and not "employees." The Court held that student interns:

> are servants of the college or clinic, and the patient who enters such a college or hospital clinic for professional services looks, not to the student but to the ... institution to provide that degree of care usually exercised by personnel or ordinary skill, ability and prudence in that school of healing. *Christensen v. Des Moines St. Coll., supra,* at 745.

This seminal case continues to be anthologized and cited for the proposition that student interns should be treated as agents of their institutions for the purposes of assigning liability. See also, *Phardel v. St. of Michigan* (Mich. App. 1982) 328 N.W.2d 108; *Sandone v. Dallas Osteopathic Hosp.* (Tex. 1959) 331 S.W.2d 476, 478. Key factors leading the court to find agency status include the following:

- Dispensing professional care - public reliance on the competence of the institutional care giver. (Applies to student interns in medicine, psychology, nursing and possibly law, etc.)

- Not "voluntary" or "gratuitous" services rendered by interns in their own individual capacities, e.g., medical student interns who treated a colleague after he collapsed in a road race were not acting as agents of their institution, thus absolving it of malpractice liability. *Gehling v. St. George's Univ. Sch. of Med.* (E.D.N.Y. 1989) 705 F.Supp. 761, *aff'd* (2nd Cir. 1989) 891 F.2d 277.

- Institution's direct (as opposed to vicarious) negligence (in supervising, hiring).

An institution may also be liable for the tortious acts committed by unpaid "volunteers" acting on its behalf. For example, in a California Supreme Court case, a divinity student at the Presbytery of San Francisco volunteered to take over the duties of the church pastor in conducting classes for students enrolled in vacation Bible school. As part of these duties, the student also drove some of his pupils to a nearby playground. In doing so, the divinity student began racing another car and caused an accident injuring his pupils. The court found that the divinity student was the agent of the institution, even though he was acting as a volunteer. *Malloy v. Fong* (1951) 37 Cal.2d 356, *see also Smith v. Univ. of Tex.* (Tex. Ct. App. 1984) 664 S.W.2d 180. Key factors leading the court to find an agency relationship included:

- The school's right to control and supervise activities of the volunteer.

professional competence of graduates." *Sofair v. St. Univ. of N.Y.* (A.D. 4 Dept. 1976) 388 N.Y.S.2d 453, 457, rev'd on other grounds (1978) 44 N.Y.2d 475.

Institutions should ensure that appropriate procedural due process protections are provided. In cases involving academic dismissals, educational institutions need not provide hearings to students in order to fulfill procedural due process requirements. *Bd. of Curators of Univ. of Mo. v. Horowitz, supra*, at 87-90. Rather, the student must merely be "aware of the faculty's dissatisfaction" with his or her performance and the decision to dismiss must have been "careful and deliberate." *Id.*, at 85. See also *Shuler v. Univ. of Minn.* (8th Cir. 1986) 788 F.2d 510, 516.

However, in cases involving discipline for misconduct, a public university student facing dismissal or suspension is constitutionally entitled to "some kind of notice and some kind of hearing." *Goss v. Lopez* (1975) 419 U.S. 565. These protections usually include giving the student advance notice of the hearing and an opportunity to present his or her case before a neutral arbiter. See *Jenkins v. La. St. Bd. of Educ.* (5th Cir. 1975) 506 F.2d 992, 1000-04. In some cases, due process may require giving the student the opportunity to present witnesses, to cross-examine accusers, and to be assisted by counsel. These due process protections only technically apply to public institutions, but private colleges and universities should provide them as well to avoid allegations of unfairness. Such instances may provide the basis of breach of contract actions unless the normal rules of procedural fairness were observed. See *Holert v. Univ. of Chicago* (N.D.Ill. 1990) 751 F.Supp. 1294, 1300-01; *Slaughter v. Brigham Young Univ.* (10th Cir. 1975) 514 F.2d 622, 626.

Torts.

Tort liability is the most serious risk associated with student internships. Tort claims have the potential for huge damage awards. Injured parties are allowed to recover damages for both tangible injuries to persons and property as well as more intangible damages, including emotional distress and punitive damages. Tort awards are what make front-page headlines, as they have the potential to hit 7 figures and beyond.

If the student intern injures him or herself, the injury is probably (and should be) covered under worker's compensation principles covered above. However, if a third party is injured directly or indirectly by an intern who is engaged in internship activities, that person is likely to attempt to assign responsibility to the "deep pocket" university. Are there theories to support this?

Generally, an educational institution is vicariously liable for every tortious act committed by its "agents." See William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* (3rd Ed.), at 98-103. "Agents" are employees acting within the scope of their employment or other persons who are authorized to act on its behalf or subject to its control. Restatement (Second) of Agency § 1 (1957).

educational services provided. This body of law applies to student internship opportunities. The institution is likely to be required to provide interpreters, notetakers, or other "reasonable" auxiliary educational aides to enable disabled students to have equal access to internship opportunities.

Physical Facilities.

The ADA, the Rehabilitation Act, and various state law provisions, are all designed to make campus facilities accessible to disabled students. This requirement also applies to off-campus internship sites if they are part of the educational programs normally open to all students. The specific degree of physical modification depends on whether the facility is an existing building, or a newly constructed facility. Where physical modifications are not practicable, the college or university must look for alternative methods to make the programs and facilities accessible to disabled students. In these cases, a suitable accessible alternative must be provided. The alternative selected should enable disabled students to participate in the activities of the institution in the most integrated setting possible. For example, if an internship is offered on the third floor of a building that has no elevator, the entire program should be rescheduled to meet in an accessible room rather than scheduling a separate internship for a student who uses a wheelchair.

Academic Dismissals.

If a student intern is treated as an employee for many purposes, what happens if the institution wishes to dismiss the intern for *academic* reasons? Under these circumstances, the complainant is likely to be treated as a student other than an employee. *Ross v. Univ. of Minn., supra*, at 32. Where "no clear dichotomy exists" between students and employees, courts are likely to classify complainants based on whether they are "primarily engaged" in educational training or the "true bargained for exchange normally associated with the employer-employee relationship." *Penn. Ass'n of Interns & Researchers v. Albert Einstein Med. Ctr.* (Pa. 1977) 369 A.2d 711, 714.

Courts are very reluctant to second-guess the professional judgment of university faculty members in cases involving purely academic judgments. See, *e.g.*, *Bd. of Curators of the University of Mo. v. Horowitz* (1978) 435 U.S. 78, 86. The U.S. Supreme Court has required lower court judges to "show great respect for the faculty's academic judgment" and "not to override it unless it is such a substantial departure from accepted academic norms" as to demonstrate that the responsible authorities "did not actually exercise professional judgment." *Reg. of the Univ. of Mich. v. Ewing* (1985) 474 U.S. 214, 225-230.

This deferential standard also applies to academic judgments concerning a student's fitness to continue in internship. Here again, courts have deferred to institution's judgments of student's academic performance and have recognized:

> "A professional school's inherent and overriding public duty, aside from written rules, to take extraordinary measures in unusual situations, to ... [assure] ... the

Under Title VII principles, an employer is obliged to take prompt remedial action once it knows or should have known of the existence of sexual harassment. As Title VII principles are often applied in Title IX cases, it may not matter which statute is relied on.

Regardless of their legal responsibilities, institutions typically will remove a student from such an internship site and attempt to place the student elsewhere. However, institutions also frequently do not delete the internship site from "the list." In such situations, when the next student complains of harassment or discrimination, it may be difficult for the institution to argue that it did not "know" about the possibility for such behavior to occur.

The situation is perhaps more complicated when the student interns are accused of sexual harassment. If the student is considered to be an employee of the institution, then it has a clear duty to take some action. It is less clear if the student is considered to be an employee of the internship site. In such situations, can the institution academically discipline the student for the student's off-campus behavior?

Courts have consistently held that an institution may discipline students for off-campus misconduct. For example, a Pennsylvania court concluded that "a college has a vital interest in the character of its students, and may regard off-campus behavior as a reflection of the student's character and his fitness to be a member of the student body." *Kusnir v. Leach* (Pa. Commw. Ct. 1982) 439 A.2d 223. Similarly, a federal district court in Virginia held that a university may discipline students for unlawful off-campus use or possession of drugs. *Krasnow v. Virginia Polytech Inst.* (W.D.Va. 1976) 414 F.Supp. 55, 57. Most recently, an Ohio appellate court held that a private college could discipline a student for an alleged off-campus sexual assault. *Ray v. Wilmington Coll.* (Ohio App. 1995) 667 N.E.2d 39, 41. See also Ann, *Misconduct of Coll. or Univ. Student Off-Campus As Grounds for Expulsion, Suspension, or Other disciplinary Action* (1994) 28 A.L.R.4th 463; Pamela J. Bernard, *Academic Dismissals of Students Involved in Clinical, Internship or Externship Activities,* 16th Stetson Coll. of L. Conf. on L. and Higher Educ. (Feb. 12-14, 1995).

Accommodating Disabilities.

What happens when a student requires an accommodation for disabilities? Under federal and often state law, institutions must take affirmative steps to ensure that students with disabilities are allowed the same educational opportunities as the rest of the student population. See The Americans with Disabilities Act (ADA) (42 U.S.C.A. §§ 2101, *et seq.* and 28 C.F.R. Part 36); The Rehabilitation Act of 1973 (29 U.S.C.A. § 701, *et seq.*); The California Fair Employment & Housing Act (FEHA); (Cal. Govt. Cde. §§ 12900, *et seq.*).

Educational Opportunities.

These statutes define disability very broadly: including any physical or mental impairment that limits a student's ability to learn. Once a student establishes that he or she is disabled, the university must make "reasonable accommodations" as long as the student is "otherwise qualified" (*i.e.*, meets the academic or professional requirements) for the

marketability and be substantially supervised (Wage and Hour Opinion Letter, Jan. 28, 1988);

- law students providing legal services to the indigent (Wage and Hour Opinion Letter, Sept. 13, 1967);

- interior design students working in return for an opportunity to receive supervised practical design experiences as part of the school curriculum (Wage and Hour Opinion Letter, March 31, 1970);

- paralegal students earning credits to work under attorney supervision (Wage and Hour Opinion Letter, March 8, 1977);

- pharmacy students working for no pay as part of instruction required by the state for obtaining a license (Wage and Hour Opinion Letter, April 11, 1973).

An additional question that arises concerns withholding in situations where the internship is paid. Medical residents are considered employees insofar as their stipends are taxable income. *Ross* v. *Univ. of Minn.* (Minn.App. 1989) 439 N.W. 2d 28, 32.

Worker's Compensation.

While the institution and/or the internship site may not wish the student intern to be considered an employee under the FLSA, they may wish to have the student considered an employee for worker's compensation reasons. This benefits both the institution and the student, allowing the institution to obtain coverage for "work" related injuries the student may suffer.

Some states have statutes specifically addressing this issue. For example, under California law, student teachers are deemed the employees of the school district under whose supervision they are teaching for the purposes of worker's compensation, unless the institution agrees otherwise.

Anti-Discrimination Laws.

Students working at internship sites pose special issues regarding discrimination law. When students are victims of discrimination, including sexual harassment, at an internship site, what are the institution's responsibilities?

The first issue is whether the student is covered by Title VII (which applies in the employment context) or Title IX (which applies in the student context). If the student is considered an employee of the internship site, then the institution may have no responsibilities. If the student is not, however, but is considered an employee of the institution or the academic relationship is considered foremost, then the institution may be exposed to liability.

Minimizing the Legal Risks of Student Internships

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Student internships are often essential components of the curriculum, and they offer students a unique learning experience. At the same time, however, they pose special problems for risk managers for a variety of reasons, including:

- By their very nature, the institution typically has less control over internships, since third parties are typically involved.
- Internships often are hybrid student/employee relationships, thus implicating special wage and hour and worker's compensation rules.
- Internships often are required for licensing reasons and therefore pose special advising and disclosure issues.
- Internships sometimes require special action on the part of the institution in order for insurance coverage to apply.

This article provides an overview of the types of questions raised and the problems posed by student internships, as well as strategies for minimizing risk to the institution.

Common Issues Raised by Student Internships

Wage and Hour Law.

Whether an intern is considered a student or an employee may depend on the context in which this question arises. Student interns may be excluded from coverage under the Fair Labor Standards Act if they are involved in education or training programs that are "designed to provide students with professional experience in the furtherance of their education and training and are academically oriented for their benefit" (Wage and Hour Opinion Letter, Jan. 28, 1988). Examples of student trainees who have been found to be exempt from the FLSA include the following:

- students working at the Women's Bar Association through an intern program, where the students would gain practical work experience, benefit from increased

3. Involve Legal Staff of University.

   a. Conflict resolution and complaint responses.

   b. Public statements should be reviewed.

   c. Involve counsel in all surveys and disclosure documents.

   d. Seek advice.
   e. Leave the legal arguments and issues to the lawyers.

4. Institutional issues.

   a. Athletic resources choices are made by campus authorities, not by the Office of Civil Rights.

   b. President/Chancellor involvement is critically important before crisis.

   c. Full disclosure of data, problems, plans to improve, goals is very important.

5. Attitudes

   a. Not hard to understand Title IX guidelines. Fogginess equals obfuscation.

   b. Athletics are good for everyone, and the positive impact of women wanting to compete is overwhelmingly good for all athletics.

   c. Know the basics of the three-prong test and get at least to the second prong as quickly as possible.

Outline of NACUA Presentation, Andy Geiger

1. Title IX Compliance depends upon philosophical support of athletics as an important educational component of the University.

    a. Varsity sports vs. Men's Athletics and Women's Athletics

    b. Solve problems incrementally.

        i. Avoid male hostility.

        ii. Issue is opportunities.

2. Self-awareness is critical.

    a. NCAA Certification Process.

        i. Self-study.

        ii. Mock audit using OCR Guidelines.

    b. Look and Listen.

        i. Important to manage by walking around.

        ii. Make sure there is accessibility and open communication.

        iii. Pay careful attention to complaints from women athletes and be responsive to the issues they raise.

    c. Community Involvement.

        i. Athletic Council - maintain Gender Equity Sub-committee.

        ii. Student-Athlete Advisory Board.

        iii. Formal and informal interaction with coaches and support staff.

C. Town/Gown Issues to Consider In Designing A Campus Debit Card System.

1. Off-Campus Merchant Access to Student Business.

2. Impact on Institution Owned/Operated Offerings and On-Campus Third Party Merchants.

3. Opportunity to Partner With Local Business Community on Related Efforts.

D. Sources of Potential Conflict.

1. Merchant Participation.

2. Freedom of Information Acts.

   a. Concerns for your banking partner.

   b. Public relations issue.

3. Family Educational Rights and Privacy Act.

B. Student's Right to Counsel.

Where a related criminal action is pending, a student has the right to have a lawyer of his own choosing to consult with and advise him during the disciplinary hearing. Gabrilowitz v Newman, 582 F.2d 100 (1st Cir. 1978).

C. Double Jeopardy.

A student subject to both criminal court proceedings and the code proceedings of a public university has not been subjected to double jeopardy as the two proceedings impose different types of punishment and are intended to protect different state interests. Paine v Board of Regents of the University of Texas System, 355 F.Supp. 199 (W.D. Tex. 1972), aff'd per curiam, 474 F.2d 1397 (5th Cir. 1973).

III. Coordinating Jurisdictional Matters and Developing Positive Working Relationships With Area Law Enforcement Agencies.

A. Define Scope of Institutional Jurisdiction.

B. Fostering Cooperation With Local Law Enforcement.

1. Cooperative Policing Agreements.

2. Informal Efforts to Develop Working Relationships.

C. Information Sharing/Joint Task Force Efforts.

D. Violation of Outside Laws as Grounds for Discipline Under Code of Conduct.

IV. Implementing a Campus Debit Card System.

A. Why a Smart Card?

1. Universal ID System would eliminate redundancy, create economies of scale.

2. Improved Customer Service.

3. Debit Card Capabilities.

B. Student Service Issues to Consider in Designing a Campus Debit Card System.

1. Safety and Convenience.

2. Limited Financial Independence at the Discretion of the Parents.

An institution clearly has the right to determine that any unlawful possession of drugs or criminal conduct on the part of its students is detrimental to the institution. As long as the student receives necessary due process, rule prohibiting such activities is allowable. Krasnow v Virginia Polytechnic Institute, 551 F.2d 591 (4th Cir. 1977).

A university may conduct a disciplinary hearing regarding a student's arrest for the sale of illegal drugs. Hart v Ferris State College, 557 F.Supp. 1379 (1983); Wallace v Florida A&M University, 433 So.2d 600 (Fl. Dist. Ct. App. 1983).

Following the necessary hearing, a college could suspend a student for participation in an off campus incident of trespass and associated misconduct (students crashed private party and were disorderly and disruptive) as college regulations prohibited assault, harassment, personal abuse, and trespass. In reaching its holding, the court noted that the college has a vital interest in the character of its students and may regard off campus behavior as indicative of a student's fitness to be a member of the student body. Kushnir v Leach, 439 A.2d 223 (Pa. Commw. Ct. 1982).

A university changed a graduate teaching assistant's position following off campus incidents resulting from her homosexual relationship with a student (not in any of her classes). The court focused on the university's legitimate interest in protecting its good name in face of potential negative public attention, parental complaints and public incidents requiring police intervention. Naragon v Wharton, 572 F.Supp. 1117 (M.D. La. 1983).

C. The activities outside of the classroom that institutions have the authority to review and discipline are widely varied. However, as a practical matter, the institution's ability to address its students' activities, whether on or off campus, and the means by which it will do so, must be determined in view of constitutional guarantees, such as due process, equal protection, and the First Amendment. A thorough discussion of these matters is beyond the scope of this presentation.

II. Interaction of Institutional Codes of Conduct With Outside Laws: Issues Arising in the Specific Context of Addressing Off Campus Behavior.

A. Timing of Institutional Proceedings and Related Criminal Proceedings.

An institution is not precluded from proceeding on a disciplinary matter under its student code where related criminal proceedings are pending but not yet concluded in the courts. Gabrilowitz v Newman, 582 F.2d 100 (1st Cir. 1978); Hart v Ferris State College, 557 F.Supp. 1379 (W.D. Mich. 1983); Furutani v Ewigleben, 297 F.Supp. 1163 (N.D. Cal. 1969).

ASSORTED LEGAL ASPECTS OF TOWN-GOWN RELATIONSHIPS

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I. Managing Bad Acts Off of Campus.

A. General Authority of Institutions of Higher Education to Manage Off Campus Behavior.

An institution of higher education has full authority to discipline both academic and nonacademic behaviors of its students occurring on campus. Universities may discipline students for off campus activities when those activities a) interfere with the lawful missions, processes, or functions of the institution, or b) present a significant threat to campus welfare. However, institutions must provide students with notice of all prohibited activities, e.g. in the student code of conduct, must be clearly set forth in the institution's student code of conduct. As explained in General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968):

> In the field of discipline, scholastic and behavioral, an institution may establish any standards reasonably relevant to the lawful missions, processes, and functions of the institution. It is not a lawful mission, process or function of an institution to prohibit the exercise of a right guaranteed by the Constitution or a law of the United States to a member of the academic community in the circumstances. Therefore, such prohibitions are not reasonably relevant to any lawful mission, process or function of an institution.
>
> Standards so established may apply to student behavior on and off campus when relevant to any lawful mission, process, or function of the institution. By such standards of student conduct the institution may prohibit any action or omission which impairs, interferes with, or obstructs the missions, processes and functions of the institution.
>
> Standards so established may require scholastic attainment higher than the average of the population and may require superior ethical and moral behavior. In establishing standards of behavior, the institution is not limited to the standards or the forms of criminal laws. 45 F.R.D. 133, 145.

B. Specific Types of Acts.

V. Areas of potential institutional vulnerability

A. The institution offers a varsity sport for men but not for women and women play the sport

1. *Cook v. Colgate University*, 802 F.Supp. 737 (N.D.N.Y. 1992), *dismissed as moot*, 992 F.2d 17 (2d Cir. 1993)

B. There are disparities in one or more of the program components between men's and women's sports

1. *Cook*, supra

C. The institution drops one or more varsity sports for women when the percentage of women athletes is substantially smaller than the percentage of women in the undergraduate student population

1. *Cohen v. Brown University*, 991 F.2d 888 (1st Cir. 1993), *on remand*, 879 F.Supp. 185 (D.R.I. 1995)

2. *Favia v Indiana University of Pennsylvania*, 7 F.3d 332 (3d Cir. 1993)

continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program"

i. Measuring interests of members of the underrepresented sex

ii. Assessing abilities of members of the underrepresented sex

3. Importance of continuing monitoring and assessment of compliance

4. Who should perform the assessment of compliance--internal experts or outside consultants

B. Increasing participation opportunities for women

1. Adding varsity sports for women

2. Increasing squad sizes for existing varsity sports

3. Examples: Big Ten and SEC requirements

C. Reducing participation opportunities for men

1. Cutting men's varsity sports

a. *Kelley v. University of Illinois*, 832 F.Supp. 237 (C.D. Ill. 1993) and *Gonyo v. Drake University*, 837 F.Supp. 989 (S.D. Iowa 1993)

2. Decreasing squad sizes for existing varsity sports

IV. Strategies for achieving compliance without litigation

A. Internal assessment of Title IX compliance

1. Compare the treatment of male and female student-athletes with respect to the twelve program components: athletic scholarships; equipment and supplies; scheduling of games and practices; travel and per diem allowances; opportunity to receive coaching and tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competitive facilities; medical and training facilities and services; publicity; support services; and recruitment of student-athletes (see 34 C.F.R. §§ 106.37(c) and 106.41(c) and 44 Fed. Reg. 71,413-423)

   a. Assessing equivalence of kind, quality, and availability
   b. Justification of differences with legitimate, nondiscriminatory factors

2. Consider the institution's ability to satisfy one or more prongs of the three-part test to determine whether the institution effectively accommodates the interests and abilities of its student-athletes (44 Fed. Reg. 71,481)

   a. "Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments"
      i. Court interpretations of "substantially proportionate" in *Roberts v. Colorado State University*, 988 F.2d 824 (10th Cir. 1993) and *Cohen v. Brown University*, 809 F.Supp. 978 (D.R.I. 1992), *affirmed*, 991 F.2d 888 (1st Cir. 1993)
   b. "Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex"
      i. What constitutes satisfactory program expansion ((see *Roberts v. Colorado State University*, 988 F.2d 824 (10th Cir. 1993))
   c. "Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a

5. Time for reporting
    a. By October 1, 1996 and thereafter annually on October 15

6. Availability of report
    a. To students, prospective students, and the public
    b. "easily accessible"
    c. Provided "promptly" upon request
    d. Institution must inform students and prospective students of their right to request the report

B. NCAA Certification

1. Operating principle related to gender equity
    a. commitment to fair and equitable treatment of men and women in intercollegiate athletics
    b. adequate information for assessing progress in this area
    c. institutional plan for addressing gender equity in the future

2. Self-study items
    a. gender and race of athletic department staff by category (senior administrative staff, other staff members, head coaches, assistant coaches, volunteer coaches, and faculty athletics board or committee)
    b. gender and race of students receiving athletics aid
    c. gender and race of student-athletes by team
    d. the following information by sport: number of scholarships, recruiting dollars expended, number of participation opportunities, number of scheduled contests, operating expenses, gender of head coach and base salary, number of assistant coaches and salaries, number of graduate assistants, number of volunteer coaches
    e. description of policies, organization, and resource allocation related to athletic support services (sports information, marketing, sports medicine, training, equipment, travel, facilities) for male and female athletes

C. Institutional barriers to compliance

1. Limited institutional resources

2. Perceptions of the interests and abilities of women student-athletes

3. Revenue-generating sports

III. Changed incentives to achieve compliance with Title IX

A. Increased risks of litigation

1. Increased frequency of filings

2. Possibility of damages after *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028 (1992)

B. New reporting requirements for intercollegiate athletics programs

1. Equity in Athletics Disclosure Act, Pub.L.No. 103-382, § 360B, 108 Stat. 3969-71, codified at 20 U.S.C. § 1092(g)

2. Purpose of the statute (stated and actual)

3. Information to be reported by varsity team
   a. number of participants
   b. operating expenses
   c. gender of head coach and full or part time status
   d. number and gender of assistant coaches and full or part time status

4. Information to be reported on institution-wide basis
   a. total dollar amounts of athletically-related student aid, by gender
   b. ratio of athletic scholarships awarded to men to athletic scholarships awarded to women
   c. total recruiting expenses for men's and women's teams
   d. average annual institutional salaries of head coaches of men's teams and women's teams
   e. average annual institutional salaries of assistant coaches of men's teams and women's teams

2. Shuttle buses and parking for football games.

3. Major construction projects and their potential impact.

4. Be open to alternative means of solving problems.

IV. How to Improve Community Relations

A. Become actively involved in the community as a student affairs officer or legal counsel.

B. Let elected officials know about problems before they hear about them from irate citizens.

C. Involve local expertise in campus problems
i.e. victim/witness program.

D. Return phone calls and answer letters.

E. Be willing to meet to discuss issues even if you think you know what the outcome should be.

F. Provide information to the community on a regular and consistent basis. Example: The Observer - Evanston edition.

G. Where possible let community members take advantage of institutional facilities and services
i.e., sports centers, reduced ticket prices for senior citizens, etc.

study, volunteer experiences, and service learning. Examples: Northwestern Volunteer Network (NVN), Adopt-A-School, tutoring programs, Special Olympics.

B. The economic impact of the institution needs to be communicated on a consistent basis.

1. Provide an analysis of the flow through influence of the institution to key decision makers in the community.

2. Develop strong and positive relationships with the local press.

3. Engage in joint ventures and demonstrate community commitment as an institution.

a. Example: Minority contractor program

b. Example: Research Park

c. Example: Neighborhood revitalization

d. Example: Park and green area development

e. Example: Debit Cards (University of Michigan and Northwestern)

III. Dealing With Neighborhood Tensions

A. Communicate, communicate, communicate

B. Take the initiative with students

1. Inform students of applicable ordinances: noise, etc.

2. Facilitate meetings between students and their neighbors.

3. Letter from student government to students.

C. Take the initiative with neighbors

1. Don't let them be surprised; e.g., moving steel girders, or opening day of school.

NACUA/NASPA STUDENT AFFAIRS WORKSHOP
"STUDENT ISSUES 2000"

Town/Gown Relationships

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I. Introduction

A. What are the causes of town/gown tensions?

1. Economic issues

2. Impact of the institution on city/town services

3. Perception that the institution does not pay a "fair share"

4. Taxation issues

5. Student behavior.

B. Why should student affairs staff and legal counsel be concerned?

1. Public relations

2. Genuine need for services from the municipality

3. Quality of life issues for students.

II. The University as an Economic and Social Participant in the Community

A. Institutional expertise can be used to address issues or fill volunteer needs.

1. Setting an expectation of involvement of senior staff through service on the Chamber of Commerce, Rotary, school committee and task forces, etc.

2. Recognizing the community service and involvement of faculty and staff.

3. Learning opportunities for students through co-op, off-campus work

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academic courses that had service components (Cooper).

2. Others argue that the university requires all kinds of things from students, certainly anything the institution thinks is valuable. Barber places service in the context of citizenship and argues it should be mandatory and credit-bearing. "Because citizenship is an acquired art, and because those least likely to be spirited citizens or volunteers in their local or national community are most in need of civic training an adequate program of citizen training with an opportunity for service needs to be mandatory. There are certain things a democracy simply must teach, employing its full authority to do so: citizenship is first among them" (256).

VI. Cautions As We Move Toward Institutionalizing Service Learning

A. Too few measures for community impact may indicate a low priority given to meeting genuine community needs (Liu 25).

B. Service for its own sake might work in the academy but may not be most effective means of transforming the culture (need to embrace social change or justice issues, something people have been reluctant to do) Service *can* do harm.
   1. Is structural dimension of the problem being addressed? Story of young woman serving meals in a soup kitchen feeling so good she says she hopes her children has the same opportunity. Misses the point about changing underlying structures of social problems.

C. Does marginal status give service learning its authenticity or credibility with communities? If it becomes mainstream, acceptable, will it resemble traditional educational methods and assumptions and take on those blinders?

D. What are we using to measure "progress" in the field? Are numbers of courses with service components or numbers of agencies involved adequate measures of impact?

E. Where is student involvement and leadership as service learning becomes more institutionalized?

VII. Future Directions for Community Service and Service Learning?

A. Sustainability of partnerships now a concern. "Having worked through the issues of recruitment, orientation, and training, practitioners now struggle with the complexities of reflection, curricular integration, and evaluation. Defining standards for quality reflection, creating incentives for faculty participation, connecting service activities with course content, measuring program impacts on students and communities, and developing a research agenda on both participation and outcomes are among the key issues that will preoccupy the field for years to come" (Liu 17).

B. Requiring service or keeping it optional becomes an issue of debate.
   1. One opponent of mandatory service argues that a graduation requirement of service sends the wrong message to students by suggesting there something deficient in them. "We need to be saying that we do not believe there is something deficient in students, but something lacking in our curricula. We need to focus any requirement on the curriculum, not on the students, emphasizing service-learning not just requisite number of community service hours." Students would then voluntarily select

behavior of telling players they played like "girls" as sexist and didn't want to perpetuated that kind of attitude in young men.

2. A psychology professor at I.U. East, who was president of the board of the mental health association, has teamed with that organization for ongoing service learning projects between the agency and his class. The head of the mental health association has gotten involved in developing curriculum and rewritten the agency's mission statement to include service learning as one of its purposes.

B. Improved learning is argument of service learning advocates who want to infuse service into the curriculum.

1. Academic study more rigorous when put through the lens of real problems and social contexts. I.U. Northwest Professor's sociology students wrote better ethnographic studies when engaged in community service. One group who volunteered in the Crown Point Courtroom had their paper accepted at the North Central Sociological Association Conference, another at the Midwest Sociology Undergraduate Research Conference.

C. Improved agency services by using student volunteers involved in service learning.

1. Alexander Astin's study of 2,039 service participants attending 42 colleges and universities that received grants from the Corporation for National Service found that a majority responding to the Community Impact Survey reported student volunteers enabled them to increase the quality of their services (71%); 61% increased intensity of services provided, and 52% were able to serve more people, largely because student volunteers "supplemental rather than replaced other volunteer labor" (Astin 3).

2. Respondents to this same survey also rated student volunteers from these institutions "substantially more effective than other volunteers, including volunteers" from colleges and universities not directly engaged in service learning. They rated the student volunteers as equal in effectiveness to paid staff" (4).

D. Citizenship is taught and developed through community service tied to academic study.

1. Astin's study found all student outcomes positively affected by service, including "a greater sense of civic responsibility, higher levels of academic achievement, and more highly developed life skills" (57).

B. Traditional Liberal Arts are more resistant; Benjamin Barber observes that experiential learning "happens least where it is most needed, in the humanities, which seem especially prone to scholastic purism" (231).

1. English. Writing for a Better Society, Prof. Joan Pong Linton, I.U. Bloomington. Students do a writing project for an agency that would not get done without their expertise and time and do their research paper for the course on the social issue that agency addresses.

C. Applied Science/Health

1. Transcultural Nursing. Prof. Ben Crandall, I.U. Kokomo Students worked with a Mexican-American migrant population in Hoosier agriculture, at health clinics and evening literacy tutorial sessions during the harvest season.

IV. How is Risk Managed?

A. School-Agency Agreements are strongly advised. "Elements to be included are determination of the existence of an employment relationship, identification of the employer, liability and indemnification, control of activities, the role of the school's service learning coordinator, student report and writing requirements, confidentiality of information, duration of assignments, the right to suspend or dismiss students, supervision, training, evaluation, transportation and the nature and manner of compensation, if any" (Goldstein 52).

B. Inform students of the risks. Visit the sites yourself. Be certain the agency has liability coverage/insurance for volunteers (Cooper).

C. Consult with legal counsel or risk management in drafting waivers or assumption of risk statements for students to sign (Strauss and Stephens 57).

V. Potential and Realized Benefits of Service Learning

A. Partnerships between campuses and communities are strengthened if service project is reciprocal. Real work gets done.

1. At. I.U. Northwest, in Gary, Indiana, for example, university faculty and students are working with neighborhood associations to develop community policing. A graduate business class has teamed up with a local merchants association to research what businesses are most effective and why and to offer that consultation to revive the economic base of the neighborhood. In a sociology class, a group studied a local basketball team, helped out wherever they were needed, and witnessed sexist and misogynist motivations from the coach. They gave their ethnography to the coach who is reportedly coaching differently now--he hadn't seen his

B. "It provides structured time for students to reflect on their service and learning experiences through a mix of writing, reading, speaking, listening and creating in small and large groups and individual work."

C. "It fosters the development of those 'intangibles'-empathy, personal values, beliefs, awareness, self-esteem, self-confidence, social-responsibility, and helps to foster a sense of caring for others."

D. "It is based on a reciprocal relationship in which the service reinforces and strengthens the learning and the learning reinforces and strengthens the service."

E. "Credit is awarded for learning, college-level learning, not for a requisite number of service hours" (Cooper).

F. Distinction between community service and service learning, with the emphasis on the latter, comes from pressures within the institution to involve faculty and move service from margins to mainstream (Liu 14).
   1. Community service fills a need in the community through volunteer efforts. Service-learning also fills that need, but it uses that need as a foundation to examine ourselves, our society, and our future (Cooper).
   2. Community Agencies seen as partners in education, not just vehicles for placement.

III. Examples and Illustrations of Service Learning Projects:

A. SEAMS (Science, Engineering, Architecture, Mathematics and Computer Science) disciplines have been specifically targeted by Campus Compact and other organizations for curriculum development grants.
   1. Statistics. Prof. Engin Sungur at University of Minnesota Morris has students in a mathematics course work with community officials to develop a ten year plan for the city. Students studied and analyzed the current economic, demographic and environmental conditions of the area in a report that the Planning Commission used.
   2. Environmental Science Prof. Peter Ryan at Salish Kootenai College, Montana had undergraduates develop a plan for permanent recycling program. Student also distributed and installed radon kits throughout the Flathead Indian Reservation, analyzed the results, prepared a report for the local health specialists, and informed the community about their findings.
   3. Chemistry. Prof. Deborah Wiegrand, University of Washington, has undergraduates work with a Girl Scout troop and use activity kits to teach young girls about science. Other students conducted water-quality tests of streams and rivers, and the test will be converted into a laboratory procedure for students in an introductory chemistry course.

Service Learning Context, Concepts, and Cautions
NASPA/NACUA Student Affairs Workshop
October 20, 1996

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I. Cultural and Historical Contexts of the Service Learning Movement

A. Roots of service and earning connections go back at least to John Dewey at the turn of the century, who worked to bridge "education and experience in the name of democracy as a way of life rather than just a political system" (Barber 247).

B. Current movement started among students
   a. Apathy and greed said to have characterized many students of the 1980's. Alexander Astin's data showed increasing importance given to "being very well-off financially" while values such as "developing a meaningful philosophy of life and participating in community affairs" declined (Liu 2).
   b. Wayne Meisel walks 1,500 miles from Maine to Washington, D.C. in 1984, visiting 70 campuses with a call to service. COOL (Campus Outreach Opportunity League) is founded.
   c. Student-led movement indicates no generational defect but idealism intact and needing support and opportunities. Initial involvement came from concern for issues, such as environment, violence, and not for service in and of itself.

C. Movement among college presidents centers on concern for civic education of youth (1985 Carnegie Foundation report by Frank Newman, president of the Education Commission of the States instrumental here).
   a. Campus Compact formed 1985 with goal to offer institutional leadership to support for increased student participation in community service. Membership in campus compact has grown from 105 institutions in 1986 to 520 today
   b. "Green deans," recent graduates, often appointed to serve as campus-wide coordinator of service activities.

II. Definitions of Service Learning Typically Include the Following Characteristics

A. "Community service serves as the vehicle for the achievement of specific academic goals and objectives."

Dental Center, 494 N.Y.W.2d 721 (A.D. 2 Dept. 1985) [release signed by patient insufficient to release dental clinic from liability for the alleged negligence of a dental student].

Insurance.

Internship programs present complex insurance issues. Risk managers will want to determine whether interns fall within the definition of "insured" under a general liability policy and if not, whether additional coverage is available or desirable.

Because interns typically do not fall within the definition of "insured" under a general liability policy, injuries suffered by interns may pose a substantial uninsured risk. When establishing an internship program, an institution should consult an insurance broker who has knowledge and experience with academic institutions. The insurance broker may suggest a specific endorsement to include interns or a separate policy insuring the interns.

The activities of interns may also trigger third party claims. For example, an intern may render negligent services in a clinical setting or the intern's neglect may result in the death or injury of a child under the intern's care. If the institution has agreed to indemnify the host of the clinical program, liability suffered as a result of an interns conduct may be covered as an insured contract under the institution's liability policy.

If the intern is assuming clinical responsibilities under the care of a licensed professional, professional liability insurance should be obtained.

- *Defamation*

Students may also claim that they were defamed by the institution's disclosure of damaging information to licensure bodies. In these cases, colleges and universities are likely to be able to assert a defense that such actions were protected by the conditional or qualified privilege of fair criticism and comment.

Courts have held that faculty members who candidly assess their students' strengths and weaknesses in letters of recommendations were protected by a qualified privilege for "full and unrestricted communication regarding matters on which the parties have common interest or duty." *Olsson v. Ind. Univ.* (Ind.App. 1991) 571 N.E.2d 585, 587. This privilege applies to any communication "if made in good faith" regarding any subject that the institution has a duty to disclose to a licensing body. The institution clearly has a duty to report all information relevant to a decision to grant a professional license. An institutional actor may also be allowed to claim a constitutional "opinion" privilege based on the First Amendment. See *Gertz v. Robert Welch* (1974) 418 U.S. 323, 339-340.

Minimizing Risks

Agreements.

One of the most important ways an institution can manage risk regarding student internship programs is though the use of agreements regarding the allocation of liability. Where a clinical program requires placement of students with third parties, institutions use affiliation agreements to spell out rights and responsibilities. Such agreements typically include sections regarding the relationship between the institution and the third party site and regarding indemnification. Although it is not always possible, the institution should avoid indemnifying the placement site for potential losses.

Releases.

Under some circumstances, it may be desirable to obtain a release from the potential intern, particularly where there are known risks attached to the internship project. Courts often uphold these agreements. For example, an Indiana appellate court upheld a waiver agreement releasing the university from liability resulting from a motorcycle accident that occurred in a school-sponsored training course. *Terry v. Indiana St. Univ.* (Ind.App. 1996) 666 N.E.2d 87.

There are also situations where the institution may wish to obtain a release from those an intern may be practicing upon. It is important that such releases fully comply with state law requirements for validity, as they are not always foolproof. See *Abramowitz* v. *New York Univ.*

conduct, the uncertainties of causation, the impracticality of judicial oversight of academic decisions, and the dangers of burdening both courts and educational institutions with frivolous litigation. See *Moore v. Vanderloo* (Iowa 1986) 386 N.W.2d 108.

Recently however, courts have become more receptive to such claims. For example, a New York court ordered Pace University to pay $1,000.00 in punitive damages and to make full tuition refunds to each of the students who alleged that a computer science course was so incomprehensible that it amounted to educational malpractice. *Andre v. Pace Univ.* (N.Y.City Ct. 1994) (N.Y.City Ct. 1994) 618 N.Y.S.2d 975. See also Heather May, *Ex-students Sue Universities Over Quality of Education: Some Seek Awards in Excess of $1 Million*, CHRON. OF HIGHER EDUC., August 16, 1996, at A29.

Courts may also be receptive to educational malpractice claims involving allegations of negligent advising. In such instances, institutions already liable under breach of contract theories would now be subjected to the possibility of concurrent tort liability and exposure to sizeable punitive damages awards.

- *Estoppel*

This equitable principle prevents a party, who has induced another to act in a particular manner, from later adopting an inconsistent position which injures the other party. Complainants often allege that educational institutions are estopped from refusing credentials or internships to students who have completed all degree requirements.

Courts have refused to sustain these claims in cases involving faculty determinations of a student's unsuitability for professional licensure. See *Sofair v. St. Univ. of N.Y.*, *supra*, at 457. Courts have held that "it is essential that the decision surrounding the issuance of these credentials be left to the sound judgment of professional educators." Indeed, courts have argued that abandoning the "long-standing practice" of judicial restraint in this area would "seriously undermine ... the value of these credentials from the point of view of society." *Olsson v. Bd. of Higher Educ.* (N.Y. 1980) 402 N.E.2d 1150, 1152-53. Courts have only sustained estoppel claims where a student was denied a degree or credential on purely technical grounds. See *Blank v. Bd. of Educ.* (N.Y. Cty. Ct. 1966) 273 N.Y.S.2d 796, 803.

- *Due Process*

Students sometime allege substantive due process violations in the denial of credentials, licensure or internships. Once again, courts are likely to adopt a deferential attitude if academic decisions are involved. See *Reg. of the Univ. of Mich. v. Ewing, supra*, at 225-230; *Bergstrom v. Buettner* (D.N.D. 1987) 697 F.Supp. 1098, 1100-01. Procedural due process claims have frequently been rejected on the same grounds. *Id.*

published policies. The implied elements may vary but generally include the student's duty to meet academic and behavioral standards, and the institution's duty to act in good faith. Thus, a student may assert that a failure to award an internship or to prepare him for a professional licensure amounts to a breach of an express or an implied institutional obligation.

Courts have generally rejected student breach of contract claims that challenge faculty academic decisions. In such cases, courts are likely to be very deferential to faculty judgments about the student's fitness for professional licensure. See *Shields v. Hofstra Univ. Schl. of L.* (A.D. 1980) 431 N.Y.S.2d 60, 62-63.

However, courts may apply contract law more stringently in cases involving affirmative representations by an institution. For example, a New York court sustained the breach of contract claims of a group of architecture students who were promised that their program would be accredited by the time of graduation if they remained enrolled and worked diligently. For budgetary reasons, the administration later decided to eliminate the program. Under these circumstances, the court upheld the breach of contract claim and required the institution to pay damages. *Behrend v. State* (Ohio App. 1977) 379 N.E.2d 617, 620.

More importantly, courts have often found educational institutions to be liable on a breach of contract theory for the consequences of negligent advising. Students who are denied credentials or other professional licenses because they reasonably relied on the erroneous advice of university employees are generally entitled to recover in breach of contract actions.

- *Fraud*

These claims are like breach of contract actions except that they also allege that the university deliberately made false representations or concealed crucial facts. Such complaints are very seldom successful because it is difficult to prove that an institution made intentional misrepresentations and that the student justifiably relied on those misrepresentations. See *Behrend v. State, supra*, at 622; *Hershman v. Univ. of Toledo* (Ohio Ct. Cl. 1987) 519 N.E.2d 871, 875-876.

- *Educational Malpractice*

This innovative cause of action provides a tort theory (along with a more generous measure of damages) in actions that would otherwise be considered breach of contract claims. This tort arises from a duty assumed by educational professionals (*i.e.*, counselors, instructors, administrators, etc.) not to harm the students relying on their professional expertise.

Traditionally, courts have refused to sustain these claims in cases alleging that an institution provided substandard educational services. See *Finstad v. Washburn Univ. of Topeka* (Kan. 1993) 845 P.2d 685; *Ross v. Creighton Univ.* (N.D.Ill. 1990) 740 F.Supp. 1319. See also Richard Funston, *Educational Malpractice: A Cause of Action in Search of a Theory* (1981) 18 U.S.D. L. Rev. 743. In rejecting such claims, courts have noted that the clear standards of