

Ten Risk Management Strategies for College Athletics

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Ten Topics for Consideration

There are a number of issues that raise liability concerns in college athletics but we have chosen ten topics that continue to be problematic for those who administer athletic programs. This will serve only as a brief overview of the areas in question.

Disciplining Athletes

Shielding athletes from the same consequences that non-athletes face can undermine the campus conduct process. It is both fair and appropriate to have two layers of discipline when an athlete engages in misconduct; 1) a response from athletics, and 2) a response from the student conduct office.

Student conduct personnel should consider a student-athlete's status as irrelevant evidence. Sanctions should always be proportionate to the severity of the violation and sanctions that affect an athlete's ability to play should have a nexus with the athlete's misconduct. Coaches should never intervene in the campus conduct process.

Universities should consider the legal implications of recruiting a student-athlete who has a history of criminal behavior, especially if the crimes involved violence. If this person is recruited and injures someone on campus, the university may be responsible under the principle of negligent selection since the subsequent misbehavior was foreseeable.

Summer Camps on Campus

There are liability concerns relative to summer camps even if the university is not a sponsor or co-sponsor of the camp since the university still retains the obligation to maintain the premises as the lessor. This entails the duty of inspection and maintenance and the warning or elimination of foreseeable dangers. For example, athletic fields must be maintained properly and dangers like moveable soccer goals must be removed. If the summer camp is residential, reasonably safe premises must be provided including adequate security in terms of locks, doors, etc.

When a university sponsors or co-sponsors a summer camp, the duty of care widens to include the proper provision of instructional programs, proper supervision, hiring personnel who are competent and suitable to work with minors, and ensuring that emergency medical care is available. The selection process for personnel is particularly important since sexual predators are often drawn to settings in which they have an opportunity to work with children.

Use of Exculpatory Agreements

The courts scrutinize exculpatory agreements because they exemplify the clash between tort principles in which parties are held accountable for their own negligence and contract law in which parties are given freedom to contract for mutually agreeable outcomes. Since the purpose of exculpatory agreements is to allow a party to be released from liability for its own negligence, the courts look closely at these contracts. State law governs the particulars of this area but there are general concerns to be aware of in terms of the context and the content of the waiver. Contextually, a waiver will not be upheld if: 1) the signer is a minor (although a minority of states do uphold a waiver signed by a minor); 2) the use of the waiver violates public policy; or 3) there is a coercive effect due to a disparity in bargaining power. In regard to the second aspect, most courts have not addressed the issue of whether using a waiver in the context of intercollegiate athletics violates public policy. An example of the third aspect would be attempting to use a waiver in a class setting that is compulsory.

In terms of the content of the waiver, the exculpatory language must: 1) be conspicuous—typeface easily read, legible and bold; 2) be clear, detailed and specific—address the risk and possible injuries with specificity; and 3) not attempt to waive liability for behavior that is more than mere negligence. State law needs to be consulted to

Crowd Management

A landowner has a duty of reasonable care to protect the public from the harmful acts of third persons. What is “reasonable” turns on the question of foreseeability. Based on the landscape of college sport today, crowd misbehavior is usually foreseeable based on two major factors. One, sporting events are surrounded by a culture of intoxication. Sales of alcohol at events, tailgating that goes on for hours preceding a contest, and the advertising and sponsorship ties between alcohol manufacturers and college venues/events are all indicators that the culture of intoxication has permeated college sport, with the result that rowdy and unsportsmanlike behavior is foreseeable. Two, schools themselves often foster an environment in which rushing the goalposts or rushing the floor after a game is not only tolerated but often condoned under the guise of school spirit. Postgame celebration damages should not be viewed as incidental to winning.

Team Transportation

There are four areas of concern regarding the transportation of teams: 1) the selection of competent drivers; 2) the selection of a safe mode of travel; 3) the proper maintenance of vehicles; and 4) the proper training of drivers.

If you use an independent firm to provide transportation you may avoid vicarious liability if an accident occurs. Remember, however, that the university may still be responsible for the improper selection of the transportation provider if there is a failure to review the fitness of the contractor. If your employees are the drivers of university vehicles, make sure that they possess the proper credentials.

As to a safe mode of travel, the National Highway Transportation Safety Administration has reported that 15 passenger vans were three times as likely to roll over when they carried 10 or more passengers. (www.nhtsa.dot.gov/hot/15PassVans) There are also safety recommendations provided by the National Transportation Safety Board in a report to the NCAA as a part of the NTSB investigation of the Oklahoma State University airplane crash of 2003. This report which suggests better oversight of the transportation needs of teams may be found at <http://www.nts.gov/recs/letters/2003/a03%5FO1.pdf>.

Maintenance of vehicles should be done pursuant to a checklist and an inspection should be done every time a vehicle is checked out for use. Maintenance personnel should be familiar with the features of the vehicles used. Proper training of drivers includes the knowledge to conduct vehicle inspections and training in emergency situations such as icy roads or tire blowouts.

Emergency Medical Care

Universities should refer to the *NCAA Sports Medicine Handbook* for extensive guidelines on developing the components of an emergency plan for all events, skill sessions, and practices. The emergency plan should include: 1) the presence of a person qualified to render emergency care; 2) the presence or planned access to a physician; 3) planned access to early defibrillation (Automated External Defibrillators); and 4) planned access to a medical facility which includes a plan of communication and a plan of transportation. As with all types of emergency plans, training of personnel is critical. Medical emergencies demand quick responses which depend upon familiarity with the emergency protocols.

The NCAA guidelines also note that “all” athletics personnel associated with practices, competitions, skills instruction and strength & conditioning should possess certification in CPR, first aid and prevention of disease transmission. Also, the guidelines provide that a member of the sport medicine staff should have the “unchallengeable authority” to cancel or modify a workout for health and safety reasons. This latter provision is an attempt to avoid the conflict of interest which may inhere if a coach is the ultimate authority in this regard.

Hiring Qualified Personnel

Liability for negligent hiring is predicated upon whether a manager acted reasonably in choosing a particular person to fill a position. This cause of action is concerned with the risk created by hiring potentially incompetent, dangerous or unfit employees. There are two underlying issues: 1) whether the prospective employee has the proper qualifications; and 2) whether the employee is suitable for the position.

In intercollegiate athletics the question of competence arises often in conjunction with hiring a coach for the cheerleading squad. Although cheerleading accounts for many serious injuries and the level of athleticism for cheerleaders continues to rise, the competence of the cheerleading coach is often not commensurate with the demands of the position. The competency issue may also become a concern with sports added to meet Title IX concerns, e.g., crew or equestrian teams.

The suitability concern may arise in two contexts. First, if a coach with a known propensity for athlete abuse is hired and this propensity plays itself out at your school, there may be liability based on negligent hiring since the violence/abuse issue was a known and you acted unreasonably in hiring such a person and endangering your athletes. Negligent hiring is also a concern when hiring supervisors or counselors for the minors who attend summer camps on your campus.

Vicarious Liability

An employer's derivative liability (vicarious liability) is triggered by actions of an employee taken within the scope of employment. The underlying philosophy is that employers should bear the responsibility for employee negligence since employers receive the benefits of employee actions. A critical issue is whether an employee was acting within the "scope of employment" but this concept is broader than the notion of job description and is usually answered by ascertaining whether the actions of the employee were undertaken to benefit the employer.

Although an employee's intentional torts are generally outside of the scope of employment, an employer may ratify or condone this behavior and thus, bring that type of behavior within the scope of employment. For example, if an athletic department allows a coach to continually abuse his players, it may be argued that the condonation of that behavior puts it within the scope of employment and the university is, therefore, liable for the intentional torts of the coach.

Voluntary Workouts for Athletes

Although out-of-season workouts may be characterized as "voluntary", most athletes perceive that unless they participate in these workouts they will be at a distinct competitive disadvantage with their teammates. There are three issues that often arise in conjunction with this topic: 1) whether there is proper emergency medical coverage; 2) whether the staffing and supervision provided is adequate; and 3) problems related to extreme heat and humidity in summer football workouts.

Many schools do not have adequate medical personnel at voluntary workouts. Often there is no one in attendance who is qualified to render emergency medical care. This violates the *NCAA Sports Medicine Handbook* guideline which provides that a person certified in CPR and first aid should be at all "strength and conditioning" sessions.

Second, there may be a conflict of interest between the supervisor of the voluntary workout, usually a strength and conditioning coach, and the safety of the athletes. The strength and conditioning coach's desire to push athletes to reach or exceed their physical capabilities should

be offset by the presence of a person who has paramount responsibility for the health and safety of athletes.

Third, although we have expert information regarding the proper acclimatization to heat for football players and the necessity for sufficient hydration, these precautions are sometimes overlooked and we continue to have a number of heat stroke deaths in football, at all levels of competition. The “no pain, no gain” culture remains entrenched within football and the ability to withstand extremely adverse heat and humidity becomes a test of manhood. A player assumes the risks inherent in football but does not assume risks that are “unreasonably” increased by coaches who disregard the precautions necessary to play in such conditions.

Sexual Harassment

College athletes often exist within a highly sexualized culture and may have to deal with the “groupies” phenomenon. It is important to train and educate athletes about the issues of consent, “drunken sex” and what constitutes appropriate communication between genders.

An awareness of sexual harassment by the athletic staff is sufficient to put an institution on notice of a potential Title IX violation. Knowledge of specific instances of harassment creates actual notice. Once actual notice exists, there is a legal obligation to provide an investigation and a prompt and equitable remedy.

To be actionable, the sexual harassment of athletes by coaching personnel must be severe, pervasive and patently offensive. To avoid this issue in our coaching environments we need to create cultures that encourage reporting by athletes and are conducive to positive bystander intervention.

Conclusion

This has served as brief overview of a number of liability issues in college athletics. A fundamental consideration in liability is foreseeability and a critical component of good risk management is taking a proactive approach. Thoughtful policies and procedures and comprehensive training are critical facets in addressing liability concerns.

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