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Liability: How to Stay Out of Court

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CNS 670 Parameters of Law

Liability can be defined as being held legally responsible for an incident that may occur. As student affairs professionals, one must be very cautious as to stay out of court. Every word or action a student affairs professional does may be scrutinized and twisted to make them or their given university legally responsible for any adverse incidents that they may have had some involvement with. Incidents which student affairs professionals may be held responsible for can range anywhere from student deaths to expulsion/removal from school and much more. This handbook is designed to better educate you about liability and how to help keep you out of court.

1. Types of Liability:

Institutional liability (Corporate) or *Personal (Individual)* - Depending on who is suing, both types of liability may be implicated in the same case.

Examples-

- Constitutional claims brought by faculty, student, or others against public institutions may create an *institutional liability*. (Kaplin, 2007, pp 61)
- Statutory claims often create only *institutional liability*, but are some cases it may also provide for an *individual liability*.
- Contract claims are usually involves an *institutional liability*, but in some cases it may include an *individual liability*.
- Tort claims often times involve both *institutional* as well as *individual liability*. (expect when an institution enjoys sovereign or charitable immunity)
(Kaplin, 2007, pp 61)

Sources of law:

1. Federal Constitution & State Constitutions
2. Statutes & Regulations
3. State Common Law

Federal Constitution & State Constitutions

- Govern actions by public institutions and their agents
- Some state constitutions may apply to private and individual

Statutes & Regulations

- Address who is subject to the law
- Address the conduct prohibited or required by the law
- Address the consequences of failing to comply with the law

State Common Law

- Developed standards of conduct
- If violated, lead to legal liability (Kaplin, 2007, pp. 60-61).

Agency Law:

-The employer (aka “principal” or “master”) must assume legal responsibility for the actions of its employees (aka “agents” or “servants”)

-The master may be liable for torts committed by its employees while they are acting in the scope of their employment (not responsible if outside of the scope) UNLESS

1. The employer intended the tort/consequences be committed
2. Master was negligent or reckless
3. The master delegated duty “undelagable”

- generally involves allegations that the institution (or its agents) owed a duty to one or more individuals to behave according to a defined standard of care
- the duty was breached
- the breach of that duty caused injury to the individual(s) (Kaplin, 2007, p. 87).

Classic Torts:

1. Negligence

- Students or others injured on campus or off-campus functions
- Defendants claim institution has a duty of supervision or duty based on its “special relationship” with the student
- Courts have rejected this “special relationship” argument for most tort claims but have imposed a duty on colleges of protecting students from foreseeable harm (e.g. hazing)
- For the tort of negligence, the legal definition will be met if the institution owed a duty to the injured party but failed to exercise due care to avoid the injury.
- Whether or not a duty exists is a matter of *state common law*.
- Typical defenses to tort claims include the plaintiff’s own negligence or the assumption of risk doctrine.
 - *Premises liability* -These claims involve injuries to students or other invitees who allege that a college breached its duty as a landlord to maintain reasonably safe buildings (classrooms, residence halls, sports complexes, performing arts centers) or grounds (parking lots, athletics fields, pathways, sidewalks).

- *Liability for injuries related to on-campus instruction*-Students or other invitees injured while involved in on-campus instructional activities may file negligence claims against the institution and/or the instructor.
- *Liability for injuries in off-campus courses*-These experiences provide valuable opportunities for student learning, but may create liability for the college or university, even if it has no real control over what the student encounters in the off-campus placement.
- *Liability for co-curricular and social activities*-An individual injured as the result of a college-sponsored event, or as a result of activity that is allegedly related to college activities, may attempt to hold the college liable for negligence.
- *Student suicide*-Although courts historically have refused to create a duty to prevent suicide, holding that it was the act of the suicide victim that was the cause of the death, more recently courts are beginning to find a duty to prevent the suicide, or a duty to warn appropriate individuals that a student is a suicide risk.
- *Liability for injuries related to outreach programs*-Programs open to the community or to certain nonstudent groups may involve litigation over the college's supervision of its own students or of invitees to the campus (such as children or high school students enrolled in precollege programs).
- *Educational malpractice*-The claim arises from the duty assumed by a professional not to harm the individuals relying on the professional's expertise (Kaplin, 2007, pp. 91-104).

2. Defamation

- Institutions may discipline students or organizations that publish libelous matter
- (1) The statement must be false (2) the publication must identify the particular person libeled (3) the publication must cause at least nominal injury to the person libeled, usually including but not limited to injury or reputation (4) the falsehood must be attributable to some fault on the part of the person or organization publishing it
- The degree of fault depends on the subject of the alleged libel
- If the subject is a public official or what the courts call a “public figure,” the statement must have been made with “actual malice”
- All other situations governed by the First Amendment, the statement need only have been made negligently. Courts make this distinction in order to give publishers extra breathing space when reporting on certain matters of high public interest (Kaplin, 2007, p. 554).

Institutional Contract Liability

- Institutions of higher education face potential breach of contract claims from employees, students, and vendors, purchases, or business partners.
- The key to the institution’s liability is authorization; that is, the institution may be held liable if it authorized the agent’s action before it occurred or if it subsequently ratified the action (Kaplin, 2007, pp. 105-106).

Institutional Liability for Violating Federal Constitutional Rights

- **Section 1983**

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...” (Kaplin, 2007, p.110).

Liability Statutes

Statutes can be defined as an enactment made by a legislature and expressed in a formal document. They are enacted by both state and federal government. Statutes often command or prohibit something or declare a policy. Federal Statutes are typically collected and codified in the *United States Code* or U.S.C. They are often referred to as legislation or “black letter law”. As a source of law, they are considered primary authority as opposed to secondary authority.

Administrative agencies have the authority to enforce their own university rules by applying them to particular parties and issuing decisions regarding the parties compliance with adjunction. An administrative authority, as well as its powers to make university rules or policies depends on relevant statutes that will establish and empower the agency. However, an agency’s adjudicatory decisions must be consistent with its own rules and regulations and with applicable statutory provisions.

Examples of Liability Statutes

- *Kelly v. Gwinnell*

-Gwinnell got intoxicated at a friend's house and drove home. He got into a head-on collision with Marie Kelly. She sued, Gwinnell, his employer and, Joseph Zak (whose house he became intoxicated at)

-The courts ruled that Gwinnell, his employer, nor Zak was liable because
1) Gwinnell was not a minor 2) no one was legally responsible for Gwinnell and his actions because he is an adult

-This case showed that sponsors of parties in which alcohol may be served, especially if to minors, could be found negligent under the social host doctrine. In situations such as these, a court could use this law to say that the university has a legal duty when alcohol is served at college sponsored activities, especially if minors will be in attendance.

- *Freeman vs. Busch*

-Carolyn Freeman, freshman student at Simpson College was sexually assaulted in a dorm room after becoming inebriated and passing out.

-A resident advisor in the dorm was informed she was in the room, drunk and passed out, but did nothing about her situation.

-Freeman tried to sue the college and hold them liable, because one of the university employees knew of her state and did not react.

-The courts ruled that a university does not have "custodial duty" over a student and was not responsible for her sexual assault.

-This case showed the lines to where a university may be held liable. Now university employees, including all student workers, are trained to report any situations that may lead to something like this.

- *Morrison v. Kappa Alpha Psi Fraternity*

-Kendrick Morrison, a student at Louisiana Tech was beaten and hazed by the local chapter of Kappa Alpha Psi Fraternity during pledging activities.

-Morrison sustained serious head and neck injuries, and reported the hazing to the police.

-An investigation was conducted and the university's chapter of Kappa Alpha Psi was suspended.

-Morrison then sued the university, the national chapter of the fraternity, and the student most responsible for his injuries.

-A jury found all three equally liable and Morrison was awarded \$312,000 in compensatory damages. The jury found the university had a responsibility to protect him against tortuous actions of fellow students.

-This case showed that a university with a hazing policy has stated that they hold a responsibility in protecting the student. They have to investigate and stop and suspected acts or reports of hazing.

- *Kleinknecht v. Gettysburg College*

-A student who played lacrosse for the university died during practice. He died as a result of cardiac arrest.

-The court ruled that a special relationship existed between the college and a student who died.

-Due to their special relationship the court said the college had a duty to provide treatment to the student in the event of such a medical emergency.

-However, if the student had been pursuing private social activities that the institution has not taken to supervise then the court may find that no duty exists.

-This case set a precedent in the *University of Denver v. Whitlock* where a decision was reversed which said the university was liable for a student who became a quadriplegic in a trampoline accident outside a fraternity house.

-A special relationship does not mean that a university had to regulate student's personal conduct just because they are on university grounds.

Many statutes are created in response to highly profiled or costly court cases involving universities. Legislators create these statutes in response to prior cases to help reduce the risk of lawsuits. Many universities self regulate in order to avoid possible law suits. When found in law suits they resort to relying on previous cases and outlined statutes. Since statutes are bound in writing, they bind students to them. They give "fair notice" to students as to what is expected from them, and what is and is not permitted at the institution.

Dream Shop Acts

Dream Shop Acts strictly regulate licensed establishments engaged in the sale of intoxicants and dispose liability to those who knowingly serve or sell alcohol to

intoxicated patrons. It is suggested that a college or university that holds a liquor license or contracts with a business that holds a liquor license enlist the help of legal counsel to assess and better understand its legal obligations as a license holder.

Enforcement Mechanisms:

Most postsecondary institutions may incur legal liability in a multiplicity of proceedings. Students, employees, or other who believes that they may have been wrong by the institution, they may want to sue.

Several federal laws are enforced through administrative mechanisms, which have been established by an administrative agency or agencies that is responsible for that particular law.

Examples-

- *U.S. Education Department* enforces nondiscrimination requirements under a federal spending status, such as Title VI, Title IX as well as Sections 504. (Kaplin, 2007, pp 62)
- *Occupational Safety and Health Administration (OSHA)* enforces the *Occupational Safety and Health Act*. (Kaplin, 2007, pp 61)
- *U.S. Department of Labor* enforces the *Fair Labor Standards Act*, as well as the *Family Medical Act*.

The administrative enforcement may involve a compliance review of institutional programs, facilities, and records; as well as negotiation and conciliation agreements, hearing that may occur before an administrative law judge and appeals through the

agency prior to resort to court. Several states have their own counterpart to the federal administrative agency enforcement system for similar state laws. (Kaplin, 2007, pp 61)

Remedies for Legal Violations:

The source of legal responsibility determines the type of remedy that will be order if an institution or its agent is judge liable. (Kaplin, 2007, pp 63)

Examples-

- Violation of statues and administrative agency regulation may lead to the termination of federal or state funding for institutional programs, debarment from future contract or grants from the government agency, audit expectations, or fines. (Kaplin, 2007, pp 63)
- Violation of statuses can also lead to an order that money damages be paid to the prevailing part.
- Equitable remedies can also be order, this can include reinstatement or terminated employee, cessation of the practice judged to be lawful, or an injunction requiring the institution to perform particular acts. (Kaplin, 2007, pp 63)

Avoiding Legal Liability

Risk management might be advisable not only because it can help stabilize the institution's financial condition over time, but also because it can improve the moral and the performance of the institutional personnel by alleviating their concerns about potential personal liability. Risk management can also implement the intuition's

humanistic concerns for minimizing the potential injuries to innocent third parties that may have resulted from the operations, and for compensating any injuries that do occur.

- Risk Management may also be known as: *Risk Avoidance, Risk Control, Risk Transfer, and Risk Retention*

Legal compliance should be thought of as the minimum that the institution must do, and not really the maximum that they should do. Policy consideration can often lead institutional decision maker to do more than the law actually requires them to do.

(Kaplin, 2007, pp 63)

Treatment Law and Preventive Law:

Counsel's role is to identify and define an actual or potential legal problem and provide options for resolving or even preventing them. There are two different laws that are able to fulfill this role, the two laws are: treatment law or prevention law. The goal of the treatment law is to cure legal disease, as for the goal of the prevention law is to maintain legal health. Under each of the approaches, the council will guide not only the legal consideration and institutional goals and policies, but also by the ethical standards of the legal profession that shapes the responsibilities of an individual practitioner their clients and as well as the public.

The treatment law is more traditional of the two practices. It focuses on the actual challenges of the institutional practices and on the affirmative legal steps by the institution in which it protects the interests when they are threatened.

The prevention law focuses on the initiative that the institution can take before an actual legal dispute arises. Prevention law involves an administrator and counsel that is in a

continual cooperative process of setting the legal, as well as policy parameter within the institution which will operate forestall or even minimize legal disputes. In the 1980's the prevention laws was not only a generally accepted practice of postsecondary institutions, but in the years since then the approach has become increasingly valuable as the impact on campuses has continued to expand.

When an institution has worked through several considerations, it should be positioned to engage in continuing course of preventive legal planning. Legal planning is a process in which an institution can identifies and assume in a particular situations, as well as to implemented strategies to avoid or resolve legal risk which will not be assumed. Legal planners may then seek to devise alternative means for achieving a particular policy objective consistent with a law. Legal planners also, may use the law to support as well as strengthen the institution's policy choices and also may, indeed, implement initiative more extensive than the law would require. A successful legal planner carefully sorts out as well as interrelates of the legal and policy issues, which in turn depends upon a teamwork relationship between an administrators and counsel. (Kaplin, 2007, pp 65)

Liability has and will always be a concern for college campuses. One tool that universities use is training programs. The rationales for these programs are to lower the liability of the university itself. Your position at a University and the Universities policies will delegate what training you must be given. If you as a student affairs professional have been trained on how to deal with various situations then you are less likely to be involved in a court case involving liability.

- Sexual Harassment Training
 - Offered at most universities online (few do an in person training)
 - Online information is provided with a short test that follows, which you are required to score at a certain level in order to pass
 - Once the test is completed at the required grade, it is submitted to the appropriate office on campus
 - Burlington Industries v. Kimberly Ellerth
 - “Found that that workers can still bring sexual harassment cases against employers even if the harassment is not reported and the employee's career is never hurt.” (Burlington v. Kimberly)
 - Title VIII
 - "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."
- OSHA Standards Training
 - Typically offered either as online training or by direct training from a supervisor
 - Robbie Nottingham Crimes Scene Investigation Act
 - “The legislation is designed to make it mandatory that campus police call in local police agencies to help investigate all deaths on campuses that do not occur in a hospital or other medically

supervised setting and all alleged rapes on college campuses.”

(crime legislation)

- This area is far stricter when involving any University cleaning personnel, but most Student Affairs Professionals receive the basic OSHA training information.
- Discrimination
 - This type of training can vary drastically from University to University.
 - Cooper v. Washington University
 - “Tenured professor Joel Cooper was forced out of his position by the chairman of his department due to the fact that he was approaching 65 years of age.” (Cooper-Washington)
 - Student affairs professionals must be careful in dealing with possible multiculturalism or diversity issues.
- Search Committee
 - Being part of a search committee that will interview or select possible candidates is something that needs to be taken seriously.
 - Most universities will require that you complete some type of Equal Employment Opportunity training before being allowed to sit on a search committee.
 - “The Office of Equal Opportunity/504/ADA Compliance will review the composition of the committee, advertisement for the job, and various outlets for the job announcement with the search committee. A representative from The Office of Equal Opportunity/504/ADA

Compliance will then meet with the search committee chair to review these procedures.” (Search Committee Training)

The above training types are just a few of the basic training seminars that most Universities require of their professionals in order to cover liability. In order to ensure that you are where you need to be, check with your department head to find out what training is required for your specific position.

Overall, liability and the knowledge on how to stay out of court are pertinent. Law suits, whether or not a university wins or loses, are costly and undesirable for the university. This guidebook covers all aspects of liability as it pertains to a university setting. If followed it will not guarantee to keep one out of court, but will greatly reduce the risks of winding up in court.

Bibliography

“Burlington Industries v. Kimberly Ellerth.”

<http://www.hrworld.com/features/top-20-sexual-harassment-cases-121307>.

[online], World Wide Web. 7:30 PM. 2009, April 22nd.

“Cooper-Washington University discrimination case heads to trial.”

<http://www.bizjournals.com/stlouis/stories/2009/01/05/daily91.html>. [online],

World Wide Web. 3:12 PM, April 23rd.

“Crime legislation gets closer to being passed.”

[http://media.www.easttennessean.com/media/storage/paper203/news/2004/02/26/](http://media.www.easttennessean.com/media/storage/paper203/news/2004/02/26/News/Crime.Legislation.Gets.Closer.To.Being.Passed-618792.shtml)

[News/Crime.Legislation.Gets.Closer.To.Being.Passed-618792.shtml](http://media.www.easttennessean.com/media/storage/paper203/news/2004/02/26/News/Crime.Legislation.Gets.Closer.To.Being.Passed-618792.shtml). [online],

World Wide Web. 7:11 PM. 2009, April 22nd.

Kaplin, William H. and Barbara A. Lee. The Law of Higher Education: Fourth Edition. San Francisco, CA: John Wiley and Sons, Inc., 2007.

“Search Committee Training.”

[http://www.wku.edu/Dept/Support/Legal/EOO/Search%20Committee%20Trainin](http://www.wku.edu/Dept/Support/Legal/EOO/Search%20Committee%20Training.htm)
[g.htm](http://www.wku.edu/Dept/Support/Legal/EOO/Search%20Committee%20Trainin). [online], World Wide Web. 8:19 PM. 2009, April 22nd.