

NCAA Division I Recruiting: Identifying and Mitigating Institutional Risk Associated with the Official Visit

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In 2006, the National Collegiate Athletic Association (NCAA) celebrated 100 years of providing opportunities for students to participate in intercollegiate athletics. During that time intercollegiate athletics underwent tremendous transformation. Beginning as student-run endeavors on Ivy League campuses, it has now evolved into a multibillion-dollar industry within the United States. "Intercollegiate athletics is now so entrenched in American society that in 2004 the United States House of Representatives Subcommittee on Commerce, Trade, and Consumer Protection held two special hearings to address their concerns about the recruitment of student-athletes" (Lawrence, Merckx, & Hebert, 2008, p. 4). The concerns addressed in the hearings centered on the negative culture of the official visit (U.S. House of Representatives, 2004a; U.S. House of Representatives, 2004b).

A prospective student-athlete or recruit is an individual who has begun ninth grade and has an interest in playing college sports (NCAA, 2007, p. 28). As of the first day of their senior year in high school, prospective student-athletes are allowed to take up to five official visits to college campuses (NCAA, p. 30). NCAA Division I Bylaw 13.02.15.1 states that an "official visit to a member institution by a prospective student-athlete is a visit financed in whole or in part by the member institution" (NCAA, n.d.a.). Additionally, the Division I on-campus official visit is limited to 48 hours and is governed by over 300 bylaws that contain the words "official visit" in the NCAA Legislative Services Database (NCAA).

With intercollegiate sports taking on competitive business characteristics in recent years, success in recruiting student-athletes has become critical to coaches in all divisions of the NCAA. The official recruiting visit is one part of an increasingly complex recruiting process that engages collegiate coaches and high school athletes year-round. NCAA Division I institutions have received more negative publicity about recruiting practices in recent years than their counterparts in Division II or III (Anderson & Dohrmann, 2004; Jacobson & Suggs, 2004; Landman, 2005; Wieberg, 2005). The media and the United States Congress have publicized allegations of recruits being involved with alcohol, drugs, strippers, sex, vandalism, and violence during their official visits (Anderson & Dohrmann; Jacobson & Suggs, 2004; Landman, 2005; U.S. House of Representatives, 2004a, U.S. House of Representatives, 2004b; Wieberg, 2005). These incidents raise questions as to the level of legal responsibility that NCAA institutions have for the actions of recruits during the official visit.

The official visit is an inherently risky venture for an institution. To date, no statutory law exists and few cases are available to guide institutions as to the duty they owe prospective student-athletes during the official visit. In most cases, recruits are under the age of 18 (minor) or between 19 and 20 (underage) when they are invited to campus for an official visit. Occasionally a prospect over the age of 21 (adult) may participate in an official visit. Current case law has established that college students are adults in the eyes of the legal system and finds no special duty owed by institutions under normal circumstances (*Booker v. Lehigh University*, 1993). However, courts have held that student-athletes are owed a special duty of care when they are engaged in athletic endeavors, especially if they have been actively recruited by the institution (*Kleinknecht v. Gettysburg College*, 1993). Because prospective student-athletes are not yet college students, it is unclear as to how they would be viewed by the legal system as it relates to duty. To establish duty and determine if a defendant's action has breached that duty, the circumstances of time, place, and person must be examined (West & Ciccolella, 2004). Additionally, legal precedent also will contribute to the establishment of duty in state law-based cases.

The purpose of this article is to examine in detail the liability exposure an institution may assume during the official visit, emphasizing Division I. Specifically, we explore (a) the risks associated with the official visit, (b) the institutions' duty to protect prospective student-athletes during the official visit, (c) if the age of the prospect alters the standard of care owed to the prospective student-athlete, (d) the potential for tort liability resulting from injuries sustained by prospective student-athletes on and off campus, as well

as whether such liability may transfer to the institution through the student-athlete host, and (e) mitigation strategies to reduce institutional exposure to risk related to the official visit.

REVIEW OF LITERATURE

To develop a broad understanding of the dynamics of the official visit and to establish a need for the examination of these issues, four topics are discussed: (a) the nature of the relationship between NCAA institutions and prospective student-athletes, (b) the behavior of prospects on their official visits, (c) the importance of the official visit in school choice decision making, and (d) the relationship between recruiting and athletic performance.

The Relationship between NCAA Institutions and Prospective Student-Athletes

Cross (1973) has argued that in most cases the athletic relationship between the NCAA institution and the athlete does not arise until the student-athlete attended his/her first practice on campus. However, he made a distinction between students who choose to participate in athletics and those who were "urged to apply for admission on the assumption that his [*sic*] academic record is adequate and in the expectation of his [*sic*] ultimate participation in varsity intercollegiate athletics" (Cross, p.151). In this latter situation he proposed that the relationship between the institution and the prospective student-athlete had begun at the point at which the student was "urged to apply for admission" or in current terminology "recruited" (p. 151). This distinction is analogous to today's NCAA institutions that actively recruit prospective student-athletes based on their commitment to participate in intercollegiate athletics versus students who arrive on campus and then pursue athletics by seeking out the opportunity to participate themselves.

The Behavior of Prospects on Their Official Visits

Lawrence, Merckx, and Hebert (2008) conducted an exploratory study into the experiences of NCAA Division I student-athletes on their official visits. Two major findings emerged from this research. The first was that prospective student-athletes engage in many risky behaviors while on their official visits. Drinking, attending on-campus and off-campus parties, and going to bars, all were found to be common negative behaviors among recruits on their official visits (Lawrence, Merckx, & Hebert). The second major finding was that the procedures and structure of the official visit may influence

the behavior of recruits during their official visits. Prospective student-athletes with a curfew on at least one of their official visits were significantly less likely to drink alcohol than those without a curfew (Lawrence, Merckx, & Hebert). Additionally, prospective student-athletes who had a family member (i.e., parent, sibling, aunt/uncle, grandparent, or legal guardian) accompany them on at least one of their official visits also had significantly fewer reported negative behaviors than those who had a nonfamily member (i.e., friend, teammate, coach, or others) attend with them (Lawrence, Merckx, & Hebert). These findings demonstrate the prevalence of behaviors engaged in by prospective student-athletes that could put the institution at legal risk and show the possible influence of institutional policy on the behavior of the recruit.

School Choice Decision Making and the Official Visit

Studies relating to the importance of the official visit within the recruiting process and specifically the role of the official visit in school choice decision making for student-athletes also have been examined by the authors. A few variables consistently have been shown to influence school choice decision making. The campus visit and campus environment consistently have ranked in the top three variables influencing school choice (Freking, 2002; Frost, 2003; Letawsky, Schneider, Pedersen, & Palmer, 2003; Mathes & Gurney, 1985). Frost (2003) found that the campus visit was the most important part of the selling portion of the recruiting process for men's basketball players. Findings such as these provide data supporting the importance of the official visit in the recruiting process.

Recruiting and Athletic Performance

Empirical evidence also demonstrates that NCAA institutions have a great deal at stake when recruiting student-athletes. An examination of the relationship between recruiting and team performance in NCAA Division IA football provided evidence that recruiting does affect team performance over the following five years (Langelett, 2003). The same study demonstrated that football teams finishing in the top 25 nationally seemed to be able to attract higher-ranked recruits, creating a cyclical pattern (Langelett). Winning in Division IA football brings media exposure and subsequent financial gain for the institution. Although there has been a long-held belief in intercollegiate athletics that attracting top recruiting talent results in a higher percentage of wins, this study was the first empirical evidence associated with that belief (Langelett).

RISKS ASSOCIATED WITH THE OFFICIAL VISIT

The official visit is an integral and valuable part of the recruiting process and is among the most important factors in determining college choice (Letawsky, Schneider, Pedersen, & Palmer, 2003). However, the official visit does expose the institution to areas of potential risk. Most prospective student-athletes engage in official visit(s) as high school seniors and may travel hundreds of miles to visit a campus (usually without their parents). Once the prospective student-athlete (who most likely is a minor) arrives on campus, he/she is assigned a student host, normally a current student-athlete, (who most likely is underage, but may be an adult) who is then expected to supervise the prospective student-athlete during the 48-hour official visit (NCAA, n.d.a., Bylaws 13.6.7.5 & 13.6.4.1). The host is permitted to receive \$30 per day (excluding meals) to entertain the minor and usually is given a schedule of mandatory meetings with professors, coaches, and athletic personnel (NCAA, Bylaws 13.02.5.1 & 13.6.7.5). The NCAA and individual institutions have specific rules limiting the types of entertainment that can be provided to recruits (Bylaw 13.6.7.1). However, during the 48-hour period there is some unstructured time during which the institution has little control over the activities of the prospective student-athlete and student-athlete host.

There are some risks associated with the prospective student-athlete engaging in routine experiences that are an important part of the official visit. Other risks are a result of the prospective student-athlete or student-host making poor decisions.

Risks Inherent in the Official Visit

Three risks inherently tied to the official visit involve transportation, housing, and practicing the prospect's sport. Prospects routinely are driven around the campus community in the personal vehicle of their student-host or other student. Some campuses limit transportation of prospects to institutional vehicles or institutional employees' personal vehicles in an attempt to limit personal liabilities. In either circumstance, there is a potential risk of injury due to negligence while transporting the prospect.

Prospects are often left alone overnight in an off campus hotel, which could present a danger to the recruit. Risks of hotel stays range from a fire in the building to someone breaking into the prospect's room and harming him/her. On-campus housing in a residence hall with the student-host is another frequently used housing option. Although this type of housing still presents some risk, the institution has more control when the prospect is on campus.

In some cases, prospects will practice their sport on campus during their official visit. The risk of injury during these practices, especially because the prospect is in an unfamiliar facility, is great enough that institutions should be aware of it.

Risks Associated with Poor Decision Making

Risks associated with poor decision making on the part of the prospect or student-host are much more pervasive and can be reduced through mitigation strategies. These risks include underage drinking, alcohol-related illness or injury, driving while intoxicated, riding in a car with an intoxicated driver, sexual assault, exposure to individuals who pose a physical threat to the prospect, exposure to an unsafe environment, engaging in criminal conduct, lying to athletic officials about the events of the official visit, gambling, and many other negative situations that can occur in a college environment.

Due to the potential for high-risk activities on official visits, this article will focus on strategies to mitigate risk to NCAA member institutions.

APPLICATION OF TORT LAW THEORY

Most lawsuits brought against an educational institution are based in negligence liability (van der Smissen, 2003). There are four elements to negligence: duty of care, breach of duty, causation, and injury (Prosser, 1971). These elements serve as the framework for the following discussion.

Assessing Duty of Care and Establishing Breach of Duty

Duty of care and breach of duty are fundamental legal concepts in the establishment of negligence. When determining duty of care and its breach, the application of legal theory and case law becomes complex given the particular nature of NCAA Division I official visits. The existence or non-existence of a special relationship between the institution and recruit, as well as establishing what defines unreasonable risk and foreseeable risk, are all worthy of the following in-depth analysis of these areas.

In Loco Parentis – Special Relationship

The issue of the duty of care has shaped courts' decisions over the past decades. Prior to 1980, the legal consensus was that institutions of higher education assumed the role of the parent (van der Smissen, 2003). Under the *in loco parentis* doctrine, institutions could govern a wide array of student

conduct issues (Pearson & Beckham, 2005; White, 2005). According to this doctrine, "college authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils" (*Gott v. Berea College*, 1913, p. 6). The rules, policies, scope, and rationale "is a matter left solely to the discretion of the authorities or parents" (*Gott*, 1913, p. 6). On such an in loco parentis rule, the Supreme Court of Illinois in 1866 pontificated, "Whether the rule be judicious or not, it violates neither good morals nor the law of the land and is therefore clearly within the power of the college authorities to make and enforce" (*People v. Wheaton College*, 1866, p. 2). Thereafter, courts were called to test this special relationship between institutions and their students, and determine whether the extent of the control exercised by the institution may lead to it being held liable in a negligence suit.

Historically, an NCAA institution could be held liable for students' injuries and losses (van der Smissen, 2003, pp. 56-57). Today, societal norms and pressure from higher education interest groups have led to the general acknowledgment that institutions of higher learning should not bear the burden of liability for activities outside of the academic program or officially sponsored curricular activities (e.g., *Bradshaw v. Rawlings*, 1979; *University of Denver v. Whitlock*, 1987). Most recently, this was confirmed in *Falkner v. Arizona State University* (2006). Loren Wade, a member of the football team, shot and killed Brandon Falkner at a Scottsdale nightclub. The plaintiffs alleged that the head football coach and athletic director knew or should have known about Wade's violent tendencies and that a special relationship existed between Wade and Arizona State University (*Falkner*, 2006, p. 2). If such a special relationship were established, it would extend the scope of liability for intercollegiate athletic departments and NCAA institutions to actions of student-athletes outside the realm of intercollegiate athletics. In its findings the court emphasized that there is no duty for an institution to control its student-athletes when they are away from the school premises and engaged in private activities (*Falkner*, p. 7). However, based on a review of recent cases and the rationale behind judicial decision making, it can be argued that, under particular circumstances, institutions may not be relieved from liability (e.g. *Nova Southeastern University v. Gross*, 2000; *Webb v. University of Utah*, 2004). In the case of a minor recruit, courts could hold the institution to an increased standard of care owed based on in loco parentis doctrine or a general supervisory duty.

The establishment of a special relationship and/or duty between parties has been explained as "an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to

protection" (Prosser, 1971, pp. 970-971). Additionally, the element of mutual dependency and control has been cited as a key factor in the finding of a special relationship (Hefferen, 2002). This broad explanation emphasizes that the totality of circumstances will determine if a special relationship or duty exists between the parties (*Rupp v. Bryant*, 1982; *Kleinknecht*, 1993). Hence an examination of particular cases and their factual background may assist in determining the management of risk by NCAA institutions in the context of the official visit. Discussion of the assessment of a special relationship not established via in loco parentis doctrine follows.

Unreasonable Risk or Harm

Theoretically, when a program or service is provided – in our case the overall experience of the official visit entails a host of programs and services – there also is a concomitant obligation not to expose the participant/user to unreasonable risk of harm (*Dukes v. Bethlehem Cent. Sch. Dist.*, 1995; Rhim, 1996). In the *Dukes* case, a track athlete suffered a broken leg as a result of the poor condition of the long jump landing pit. The court found that school districts "have been held to owe a duty of exercising reasonable care to protect student athletes who voluntarily participate in extracurricular interscholastic sports from unassumed, concealed or unreasonable risks" (*Dukes*, p. 3). Furthermore, "a determination as to whether a defendant owes a duty of care depends upon a determination that the defendant had 'sufficient control over the event to be in a position to prevent the negligence'" (p. 3). Using the rationale from *Dukes*, in conjunction with the ensuing analysis of *Rupp* (1982) and *Kleinknecht* (1993), one may argue that an institution recruiting a prospective student-athlete could be held responsible for unassumed, concealed, or unreasonable risks for a high school student-athlete, provided the recruiting institution had sufficient control over the total official visit experience.

Fifty-nine separate subheadings of specific rules related to the conduct of the official visit are listed under Division I NCAA Bylaw 13.6 that could be construed as control over the visit (NCAA, n.d.a). Specifically, in Bylaw 13.6.1, institutions are required to develop and enforce policies and procedures for campus official visits (in addition to NCAA rules) with appropriate penalties (NCAA). It will be decided on a case-by-case basis whether the recruiting school might be in a position to prevent the negligence, thus establishing a duty of care (i.e., an instance of a recruit being led by a student host to visit locales of known past criminal activity, an immediate extension of *Nova Southeastern University*, 2000).

One of the most interesting aspects of the problem this research is dealing with is whether the risk is foreseeable, as held in *Nova Southeastern University* (2000). The *Nova* case established liability of an institution for injuries sustained at an off-campus (mandatory) internship site. Bethany Jill Gross, the plaintiff, was a student who was robbed at gunpoint and later raped. The site where the criminal act took place was deemed as a known "bad neighborhood" to Nova. Nova had data that documented prior criminal activity in the particular site. The court found that Nova, in having control over the students' experiences and conduct, and the ability to enforce rules and assign students to particular internship sites, also assumed the duty to act reasonably and not expose students to known dangers (*Nova Southeastern University*, 2000, p. 6).

In the context of official visits, the institution – controlling the official visit experience in its totality – may have to bear a similar duty when assigning a recruit to a student-host and allowing the latter to entertain the former in a manner that may involve "known dangers" (e.g. off-campus parties, "bad neighborhoods," etc.). If such a foreseeable risk is established, then the institution may indeed bear the duty to proactively protect the student in a reasonable manner. Thus, if the institution fails to fulfill such a duty during the recruiting process, it runs the risk of being found negligent.

Foreseeable Risks

Institutions should be able to prudently forecast risks associated with official visits, as foreseeability may be the instrumental factor in establishing duty of care and its breach. The specific or exact injury does not need to be foreseen (*Lamorie v. Warner Pacific College*, 1993). In *Lamorie*, the plaintiff, a basketball student-athlete on scholarship, underwent surgery following an injury and was required to wear a nose cast. One of his eyes was almost shut and his face was still noticeably bruised from the surgery when the defendant basketball coach asked the plaintiff to participate in a scrimmage. During the scrimmage, the plaintiff was reinjured and his traumas were aggravated. The court ruled that

a reasonable jury could infer that Defendant knew or should have known that plaintiff's vision was potentially impaired by his injuries and that he would be at increased risk for *any* injury if he played basketball. A reasonable jury could find that an injury to the eye was foreseeable in the 'general category of risk' that could be anticipated (*Lamorie*, 1993, p. 9).

Moreover, the court specifically clarified that

whether a risk is foreseeable depends on the facts in the case. The actual sequence of events causing an injury does not have to be predictable in order for the injury to be foreseeable. . . . The injury need only fall into the general category of risk reasonably to be anticipated. . . . If an injury falls into that general category, the injury is foreseeable (*Lamorie*, p. 7).

On the other hand, lack of foreseeable and unreasonable risk may eliminate the obligation of operating proactively even though a duty to protect a student or a recruit may still exist (*Chudasama v. Metropolitan Government of Nashville*, 1995). In the *Chudasama* case, the question was whether Metropolitan Government had to hire extra faculty overseeing gym classes due to a history of violence and incidents taking place in its schools. The plaintiff was the family of a 12-year-old girl who suffered injuries during a locker room fight at the end of gym class. The court noted:

We cannot find Metro Government liable for injuries that may have resulted from Dr. Ross' (defendant principal's) efforts to allocate the limited resources under his control to meet the broad supervisory and instructional needs of the student body. Though the decision to assign only a single male teacher to a mixed gym class may have been unwise, it is not actionable (*Chudasama*, 1995, p. 4).

Because many prospective student-athletes are minors at the time of their official visits, recruiting institutions should owe a duty to protect them and should operate preemptively in regard to their safety. This general duty notwithstanding, in cases where risk is deemed unforeseeable and reasonable, the recruiting school may be relieved from liability (i.e., a recruit voluntarily engages in recreational basketball with the student-host and other students at the conclusion of a day of recruiting activities and sustains an injury).

Thus, one observes three applicable extensions for the purposes of determining institutional duty of care during official visits. First, as long as there is sufficient control of an activity (based on NCAA regulations, institutional policy, and the general nature of the official visit) the institution should be considered to owe a duty of care to its recruits. NCAA institutions also should have the duty to operate preemptively so as not to expose a recruit to unreasonable dangers. Second, provided a foreseeable risk of danger is established, the institution may be held liable (e.g., a visit to an off-campus location with a history of criminal activity). Third, if the risk is not foreseeable, the institution may not be found negligent, even though it has a duty to protect the recruited prospect (e.g., a fire in the hotel where the recruit is housed).

Causation

So long as the breach of the duty of care has been documented and led to the plaintiff suffering an injury, the other crucial factor that needs to be addressed is whether there was actual and proximate cause between the breach and the loss suffered. If the same harm would have resulted if the negligent act had never occurred, then the act is not the actual cause of the harm (*Allen v. Rutgers*, 1987; Wong, 2002). Alternately, absent the school's negligence the plaintiff would not have been exposed to such harm (*Pinson v. State of Tennessee*, 1995). Proximate cause refers to the act resulting in risk of the same general character of the loss suffered by the plaintiff (*Lamorie*, 1993). Although an intervening cause may result in a successful defense from a negligence claim, it is not necessary to eliminate all of the other potential causes for the injury suffered (Champion, 2005, p. 258; *Pinson*, 1995, p. 38). Provided that a school put a recruit in harm's way, negligently, unreasonably, and by failing to protect against a foreseeable risk, the plaintiff's claim may be successful.

Resident Students and the Invitee

An institution's negligent supervision of dormitories and facilities may causally result in injuries suffered by a prospective plaintiff. A particular area of institutional liability may involve the recruit's on-campus housing, especially given their "invitee" status. In *Mullins v. Pine Manor College* (1983), the Supreme Judicial Court of Massachusetts did not apply an in loco parentis doctrine, but did establish institutional responsibility for resident students. The student plaintiff was successful in her negligence claim after a sexual assault occurred immediately after the student was abducted from her dormitory. This theory (see also *Miller v. State*, 1983 & *Nero v. Kansas State University*, 1993) becomes very important and applicable in analyzing the relationship between student-hosts (some of them residents of dormitories) and recruits. As invited visitors to campus, some recruits stay with their student-hosts on campus during their visits. Pearson & Beckham (2005, p. 462) point out that institutions taking steps to foresee against on-campus assaults and particularly ensuring the safety of residence halls may not be able to claim as their defense in court that the particular danger for which they proactively planned was unforeseeable. Protection actions by institutions eventually may lead to a judicial inference that criminal activities are indeed foreseeable, and thus institutions have been found liable (*Stanton v. University of Maine*, 2001).

The essential question becomes: Are the plaintiff's interests entitled to legal protection against the defendant's conduct? Relying upon both *Tarasoff*

v. Regents of University of California and Bradshaw, one finds duty defined thusly: "Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection" (*Bradshaw*, 1979, p. 136; *Tarasoff*, 1976, p. 433). Following his own examination of *Mullins*, Olivas (2006, pp. 635-636) presents a collection of theory and cases which may establish institutional liability. In the most recent and relevant cases, *Nova Southeastern University* (2000) and *Webb* (2004), institutions have been held liable for injuries resulting from mandatory activities on- or off-campus (internship off-campus and field trip off-campus, respectively, as elaborated below).

Recruitment of Student-Athletes

In *Kleinknecht* (1993), the Third Circuit found a duty for colleges to take adequate precautions for foreseeable medical emergencies during athletic contests (p. 1370; Olivas, 2006). The *Kleinknecht* court specifically mentions that a recruited student-athlete is owed a duty of care for activities sponsored by the institution: "We believe that the Supreme Court of Pennsylvania would hold that a special relationship existed between the College and [Plaintiff] Drew that was sufficient to impose a duty of reasonable care on the College. Other states have similarly concluded that a duty exists based on such a relationship" (*Kleinknecht*, 1993, p. 1362).

Also relevant to the establishment of a special relationship via recruiting is the comparison between duty owed at the high school level (in loco parentis) and college level. The following section of the *Kleinknecht* decision (footnote 5) recognizes

that most of these cases involve participation in sports sponsored by a public school system at the pre-college level. Arguably, the relationship between the injured participant and the sponsor is closer, and the need to import a duty based on the special nature of the relationship between a public school and its interscholastic athletes is therefore more compelling than in the case of a private college and its students participating in an intercollegiate athletic program. Here, however, we think that distinction is balanced out by *Gettysburg's active recruitment of Drew to participate in its intercollegiate lacrosse program* (*Kleinknecht*, 1993, p. 1362, emphasis added).

Hence, the "active recruitment" of a student-athlete introduces what may prove to be a deciding factor in legal cases for an institution to be found in breach of its duty of care.

Voluntary vs. Mandatory Acts

Interestingly, in *Webb* (2004) the court clearly distinguishes cases surrounding mandatory activities (Webb sustained injuries during a mandatory off-campus field trip at a site alleged to be dangerous) from voluntary acts that may lead to injury, such as voluntary intoxication (as in *Beach v. University of Utah* (1986)): "The crucial difference between Beach and the facts in this case is that Webb's fall occurred while Webb was acting pursuant to instructions given by the University during course work" (*Webb*, 2004, p. 365). In *Webb* the court found that "[t]he University owes its students the duty to exercise ordinary and reasonable care when it directs students to engage in specific activities as part of its educational instruction" (*Webb*, p. 365). Similarly, the court in *Nova* stated that

the practicums were a mandatory part of the curriculum that the students were required to complete in order to graduate. Nova also had the final say in assigning students to the locations where they were to do their practicums. . . . As Nova had control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the Hohfeldian correlative duty of acting reasonably in making those assignments (*Nova Southeastern University*, 2000, p. 6).

Hohfeld (1913) analyzes the correlation between "rights and duties" and proclaims that "even those who use the word and conception 'right' in the broadest possible way are accustomed to thinking of 'duty' as the invariable correlative" (p. 31). Thus, when an institution bears the right to control activities, procedures, and student services, it also bears the inextricable duty to exercise due care in administering such affairs. Hohfeld's (1913) "correlative duty" is used in cases (e.g., *Nova & Rupp*) dealing with institutional liability and may serve as solid theoretical underpinning of a prospective student-athlete's claim against an institution. By the very nature of the official visit, the control exerted by the institution directly affects the recruit's experiences, and while the school has the right to govern the official visit as it deems appropriate, its correlative duty may not relieve it from a concurrent liability. Regardless of whether a jury may establish a breach of the said duty owed to recruits, the fact remains that a legal duty exists. The above cases demonstrate that activities (on or off campus) over which the institution has control may establish a special duty owed to the prospect during the official visit.

Transference of Liability through the Student-Host

The next issue at hand is that of the transference of liability to the institution via the student-host. Student-hosts may receive \$30 a day to host a prospect and up to \$15 more per day for each additional prospect he/she hosts in Division I (NCAA, n.d.a, Bylaw 13.6.7.5). During the 48-hour official visit, institutions control the actions of the student-hosts almost as much as the actions of the prospects. Case law on contract theory has established that a principal/agent relationship exists when "one party exercises control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks" (*Baird v. Sickler*, 1982; *Councell v. Douglas*, 1955).

Using this definition, an institution might be found liable under the principal/agent relationship should the actions of a student-host cause injury to a prospect. The purpose of the student-host is to assist in the recruitment of the prospect with the ultimate goal being to have the prospect attend the institution. The institution also has direct control over the student-host and the student-host is assisting the institution in attaining its goal of acquiring the prospect. Hence, a principal/agent relationship could be found to exist between the NCAA institution and student-host. As an expansion of the cases mentioned above, the following section will address specific areas of institutional responsibility during the official visit and examine the application of tort law to the official visit.

Application of Tort Law to Recruits/Official Visits

In the scope of official visits, recruits are generally high school students who are minors. The college environment is wrought with alcohol use and potential for injury and each institution determines the level of supervision provided to recruits on their official visit. Thus, the interaction between the age of the prospect, his/her behavior on the official visit, and the supervision provided by the institution will frame the discussion on tort law specific to the official visit.

Minors

The distinction between a minor, someone who is underage, and an adult is critical in determining if a legal special relationship exists between an institution and recruit. A unique aspect of the official visit is that a majority of prospects are high school students who are under the age of 18 when they visit campus. This distinction falls between most existing legal analyses that seek to

establish criteria for institutional duty. Considering the age and academic status of the student, the analysis of the relationship between the institution and the prospective student-athlete may fall within case law related to the relationship between a high school and its students. One vital question in the discussion is the age of the prospective student-athlete at the time of the visit and forecasting whether case precedent and legal theory will differentiate institutional duty of care owed to a "minor" from a prospective student-athlete who is "underage" or an "adult."

Some courts have held that a duty does exist between a high school and a child when the activity the student is engaged in is authorized and sanctioned by the school and control of the activity through established guidelines has been assumed, in this case by assigning a faculty advisor (*Rupp*, 1982). Bryant's spinal cord was severed as a result of a hazing-related injury he sustained during an initiation ceremony. Rupp was the assigned Faculty advisor for the club, which needed pre-approval for any extra-curricular activities by the principal. Further, Rupp's presence was required at all club activities. Rupp was absent from the hazing ceremony. In *Rupp*, the court's decision held that the school owed supervisory duty. Specifically, the Supreme Court of Florida stated: "A public school, at least through the high school level, undoubtedly owes a general duty of supervision to the students placed within its care" (1982, p. 23). The court based the supervisory duty on Hohfeld's (1913) correlative duty and Prosser's balancing test of the interests involved (*Rupp*, 1982, pp. 25-29). By extension, one could argue that the official visit of a high school senior may be examined in the same light with regard to duty of care owed. Therefore, NCAA institutions may owe a duty similar to those of high schools when the institutions' recruiting actions mirror those of a high school. The duty of care owed the minor recruit may be founded on (a) the control asserted by the institution by funding the trip, (b) assigning a student-host, (c) issuing host money, and (d) establishing guidelines for activities.

An argument can be made that athletic departments are required to consider two standards of care: one for those recruits under the age of 18 and another for those who are over 18. In *Booker v. Lehigh University* (1992), the university was not found to have any legal liability for a 19-year-old student who consumed alcohol at a fraternity party in violation of the university's social policy. The court held that policy was not an assumption of duty (as alleged by the student), but rather a policy statement that supposedly responsible adult students should be aware of their own behavior (*Booker*, 1992, p. 241). The question that remains is whether the court's decision would have been different if the student were a minor.

Alcohol

Alcohol consumption on college campuses is not a new trend, but with ever-increasing media scrutiny, alcohol consumption by recruits can cause serious problems for institutions. In the spring of 2006, a Chico State University softball recruit was hospitalized for alcohol poisoning following an off-campus party hosted by the team during her recruiting trip to the institution. Following the incident, Chico State athletics officials were quoted as saying, "Because this was a formal recruiting visit, [the players] were representing Chico State Athletics. This wasn't just an off-campus get-together of a bunch of students. They had an official role, and as such, they're held accountable for the standard we set" (Berry, 2006, ¶22). Additionally, an athletics representative went on to say, "the fact that a student was here on an official visit, she was under our care during that time that official visit was happening"(Berry, ¶9).The institution's view that the team was an official extension of the university, in conjunction with the same acknowledgment by a representative of the athletic department could render the institution's defense attorney's job much more difficult, since liability from the team's off-campus function could directly lead to a finding of institutional negligence.

This situation raises the question of a principal/agent relationship between the institution, team, and the student-hosts. It also raises the question as to the responsibility of the institution to entertain the invited minor recruit in safe premises. If an individual, in our case a student-host, is found to be an agent of the university, the chief risk of such liability (alcohol) occurs in situations in which the agent facilitates or encourages the serving of alcohol to underage or intoxicated students (National Association of College and University Attorneys, 1989).

Conversely, in *Bradshaw* (1979) – in which an intoxicated underage student leaving an off-campus university function crashed his car, leaving another student injured – the court held that the institution did not have a duty to protect the injured student. Additionally, federal case law has established that institutional policies prohibiting alcohol consumption do not create a special duty to adult college students, even if they are under the legal drinking age (*Booker*, 1993). *Booker* (1993) emphasizes that college students (even if under age 21) are adults. The question remains as to whether the courts' decisions in these cases would have been different had the injured party been a minor.

In the case of a student-athlete being injured after consuming alcohol off campus, the institution was not found liable for the injury suffered by a tennis player who chose to consume alcohol on a team trip and was injured (*Albano*

v. Colby College, 1993). The coach neither provided the alcohol nor was aware of the consumption by the athlete. Additionally, the consumption of alcohol was not related to the tennis team's training or instruction. Similarly, in the case of *Beach* (1986), no special relationship was found to exist between an intoxicated student and the institution while on a university-sponsored trip. The student, who chose to become intoxicated, wandered away from the group at night and fell from a cliff. The court held that no special relationship existed between the parties requiring the university to protect Beach from the consequences of voluntary intoxication. The *Bradshaw*, *Albano*, and *Beach* cases all dealt with college students already enrolled and over the age of 18. It should be noted at this point that rulings such as *Bradshaw* and *Beach* have not been received positively by some scholars. In the aftermath of the Virginia Tech shootings and the institutional liability theory discussions that ensued, Lake (2007) comments that such rulings are "not just out of step legally, but also plain wrong in light of our missions to educate students in a safe and healthy environment" (p. B6).

In a related wrongful death case, *Benally v. Robinson* (1962), the victim (in a very drunken condition) fell off a stairwell after a brief fight with police officers and died three days later as a result of injuries sustained in the fall. The defense argued that one was not bound to protect the victim from his own folly. The court asserted that this argument was not entirely without plausibility; however an absence of duty ended when custody started (*Benally*, 1962). The court noted that absent unusual circumstances that justify imposing an affirmative responsibility, "one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself" (p. 390). However, in the end, the court decided that the judge was incorrect in instructing the jury that the officer would be liable only if intentionally injuring the victim and that a degree of care was owed to the deceased even though he was drunk (*Benally*). Additionally, the court noted that "[a] drunk man is as much entitled to a safe sidewalk as a sober one, and is a great deal more in need of it" (p. 390). The question exists as to whether the official visit, especially with a minor recruit, would qualify as an "unusual circumstance," essentially assimilating a custody relationship between the institution and the recruit according to the *Benally* decision. It would follow that NCAA member institutions are aware that most recruits are minors, and extra care should be exercised in all their interactions with them, including the official visit.

The issue of foreseeability also should be mentioned, as it could play a role in court decisions in future cases related to alcohol consumption. In *Knoll v. Board of Regents of the University of Nebraska* (1999), the court found that

hazing was foreseeable by the university because the institution had knowledge of previous instances of hazing by other fraternities and of specific instances of possession of alcohol, alcohol abuse, and assaults associated with the fraternity that had subjected the student to hazing. The concept of exposure to liability for an institution by tolerating a "dangerous condition" by student groups on campus was identified by the National Association of College and University Attorneys (1989) and also relates to the concept of foreseeability. If an institution is found to tolerate a "dangerous condition" created by student groups on school premises, exposure to tort liability could occur (The National Association of College and University Attorneys). With the rationale from *Knoll* and such "dangerous conditions" in mind, the university may be found to have a duty to protect the recruit from foreseeable harm if the institution has knowledge of a history of drinking on an athletic team and a recruit is injured on his or her official visit as a result of drinking with the team.

Injuries.

Aside from legal issues associated with injuries on the playing field, cases of student injuries occurring off the field must be examined. The landmark case of *Nova* in Florida found a university liable for the abduction and assault of a graduate student completing a mandatory internship at an off-campus location (*Nova Southeastern University*, 2000). As discussed earlier, the institution knew that the internship location was in a dangerous area and failed to provide adequate warning to the student. The court ruled that the institution breached its duty to provide ordinary care in providing their educational services and programs. The Supreme Court of Florida referred to a Hohfeldian correlative duty owed by the institution to its student even if it encompasses off-campus locations (*Nova Southeastern University*, p. 6). In the discussion of the official visit, this case has applications for off-campus entertainment. A prospect who is taken off campus to a known dangerous location by a student-host in the course of his/her official visit and is injured or sexually assaulted may use the *Nova* precedent in an attempt to establish institutional liability, provided foreseeability of harm is determined.

As previously discussed, legal literature also suggests that "while colleges and universities are not normally regarded as the insurers of a student's well being, judges have imposed institutional liability for breach of a duty of care associated with the role of the institution as a landlord responsible for the safety of campus residents and invitees" (Pearson & Beckham, 2005, p. 461). In a situation in which a recruit is assaulted, it could be argued based on *Mullins* (where a resident student was kidnapped from her dorm and raped,

establishing liability of defendant Pine Manor College) that the prospect was an invitee during the official visit and thus should expect protection from assault and injury. According to Lake (2007),

Mullins became the bedrock law governing modern campus security. It also was one of many decisions that signaled the end of an era of legal insularity and protectionism based on academe's status. It represented a major step in the mainstreaming of higher-education law under principles of general business-liability law (p. B6).

Balancing theory.

The duty of care owed also may be established by an analysis of the conflicting interests of each party involved in litigation, weighed against societal interests – known as the balancing theory (*Rupp*, 1982). An example of the balancing theory is embodied in the discussion of whether institutions should monitor students' interactions, postings, and possible unlawful or unethical conduct on social networking sites. In this situation, the duty of care in operating a safe and prudent educational environment is balanced against the practical and budgetary constraints of hiring staff to monitor social networking sites and ensure that student activity is within the parameters of the Institution's Code of Conduct. The balance appears to favor no-action (and no duty of care owed) on the part of institutions at this time (Van Der Werf, 2007). The fiscal constraints of institutions (also note *Chudasama*, 1995, where the budgetary constraints of the school district would not yield an obligation to hire additional staff to monitor classes of large numbers) in this situation appear to tip the scale in their favor, as it appears practically impossible to employ sufficient staff to monitor the thousands of users obtaining a social networking account at each institution (Van Der Werf). In a latest development, however, new software introduced in 2008 allows institutions to monitor their student-athletes' appearances on social networking sites, for \$250 per month, and a \$500 start-up fee (Sander, 2008). Such technological developments in the ensuing years may actually tip the scale against institutions, naturally dependant on the political reasoning of the judicial mind deciding on such cases. The issues of privacy involved on the matter go beyond the scope of this article and may serve as an excellent field for future research. It could be argued that institutions would not be found in breach of their duty of care if they did not discover evidence of violations of student or student-athlete code of conduct (e.g., a video available online featuring students drinking in their residence hall with a 17-year-old recruit). They could, however, still be found liable if they breached their duty of care,

e.g., by neglecting to instruct student-hosts not to visit particular off-campus locations that are documented for prior criminal activity as shown in *Nova*.

Balancing student safety against privacy law is another issue for the balancing theory. One may argue that the traditional safeguards provided by the Family Educational Rights and Privacy Act (FERPA, 20 U.S.C. § 1232g, 2007) have been misunderstood. For example, the heated debate surrounding Virginia Tech's alleged duty of care breach revolved around the fact the institution did not disclose available mental health background information on the student responsible for the 2007 massacre. FERPA does not prevent sharing information about a possibly dangerous student, and one can further use *Tarasoff* to solidify that "privacy ends where safety begins" (*Tarasoff*, 1976, p. 441). FERPA was not passed to "block colleges from creating safe campuses... The Law recognizes that safety outweighs privacy at times" (Lake, 2007, p. B6).

In related cases dealing with institutional responsibility during official visits, student safety interests may well outweigh either fiscal (e.g., costs involved in preparing an action plan or updating communication systems) or privacy (FERPA) concerns. Thus, an institution may be found liable if it did not disclose past records of criminal activity in particular locales visited during an official visit, or the criminal background of student-hosts.

Even though case law does not exist relating to official visit standard of care and duty owed to prospective student-athletes, institutions should implement strategies designed to assist in ensuring a safe environment for prospective student-athletes. An analysis of existing legislation and NCAA policy is necessary prior to a discussion of specific recommendations that would serve as mitigating strategies for such risks associated with official visits.

OFFICIAL VISIT RULES AND REGULATIONS

The NCAA, as a membership-driven organization, sets policies and procedures for all of its member institutions. However, recent instances of alleged criminal activity during official visits have attracted the attention of the United States Congress. As a result, both the NCAA and Congress have examined the issues at hand. The role of policy is crucial in the discussion of liability related to the official visit. The policy discussed here is intended to create a change in behavior. Positive behavior changes in recruits, coaches, and administrators will result in a fewer chances of institutions being legally at risk due to negative behavior.

Historically, the governance of intercollegiate athletics has been left to member organizations such as the NCAA and individual institutions of higher education. However, it is quite clear from two House of Representatives hearings in 2004 before the Committee of Energy and Commerce Committee that the efforts of the NCAA to curb negative behavior by prospective and current student-athletes are being watched closely. In the second of two hearings, Representative Towns noted that NCAA member institutions receive billions of dollars from the U.S. government and therefore the government has a role in ensuring that universities remain centers of higher education (U.S. House of Representatives, 2004b, p. 6). Federal government intervention is not unheard of in intercollegiate athletics, with at least three federal laws related to intercollegiate athletics. The most well-known statute is Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681-1688, 2007). The original intent of Title IX was to provide equal opportunity in education for men and women, but later it was determined to also apply to intercollegiate athletics at institutions receiving any type of federal funding (20 U.S.C. §1687; A Policy Interpretation, 1979; S. Rep. No. 64, 1988). Secondly, the Student-Athlete Right to Know Act requires that colleges and universities release graduation rate data for athletic teams to assist high school students in deciding where to attend college (P.L. §101-209, 1989). Finally, the Equity in Athletics Disclosure Act requires institutions to report athletics spending based on gender (P.L. §103-382, 1999). If the 2004 legislation adopted by the NCAA to assist in controlling official visits fails to change deviant behavior, then the United States government may take a more active role in the governance of intercollegiate athletics to protect student-athletes.

NCAA Policy

The NCAA exerts an enormous amount of control over the actions of member institutions with regard to the official visit. When conducting a search for the terms "prospective student-athlete" within the NCAA Division I Legislative Database, over 330 matching bylaws were returned (NCAA, n.d.a). Among the general NCAA Division I bylaws of interest to this topic is Bylaw 2.1, which refers to institutional control and the scope of that control. Specifically, it states that "the overall control of the intercollegiate athletics program rests with the university president" (NCAA, Bylaw 2.1). Additionally, the president's responsibility includes "the actions of its staff members and for the actions of any other individual or organization engaged in activities promoting the athletics interests of the institution" (NCAA, n.d.a, Bylaw 2.1.2). Interpretation of this regulation would certainly find that a

student- host would be promoting athletics interests when hosting a recruit during the official visit.

The bylaw focusing on unethical conduct, Bylaw 10.1, specifically states that a prospective student-athlete is held to this regulation (NCAA, n.d.a). This bylaw is written confirmation that the relationship between the prospective student-athlete and institution begins at the initiation of the recruiting process. Official visit regulations (NCAA, Bylaws 13.5 & 13.6) also include restrictions on the type of transportation that is to be provided to the prospect and places a plethora of restrictions on student-hosts. The NCAA regulates the amount of money student-hosts receive (Bylaw 13.6.7.5), how far a student-host can drive a recruit off-campus (a 30-mile radius) (Bylaw 13.5.1), and even prohibits prospects from receiving frequent flyer miles for their flight to their official visit (Bylaw 13.5.2.3.1).

Recruiting has been a contentious issue for most of the 100-year history of the NCAA (Crowley, 2006; NCAA, n.d.b). In 2004, allegations of strippers, sex, alcohol, and drugs at recruiting parties at the University of Colorado thrust intercollegiate athletics recruiting into the national media spotlight (Anderson & Dohrmann, 2004; Jacobson & Suggs, 2004; Wieberg, 2005). Following the Colorado allegations, the NCAA established a Task Force on Recruiting and gave them the charge of

review[ing] current NCAA rules and recruiting practices related to "official campus visits" and to propose changes that ensure an adequate opportunity for prospects to evaluate the academic, campus, social, team and community environments, while also requiring standards of appropriate conduct and accountability (NCAA, 2004a).

Adding to the urgency to control recruiting was the 2004 U.S. House of Representatives hearing during which David Williams, vice chancellor for student life and university affairs at Vanderbilt University, said that "the rules need to be revised, need to be reviewed, and we need to come up with best practices in recruiting and other things" (2004a, p. 27). As a result of findings from the NCAA Task Force on Recruiting, NCAA Bylaw 13.6.1 now requires institutions to develop their own policies related to official visits and holds institutions accountable through NCAA enforcement if a disregard for those policies is discovered (NCAA, n.d.a.; NCAA, 2004c).

Other additions to NCAA recruiting policy as a result of the Task Force include legislation that prohibits noncommercial transportation (Bylaw 13.5.2.3), excessive lodging and meals (Bylaw 13.6.6), and luxury transportation on and around campus (Bylaw 13.5.2.2.4) (NCAA, n.d.a.). During a second U.S. House of Representatives hearing in response to the new

recruiting legislation, Representative Schakowsky expressed her concern that the initial recruiting proposals did not go far enough because they failed to set standards regarding alcohol use and unsupervised entertainment of recruits (U.S. House of Representatives, 2004b, p.4). The final recruiting legislation required that institutions prohibit alcohol, gambling, and sex in recruiting, but did not address unsupervised entertainment of recruits (NCAA, 2004b). The specific topics (i.e. prohibiting alcohol, gambling, and sex) required to be covered under the institutional recruiting policy are not included as NCAA Bylaws, but are considered a directive of the NCAA Board of Directors (institutional presidents and the highest level of legislative authority within Division I).

Wallace Renfro, senior advisor to the NCAA president, emphasized that the goal of the 2004 recruiting legislation was to "return recruiting visits to the purpose for which they were intended, a thorough examination of what each campus has to offer both athletically and academically" (U.S. House of Representatives, 2004b, p. 16). During this same time period, the NCAA Management Council (athletics personnel and the second highest level of legislative authority within Division I) and Board of Directors declined to recommend other areas of legislation that dealt with official visits (NCAA, 2004b; NCAA, 2004c). Allowing institutions to pay for airline transportation costs of a parent (or legal guardian) was one such proposal that never made it to the Board of Directors due to defeat in 2005 at the Management Council level (NCAA, n.d.a, Proposal 2004-98). When the proposal was amended to include any transportation costs (not only airfare) for one parent (or legal guardian) to accompany a prospect on their official visit, the proposal was again defeated (NCAA, Amendment to Proposal 2004-98). In a nutshell, on matters of NCAA policymaking, one may argue that NCAA recruiting policy is both a response to institutional need and a reaction to problems that arise with current policy.

Conference and Institutional Policy

NCAA policy drives institutional policy, but institutions are permitted to increase the stringency of the policies by which they operate. Individual athletic conferences also have the ability to regulate policy and regulate institutions. Even with the heavy hand of the NCAA, the legal risk lies much more squarely on the shoulders of the individual institution than it does on the conference or the NCAA.

The 2004 NCAA recruiting legislation changes allow some freedom under which an institution can operate its official visits. Examples of varying

institutional policy include the establishment of a curfew, additional restrictions on off-campus entertainment options, restrictions on unstructured time, the intensity of education required for student-hosts prior to serving as a host, and the sanctions associated with institutional violations of the official visit policy. The University of Delaware has gone so far as to state in its Athletics Policy Manual that "[c]oaches are responsible and student-hosts accountable for the activities in which a prospective student-athlete engages during a visit" (University of Delaware, 2004, §XX, ¶3). With this statement, Delaware acknowledges the relationship between the student-host and the actions of the prospect.

In most areas of NCAA operations, rules and regulations are created for the protection of the student-athlete. However, with official visits, the rules seem to focus on protecting the institution and creating a level playing field in securing recruits rather than protecting 17-year-olds visiting campus. For example, "the NCAA has provisions that require all athletes to sign a consent to drug testing as part of their statement pertaining to eligibility, recruitment, financial aid, amateur status, and involvement in organized gambling activities concerning intercollegiate athletic competitions" (Champion, 2004, p. 430). In the event the student-athlete is under the age of 18, a parent is required to sign the form for it to be considered valid. In the case of a recruit, few (if any) institutions require a signature of either the recruit or his or her parent prior to arriving on campus for the official visit.

In general, institutions rely on an abundance of forms to protect themselves from NCAA rule violations and inform coaches, student-hosts, and recruits of the expectations associated with official visit behavior. Common forms requiring signatures include 1) Student-Host form indicating receipt of host money (and later used as an expense report) and understanding of host expectations; 2) Information for Prospective Student-Athletes form, which informs the prospect of the institution's recruiting rules and behavior expectations; and 3) Official Visit Prospect's Declaration Form, which is signed by the prospect prior to the conclusion of the official visit and generally confirms that the prospect did not violate any official visit policies (Kansas State University, 2005; Michigan State University, 2005; Northern Arizona University, n.d.; University of Delaware, n.d.). Ultimately the burden is placed upon the institution to decide whether or not to act beyond the requirements of the NCAA and their respective conference office when establishing policy related to official visit structure.

RECOMMENDATIONS

Understanding that not all risks can be eliminated, there are some areas in which risk may be mitigated through new or altered policy at both the national and institutional level.

NCAA Bylaw 10.1

There might be a need for amendments to NCAA Bylaw 10.1 (unethical conduct) to reflect the contemporary reality of official visits. Currently, Bylaw 10.1 refers to ethical conduct and includes a non-exhaustive list of behaviors by administrators, coaches, student-athletes, and prospective student-athletes that are considered unethical. The inclusion of conduct that leads to criminal prosecution or directly rendering certain practices as unethical could potentially lead to a reduction in dangerous behaviors. The more conservative approach would be to equate unethical conduct with a criminal conviction. Currently, unethical conduct refers to behaviors such as refusal to cooperate with NCAA procedures, academic misconduct, and fraudulent acts such as improper inducements and providing extra benefits (NCAA, n.d.a, Bylaw 10.1). As a reflection of the present-day reality of the official visit, samples of impermissible (and unethical) conduct would include official visit activities such as visiting a strip club, going to a bar, consuming alcohol, and any violation of local, state, or federal law. This policy change would mirror the intent of Bylaw 13.6 (requiring institutions to develop recruiting policies and procedures), but would clearly establish the behavioral expectations on a national level as opposed to on each campus. The establishment of explicit behavior expectations for the official visit by the NCAA in Bylaw 10.1 would reduce some risk exposure to the institution as it operates within the larger framework of the NCAA in the regulation of official visits.

Student-Athletes as Policymakers

The NCAA has a committee of student-athletes within its national governance structure, the NCAA Student-Athlete Advisory Committee (SAAC). Most institutions also have a campus-based SAAC. Student-athletes serving on these committees are closer to the issue of what really occurs on official visits on campus than administrators. The NCAA should solicit legislative proposals from the NCAA SAAC that encourage a more positive recruiting environment. Involving student-athletes in the policy development process will create a sense of ownership and assist in compliance with established policies by dissemination of policies and procedures through

institutional SAACs. Institutional administrators also should encourage SAAC members to share their knowledge of official visit behaviors with administrators to assist in the identification of potential areas of legal risk. Thus, the involvement of these groups in both campus and national policy is imperative when seeking to facilitate change.

Parental Involvement

In 2004, the NCAA introduced legislation that would have permitted institutions to pay the transportation costs for one parent or legal guardian to attend the official visits with their child. Ultimately, the legislation failed (defeated by Management Council in January 2005) due to cost concerns and competitive equity issues (NCAA, n.d.a., Proposal 2004-98). Additional rationale for non-support from the NCAA Academics/Eligibility/Compliance Cabinet included the possibility that parents might limit the interaction between student-athletes, recruits, and coaches (NCAA, Proposal 2004-98). With research now showing that recruits are significantly more likely to participate in negative and risky behaviors on their recruiting trips if they do not have parents with them this legislation should be revisited (Lawrence, Merckx, & Hebert, 2008). One lawsuit, even if the institution ultimately prevails, can cost an institution millions of dollars and damage its reputation for years. Compared to litigation, the cost of involving parents in the official visits (especially in high-risk sports) is worth it if potential lawsuits can be avoided.

The NCAA does allow institutions to provide some benefits (e.g., lodging, tickets to games, meals) for parents attending an official visit with their child (NCAA, n.d.a., Bylaw 13.6.8). While this is the current status of NCAA legislation, institutions should encourage parental involvement in the official visit and provide what they can to parents within the realm of NCAA regulations. If parents are not able to visit campus with the prospective student-athlete, parental consent should be given. Requiring a parent's or guardian's signature prior to the beginning of the official visit would aid in protecting institutions. A consent document should include a tentative schedule of the visit, emergency contact phone numbers during the visit, a waiver related to transportation, a statement acknowledging that the child will be on a university campus and is expected to act responsibly because constant supervision is impossible, and a statement releasing the institution from liability related to negligence on the part of the institution. With each state interpreting the validity of waivers and consent forms differently, institutions should examine state law and its application when choosing to implement a

waiver or consent form. However, giving parents an awareness of the official visit activities is a positive measure to undertake regardless of state interpretation of waiver law.

Unstructured Time

In the spirit of creating a safer environment for recruits, student-athletes, and student-hosts, the restrictions placed on off-campus entertainment for recruits could be more specific. Although Bylaw 13.6 restricts some types of off-campus entertainment, each community in which member institutions are located are very different. Thus, individual institutions should decide the appropriate additional restrictions for their campus. At a minimum, suggestions for suitable entertainment options in the locale of the institution should be provided to prospects and their hosts. Prohibiting attendance at off-campus parties also may reduce alcohol use, which could in turn reduce the possibility of incidents such as the one that occurred at Chico State University in 2006. Another option is for institutions to eliminate as much unstructured time as possible during the official visit. This could be done by simply requiring the student-host or a member of the athletic staff to accompany the prospect at all times. Athletic departments also could require that all recruits meet with the same list of individuals and sponsor recruit activities on recruiting weekends.

Establishing a curfew is another area of institutional policy that has been shown to significantly reduce negative behaviors (Lawrence, Merckx, & Hebert, 2008). The Big Ten Conference has recommended a 1:00 a.m. curfew for recruits, but it is not a policy (Michigan State University, 2005, p.2). If an institution chooses to implement a curfew, policy also must dictate the enforcement of the curfew. Coaches may resist involvement in enforcing an established curfew and their input should be solicited prior to a curfew being established. Many of the negative behaviors that result in legal liability occur late at night. Thus, a curfew may be a viable option for institutions wishing to reduce the possibility of bad behavior. Housing recruits in a hotel and having a curfew presents the additional challenge of enforcing the curfew in a hotel room with the student-host absent. Eliminating hotel stays and requiring recruits to stay in on-campus housing with their student-host would enable the institution to retain more control over the activities of the prospect and make it easier to enforce a curfew if one were established.

Background Checks

Following an incident in which a recruit with a criminal history engaged in criminal activity on his official visit(s), a few schools have begun conducting criminal background checks on prospects prior to their official visits. In *Peterson v. San Francisco Community College District* (1984), the college was held liable based on the fact that it had knowledge of previous crimes committed by a student. The court ruled that foreseeability was at issue and that the college failed to warn its students. Using *Peterson* as a guide, it also might be recommended that colleges and universities take seriously any knowledge they have of negative behaviors occurring within teams or on official visits. Some colleges and universities have begun to conduct background checks on prospects, but the authors are not aware of any that conduct background checks on student-hosts.

Conducting background checks on student-hosts would provide another layer of protection for the institution with regard to providing a safe environment for the official visit. Student-hosts with a record of unsavory behavior should not be allowed to host prospects. The challenges with background checks of any kind are that procedures vary by state for checks, they are expensive, juvenile records are often sealed, and if the individual has moved from state to state multiple checks are needed. So although this could be a protection for the institutions, each school must evaluate the feasibility of such action.

Standardized Student-Host Training

Although some sort of student-host training is required by the NCAA, institutions are at liberty to decide how intensive that training will be. The expectations of student-hosts should be communicated as well as consequences for noncompliance. Student-hosts also should be instructed on how to handle a recruit who demonstrates inappropriate or dangerous behavior. At this time, location-specific ideas of permissible entertainment options (e.g., local restaurants and movie theaters) should be provided along with emergency guidelines and athletic staff emergency contact information.

Transportation

Policy development for transportation is based on how much risk the institution is willing to undertake. With the signature of a parent (as indicated above), this risk can be reduced considerably for institutions. Commercial transportation is the least risky type of transportation available to institutions;

however, it is not practical for the official visit. Requiring that student-athletes ride in only institutionally owned vehicles driven by university employees or student-hosts who have been properly trained might be a significantly better option than letting prospects ride with whomever they choose.

Documentation

As with any effort to minimize risk, documentation is essential. All institutions use some standard forms relating to official visits. However, documentation of other details of the trip could assist the institution as a defense in court. Prior to the trip, the prospect (and his or her legal guardian) should be warned of the inherent dangers associated with the official visit. According to Pearson and Beckham (2005), it is not necessary to provide notice of the specific manner in which an injury might occur, only to warn that there are inherent risks in engaging in the activity. The itinerary of the visit, any unusual circumstance surrounding the visit, and general comments about the visit should all be noted by an athletic staff person familiar with the visit. Additionally, feedback should be solicited and documented from the student-host and the prospect about the trip. This feedback should go beyond closed-ended questioning and provide for open discussion about the visit.

The practicality of the above recommendations differ from institution to institution, but provides a starting point for institutions seeking to reduce their exposure to risk associated with the official visit. Providing legal protection to the institution, while also ensuring that the prospective student-athlete is able to be immersed into the life of a student-athlete during the official visit, is fundamental to the success of any official visit policy.

CONCLUSION

The purpose of this article was to examine in detail the areas of liability to which an institution may be susceptible during the NCAA official visit. Without specific case precedent, it is difficult to forecast the future of institutional liability related to the official visit. However, recent events point to a greater burden being placed on the institution.

In December 2007, the University of Colorado settled a Title IX lawsuit stemming from the alleged rape of two women at an off-campus party where football recruits were being entertained (Associated Press, 2007). The primary question of law was whether, "the risk of sexual assault during recruiting visits at CU was obvious" (*Simpson v. Colorado*, 2007, p. 1170). Prior to the settlement, the appellate court had found, among other things, that the "alleged sexual assaults were caused by CU's failure to provide adequate supervision

and guidance to player-hosts chosen to show the football recruits a 'good time'" and that "the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference" (*Simpson*, 2007, p. 1170). Although this case was settled, it is an example of a court making a strong statement about the role of an institution regarding supervision during official visits and the sense of culture that may exist within the athletic department.

By taking proactive steps to mitigate risk associated with the official visit, institutions will find themselves in a better legal position if a situation occurred during an official visit that resulted in legal action. The NCAA, conferences, and individual institutions should strive to have policies and procedures in place and adhered to that are designed to create a positive and safe experience for everyone (i.e. recruits, parents, student-hosts, coaches, other students, the community) involved in the official visit. If this is done, it could be more difficult for a court to find "deliberate indifference" to a given situation as was stated in *Simpson*. There is no perfect formula that can guarantee every institution will be relieved of liability associated with official visits, so utilizing best practices as a guide to institutional operations is a good start.

Shortly following the settlement in *Simpson*, another significant legal settlement related to the future of intercollegiate athletics policy and practice was reached. In the class action antitrust suit *White v NCAA*, the 2008 settlement (pending final approval in California) specifies that NCAA division I institutions are allowed, but not required, to provide comprehensive year-round health insurance for their student-athletes (*White*, 2008, p. 12, ¶ 2-3). Prior to the *White* settlement, schools could provide student-athletes with basic insurance coverage for athletically-related injuries, but not year-round comprehensive coverage (*White*, 2008, p. 11, ¶ 26; NCAA, n.d.a, Bylaws 3.2.4.8, 16.4.1, & 31.7.4.3). With comprehensive health insurance not covered in the current value of grant-in-aid (athletic scholarship), one could argue that expenses for student-athletes' comprehensive insurance could be a considerable burden for institutions, especially if the presently made available NCAA funds expire (*White*, 2008, p. 10, ¶ 9; Carey & Gardiner, 2008). Those institutions able to financially provide the new insurance may be held as meeting their duty of care as analyzed above. Conversely, institutions financially unable to do so, may find themselves presented with an intriguing dilemma: run their athletic department's business prudently as aforementioned and as allowed under the *White* settlement, or attempt to maintain extensive broad-based athletic participation and scholarship opportunities.

Considering the dynamic explored in the above balancing theory discussion, a court could find that an institution breached its duty by opting to

offer more athletic scholarships, instead of investing funds in comprehensive insurance that would cover off-campus, away from practice/competition injuries for the existing student-athletes of the institution. Additionally, the *White* settlement gives institutions more latitude in deciding how they use existing allocated funds (i.e. special assistance fund for student-athletes and student-athlete opportunity fund) thus possibly allowing for new institutional programming related to student-athlete welfare (i.e. funding student host education, background checks, and other means to ensure that official visits would be conducted in prudent fashion). Conversely, an institution choosing to offer the new insurance may be forced to limit spending in those same areas related to student-athlete welfare. It is the belief of the authors that schools opting to provide comprehensive insurance plans will have a competitive advantage in recruiting since the value of the athletic scholarship at these institutions is greater than their competition not offering the new insurance. The fear is that financial decisions may be made based on the potential recruiting advantage associated with offering the insurance whilst neglecting to fund such preemptive measures that are mitigating the various types of risks an official visit entails. The manner in which institutions interpret the *White* settlement, use the available funds, and forecast against potential risk needs to be carefully monitored. An additional twist in this discussion is that the current plan to assist in subsidizing these insurance policies is dependant upon men's basketball television contract revenue. To that end, future research is a necessity to assist institutions with their liability risk management and budgetary planning.

Beyond the legal risk exposure that exists with the official visit, athletic departments within institutions of higher education must be reminded of the reason for their existence: to provide an education and produce quality citizens in the process. The official visit should be integral to that mission. David Berst, NCAA vice president for Division I, summed up the inherent institutional responsibility associated with official visits:

It is critical to understand the differences . . . between violations of criminal law and violations of NCAA bylaws. And yet, the NCAA and higher education understand that there is a responsibility within college sports to create an appropriate environment for sports on-campus. It should be an environment in which the operation of intercollegiate athletics is aligned with institutional values, moral precepts and respect for human kind in such a way that headlines decrying violations of either laws or bylaws appear so rarely that we are struck by their infrequency rather than their common occurrence (U.S. House of Representatives, 2004a, p. 39).

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