

**Marquette University Law School
National Sports Law Institute
2018 Fall Conference**

EMERGING LEGAL ISSUES IN COLLEGE ATHLETICS

2018 MULS NSLI Fall Conference

**“Do what you can,
with what you have,
where you are.”**

President Theodore Roosevelt (c.1906)

Moderator:

- **Jayma Meyer**, Counsel, Litigation Department, Simpson Thacher & Bartlett LLP, New York, Visiting Clinical Professor, Indiana University

Panelists:

- **Christian Bray**, (L'14), Assoc. Ath. Dir. for Compl., Harvard University
- **Aaron Hernandez**, (L'13), Asst Dir of Enforcement (Football), NCAA
- **Jessica Kumke**, (L'08), Assoc. Ath. Dir. – Compliance & Enrollment Services, University of Wisconsin-Milwaukee
- **John Long**, (L'09), Counsel, Jackson Lewis, P.C., Dallas, Texas
- **Mike Marcil**, (L'85), former Commissioner, Sunshine State and North Central Conferences, Adjunct Instructor, Bellevue University
- **Keith Miller**, (L'01), Assoc. Ath. Dir. - Compliance, Baylor University
- **Kristina Minor**, (L'13), Director of Compliance, Rutgers University
- **Djenane Paul**, Senior Assoc. Ath. Dir./SWA, Fordham University

Emerging Legal Issues in College Athletics

- **“Pay for Play”**
 - *O’Bannon, Alston/Jenkins*
- **NCAA Basketball Scandal**
 - **Reaction to the Basketball Commission report**
- **Crisis Management**
 - **Sexual Harassment, Investigations, Litigation**
- **Sports Gambling**
 - **U.S. Supreme Court’s PASPA decision**
- **Safety & Education**
 - **Duty of Care, NCAA Academic Rules**

Emerging Legal Issues (cont.)

- **Freedom of Speech and Expression**
 - **Impact of Social Media on rules compliance**
- **Role of the NCAA**
 - **Congressional Antitrust Exemption to limit Commercialization? Governance of NCAA**
- **Gender Equity**
 - **Title IX Compliance – Sport Offerings, Rosters, Coaches, Facilities, Administration**
- **NCAA: What Changes Would You Like?**
- **What Will College Sports Look Like in 2028?**

Employment Relationship?



NCAA

To date, student-athlete's
are not considered EE's – Courts have held
that the integral part of the colleges'
business = education, not the athletic
programs.

- But in 2015, **Northwestern University** football players and Nat'l College Players Assoc., backed by the United Steelworkers Union, sought to unionize S/A's to create an employee status for collective bargaining rights.



No Employment Relationship



- With 5 member unanimous decision, the **National Labor Relations Board (NLRB)** denied the Northwestern student-athletes claim that they are university EE's and should be able to collectively bargain.
- The **NCAA** and **Northwestern University** successfully argued disruption of competitive balance and potential adverse impact on NCAA rules if one team could unionize and treat S/A's like EE's. However, likely there will be other attempts to consider S/A's as EE's.

Employment – If Student-Athletes Are Paid for Play...

- Employment = Contractual in nature – Betw. ER & EE
- Involves an express or implied agreement to perform personal services. The agreement covers salary, work duties, benefits.
- Employment-at-will doctrine: Either the ER or the EE may terminate the employment relationship at any time and for any reason.



- O'Bannon, fmr. *Ucla* mbb player, filed on behalf of class of NCAA DI fb and mbb S/A's: **Argued S/A's should be compensated for the commercial use of their images.** NCAA said paying S/A's would be a violation of amateurism.
- CA district court found that **NCAA violated antitrust laws by unreasonably restraining trade and limiting S/A compensation.** In 2015, Ninth Cir. of Appeals (CA, AR, AK, HI, ID, MT, NV, OR, WA) **affirmed.**
- Marked first time a district court applied rule of reason analysis to NCAA regulation of student compensation. Ruled schools should be allowed to pay S/A's full cost of attendance and put up to \$5,000 in a trust for ea. S/A for ea. yr. of S/A's eligibility.
- U.S. Sup. Ct. **denied** petition for **certiorari** on 10/3/16.

- **Four years after** she presided over O'Bannon v. NCAA, U.S. District Judge Claudia Wilken presiding over **a second college sports trial that could be a game-changer** in the Oakland federal courthouse.
- Shawne Alston, fmr.  fb. S/A and Justine Hartman, fmr.  wbb S/A filed class action on behalf of fmr. men's and women's college S/A's against the  and 11 athletic conferences (Pac-12, Big Ten, Big 12, SEC, ACC, AAC, CUSA, MAC, MWC, SBC and WAC).
- **P's assert NCAA's system capping value of grants unlawfully prevents conferences and colleges from competing with each other.** P's stress colleges compete for S/A's many way, spending millions to hire coaches, building stadiums, arenas, training facilities, etc. and yet **none of those ways pays the actual S/A's.**
- **P's argue a fair grant-in-aid offer would incorporate extent to which this recruit's affiliation to an institution would boost H.S. applicants' interest in applying to that institution and increase alumni donations to that institution.** Colleges forced by rule to offer essentially same financial package-tuition, fees, room, board, course-related books and other expenses up to the value of the full cost of att.. **Recruits, therefore, denied full benefits of competition for their services.** In turn, **college that lands a recruit retains value of recruit's contributions** to college that exceed the amount of money college "paid" recruit through grant. The college then can use the funds to pay coaches' salaries and other inst'l expenses.

In Re: Grant-in-Aid Cap Antitrust Litigation – P's Arguments

- **P's argue a free marketplace for grants-in-aid would help, not hurt, the education and college experience of S/A's.**
- **P's charge** this blatant restriction on the ability of colleges to compete through market-based grants **violates federal antitrust law**, which is designed to ensure that competing businesses—including conferences, colleges and other NCAA members—**actually compete**. **P's argue** antitrust laws bar competitors from conspiring through anti-competitive measures that, among other things, deprive labor of their rightful value and trigger more anti-competitive harms than pro-competitive benefits.
- **P's demand** that if there can't be a free market for athletic grants, then at least individual conferences should be able to determine their own rules for capping athletic grant compensation and accompanying benefits. The Southeastern Conference and the American Athletic Conference, for example, do not necessarily have to land on the same set of scholarship rules—the **P's believe each conference should have autonomy.**

In Re: Grant-in-Aid Cap Antitrust Litigation

- Like O'Bannon, Alston and Hartman aren't seeking money from trial. Instead injunctive relief—namely, a change in NCAA rules to permit a more competitive, market-oriented approach to athletic grants.
- The focus on injunctive relief reflects recent out-of-court settlements reached with the NCAA. In 2008, the NCAA settled the Jason White case for \$230M for S/A's enrolled from 2007-2013; In 2017, the NCAA and the 11 major conferences settled with about 40,000 S/A's who played FBS football or DI mbb or wbb between 2009-10 and 2014-15.
- The more recent settlement called for the S/A's to be paid \$209M (about \$6,800 for each S/A), which reflects the P's contention that the NCAA and its members unlawfully conspired to deny S/A's the difference between the value of the grant-in-aid funds they received and the full cost of attending their respective institutions. Through the settlement, the NCAA was able to avoid the possibility of paying treble damages if those cases had gone to trial and P's prevailed. However, while the settlement extinguished Alston and Hartman's claims for a financial penalty, the question of injunctive relief is still undecided..)

In Re: Grant-in-Aid Cap Antitrust Litigation – D's Arguments

- The NCAA and 11 conferences **argue grant-in-aid restrictions estab. “ground rules” for maintaining longstanding integration of S/A’s into broader campus community.** S/A’s can focus less on money, more on school and thereby “get more out of their college experience, leading to tangible benefits for the rest of their lives.”
- If S/A’s paid “substantial sums for their performance” it would **“inevitably reduce their incentives to achieve academically and participate in all other aspects of campus life and drive a wedge between them and other students.”**
- Also, in absence of grant-in-aid restrictions, college sports would devolve into **second-rate imitator of minor league sports.** That outcome, D’s contend, **would harm—not advance—competition in college sports.** Because college sports fans and consumers currently perceive S/A’s as playing more for the love of the game and love of their school than for money. As NCAA recently stressed in a court brief, “despite the abundance of professional minor leagues and the NBA G League filled with very skilled athletes, none has ever attracted anything close to the popularity of college sports.”

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In Re: Grant-in-Aid Cap Antitrust Litigation

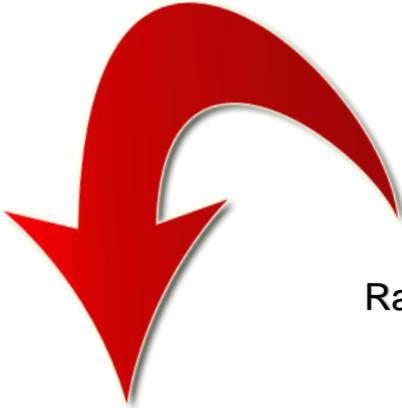
- Meanwhile, the NCAA and other D's are focusing on 9th Circuit's language in O'Bannon that "NCAA not paying S/A's is precisely what makes them amateurs" and that "offering S/A's cash sums untethered to educational expenses would be a quantum leap."
- D's assert that grant caps and rules are procompetitive because they help distinguish college sports from pro sports and that distinction helps colleges retain and recruit fans, networks and sponsors. Non-uniform grant rules would lead to changes in conference and NCAA division membership and negatively impact many institutions and their S/A's.
- Given Judge Wilken ruled against NCAA in O'Bannon, by finding NCAA amateurism rules unlawfully suppressed competition for the use of S/A's names, images and likenesses, **it is possible that the judge also will rule NCAA amateurism rules also suppress competition for grants-in-aid to the detriment of S/A's.**
- The losing side will almost certainly appeal to U.S. Court of Appeals for Ninth Circuit, which will likely take a year or longer, depending if the U.S. Supreme Court then accepts or rejects a petition.

FBI's Alleged NCAA Coaches Bribery Scheme

U.S. v. Chuck Person, et al.
U.S. v. Lamont Evans, et al.

Managers/Advisors

James Gatto – **Adidas**
Christian Dawkins - Agent
Munish Sood – Financial planner
Rashan Michel – NBA custom suit maker



BRIBES

College Asst. Coaches

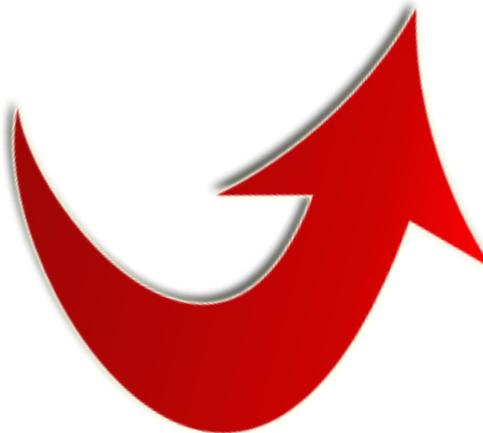
Chuck Person – AUB
Lamont Evans – Ok St
Emanuel Richardson – AZ
Tony Bland – USC

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Directed by Coaches

Top H.S. Players & Families

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Pressure on Players

NCAA Basketball Commission



- **Dr. Condoleezza Rice (chair)**, Former Provost, Stanford University, 66th U.S. Secretary of State
- **Mary Sue Coleman**, President, Association of American Universities
- **General Martin E. Dempsey, U.S. Army, Retired**, Chairman USA Basketball
- **Mark Emmert (ex officio)**, President, National Collegiate Athletic Association
- **Jeremy Foley**, Athletics Director Emeritus, University of Florida Athletic Association
- **Jeffrey A. Hathaway**, Vice President/Director of Athletics, Hofstra University
- **Grant Hill**, Owner/Vice Chairman, Atlanta Hawks
- **Rev. John I. Jenkins, C.S.C.**, President, University of Notre Dame
- **Mike Montgomery**, Retired Basketball Coach, Analyst, Pac-12 Networks and Westwood One Sports
- **G.P. “Bud” Peterson (ex officio)**, President, Georgia Institute of Technology, Chair, NCAA Board of Governors
- **David Robinson**, Founder, Admiral Capital Group
- **Kathryn Ruemmler**, Former White House Counsel, Partner, Latham & Watkins LLP
- **Gene Smith**, Sr. Vice President and Wolfe Foundation Endowed Athletics Director, Ohio State University
- **John Thompson III**, Board of Directors, National Association of Basketball Coaches, Asst. Coach U.S. Men’s National Team

NCAA Commission Recommendations



- Recommend to the NBA to **get rid of the one-and-done rule** by allowing players to enter the draft once again out of high school. If they don't then the NCAA would look at a model of freshmen ineligibility or "locking" up scholarship for a period of time (years). But the baseball model of once you arrive on campus and staying for three years was rejected as something that could not be applied in men's college basketball.
- Allow players who aren't selected in the NBA draft to **return to college**.
- **Allow NCAA-certified agents to "engage" with student-athletes in high school**, at an age or grade to be determined. No athlete would lose eligibility by meeting or contacting certified agents.
- **Continue** to require players to **sit out upon transferring**.
- **Strengthen enforcement** by creating **independent parties to investigate and adjudicate major, complex cases**. This has long been discussed at the highest level, to pull this phase away from member schools.
- **Increase the penalty structure for a Level I violation** and make it stern. A five-year postseason ban would certainly do that if something was enacted. So, too, would a life-time show cause ban and a head coach restriction of more than one year.

NCAA Commission Recommendations (Cont.)



- There is a need for a **new summer basketball model to be developed with the help of the NBA, NBAPA and USA basketball**. In the short term, that means non-scholastic basketball events would go through **rigorous financial disclosure** before coaches would be allowed to attend. New model should be developed for the **summer of 2019**.
- There is a need for the **apparel companies to cooperate** in helping clean up summer basketball.
- The commission recommends a **NCAA Board of Governors change** with **at least five independent voices** as part of the governing body.
- Colleges should **no longer be able to defend an academic fraud or misconduct case on the basis that “all students, not just athletes, were permitted to benefit”** from the academic fraud or misconduct.

NCAA Commission Recommendations (Cont.)



- The commission also recommended the NBA and its players association **get rid of the current NBA draft rule**, something that is negotiated between the two parties in their collective bargaining agreement.
- The commission wants to **go back to when players had the option out of high school to turn professional rather than feeling “forced” to choose one season in college and sometimes not even two full semesters.** The commission said in its report the enhanced improvements to the NBA’s G League, formerly known as the D League, could help give high school prospects options out of college. The NBA is raising the regular G League base salaries to \$35,000 for next season after they maxed out at an average of \$26,000 this past season. Some committed college players have already chosen the G League option for next season instead of going to play for a college. There are players who would rather turn professional immediately than go to college during for one-year while waiting for the NBA draft.

Crisis Management

- Sexual Harassment is Closely Associated with Gender Discrimination.
- **Title VII of Civil Rights Act**, **EEOC Guidelines** & **court rulings** have developed the **Elements of Sexual Harassment**:
 1. **Unwelcome** sexual advances;
 2. **Not desired** by the employee (Victim);
 3. Conduct that **creates a hostile or abusive work environment** (negatively affects job performance; intimidation, ridicule, insult);
 4. Can arise from **either verbal or physical** conduct.
- **Sexual Harassment**:
 - Can occur with **any combination of gender**;
 - Quid pro quo (“**this for that**”; this for a raise/promotion/better office, etc.)
 - Creates **hostile work environment** or **constructive discharge** (Victim can no longer work there because situation intolerable)
 - **ER’s must have zero tolerance** and effective procedures in the event of a complaint. **Remedial action as necessary.**

Crisis Management

- A student can sue a coach or teacher who harassed him or her. And, the student's institution can be liable for damages if the coach's or teacher's behavior is so severe that it constitutes a **hostile environment of sexual harassment** (i.e., harassment which interferes with the student's ability to perform). (*Franklin v. Gwinnett Co. Public Schools*).
- **Factors considered** = more than one student affected, type of sexual harassment, frequency, duration of the conduct, relationship between the parties, the age, the sex of the alleged harasser, the size of the school/program, the location and context of the harassment incidents, other similar incidents at the school and incidents of gender-based nonsexual harassment.
- Institutions have the chance to respond to harassment and to terminate or discipline a coach or teacher. But if they do not take **immediate steps** to remedy the problem, they will may liable under Title VII.

Crisis Management

- OCR – Harassment must be **severe, persistent and pervasive**. But each situation different.
- Any conduct that could be interpreted as **possibly harassing** (including just a male coach hugging a female player) should be monitored and avoided.
- According to the OCR and courts, **potential responsibility for sexual harassment begins** when the school officials first learn of the conduct.
- If school administrator knows but does nothing to remedy, then the school itself might be liable for the conduct of it's EE's = Deliberate Indifference.

Crisis Management



NCAA Infractions Process

The NCAA national office rules enforcement staff includes former coaches, campus administrators, compliance officers, college athletes, attorneys. The Committee on Infractions and Infractions Appeals Committee includes qualified university and athletics administrators from NCAA institutions, conferences, former coaches and individuals and attorneys from the public.

NCAA Enforcement Staff Duties:

- Monitors information regarding potential violations.
- Investigates potential threats to college sports.
- Processes less serious violations (Level III/ secondary) without an investigation.
- Provides notice of alleged violations.
- Presents cases to the Committee on Infractions.

NCAA Committee on Infractions Duties:

- Reviews information from the applicable institution(s), NCAA Enforcement staff and other involved individuals.
- Conducts hearings, resolves factual disputes and concludes whether NCAA violations occurred.
- Prescribes appropriate NCAA penalties.
- Issues a written decision with assistance of the NCAA staff.

NCAA Infractions Appeals Committee Duties: If the involved school or individual appeals, reviews the initial COI decision -

- Conducts hearings to determine if the COI decision should be affirmed or reversed.
- Provides the final word on the rules violation and penalties and reviews the annual compliance reports from school.
- Analyzes compliance with the penalties and requirements. Requests follow-up information, if needed. The committee handles any substantive issues and restores full membership rights at conclusion of probation.

Professional and Amateur Sports Protection Act (PASPA)

- **PASPA was signed into law by President George H.W. Bush in 1992 and went into effect in January 1993.**
- **Nevada – the only state at time bill became law that had widespread state-sponsored sports betting – and three other states with more limited sports betting (Oregon, Delaware and Montana) were grandfathered in.**
- **PASPA didn't outlaw sports betting because that was already illegal. Rather, PASPA banned states – outside those given exemptions – from regulating (and taxing) sports betting.**
- **Despite PASPA's existence, the American Gaming Association (AGA) estimates at least \$150 billion a year is gambled on sports in the U.S. and 97% of that amount is bet illegally.**

Sports Gambling

- On May 14, 2018, the U.S. Supreme Court ruled in favor of New Jersey and effectively killed the Professional and Amateur Sports Protection Act (PASPA). PASPA was the federal law that essentially limited the \$150B sports betting industry to one state (Nevada) for the last 25 years.
- PASPA was declared unconstitutional in the 6-3 decision (*Murphy v. NCAA*), meaning, effective immediately, it is now up to each state – including New Jersey, which has sought to establish sports gambling for years – to decide whether to allow its residents to bet on sports.
- At this point, it appears there is a divide among the leagues regarding sports betting. The NBA, MLB, PGA, MLS and UFC are spearheading a state-by-state lobbying effort. They are supporting legislation to legalize sports betting as long as it includes certain stipulations beneficial to the sports leagues (i.e., a share of the revenue).

Sports Gambling

- The NFL and NHL have been relatively quiet regarding the issue up to now. But it is likely that those leagues also will soon respond to the potential new source of revenue. the majority of states that approve sports betting will offer online and/or mobile wagering. Therefore, industry experts predict it will not be long before most sports bets will be placed online.
- Meanwhile, NCAA president Mark Emmert has openly discussed the potential for an effort to have college sports expressly excluded from any future sports betting legislation.
- Compliance efforts may increase to prevent game-fixing and point-shaving scandals. However, some proponents of sports gambling, including the NBA, believe a legal, heavily regulated market overseen by licensed officials is the better approach to protecting the integrity of sport than the illegal market that has been serving most of the U.S. for the past quarter century.

Some Types of Sports Risk

- **Sport and Spectator Related Health, Trauma, Falls and Illness** – Head/neck injuries, knees, hips, ankles, feet, shoulders, arms, hands, fingers, hydration, and whole range of health emergencies like falls, cardiac arrest and blood-borne pathogens.
- **Facility and Equipment** – Related Safety Issues.
- **Fan, Player, Coach, Officials Safety, Crowd Control** - Ticketing, entrance searches, seating, avoiding violent acts, exiting process.
- **Weather** - Hurricane, tornado, lightning, fire, smoke, heat, snow, ice and cold.
- **Food & Beverage Issues** – Concessions, food prep, fan tailgating and event supplies. Alcohol-related issues.
- **Personnel Issues** – Harm from physical injury, discrimination, sexual harassment.
- **Travel Issues and Accidents** - Team and officials travel = long distances, long hours, deadlines, adverse weather = Risk of car, bus, plane accidents.
- **Child Protection & Terrorism** – Prior to, During and Following games.

Safety & Education, Duty of Care

- **Sports Law** is about Managing Risk.
- **Risk** is everywhere & can happen anytime involving: Participants, Coaches, Staff, Officials or Spectators.
- Risk Management is about Loss Prevention [e.g., Loss of life, health, safety, money, time (including due to possible legal actions), effort, image & goodwill].
- Risk Management is a course of action to reduce, or eliminate the risk of injury and liability associated with the applicable sport, athletics event or recreational activity.
- Includes risk management of the sport, athletics or recreational stadium, arena or other facility being used.
- Often working to reduce risk, because elimination of all risk not always possible without canceling an event or closing a facility.
- Dramatically or completely removing a risk (e.g., no checking in hockey, no tackling in football) can impact a sport/activity so negatively event loses meaning for participants and/or spectators.
- As a result, sport administrators must find methods to modify policies, rules, facilities and equipment that will reduce risk.

Analysis: **Risk** Identification

How do we accomplish this?

- Objective sources? Does a standard or duty of care exist? What are the industry standards?
- Are there related overriding legal concepts? Do negligence and/or strict liability laws apply? Do these related laws complement or supplant the industry standards?

Elements of Negligence

P has burden to prove each of the four elements/requirements of negligence:

1. **Standard/Duty of care to act as a reasonable and prudent person existed.**
 2. **Failure/Breach of that duty**
 3. **Causation of Injury**
 4. **Injury/actual harm occurred (Monetary damages (\$) is how we reimburse for harm done)**
- The Standard/Duty is **based on Fault not Intent.**

Negligence Element #1 – Duty of Care

= The Duty/Responsibility owed by a Defendant (person or organization) to another (the Plaintiff)

•To determine whether a duty existed, courts use **the Reasonable Person Standard** and consider the following:

1. Case Precedent = What have courts held in previous cases with similar facts? (i.e., “Stare decisis”, which provides predictability, stability and flexibility in law.)

2. Regulatory Agency Rules & Regulations = E.g., Nature of activity, No. of participants/spectators, No. of security officers, Size of facility, Type of equipment required or other sport-specific rules.

Negligence Element #1 - Duty of Care (cont.)

3. State, Federal and Municipal Laws, Rules and Regulations =
Legislation may mandate certain act(s).

- E.g., Prohibition on selling alcohol to minors, AED's on site.

4. Community Practice/Industry Standard

- E.g., Lightning safety plans

5. Federal Regulatory Agencies – E.g., Consumer Product Safety Commission (CPSC) regulations and policies.

- E.g., Movable soccer goal specifications to ensure no tipping

6. Professional Associations - E.g., NCAA, ACSM, NATA, Engineering or Medical groups, etc. = rules, guidelines on lightning and equipment safety.

Negligence Element #1 - Duty of Care (cont.)

7. **Agency/Organization Manuals** = What do the organization's own policy and procedures manuals say?
8. **Expert Opinion** = What do forensic, economic, sport safety experts or other experts say regarding a particular situation?
9. **Assumption of a Duty** = E.g., A coach has a duty to teach safe tackling techniques. A lifeguard has a duty to watch for distressed swimmers. Even a non-participating coach who decides to assist in care of injured player and aggravates the injury may have assumed a duty of care once he/she intervened.
10. **Negligent per se** = If a D violates a statutory duty, then the defendant is **negligent as a matter of law**. The statute sets up both the legal duty and the standard of care for the P. Therefore, the P only needs to prove the elements of causation and actual harm to prevail.

All of these points are considered by a court in determining a person's/organization's duty of care.

Analysis: Risk Evaluation

Low Risk



High Risk

- **Seriousness of the *potential* injury. Is death a possibility?**
- **Probability of an injury occurring?**
- **Causation or foreseeability?**
- **Competition in high risk sports = injuries, fights, falls, stadium and court storming (e.g., tearing down goal posts = 40 ft. high, 450-500lbs, steel models can be 1,800lbs = injuries even deaths), etc.**

Effective Management

Managers generally have latitude in decision making, **impacted by:**

- **Education** – an awareness of risk from study.
- **Training** – **learning on the job** from event participation, internships and early employment.
- **Experience** = building up a **history** of past incidents, successes and near misses.
- **Following current events** in the sports management field (i.e., the latest sports media topics and lawsuits)
- **Must consider cost** of various policies and procedures (AED's, lightning monitors, padding, railings, insurance etc.)
- **Need support** from CEO's and other institutional supervisors to develop and implement safety plans.

Management/Coaching Instruction

- **Teacher to Student = Coach to Student**
- **General Supervision** = Staying within sight and hearing of participants. (e.g., basketball game or tennis match)
- **Specific Supervision** = Staying within close contact and proximity of participants. Supervisor stays within close contact and proximity of participants and is ready to provide hands-on assistance immediately (e.g., supervising young, beginning swimmers, gymnasts or cheerleaders) Participants are younger, less skilled and activity is higher risk.
- Type of supervision needed determined by considering participants **age, skill level and the activity**. Supervisors should have proper qualifications, education, experience. Sufficient no's.
- Provide safety information first. Warn as necessary (e.g. reinforce safe tackling methods). Have a plan for supervisory replacements.

Management/Coaching Instruction

- Instruction should be **proper, accurate, and thorough**.
- Activities should be within reasonable abilities of participants.
- Participants should be warned of inherent risks. Safety rules should be explained and enforced.
- Instruction should be up to date and in accord with latest professional and safety guidelines.
- Safety measures should be individualized for each player/position.
- Participants should not be forced. Avoid mismatches.
- Regular feedback and corrections should occur.
- Injured or ill participants must receive proper clearance to play

Maintaining Safe Equipment/Premises

- **Dangerous/improper equip., premises, instruction, supervision = Injuries.**
 1. **Equipment** – Safe and include instruction. Proper model, proper fitting, proper wear.
 2. **Proper helmets, masks and pads** (football, hockey, baseball, softball, lacrosse, etc.) Use **NCAA or NFSHS** equipment safety handbooks.
 3. **Playing fields/courts/stadiums/arenas etc. regularly maintained and inspected. Necessary safety warnings/features added. Use of experts in planning/building/maintaining. Regular inspections. Follow-up on necessary action plans.**

Football Security Planning

- It takes 15 seconds or less for fans to get on a field after a game.
- Collapsible/retractable goal posts are now common at many Division I stadiums. These **posts can be collapsed or retracted (using hydraulics)** into the ground within seconds after a game. You need to get them in the ground or on the ground before the fans arrive on the site. Once the posts are lying on the ground, fans no longer are attracted to them.
- Athletic administrators also should have **emergency action plans** to effectively control overflowing crowds. These plans should include increasing security/game management staffing numbers to a level necessary to maintain a secure field. Increasing the number of security personnel ringing the field following a game can effectively decrease the chance of the dangerous post-game celebrations.
- Adding additional financial and human resources (**more staff, signage, scoreboard messages, p.a. announcements**) to protect against dangerous post-game celebrations, will add significantly to game day expenses. However, it also would help reduce the financial liability faced by the university. **Fans must be informed before and during the game** that they may not enter the field and that if they do, they may be ejected from that game and/or future games and may face **prosecution for trespassing.**

Managing Risk

Risk Managers/Dir. of Loss Prevention

Primary responsibility to ensure **safety** of facility:

- **Emergency Action Plans** including: safety & fire emergency procedures and inspections, routine and emergency medical services (AED unit), unwanted intruder scenarios.
- Adverse weather plans – Tornado, Hurricane, Lightning
- Food service and equipment quality
- Blood-borne pathogen protection
- Alcohol service training
- Often these responsibilities carried out by a group of people rather than by a single individual. Need communication/support from CEO's to develop and implement safety plans.



Developing Policies and Procedures

- **Development:**
 - Gather top examples from industry. Development of a standard. Use of court precedents, statutes, industry rules, standards, or guidelines.
 - Modify to fit your particular situation. Disseminate drafts for review and **feedback/buy-in**. Design for easy modification, revision, addition. Finalize and distribute in user-friendly form(s) (hard copy and/or online) to each applicable staff member and volunteer.
 - Regarding online version: Should all or part be available to general public? Should sections on rules compliance policies made available to boosters? Should staff members be required to use codes to access various policies and procedures?
- Problem of gathering dust – **Needs to be “living” resource - Used frequently.** **Followed appropriately.** **Reviewed, updated and modified regularly.**

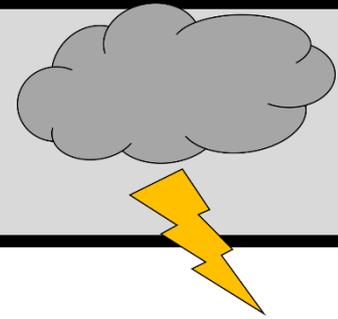
Emergency Action Plan (EAP)

- A **comprehensive, proactive** plan that addresses potential **medical emergencies** occurring in a sport setting;
- Legal and ethical duty in preparation of such plan: **court rulings, statutes, regulations, industry standards.**
- EAP Issues: Communication; Emergency training; Location of EMS; Role of first responder; When to dial **911**; Documentation; **Conduct Drills (test the plan)**; etc.

Crisis Management Plan (CMP)

- A comprehensive, proactive plan designed to lessen the negative impact on an organization in the event of a crisis (e.g., Computer Failure, Weather Event, Crime, Terrorism).
- **CMP Development:**
 - Establish and convene CMP team;
 - Develop comprehensive CMP
 - **Test the CMP.**
- **Communication CMP to all appropriate (e.g., Board, Mgt., Staff, Customers Players, Students, Family Members, etc.)**
- Post-Crisis Communication, Reports and Response.

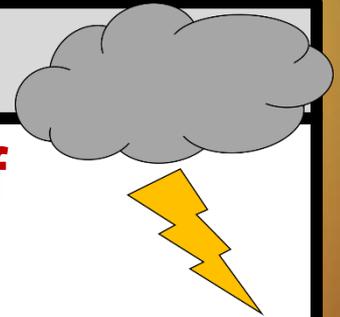
Lightning Safety Issues



Key Statistics:

- During the last decade, lightning was responsible for an **average of 42 fatalities yearly** in the U.S. and an estimated **10 times as many injuries**.
- Data from 2005 indicated that approximately **15% of lightning casualties** occurred during organized sports and an additional **25 to 30%** resulted from recreational activities.
- The National Weather Service reports from 2010-2011, with **48%** and **62%** of **lightning fatalities** attributed to sport and recreation, respectively.

Lightning Safety Issues



- **NATA - Six (6) essential components of lightning safety:**
 1. **Organization designates a chain of command and a person with the authority to remove participants and spectators;**
 2. **Weather watcher should be appointed who notifies person with authority to cancel or suspend activity if severe weather becomes dangerous;**
 3. **Use a consistent reliable means of monitoring of lightning activity;**

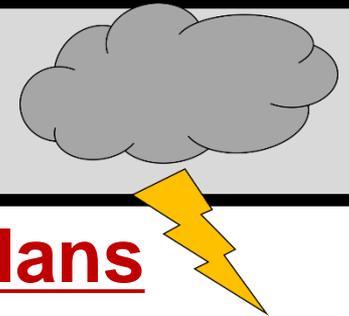
Lightning Safety Issues



4. Identify fully enclosed structures for seeking shelter from lightning. Build if necessary. Must be in areas where they can be quickly accessed if needed. Know time it will take to get there;
5. Establish specific criteria for suspending and resuming sport and recreational activities should be implemented (such as flash-to-bang count; “Half hour since thunder rolls, now it’s safe to go outdoors.”);
6. Have CPR and first aid responders available.



Lightning Safety Issues



- Formal Facility-Specific Evacuation Plans
- For large athletic facilities, develop specific written **evacuation** and **take shelter** plans;
- Practice evacuation and take shelter plans with organization's staff.
- Make sure plans are distributed to appropriate security and medical personnel and all who need the information.
- Review and update all plans as necessary.

NCAA Academic Standards

- **Should the NCAA establish academic rules and not just provide guidance?**
- **Should the NCAA establish best academic practices or recommendations?**
- **Should the NCAA expand its academic focus beyond the number of classes taken and metrics such as graduation rates and g.p.a.'s?**
- **Or should these type of academic issues remain institutional?**

Freedom of Speech & Expression

- **Impact of Social Media on Rules Compliance, Monitoring and Communication with S/A's**



- **Protection of First Amendment Rights**
- **Student-Athletes vs Student Body as a Whole**
- **S/A Activism (e.g., Political acts, Kneeling during National Anthem, etc.)**



NCAA Board of Governors

(formerly the NCAA Executive Committee)

1) **Five presidents** from the five highest-resource conferences (**ACC**, Big Ten, **Big 12**, **Pac-12** and **SEC**);

2) **Five presidents** from the remaining five Football Bowl Subdivision Conferences (**FBS** = American Athletic Conference, Conference-USA, Mid-American Conference, Mountain West Conference and Sun Belt Conference);



NCAA Board of Governors

(formerly the NCAA Executive Committee)

- 3) **Five presidents from the Football Championship Subdivision (FCS);**
- 4) **Five presidents from Division I schools without football;**
- 5) **The Chair of the Division I Student-Athlete Advisory Committee;**
- 6) **The Chair of the NCAA DI Council (the governance body charged with the day-to-day work of the division, intended to be an athletics director);**



NCAA Board of Governors

(formerly the NCAA Executive Committee)

7) **A Division I member of the Faculty Athletics Representatives Association (FARA) appointed by the FARA executive board;**

8) **A campus senior woman athletics representative (SWA) chosen by the executive committee of the National Association for Collegiate Woman Athletics Administrators (NACWAA).**



Presidents of the NCAA

- 1. Walter Byers 1951–1988:** Moved NCAA office from Chicago to his hometown, KC; expanded M's Basketball Tourn. from 8 to 16 teams; helped start the USBWA in 1956; negotiated initial NCAA TV contracts
- 2. Dick Schultz 1988–1993:** From Iowa, head baseball/basketball coach at Iowa, AD at Cornell and UVA. At NCAA, he traveled to many NCAA institutions and conferences. After NCAA served as USOC Exec. Director
- 3. Cedric Dempsey 1994–2002:** AD at Pacific, San Diego State, Houston and Arizona. At NCAA, restructured governance structure and national office staff, cracked down on gambling in college sports, emphasized fiscal responsibility, negotiated record championship TV contracts with ESPN and CBS.



Presidents of the NCAA

4. Dr. Myles Brand, 2003–2009: From NY, played Fr. lacrosse and basketball at RPI. Ph.D. in philosophy at Univ. of Rochester. Philosophy Dept. at Univ. of Pittsburgh, Dept. Chair at Univ. of Chicago, Dean at Univ. of Arizona, VP at Ohio State University, President at University of Oregon and Indiana University. First college president to head NCAA. Worked to improve academic and athletic experience of student-athletes.

5. Jim Isch (Interim), 2009–2010: NCAA Sr. VP and became NCAA interim president.

6. Mark Emmert, 2011– at least 2020: BA from Washington, PhD from Syracuse, faculty and admin. at UConn, Montana State and University of Colorado. Chancellor at LSU and President at University of Washington.



NCAA National Office Staff

- **Administration/Governance**
- **Championships**
- **Committee Support**
- **Enforcement**
- **Legislative Services**
- **Compliance/Academics/Eligibility Center**
- **National Letter of Intent**
- **Health, Drug Education & Testing and Safety**
- **NCAA Publications/NCAA.com/Media**
- **NCAA Hall of Champions**



- **Has created extensive rules restricting the nature of participation in intercollegiate athletics:**
 - **Limits on Recruiting;**
 - **Academic Eligibility Requirements;**
 - **Financial Aid Standards;**
 - **Agent Regulations;**
 - **Amateurism Rules, etc.**

Antitrust Laws

= Keeping Reigns on Capitalism to Protect Consumers



Goals of U.S. Antitrust Laws

1. Promote competition and efficiency in the marketplace;
2. Protect consumers from the growing monopoly power of big business;
3. Maintain a high level of competition among producers so consumers able to obtain quality products at reasonable prices.

President Benjamin Harrison worked with both parties to develop the **Sherman Antitrust Act**. “Every contract, combination in the form of **trust** or otherwise, or conspiracy in **restraint of trade** or commerce among the several states or foreign nations is declared to be **illegal**”

(15 U.S.C. § 1, 2013)

Key U.S. Antitrust Laws

- **Sherman Antitrust Act of 1890**
- **Clayton Antitrust Act of 1914 (established treble damages for antitrust violations)**
- **Sports Broadcasting Act of 1961**
- **Curt Flood Act of 1998**
- **Each state also has adopted antitrust laws that mirror federal antitrust laws.**

Sherman Antitrust Act

- To prove a violation under Sec. 1, P must show the following 3 elements:
 1. Existence of an agreement between the two separate parties;
 2. Action taken under the agreement is anticompetitive because it unreasonably restrains trade; and
 3. Action taken under the agreement involves interstate commerce (i.e., commerce affecting two or more states)

Violations of the Sherman Antitrust Act, Section 1

- Courts analyze the conduct under:
 - 1) The Per Se Rule, or
 - 2) the Rule of Reason approach.

Per se violations

= conduct that is **inherently anticompetitive** = automatically violates the Sherman Antitrust Act.

= conduct so destructive P does not have to show he/she was harmed by it (e.g., **price fixing, group boycotts**)

Sherman Antitrust Act, Section 1

Rule of Reason = conduct not inherently anticompetitive;
Court focuses on whether the challenged conduct
unreasonably restrains trade.

P must show:

1. Separate entities have an agreement;
2. The agreement negatively affects competition in a germane market;
3. The anticompetitive effects outweigh any procompetitive effects.

= A Balancing Test must be conducted by the court to weigh the anticompetitive effects of the action vs. the procompetitive effects of the action.

Sherman Antitrust Act, Violations of Section 1

D can defend its conduct by showing:

1. A **legitimate business reason** for the restraining conduct; and that
2. The methods used by the D are the **least restrictive means possible.**



- **NCAA's stated mission:**
 - To preserve the amateur nature of intercollegiate athletics as a part of the educational process in university;
 - To ensure that its member schools compete on a level playing field.
- Recognizes that the consumer welfare antitrust laws exist to promote competition within markets.
- But, joint-ventures of competitors working together have been ruled permissible if reasonable, produce a net pro-competitive effect and increase consumer choice.



- **NCAA has created extensive rules **restricting** the nature of participation in intercollegiate athletics:**
 - **Limits on recruiting;**
 - **Academic eligibility requirements;**
 - **Amateurism rules;**
 - **Agent regulations;**
 - **Financial aid standards & limits.**



- Rules that **affect commercial activity** have been found to **violate** the antitrust laws:
 - NCAA football television plan that set limits on number of games that could be televised was found to violate antitrust laws (*NCAA v. Board of Regents*, 1984);
 - Rule restricting coaches' salaries was found to violate antitrust laws (*Law v. NCAA*, 1998);



- NCAA rules that are not commercial in nature have been found to not violate the antitrust laws:
 1. NCAA eligibility rules and academic standards that NCAA argues are needed to preserve amateurism of NCAA athletics;
 2. NCAA no-draft, no-agent rules barring athletes who are drafted by a professional sport league or sign with an agent do not violate antitrust laws (*Banks v. NCAA*, 1992)

Antitrust Exemptions Exist

Exemptions can come from:

- 1) a finding by a **court**, or from
 - 2) **legislative action** (i.e., provisions of statutes or laws that exempt a party from antitrust review)
- Exemptions allow a party to avoid being found in violation of the antitrust laws as a result of its actions that otherwise could be found to be violations.

Pro Sports Restraints

- In pro sports, teams have long used different types of restraints to restrict player movement:
- **Free Agent Compensation Agreements; Option and Reserve Clauses; No Tampering Rules; Salary Caps; Player Drafts.**
- Players and Players Associations have long objected to these practices because they limit player salaries and bolster team profits.
- Pro sports team owners managers have viewed restraints as necessary to maintain economic viability and competition.

Antitrust Law Exemptions for Sports Organizations

- Pro sports teams and leagues have been provided some limited exemptions from the anti-trust laws so that some player restraints are allowed to continue.
- The exemptions been used by players, owners, universities, teams and leagues to change conditions causing them negative economic consequences.
- Negative economic consequences for sports = lower wages, inability to relocate teams, unfair competition, lower TV revenue.

Top Pro & College Coach Annual Salaries

Nick Saban — \$11.1M
Greg Popovich - \$11M
Jon Gruden - \$10M
Doc Rivers - \$10M
Tom Thibodeau - \$10M
Dabo Swinney — \$8.5M
Pete Carroll - \$8.5M
Sean Payton - \$8M
Bill Belichick - \$7.5M
Andy Reid - \$7.5M
Mike Krzyzewski - \$7.3M
Jim Harbaugh — \$7M
Jon Harbaugh - \$7M
Mike Tomlin - \$7M
Scott Brooks - \$7M
Stan Van Gundy - \$7M
John Calipari - \$6.8M
Urban Meyer — \$6.4M
Jason Garrett - \$6M
Mike McCarthy - \$6M
Jimbo Fisher — \$5.7M
David Shaw — \$5.7M
Tom Herman — \$5.5M
Scott Frost - \$5M
Bill O'Brien - \$5M
Jay Gruden - \$5M
Bill Self - \$4.8M

Currently, several NCAA D I college football and college men's basketball coaches, AD's and commissioners receive multi-million dollar salaries. They are paid comparable to what pro sports coaches and administrators receive. Why doesn't the NCAA seek a limited antitrust exemption from the U.S. Congress? The purpose would be to allow educational institutions to lower the compensation of coaches, AD's and comm's so additional funds would be available for the operating expenses/grants-in-aid for the S/A's. **NCAA DI m's & w's coaches, AD's and comm's would be paid based on a pre-established salary scale.** Major DI conference salary scales = higher. Smaller DI conference salary scales = correspondingly lower. NCAA DI coaches, AD's and comm's would be paid thousands, not millions. **Then millions more could go towards other institutional expenses.**

Gender Equity

- “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.”
- Prohibits discrimination against the underrepresented sex, which historically has been women.
- Title IX says nothing about athletics, but the courts quickly ruled that athletics is part of overall educational program.
- Title IX of the Educational Amendments of 1972

Gender Equity

- Regulation and Enforcement of Title IX = Dept. of Health, Ed & Welfare, which is now the **Office for Civil Rights (OCR)** within the **Department of Education**.
- In 1975, the Dept. passed Title IX regulations governing how the law affects athletics. Initially was focused on equal opportunity.
- Included college athletics, college clubs, intramural programs and high school athletics.
- Included equal equipment and supplies, scheduling of facilities for games and practices, locker rooms, etc.

Gender Equity

- **Part 1 – Athletic financial aid must be allocated equally to male and female student-athletes.**
- **Part 2 – Must be equality in other athletics program areas such as facilities, equipment, travel, scheduling, etc.**
- **Part 3 – The interests and abilities of both genders must be accommodated through the selection of sports the institution sponsors**

Gender Equity – 3 part test

1. **Safe Harbor Test** = Whether participation opportunities for male and female students are provided in nos. substantially proportionate to the school's undergraduate enrollment.
2. Whether an institution can show a history and continuing practice of program expansion responsive to the developing interests and abilities of the members of the underrepresented sex.
3. Whether an institution can demonstrate that the interests and abilities of the members of that underrepresented sex have been accommodated fully and effectively by the present program.

Gender Equity

- Institutions **must count football** in the gender equity analysis. Therefore, often sponsor more women's sports than men's sports to achieve overall gender equity.
- Is the primary purpose of the activity **athletic competition**? Is it an **intercollegiate** or **interscholastic activity**? Club and intramural sports, drill team, cheerleading, dance line, skate line, pep squads, etc. not included in athletic department gender equity analysis.
- OCR looking for team preparation, structure, administration and competition and **esp. whether the NCAA considers it a sport**. NCAA has added several new emerging women's sports (rowing, bowling, water polo, ice hockey).

Gender Equity

- Equity in funding for male and female sports teams is the responsibility of the athletic administration.
- If the men's sport booster club raises \$\$\$, and the women's sport doesn't have a booster club, then the athletic administration must provide \$\$\$ for the women's sport.
- Cannot just take away benefits from a men's team to try to create equity with a women's team.
- Cannot say you "didn't intend to discriminate" against the women when a new practice facility is built only for the men. Intent not relevant. The fact there are unequal facilities = discrimination against women = violation of Title IX.
- Cannot hide details about what is provided to male and female teams.

Break & Then Panel Discussion

**“The aim...of discussion
should not be victory,
but progress.”**

French writer, Joseph Jobert (c.1800)