

Educational Malpractice in a New Light?

Navigating the Legal Environment for Academic Advisors

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I. Introduction

The legal environment surrounding college and university academic advisors is complex and changeable. Indeed, during the 1990's college and university academic advisors to athletes found themselves under greater scrutiny because of publicized cases of academic fraud.¹ Several high profile athletic academic advising programs seemed to have been designed to maintain athletic eligibility rather than facilitate and support the academic progress of student athletes. Inappropriate activities included preparation of students' work by others and directing students to courses where they were assured of good grades. In response to widespread criticism and civil and criminal investigations, changes were made in the programs – including changes in advising and athletic personnel and program reorganization. One program reorganized so that the athletic academic advisors reported to academic administrators rather than athletic administrators. Hopefully reorganization and other changes have increased the integrity of the academic advice given to student athletes and the students' overall academic experience.

At the same time that several higher education institutions were in the press because of their academic advising practices, some litigation brought by former college and university athletes focused on the legal duty that colleges and universities owe to their student advisees. The full effect that this focus on academic advising for athletes

¹ See, "Scandal Forces Colleges to Reassess Roles of Academic Advisors for Athletes," and "U of Minnesota Ousts 4 Top Athletics Officials in Academic-Fraud Scandal" Welch Suggs, *The Chronicle of Higher Education*, December 3, 1999.

will have on academic advising in general remains to be seen. However, discernable shifts in the way that some courts have looked at the duty educational institutions owe to student athletes may portend changes in the theories of duty, causation and liability courts will apply to colleges and universities as measures of duty owed to all students who receive advising service from higher education institutions. The courts have discussed several potential causes of action that could apply to academic advisors, including educational malpractice, negligence and breach of contract. While courts are not embracing the concept of educational malpractice as a viable tort because of policy concerns, some courts have decided cases involving the issue of liability of academic advisors using analysis in which the court appears to be dissecting the concept of educational malpractice to determine whether it makes sense to continue to support the policy argument against adopting the theory of educational malpractice. Moreover, in notable instances, the courts have opened the door to allow for the application of other theories of duty and negligence in the advising relationship.

Any shift in the common law standard for duty to academic advisees and its consequences for advisors must also be considered in the context of other sources of scrutiny and risks of liability for advisors and their institutions. Among these sources of risk are: 1) governmental regulations; 2) increased calls for institutional accountability – using standards for performance that are considered best practices which are converted into measures for gauging acceptable performance; 3) the consumer movement that reached campuses years ago and manifests itself in greater expectations and requests from students for services that meet their perceived needs.

The purpose of this paper is threefold: 1) to discuss recent notable cases involving academic advisors and to highlight judicial discussions of educational malpractice and theories of duty owed to students; 2) to identify some specific obligations for advisors and their institutions; and 3) to identify practical approaches that academic advisors can use to minimize legal risks.

II. Educational Malpractice and Academic Advising in the Courts – A Sample of Significant Cases

The 1992 decision of the United States Court of Appeals for the 7th Circuit in *Ross v. Creighton University*² was based on facts that presented a very uncomplimentary view of the academic advising the university provided for a former athlete. When the former basketball player's eligibility ended, he left the University without a college degree and with language and reading skills at an elementary school level. The facts painted a picture of an athlete who served the University's athletic program, but was advised in a way that was unlikely to lead him to successful completion of his college education. Despite compelling facts, both the federal district court and the 7th Circuit Court of Appeals ruled that no cause of action existed for educational malpractice, one of the theories advanced by Ross. The court stated that Ross equated educational malpractice with "not providing him with a meaningful education and (not) preparing him for employment after college."³ The rationale for the court's decision about this potential cause of action was rooted in public policy that had been articulated by earlier decisions. The four policy reasons listed in *Ross*⁴ for rejecting educational malpractice as a cause of action were:

- Lack of a satisfactory standard of care by which to evaluate an educator or education program.
- Inherent inconsistencies exist about the cause and nature of damages for a student's academic failure. (For example, not only a faculty member's actions, but also a student's attitude, motivation, temperament and past experience are essential factors in learning.)
- Potential for a flood of litigation against educational institutions.
- The cause of action would threaten to embroil the courts in overseeing the day-to-day operations of educational institutions.

² 957 F.2d 410 (1992)

³ *Id.*, p. 412. Parentheses added.

⁴ *Id.*, pp. 414 and 415

Nevertheless, the 7th Circuit ruled that another theory of liability was a basis for reconsideration by the trial court, namely the facts presented a narrow contractual issue for adjudication by the trial court. The case was settled before the trial court considered the case on remand.

*Andre v. Pace University*⁵, decided in 1996, mirrored courts' prior reticence to recognize educational malpractice as a cause of action. This case did not involve an aggrieved athlete. Rather, former students sued the University and asserted that their academic advisor had misinformed them by advising them that they needed less preparation for a compute programming course than they discovered was needed after they enrolled in the course. The students also asserted that the advisor had been mistaken about the course content and that the University misrepresented the nature of the course in its course descriptions to prospective students. The trial court was sympathetic to their claim and found that the University was liable to the plaintiffs for: 1) breach of contract; 2) breach of fiduciary duty; 3) educational malpractice; and 4) violation of the New York state law that prohibits deceptive business practices. The New York state appeals court overturned the trial court decision favoring the plaintiffs. The appeals court reasoned that the trial court decision was a departure from public policy-based decisions by earlier court that refused to recognize educational malpractice, related torts and related contracts as causes of action because of the court's deference to the decision-making of educational institutions regarding academic matters. However, it is noteworthy that the trial court's *dicta* described students as consumers and found that a fiduciary duty existed on the part of a faculty advisor toward students. The trial court's reasoned opinion⁶ opened a door to consider circumstances in which educational malpractice could be another cause of action. This is important to remember in today's climate of accountability for higher education institutions, both public and private, combined with the development and adoption of best practice measures for academic procedures and activities.

⁵ 170 Misc. 2d 893; 655 N.Y.S.2d 777 (1996)

⁶ 161 Misc.2d 613; 618 N.Y.S.2d 975 (1994)

Eight years after *Ross* and four years after *Andre*, the March 2000 decision of *Hendricks v. Clemson University*⁷ involved another college athlete who alleged that the advice the University had given him had damaged him. In this case, a baseball player who transferred to Clemson alleged that improper academic advisement by the University athletic academic advisor rendered him ineligible to play baseball under NCAA regulations. The South Carolina Court of Appeals found sufficient facts in dispute for the trial court to determine whether Clemson undertook a duty to advise Hendricks concerning compliance with NCAA eligibility standards and whether the duty was fiduciary in nature. The court also found a genuine issue of material fact existed regarding the terms of Hendricks' contract with the University and whether the contract was breached.

The facts in the *Ross* case were no less compelling than the facts in *Hendricks* relative to the issues of fairness and duty to student athletes. In *Ross* the former athlete who had originally entered Creighton as an athletic recruit with very weak academic abilities asserted that for four years he has taken courses on the advice of the university's athletic department; that a secretary in the department read his assignments and prepared and typed his papers; the university failed to provide him with the quality of tutoring he had been promised; and, at the end of four years, the University placed him in a remedial program with elementary school students. He did not graduate from Creighton. Prior to filing suit against the University, he entered another university, but withdrew for lack of funds. He alleged great emotional anguish arising from the University's actions. In *Hendricks* a student who transferred to Clemson for the purpose of playing baseball while pursuing his undergraduate education, followed the advice of the athletic academic advisor to his detriment. The advisor gave incorrect advice that resulted in his being ineligible to play baseball at Clemson. Hendricks also incurred expense for Clemson's tuition, room, board and other expenses, during his ineligibility to play baseball because of the mistakes in advisement. The major difference between the rulings in *Ross* and *Hendricks*, eight years later, is that the *Ross* court did not allow for consideration of any elements of a lawsuit based upon the theory of educational malpractice or any theory of

⁷ 339 S.C. 552; 529 S.E.2d 293 (2000)

negligence. The court found no duty owed to the student that was breached through negligence on the part of the university or any counselor. However, the court in *Hendricks* recognized that the evidence in the case created a factual dispute whether Clemson had taken upon itself a duty to advise and whether the duty was breached. That difference was the fact that the advisor in *Hendricks* had acknowledged providing Hendricks with specific incorrect advice. Her mistake could be identified without making a subjective judgment about an educational service. The legal issues raised by Ross were based upon factual situations that were not as amenable to classification without having to make a judgment about the educational quality of the program. This difference distinguished the cases in such a way that the court in *Hendricks* decided to allow for a possible finding of negligence.

The plaintiff in the case of *Sain v. Cedar Rapids Community School District*⁸, decided in April 2001, based his complaint upon events that occurred while he was attending secondary school, rather than higher education. However, the plaintiff's basis for his lawsuit was the quality of the advice that he received in high school – specifically as it related to fulfilling the requirements for college NCAA sports eligibility. The plaintiff alleged that the negligent advising of his high school counselor, coupled with the school district's alleged negligence in not submitting a course he took to the NCAA for approval under athletic eligibility requirements, resulted in his being ruled ineligible in his freshman year and in his losing his college scholarship.

The court in the *Sain* case court identified three potential categories of educational malpractice.⁹ Nevertheless, the court refused to accept the theory of educational malpractice as a cause of action because of policy issues.¹⁰ Instead the court took the significant step of concluding that “(t)he tort of negligent misrepresentation is broad enough to include a duty for a high school guidance counselor to use reasonable care in

⁸ 626 N.W.2d 115 (IA 2001)

⁹ *Id.* The court but described three categories of the potential tort, namely: 1. basic academic instructions or misrepresentation of the level of academic performance, *Id* at 113; 2. placing or failing to place a student in a specific educational setting, *Id*; and 3. supervision of student performance, *Id*

¹⁰ In *Moore v. Vanderloo*, 386 N.W.2d, 108. 113-15 (Iowa 1986) the Supreme Court of Iowa refused to recognize a cause of action in Iowa for educational malpractice. .

providing specific information to a student when the guidance counselor has knowledge of the specific need for the information and provides the information to the student in the course of a counselor-student relationship, and a student reasonably relies upon the information under circumstances in which the counselor knows or should know that the student is relying upon the information.” The importance of the *Sain* case is that it recognized the tort of negligent misrepresentation as applying to high school counselors because the court found that high school counselors were in the profession of supplying information to others. Liability for negligent misrepresentation was “limited to harm suffered by a person for whose benefit and guidance the counselor intended to supply the information...and to loss suffered through reliance upon the information in a transaction the counselor intended the information to influence.”¹¹

The relationship between secondary school counselors and students advisees differs in some significant respects from the relationship between college and university advisors and college/university students. The secondary school relationship is built upon a degree of reliance on the high school counselor that a high school student would have. A college or university student is likely to be older, generally more independent and generally less reliant on the advice from an advisor. Nevertheless, there are circumstances in which a college or university student may rely heavily on the advice of his or her academic advisor. The student athlete/advisor relationship is one in which the level of reliance that the student has may be very great because the requirements for compliance with academic eligibility requirements are complex and fraught with the risk of error that can end a promising academic and athletic career. Furthermore, the insular culture surrounding college athletes can create a high level of reliance on advice given by an advisor appointed by the institution to counsel the student academically. Another situation in which college students may rely heavily on the advice they receive from their academic advisors is that of preparation for professional licensure. Again, the requirements may be complex and obscure. In such cases, a mistake can have a

¹¹¹¹ *Id.*, p. 127. See *Knutson v. Bitterroot Int’l Sys., Inc.*, 2000 MT 203, 5 P 3d 554, 560, 300 Mont 511 (Mont.)

devastating effect on a student's professional future and a student may rely heavily on the advice he or she receives from an academic advisors.

The trial court *dicta* in *Andre*, the *Hendricks*' court's recognition that negligence could be found on the part of the faculty advisor and the university, and recognition in *Sain* of the tort of negligent misrepresentation as a potential source of liability for an academic advisor and the educational institution are all chinks in the wall of defense around educational institutions that has guided courts through the years. It will be interesting to see what theories are applied (and not applied) as the courts look at new compelling facts, consider whether any duty to students has been breached and whether the public policy arguments against educational malpractice continue to be persuasive—especially as educational delivery methods, expectations, measures of success and best practices in higher education change.

III. Risk Issues for Academic Advisors

While we are waiting to see how the courts rule in future cases involving allegations of negligence by academic advisors, there are several predictable areas of risk for advisors and their institutions. Risks are associated with several recurring questions that are important to students and that they raise:

- What courses do I need to take to fulfill the requirements for my major?
- What are my requirements for graduation?
- What courses must I take in order to obtain the license to work in my chosen field?
- What courses must I take to fulfill eligibility requirements to play my sport?

In order to answer these questions in a manner that minimizes risk, each academic advisor should plan ahead. Planning should encompass the following: 1) become as familiar as possible with requirements for majors, graduation, licensure and athletic eligibility; 2) know to whom their advisees should be referred for accurate answers to

questions that advisor cannot answer; 3) tell students the nature of questions that the students must be prepared to answer for themselves; and 4) tell students that there are some questions for which there are not ready answers, providing answers when possible. Each higher education institution should anticipate these and other questions that students are likely to ask about their academic life and future and prepare to direct students to information that gives them useful answers. Higher education institutions should train academic advisors about resources for addressing students' questions and institutional policies and procedures related to students' questions. Furthermore, institutions should inform students about their responsibilities for finding the answers to questions related to their academic advancement.

Higher education institutions should also evaluate all of their written documents available to students and consider the documents' impacts on the academic advising of students. During the training process for academic advisors, higher education institutions should provide an overview of the statutes and regulations (local, state and federal) affecting the academic advising relationship that the higher education institution has with students (e.g. FERPA, Americans with Disabilities Act). See Exhibit 1 for an example of an outline of an overview of issues with which advisors should be familiar.

The process that a higher education institution uses to familiarize its academic advisors – who are often times faculty members—with the legal vulnerability in their relationship with student advisees should be an interactive process. That is, whether the information is distributed on line, in writing or in person, there should be a component of the training process that gives advisors an opportunity to work through some thorny issues before they face them with their advisees. This can be accomplished through the use of workshops with role playing or work groups that give each advisor an opportunity to learn what to anticipate and to work through solutions. The two hypotheticals attached as Exhibits 2 and 3 to this paper are examples of fact patterns that advisor can analyze and work through either through role playing or small work groups. The hypotheticals are designed to encourage advisors to identify the nature of the advising relationship with

students and define the expected duty owed to the student—as well as attendant risks of liability and potential resolutions for the problems presented in the hypotheticals.

IV. Conclusion

The tort theory of educational malpractice has not been embraced by the courts. However, some plaintiffs continue to assert this theory of liability for alleged mistakes made by academic advisors. During the late 1990's some courts have accepted theories of liability for education institutions that are broader than prior theories of liability, yet less sweeping than education malpractice. However, forces are in motion, such as requirements for institutional accountability and measures for academic success, which may overcome the public policy arguments against the theory of educational malpractice.

Exhibit 1

Outline for Workshop for Academic Advisors

The Legal Environment for Academic Advisors¹²

By Sheila Trice Bell, Esq.

I. Introduction

An academic advisor's legal responsibilities arise from the relationship that a college or university creates with students and the external standards set by statutes, regulations and court decisions. The courts recognize the individual rights of students enrolled at private and public higher educational institutions. These individual rights arise from several theories of institutional responsibilities for students, such as the creation of mutual promises that form a contract (either explicit or implicit) between the institution and its students or the duty to protect the student from certain foreseeable injuries. The duties created by statutes and regulations comprise an ever-expanding range of responsibilities for private and public institutions, their faculty and administrators. This outline focuses on the legal environment for academic advisors and can be customized to address your institution's needs.

II. Academic Advisors at University X (review institutional documents and practices and customize this section—examples follow)

- A. Faculty
- B. Deans
- C. Pre-professional advisor
- D. Athletic academic advisors

III. The University's Description of Academic Advisors – internal documents that describe the advising relationship

Courts in the United States look to the catalogues, bulletins, circulars and regulations of colleges and universities to determine the contractual relationship between students and educational institutions. Listed below are of University X's documents that are likely to describe the relationships between the University and academic advisors and between the advisors and students.

- A. Student Handbook

¹² © 2001 Bell & Trice Enterprises, Inc. This document provides information, but does not constitute legal advice. A lawyer should be consulted regarding the specific facts and circumstances associated with any legal question.

- B. Faculty Handbook
- C. College or university catalog
- D. Brochures given to applicants and/or to new students
- E. Other documents
 1. The University produces several documents because of statutory or regulatory requirements and some have implications for academic advisors, e.g. FERPA statement.
 2. Review department and college documents, especially those that are presented to students, for any references to advising responsibilities.

IV. External requirements -- Federal Laws

The Student Handbook probably refers to federal requirements either directly or indirectly. Academic advisors should be familiar with the existence of several federal requirements, including the following:

- A. Family Educational Rights and Privacy (FERPA), also known as the Buckley Amendment.
 1. Include information referring to specific college or university documents.
 2. Three-part focus of the Act
 - a. Privacy of education records
 - b. Student's right to access his/her education records
 - c. Student's right to correct errors in his/her records.
 3. The rights under the Act are the student's rights, irrespective of age. Nevertheless, under certain circumstances a university may grant a parent access to records considered private under the Act.
 4. Academic advisor's notes and the "sole possession" regulation.
- B. The Rehabilitation Act of 1973, Section 504 is a precursor to the Americans with Disabilities Act. Section 504 continues in force and requires that all federally funded programs be readily accessible to individuals with disabilities, despite the possible need for major structural alternations to university facilities. Section 504 is likely to be of less concern to advisors than the ADA, below.

C. The American with Disabilities Act of 1990 (ADA). Prohibits discrimination on the basis of disability in access to private colleges and universities.

1. Who is considered disabled under that ADA?

The law defines an “individual with a disability” as someone with a physical or mental impairment that substantially limits one or more “major life activity.” Therefore, a student with a mental or physical impairment that interferes with walking, seeing hearing, speaking, breathing, taking care of oneself and learning may be a “qualified student with a disability” under the act.

2. Which students are eligible for reasonable accommodation for academic programs?

A “qualified student with a disability,” that is, a student who, with reasonable modifications or accommodations to policies, procedures, rules or the provision of auxiliary aids or services meets the basic eligibility requirements to receive services or to participate in university programs or activities.

3. What responsibility does an academic advisor have to a qualified student with a disability?

If a qualified student with a disability is assigned to a faculty member for academic advising, the faculty advisor must reasonably accommodate the student so that he or she receives the educational guidance that is available to all students

4. What are the disabled student’s responsibilities relative to the university’s accommodation to the disabled student’s needs?

Check your institutional documents to be certain about any requirements that may be in the student handbook. Also, state which administrator has responsibility for making decisions about student ADA matters at your college or university.

5. Remember that a student’s disability records are confidential. They are not generally available to others in the university community without the student’s permission.

D. Title VI of the Civil Rights Act of 1964.

E. Title IX of the Education Amendments of 1972.

- F. Age Discrimination Act of 1975.

V. External requirements – State and Local Laws

- A. State illegal discrimination laws – check with the University’s legal counsel regarding state laws that impose sanctions for illegal discrimination on the basis of race, sex, gender, national origin or sexual orientation.
- B. State common law – found in court decisions regarding duties that the courts recognize as owed by colleges and universities to students and vice versa. An example of a duty that the courts would analyze and interpret is the contractual obligation between a higher education institution and its students. Likewise, another duty that the court may analyze is the duty to provide a safe place to attend classes. Public institutions have some levels of immunity from liability. However, this is an issue that requires analysis by legal counsel.
- C. State standards for institutional accountability – especially applicable to public institutions that are dependent on state assistance. During the 1990’s state assistance became more closely tied to measures for successful completion of goals set by the state. For example, consider this in the context of license testing pass rates for institutions of higher education.

VI. University Resources for Academic Advisors

List the college or university faculty, administrators and staff who provide support for academic advisors in the form of information, referrals or other forms of assistance. Examples follow:

- A. Dean of Students
- B. Director of Academic Advising, if such a position exists
- C. Director of Counseling and Health Services
- D. The Registrar
- E. Director of Public Safety and Security
- F. List others, as applicable and appropriate.

VII. Other Resources

Several websites offer useful information regarding the legal responsibilities of higher education institution. Determine which sites may assist your advisors.

VIII. Conclusion

Sound academic advising is an essential service to college students. While courts and governmental agencies generally defer to higher education institutions regarding decision that are academic in nature, the academic advisor must be aware of legal requirements that were created to assure fairness in the manner that educational institutions deliver their educational services to students.

Exhibit 2

Hypothetical 1 Timing is Everything

We meet Susan Diligent in the fall as a first semester senior majoring in Biological Sciences at Evergreen University. She plans to teach science at the high school level and is completing the courses for her major as well as for teacher certification and licensure in her home state, where Evergreen is located. Susan's academic advisor is a tenured member of the Biological Sciences department, Professor Edmund Morph. In the past he served as department chair and is very familiar with the requirement for successful completion of her major. For several years he has also advised biology majors on the requirements for teacher certification/licensure.

Dr. Morph has advised Susan concerning the courses required for her major and to qualify for a license in the state. He has also advised her that she must submit her application for state certification and licensure to him by March 1 so that he can complete his portion of the form and give it to Evergreen University's Department of Education by March 15. He tells her that the University's Education Department will, in turn, submit the application to the State in a timely fashion.

At the time Dr. Morph advises Susan about the State requirements, the application is due in the State Department of Education offices no later than April 1. Timely submission of the application is required in order for Susan to sit for her teaching licensure examination in the spring of this year. The University catalog also gives the same deadline of April 1 and states that students must give their completed forms to their academic advisors no later than March 1. Exam results are released in the summer so that primary and secondary schools will know whether applicants for teaching positions will be eligible to be licensed prior to the commencement of the school year in the fall. A license is a requirement to teach in all public schools. Susan has been offered employment by her hometown public school board, conditional upon her obtaining a teaching license before the school year starts in September.

In January the State mails notice of new criteria for teaching certification and licensure to all colleges and universities, including Evergreen University. Moreover, the date for filing applications has changed to March 20. Those applicants whose applications arrive in the offices of the State Department of Education after March 20 must fulfill new, different, more stringent criteria for licensure. The newer criteria require more education courses than Susan is scheduled to complete during her last semester at Evergreen.

The University sends notices to all academic advisors, including Dr Morph, of the State changes in criteria. Unfortunately, Dr. Morph does not read the notice and Susan is not notified of the change.

Susan completes the student portion of her application and gives it to Dr. Morph on February 28--before the deadline he told her for her part of the application. He completes his portion of the form and gives it to the University Department of Education on March 20. The Department of Education submits the final form to the state on March 23—too late to meet the less stringent licensure requirements.

On April 15 Susan receives notification from the State that her application was received on March 23 and that she can sit for the examination in the fall, rather than the spring as she had anticipated. Furthermore, she learns that she must fulfill course requirements that she is not scheduled to fulfill before her graduation day in June. She is shocked by the notice. When she contacts the State office to tell them that she submitted her application in a timely manner with her university, she is told that the deadline is final and that the State does not grant waivers of the requirement. That is, she may NOT take the teaching examination until the fall. She contacts her hometown school and is told that she must take and pass the spring exam or they will be required to withdraw the offer of employment for a position as a teacher starting in September.

Susan tells Dr. Morph of her dilemma and he is also shocked. Despite his efforts and the efforts of the Evergreen University Department of Education, she must wait until the fall to take the teacher certification and licensure examination. The earliest that she can work for her hometown school district is in January when the second semester begins.

After graduation, Susan works at a local small business. During the summer, she incurs the expense of additional courses that meet the new certification and licensure requirements. She does so while living on a wage that is less than she would have made as a teacher.

To make matters worse, a state economic crisis affects Susan's hometown school district. In the fall the school board decides to institute a hiring freeze on all teaching positions. Susan passes the required licensure examination, but there are no longer any teaching vacancies in her school district.

Susan is crestfallen because she now has no foreseeable prospects for achieving her dream of working as a teacher in her hometown. She has no other prospects for teaching. Furthermore, she is incurring more and more debt arising from taking the education courses that she would not have had to take if her application had been submitted with the State in a timely manner.

She seeks the advice of her hometown mentor who retired from a successful career as a professor and administrator at another university. She trusted and relied upon Dr. Morph and the University to advise her correctly about the requirements for state licensure. She believes that the University and her advisor should: 1) reimburse her for the cost of the additional courses that she has been required to take to fulfill the requirements for licensure; 2) that they should bear responsibility for the difference in her

current salary from the salary that she would have had as a teacher; and 3) compensate her for the emotional anguish that she has experienced.

What should happen next?

- A. Susan's perspective
 - Who owes what duty to her relative to academic advising?
 - Was the duty breached?
 - If not, what should she do?
 - Does she owe any duty to someone relative to the facts stated above?
 - If duty was breached, what recourse does she have and against whom?

- B. Dr. Morph's perspective
 - What duty, if any, does he have to Susan as her academic advisor?
 - Was the duty breached?
 - If not, what should he do?

- C. Evergreen University's perspective
 - What duty, if any, does the University have toward Susan relative to the issue of academic advising?
 - What action should the University take, if any, relative to Susan's dilemma?

Exhibit 3

Hypothetical 2

The Scholar Athlete

Doug Quantum is a freshman who was unusually talented in science in high school and who wants to be a software engineer. He is also a very talented basketball player. Many colleges recruited him and he accepted the offer from Perspective University. At Perspective, his academic advisor through the athletic department is Learned Green who was selected out of the pool of academic advisors for athletes. The academic advising program is a joint program administered by advisors who report to the Vice President of Academic Affairs and the Athletic Director. Dr. Green is a tenured Mathematics professor who has advised over a dozen athletes in the past. He is an enthusiastic supporter of the athletic program.

Juggling engineering courses and varsity basketball practices and games is a big challenge for Doug. He asks Dr. Green to advise him on the courses to take to fulfill the NCAA requirements and the requirements for a degree in software engineering. He is in a five year program of study and has told Dr. Green that he wants to be able to play basketball for at least three years—with his senior year being one of those years. Dr. Green advises Doug on the courses to take and Doug signs up for those courses. He is a good player, but he is not playing as well as he had hoped, and the coach has told him that his playing needs to improve if he wants to stay on the varsity team. Furthermore, his grades begin to slide. His first semester grades are high enough to meet NCAA eligibility, but are not good enough to complete his rigorous academic program in the five-year timeframe that Doug has planned.

Doug asks his advisor for a lighter academic load. Dr. Green complies with his request by suggesting some courses that are not as rigorous. However, in the second week of 2nd Semester Doug discovers that the schedule recommended by Dr. Green (which is also the schedule for which he is enrolled) does not fulfill NCAA requirements. He is forbidden to play for the remainder of the academic year—including the basketball tournament. Doug is crestfallen. His disappointment is substantially heightened when the basketball team goes to the Sweet 16—which he misses because he has not fulfilled NCAA requirements. Eventually he graduates with honors from Perspective University in six years, rather than the five years that he had planned. Doug becomes eligible later in his time at Perspective U, and plays on the varsity team again. However, the team does not place in the Sweet 16 after he misses the tournament during his freshman year. All of the team members who were on the Sweet 16 team received offers to play on professional teams. Doug had planned to balance his software engineering expertise with a career in professional basketball. But he has not received any offers to play on any professional basketball teams. That path appears closed to him. The crash in the tech company market has had an impact on his job prospects as a software engineer. He has an offer in a related field, but not doing what he expected his education would make it possible for him to do.

Did Dr. Green breach his duty as an academic advisor to Doug Quantum?

If so, does Doug have a legitimate legal cause of action against Dr. Green or the University?

If so, what damage was done was done to him by Dr. Green or the University?

What, if any, relief in the form of monetary damages should Doug collect from the University or from Dr. Green?