

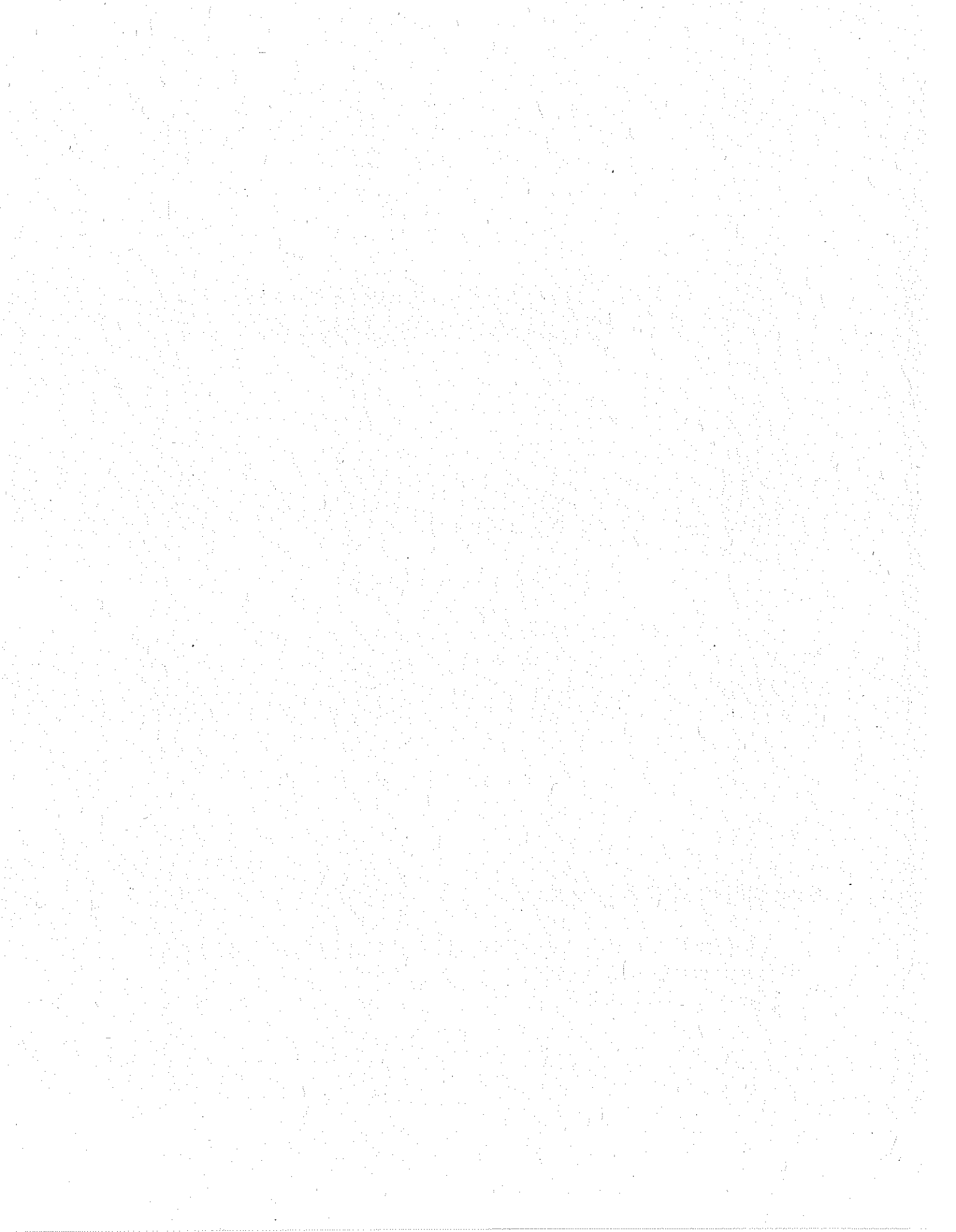
**INSTITUTIONAL LIABILITY FOR  
OVERSEAS STUDY PROGRAMS**

**Presenter:**

**SANDRA McMULLAN  
General Counsel  
North Harris Montgomery Community College  
Houston, Texas**

**Stetson University College of Law:**

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# INSTITUTIONAL LIABILITY FOR OVERSEAS STUDIES PROGRAMS

Sandra McMullan

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## Introduction

Nationally, more and more U.S. college students are participating in studies programs overseas. For many reasons, including the less litigious cultures in many overseas countries, these overseas studies programs have developed quietly, without the challenges of liabilities and, often, without the careful scrutiny of legal counsel.

Despite the fact that only two cases have been reported involving overseas studies programs,<sup>1</sup> newspaper and anecdotal accounts from administrators confirm that the all too familiar serious incidents -- death or serious injuries, serious medical conditions and illnesses, and kidnapping and criminal experiences which pose significant legal risks -- do occur in overseas program. In fact, the situations, and in many cases, the legal issues are identical to those that arise on U.S. soil. Unfortunately, too often the available preventative steps have not been incorporated into program practices and solutions to crises are left to be developed as the crisis unravels.

This outline identifies four familiar legal issues with particular significance for international studies programs and identifies issues that need to be addressed:

- Negligence
- Contract
- Waiver and Release Forms
- Civil Rights and Other Federal Requirements

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<sup>1</sup>Furrh v. Board of Regents of the University of Arizona, 676 P.2d 1141 (1983); and Sipple v. Board of Governors of North Carolina, 318 SE2d 256 (1984).

### What Is Negligence?

Put simply, negligence is "conduct which falls below the standard established by law for the protection of others against unreasonably great risk of harm."<sup>2</sup>

In a negligence action, the plaintiff must typically prove:

- a. that he or she suffered a personal or economic harm;
- b. that the defendant had a duty to avoid the injury/harm;
- c. that the defendant did not meet this duty; and
- d. the breach of this duty caused the plaintiff injury.

### What Duties Are Owed to Students?

While allegations of negligence are the most common legal complaints brought against colleges and universities, the question of the legal duty owed by a college to student is often the pivotal legal issue affecting liability. Generally, one has no duty to control the conduct of another unless any agency or special relationship arises which imposes a duty to control the third party's conduct, or a special relationship exists giving rise to a right to protection.<sup>3</sup> Yet, courts have struggled and disagreed over the extent of and legal rationale of legal responsibility assumed by educational institutions. When analyzed in the context of an overseas program, the potential exists for an expansion of the both the duties owed and the ultimate tort liability exposure.

1. **In loco Parentis.** For many years, courts asserted that universities "stood in shoes of the parents", or the *in loco parentis* doctrine. Although this concept continues to guide the courts in determining the duties of elementary and secondary schools, it fell out of favor with respect to university students above the age of majority. Today, it is much more common to read court's opining that "colleges are not guarantors of student safety:"

*The campus revolutions of the late sixties and early seventies were a direct attack by the students on the more rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights ... Regulations by the college of student life on and off campus has become limited. Adult students now demand and receive expanded rights of privacy in their college life including, for example, liberal, if not unlimited, visiting hours. College administrators now no*

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<sup>2</sup>Restatement Second of Torts, Section 315.

<sup>3</sup>See Restatement Second of Torts Sec. 315, 319, and 320.

*longer control the broad arena of general morals. ... Thus, for the purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years.* <sup>4</sup>

**2. Some Potential Legal Duties for Colleges/Universities.**

- a. Duties arising from responsibility for the property. Certain duties may be held to accompany the ownership (including the rental) of property, including the duty to protect, duty to provide adequate security, and duty to warn students of dangers. <sup>5</sup> Institutions which directly lease or purchase educational facilities or student housing for overseas programs should carefully review the accompanying liability with counsel.
- b. Duties assumed voluntarily. The Supreme Court of Delaware found the University of Delaware liable for the off-campus hazing injuries of a student, based in part upon the University's failure to effectively enforce its anti-hazing policy.<sup>6</sup> One recurring concern for overseas program administrators is the level of responsibility to assume for advising and updating students and/or their families on Department of State Travel Advisories and when and how to leave a region involved in civil unrest or war. Duties assumed, whether through contracts, by policy or even by the goodwill of the administrator or resident faculty should be scrutinized to determine whether they create intended (and enforceable) legal duties for the institutions. Some areas that can be problematic: Making travel arrangements for participants; selecting and assigning housing; providing social and recreational activities; or arranging for personal medical care.
- c. Duties imposed by law. The courts continue to struggle to determine

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<sup>4</sup>Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), cert. denied 446 U.S. 909 (1980) cited in Nero v. Kansas State University, 861 P.2d 768 (1993).

<sup>5</sup> Walker v. Daniels, 407 S.E.2d 70 (Ga. App. 1991); Peterson v. San Francisco Community College District, 685 P.2d 1193 (1984)(duty to warn student); Burch v. University of Kansas, 756 P.2d 431 (Kan. 1988)(duty to keep premises safe); Vangeli v. Schneider, 598 N.Y.S. 837 (1993)(adequate security). This duty applies even when college or university leases, rather than owns premises.

<sup>6</sup> Furek v. University of Delaware, 594 A.2d 506 (De. 1991).

whether laws applicable to colleges create special duties with respect to specific individuals. Some states impose a legal duty upon those who serve alcoholic beverages (social host statutes).<sup>7</sup> By contrast, however, most courts have been unwilling to extend liability for student injuries caused by illegal drinking and drug use despite the emphasis of new federal and state laws to compel drug and alcohol abuse prevention on campuses.<sup>8</sup>

2. Special Relationships. Some courts have simply assumed that colleges and their students have a "special relationship", with resulting duties owed by the college to student, although more courts have insisted that a student complainant factually establish both the nature and extent of any alleged special relationship (and resulting duty).<sup>9</sup> The special relationship analysis has been suggested to have special application in the context of overseas programs given the relative dependence of an American student overseas on the sponsoring institution and the arguably broader range of responsibilities by U.S. institutions for their overseas students that would not exist in the US.<sup>10</sup>
3. High Risk Activities. Some courts have analyzed the duty owed by colleges to U.S. students in terms of a heightened duty of care for high risk or known dangerous activities.<sup>11</sup> Some overseas program activities that may fall into

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<sup>7</sup> "Social Host Liability for the Negligent Acts of Intoxicated Guests", 70 *Cornell L. Rev.* 1058 (1985).

<sup>8</sup> The liabilities associated with student drinking has received much attention by the courts and by legal analysts. See "Anno., "Tort Liability of College or University for Injury Suffered by Student as a Result of Own or Fellow Student's Intoxication", 62 A.L.R.4th 81 (1988); "Developing Effective and Legally Sound Alcohol Policies", American Council on Education (1994). For copies call (202) 939-9355. See also, Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979)(a student injured in an car driven by another student who became intoxicated at a sophomore class picnic was not able to recover against the university); Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal. Ct. App. 1981)(student injured by an intoxicated student driver who had been drinking in dormitory room not allowed to recover damages against university).

<sup>9</sup>Cf. Mullins v. Pine Manor College, 389 Mass. 47 with University of Denver v. Whitlock, 744 F.2d 54.

<sup>10</sup> See, "Stranger in a Strange Land", 18 *J. of Coll.&Univ. Law* 299 (1991).

<sup>11</sup>See, Furek v. University of Delaware, 594 A.2d 506 (where the court said the institution had a duty to protect students from foreseeable dangerous conditions) and Pitre v. Louisiana Tech University, 596 So.2d 1324 (La. App. 2d Cir. 1991)(institution had a heightened responsibility for students who were unfamiliar with sledding and snow who were sledding into a parking lot in

that arena: the decision to send students to an area with civil unrest or that is listed on the State Department's Travel Advisory, exposure of students to sports or activities that are unfamiliar and involve potentials for serious injury.

### **Agency**

An institution can be vicariously liable under the laws of agency for the negligence of persons who are conducting its business for it.

1. An institution may be held vicariously liable for the torts of its employees or agents. Commonly, institutional liability extends only to the conduct that is within the course of employment. An institution may be liable for the harm caused by the negligence of an employee who is acting in violation of university policy if the action "was designed to promote the interest and welfare of the employer" instead of personal self-interest.<sup>12</sup>
2. An institution may also be held to be liable for the tortious conduct of persons who are not employees but who act as if they are under the direction/supervision of the university. For example, faculty or administrators of the overseas or host institution may act as if they are the agent of the institution even though they do not have the authority they seem to carry out. The practical difficulties created by distances and travel make this a challenge to monitor and control effectively.

### **Immunity for Torts**

Public institutions of higher education may be immune from actions sounding in tort. This issue is uniquely a matter of state law, and is dependent upon the statutory schemes of the state in which the institution claiming the liability resides.

For example, in the state of Texas, public community colleges are immune by statute from all tort exposure except that arising from the use of a motor vehicle.<sup>13</sup> Other states, including the state of Florida, grant immunity for those activities which are "discretionary" and deny immunity for those activities in which case the action is government actor is "ministerial". Particularly where two or more institutions are cooperating in the conduct of the program and have differing types of involvement and legal standards governing their immunities, such issues must be addressed and reflected intelligently in the written agreements between the institutions.

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Louisiana).

<sup>12</sup> See, Emoakemeh v. Southern University, 654 So.2d 474 (1995).

<sup>13</sup> Texas Tort Claims Act, Tex. Civ. Prac. & Rem. Code, Sec. 101.021, et. seq.

## Suggestions

1. Identify who could be argued to be agents of the institution. Set up monitoring systems to ensure that expectations are being met.
2. List and identify the negligence risk accompanying all overseas programs activities. Identify a full range of loss prevention alternatives, ranging from abandoning that activity, contracting it (and the responsibility for negligence) to another party better able to manage it, and insuring it.
4. Once you make up your plans, create tickler systems and accountability lines to monitor success and failure, review complaints and reconsider the relationships.
5. Constantly review your written materials, and make sure that all commitments are ones your institution is able to meet..
6. Make a plan for emergency situations that can arise overseas. Simulate a need to carry it out. Be certain to identify how the university will stay apprised of security and health risks in the countries in which programs are run.

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## Contracts

Some of the most expensive liabilities raised in overseas programs are based in contract, rather than the tort of negligence. Contracts are also important tools to clarify and even shift responsibility for negligence.

1. In essence the law of contracts permits a party to a contract to seek the assistance of the court in either carrying out the terms of the parties agreement or in remedying a breach of material contract terms with monetary damages.
2. Consortial and sponsor programs of overseas studies involve many types of legally enforceable agreements:

### State-side

- Consortial groups
- Students (tuition \$, waiver/releases, conduct, financial resources to permit emergency return home, medical insurance)
- Faculty (travelling with groups, teaching, administering the program)
- Travel agents, airlines, insurers for the college

### Overseas

- The overseas university (classes, costs, administration, reporting of grades)
- Service providers (travel within country, housing, medical care, food)

3. Not all enforceable agreements are called a contract or reviewed by a lawyer. Some less formal agreements and writings can be interpreted to make enforceable agreements.

- Advertisements, brochures and booklets describing programs;



- Letters exchanged between a travel agency and a university concerning exclusive agency for making airlines travel arrangements for students;
  - A verbal agreement with a faculty member about use of his or her personal auto for trips within the country;
  - The student handbook's sexual harassment and sexual assault policy.
4. Insurance contracts are particularly important to review with broker, risk manager and counsel to ensure that coverage is available for the institution's actual exposures. For example:
- Liability insurance policies may exclude claims brought outside the U.S. borders or claims arising from acts of war or rebellion;
  - Student medical insurance policies may contain low evacuation or repatriation expenses;
  - Workers compensation coverage for U.S. employees may be limited or nonexistent for work related injuries occurring overseas.

**Contract Management Suggestions:**

1. Have one person in charge all agreements. Ask counsel to review, in particular, indemnification, choice of laws and subrogation principles in the agreements.
2. Review all materials advertising the program and all materials sent to students and parents and identify all commitments made. Monitor whether commitments made are in fact being carried out.
3. Investigate all service providers and seek feedback from students and faculty, in particular those involving housing, transportation and educational quality.
4. Put all complaints about services in writing and follow-up.
5. Do not tolerate unsafe actions.

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## **Waivers and Releases**

### **Exculpatory Agreements**

Exculpatory agreements, also called waivers and releases, are established to be a contract relieving a party from liability for its own negligence.

1. The law of waivers and releases is uniquely a state court issue, and is one that varies greatly from state to state. For example, some state courts preclude the enforcement of liability releases as void against public policy.<sup>14</sup> Do not use this outline to prepare a waiver and release in your state; you

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<sup>14</sup> Tunkl v. Regents of California, 383 P.2d 441 (1963); Fedor v. Mauwehu Council, Boy Scouts of America, 143 A.2d 466 (1958)

need legal counsel who knows the law of your state.

2. Liability releases are usually effective for activities which are inherently risky, dangerous or recreational in nature.<sup>15</sup>
3. Under contract law principles in most states, a minor who has signed an exculpatory agreement may ratify or void the agreement upon reaching the age of majority. Also, a parent or guardian can not release or waive the potential claims of a minor.<sup>16</sup>
3. A waiver/release cannot apply to liability for an intentional tort.
4. Language must be clear, conspicuous and unambiguous. Any ambiguity in the agreement will be construed against the drafter of the agreement.
5. Generally the agreement will not be upheld if the risk which caused the injury is not one which ordinarily accompanies the activity.

### **Agreements to Participate**

Even situations in which an exculpatory agreement will not be enforceable (a minor student, state precedent finding such agreements to violate public policy), it is still useful to require all participants to complete and sign agreements to participate.

1. Many states permit a defense called "assumption of the risk" in acts of negligence. In such a case, often applicable in sports activities, the key issue what risk, if any, was assumed by the participant.<sup>17</sup> An agreement to participate which identifies with specificity the risks of participation can be used as proof that the plaintiff understood the risks.
2. To be useful, an agreement to participate should contain similar features as above:
  - a. The risks must be specified with particularity and in clear and understandable and clear prose.
  - b. To receive its full value in a case involving a minor, the parents should sign (again, the purpose is to indicate that they understood the

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<sup>15</sup> Poskozim V. Monnaccept, 475 N.W.2d 1042 (1985)(sky-diving class); Blide v. Rainier Mountaineering Inc., 636 P.2d 493 (1981)(mountain climbing).

<sup>16</sup> See, e.g., Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. Alp. 1989); But see Home v. San Diego Unified Schl. Dist. 224 Cal. Ap. 3d 1559 (1990).

<sup>17</sup> Regents of the University of California v. Roettgen, 96 C.D.O.S. 276 (1996)(the risk of falling was said to be an inherent risk in rock climbing and one assumed by participant).

risks and agreed to their child's participation.)

3. Do not write this with only a "legal" perspective; use it as an educational tool and highlight it in the package of information. Handled that way, it will educate the students, his or her family and the institution of the actual risks.

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## **Familiar Federal Statutory Responsibilities Overseas**

### **Civil Rights Laws**

Virtually all institutions of higher education are familiar with the federal civil rights requirements that prohibit discrimination on the basis of race, color, ethnicity, sex, or disability in all programs and activities of the institution. Some counsel have advised that these civil rights obligations do not extend to students studying overseas, analogizing to caselaw and interpretations of Title VII. Although the U.S. Office of Civil Rights has not issued formal guidance to educational programs on application of any of the civil rights laws to overseas programs, the staff attorneys confirm that they have processed student complaints about the failure of U.S. institutions to investigate and respond to civil rights complaints arising overseas.

College have reported particular difficulties handling complaints of sexual harassment<sup>18</sup> and requests for reasonable accommodations by persons with some disabilities<sup>19</sup> in overseas programs.

### **Suggestions to Handle Civil Rights Complaints**

1. Request an opinion of counsel as to the applicability of the ADA, Title IX and other civil rights laws to the overseas program.
2. If applicable to the overseas program, make sure that the policies and the procedures are included in student materials, are drafted to fit the situations that are likely to occur (i.e., timelines and locations for making complaints) and are familiar to the institutional contact people who will be dealing with students.
3. Do not adopt a laissez-faire attitude toward any complaints; ensure that they are properly and quickly investigated and resolved in conformance with policy.

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<sup>18</sup>20 U.S.C. Sec. 1681; Franklin v. Gwinnett County School District, 112 S. Ct. 1028 (1992).

<sup>19</sup>Section 504 of the Education Amendments of 1972, 29 U.S.C. Sec. 794; 46 Fed. Reg. 40686 (Aug. 11, 1986); 34 CFR Sec. 104.410.47; The Americans with Disabilities Act, 42 U.S.C. Sec.1201.

## **Sexual Assault**

A recent amendment to the Campus Security Act requires colleges and universities to adopt mandatory programs designed to "prevent sexual assault", including date rape, on all campuses.<sup>20</sup>

1. This law requires the institutions to include within its annual crime statistics report a description of institutional policy regarding sexual assault:
  - a. Describe the programs designed to promote awareness of rape, acquaintance rape, and other sexual offenses.
  - b. Create procedures to follow if a sexual offense occurs, including who to contact, the importance of preserving evidence and to whom the alleged offense should be reported.
  - c. Information on student's option to notify proper law enforcement authorities, and an institutional statement on assistance to be provided in these circumstances.
  - d. List of on and off campus counseling, mental health, and other student services for victims of sex offenses.
  - e. Notice that an institution will change a student's housing and academic situation after an alleged offense if reasonably available.
  - f. Sanctions which may be imposed for sex offender.
2. An institution is required to collect and report crime statistics for each campus it owns and controls.<sup>21</sup> It appears that institutions that utilize other overseas program sites, rather than operate their own, do not need to include crime statistics in their reports.
3. Even if the campus is not required to report crime statistics from overseas programs, sponsoring institutions will need to make sure that their sex crime policies (regarding referral to counselors and medical professionals, procedures for reporting a sex offense and the handling of disciplinary actions, and notification of options for changing living situations after a sexual offense has occurred) are known to and available to students in overseas programs.

### **Suggestions to Handle Sexual Assault Complaints**

1. Know your institutional policies with respect to sexual assaults and ask counsel to review the

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<sup>20</sup>Student Right to Know and Campus Security Act, 20 U.S.C. 1092(f), 34 CFR Part 668 (see also 59 FR 22314 (April 29, 1994)). See "Complying with the New Federal Laws: Sex Offenses on Campus" prepared by the American Council on Education and the National Association of Personnel Administrators (March 1993).

<sup>21</sup> "Dear Colleague" Letter from the Department of Education, August 1991, GEN-91-27).

- applicability to the institution's specific overseas program.
2. If applicable to the overseas program, make sure that the policies and complaint procedures are included in student materials and are known to the institutional contact people who will be dealing with students.
  3. Do not adopt a laissez-faire attitude toward any complaints; ensure that they are properly and quickly investigated and resolved properly.

### **Drugs and Alcohol Abuse**

The Drug-Free School and Communities Act <sup>22</sup> requires each college and university that receives federal funds to certify that it has implemented a program designed to prevent the illegal use of drugs and alcohol.

1. Institutions that do not comply with the Drug Free Schools and Campus Act may be disqualified from receiving federal funds or participating in student loan programs. Each school must adopt a substance abuse program that:
  - a. prohibits the unlawful possession, use or distribution of drugs or alcohol on college property or as part of a college activity;
  - b. annually distributes a document describing the health risks of using illicit drugs and alcohol; available counseling programs; local, state and federal legal sanctions; and the college's own sanctions;
  - c. establishes sanctions up to an including expulsion and referral for prosecution.
2. In addition, the school must:
  - a. ensure consistent enforcement of its sanctions;
  - b. provide upon request a copy of the program to the Sec. of Ed
  - c. review its program at least every two years.
3. The regulations define a "college activity" to include all student activities on or off campus considered to be university-sponsored events, including overseas campuses. See 55 Fed. Reg. at 33,595-96.
4. Some European countries have no legal drinking age, hence drinking by an 18 year would not be unlawful. What does the institution do when circumstances are brought to its attention regarding a student whose behaviors would violate the policy at home?
5. Some institutions' alcohol and drug abuse policies limit the institution to handling only complaints brought to its attention, whereas others taken on additional authority to investigate compliance. Must the institution enforce the policy in the same manner overseas. (Note that the regulations reflect that the institution may consider the circumstances surrounding each case" so long as the institution treats similarly situated offenders in a similar

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<sup>22</sup>20 U.S.C. 1145g; Regs. 34 CFR Sec. 86.

manner.)

6. The Campus Security Act requires the institutions to include in an annual crime statistics report specific information about arrests on the campus for liquor law violations and drug abuse violations.<sup>23</sup> As with its sexual assault components, the crime statistics reporting obligation extends to overseas program campuses if the facilities are "owned or controlled by" the institution.<sup>24</sup>

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<sup>23</sup>20 U.S.C. Sec. 1092(f)(1)(H); CFR Sec. 668.48(a)(B).

<sup>24</sup>See 42 CFR Section 668.48(c).