Sport Law

A Managerial Approach

Fourth Edition

Linda Sharp,
Anita M. Moorman and Cathryn Claussen

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SPORT LAW

Now in its fourth edition, this text is still the only sport law textbook to introduce sport legal studies from a management perspective and integrate legal strategies to gain a competitive advantage in business. Acknowledging that students understand legal concepts better when they are tied to real sport management practice, the book is organized around the core management functions.

It provides concise explanations of key concepts, as well as current industry examples and legal cases, and gives the student all the legal knowledge they need to become confident and effective professionals in sport management, recreation, or sport education. This new edition includes additional contributions from leading sport law educators and practitioners, and has expanded coverage of important contemporary issues including:

- Sports injury and concussion litigation
- Impact of Covid-19 on events and leagues
- Gender discrimination, disability discrimination, sexual harassment, #metoo, and USWNT pay equity
- Intellectual property, licensing agreements, publicity rights, social media influencers, and digital privacy
- Student-athletes and marketing rights
- Sport gambling and state regulation
- Athlete activism, employee free speech, and collective bargaining
- Olympic and Paralympic restructuring
- NCAA Division 1 Coaches Contracts

The book contains useful features and ancillaries to help with teaching and learning, including managerial context tables, case opinions, focus cases, strategies for competitive advantage, discussion questions, and learning activities. It is an essential text for any course on sport law or recreation law, an invaluable supplement to any course on sport business and management, and an important reference for all sport management practitioners.

Online resources include a variety of exam questions for each chapter, featuring multiple choice, true or false, short answer exam questions and short essay questions, and a sample syllabus.

Editor

Anita M. Moorman is Professor of Sport Administration at the University of Louisville, USA. She teaches sport law and legal aspects of sport. Professor Moorman is licensed to practice law in the State of Oklahoma and was admitted to practice before the U.S. Supreme Court when she served as co-counsel for nine disability sport organizations on an amicus curiae brief in the landmark Americans with Disabilities Act case involving the professional golfer, Casey Martin (*Martin v. PGA Tour*, 2001). She served as an expert consultant for the SB206 California Community College Name, Image, and Likeness Working Group

studying the impact of NIL policies and legislation on community college athletes. Her research interests include examining contractual and commercial relationships in sport and the unique impact that numerous Supreme Court decisions have had in the sport industry with a focus on participant rights in sport.

Non-Contributing Editors

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4th Edition

Edited by Anita M. Moorman

Non-Contributing Editors:
Linda Sharp and Cathryn Claussen

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To Dr. Betty van der Smissen who inspired a generation of legal educators and scholars. Since the second edition, we have recognized the impact she had on our field and continue to recognize her mentorship and the standards of rigorous scholarship she set for herself and us all.

To my mom who inspired me at an early age to be willing to confront injustice and to believe a woman can pursue any career she is passionate about.

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PREFACE

The law is dynamic and rapidly evolving in numerous segments of the industry. Sport Law: A Managerial Approach, 4th Edition provides comprehensive discussion and analysis of legal issues in sport and recreation. The 4th Edition further captures recent and continuing developments including the problematic drafting of liquidated damages clauses in college coaches contracts during a period of frequent and escalating buyout amounts, the ongoing expansion of student-athlete commercial opportunities and changes to the NCAA regulatory approach toward commercial restraints on student-athletes, the impact of Covid-19 on the sport industry during an unprecedented moment in modern history; the imposition of liability across the sports landscape for sexual abuse of young athletes at the hands of coaches and medical personnel, and administrative failures in this regard; and a host of issues associated with venue operations, intellectual property, digital marketing and data privacy.

Rationale for a Text on Managerial Law for the Sport Enterprise

This text is driven by management functions, not legal topics. The main benefit of presenting sport/recreation law information in this way is that you, the reader, can use the information as a prospective sport/recreation manager, not as an aspiring attorney. It allows you to understand how the legal concepts relate to each management function, an integration that is not usually accomplished when the content is organized according to legal topics.

In implementing the managerial approach, we have adopted the framework used by Antoni Brack in his article entitled "The Paradigm of Managerial Law" (1997). Brack, a professor of business law at a Dutch university, wrote this article to suggest how to structure the primary legal course in a business school curriculum. Brack's suggestion was to structure courses as "managerial law," which links law to business functions, in an attempt to train prospective business managers to be legally informed and better professionals. By structuring courses in this way, we recognize that law courses in business schools should have a business orientation because business professionals need to be able to recognize and deal with legal difficulties, problems, risks, and costs in a pragmatic way. Thus, the traditional legal structure of a course should give way, according to Brack, to a structure based on business functions, which have more practical and operational meaning to prospective managers.

Organization of this Text

We have organized this text based on four commonly acknowledged business functions, with an orientation toward managerial law, as mentioned above. These functions are: (1) human resource management; (2) strategic management – governance; (3) operations management; and (4) marketing management. With the managerial law approach, legal topics are subsumed under the managerial components of each function. The legal topics have to fit the function to provide "optimal operational and strategic use" (Brack, 1997, p. 240).

Part I, "Introductory Legal Concepts," introduces readers to material that is necessary for an understanding of the legal system, legal resources, and managerial strategies to minimize liability. The remainder of the book is organized according to the previously mentioned four business functions common to all sport organizations.

Part II, "Human Resource Management," first looks at the legal issues surrounding managerial decisions in hiring, firing, disciplining, and evaluating employees, from the perspectives of contract law, tort law, and discrimination law. These chapters also cover liability for the acts of employees and statutory law pertaining to working conditions for employees. We include labor relations and collective bargaining matters within professional sport, and we address the role of the sport agent.

Part III, "Strategic Management: Governance," deals with governance issues in a variety of settings. We discuss the authority of professional and amateur athletic organizations and regulatory issues concerning athletes in professional sport, high school and college sport, and Olympic sport.

Part IV, "Operating Venues and Event Management," focuses on the legal issues pertinent to sport facilities and the development of events, including liability issues related to sport participants, participant violence, and the safety of spectators on our premises. We discuss a range of agreements central to the operation of facilities and events including lease agreements, promotional materials, game contracts, conduct codes, and exculpatory agreements as a component of this managerial function. Finally in this section we include planning and accessibility issues associated with financing, constructing, and operating sports facilities including a discussion of the Americans with Disabilities Act, and spectator searches and surveillance.

Part V, "Marketing Management," concerns the legal issues surrounding intellectual property matters such as trademarks, copyrights, patents, and publicity rights. In these chapters, we consider trade practices such as false advertising, social media influencers, and ambush marketing. We present contractual issues, including endorsement and sponsorship contracts. We discuss constitutional and civil rights issues pertinent to marketing and address sports information, media, and public relations concerns, such as broadcasting agreements, privacy rights, and defamation.

As you see, we have integrated the legal theories and concepts pertinent to each business function in such a way as to enable you to better use the law as you engage in decision making in your roles in sport and recreation organizations. In this way, we are suggesting that you use the legal theories in a pragmatic manner, to solve real-life problems found in sport enterprise.

Objectives of this Text

In conjunction with the managerial law approach discussed above, the specific objectives for this book include:

- Recognizing the role of legal knowledge in providing a competitive advantage.
- Recognizing the role of law and regulation in developing business strategies.
- Recognizing the role of preventive law in the management of sport and recreation organizations.

Special Features of the Text

In an effort to accomplish the foregoing objectives, the following text features are designed to facilitate the reader's understanding and application of the material.

Managerial Context Tables

Since one of our prime objectives is to have you understand the connections between legal theory and the practical uses of the law in your managerial functions, we have developed tables in each chapter to help with this. The introduction to each of these chapters includes a table identifying the managerial contexts,

the major legal issues, the relevant law, and illustrative cases for that chapter. This table serves as an overview of the chapter's content and reinforces the connections between your management responsibilities and the legal material presented.

Glossary of Legal Terms

Although legal terms will be defined when they are first presented, we also provide a glossary at the end of the book to refresh your understanding of legal concepts as you encounter them throughout the text.

Case Opinions

Most chapters contain one or more "Case Opinions" that have been chosen to illustrate particular legal points. For each case, we state the facts in our own language but use the actual language of the courts, in condensed versions, to give guidance on legal theory. Discussion questions follow each excerpted case. The specific cases have been selected because they represent landmark illustrations of important legal issues you need to understand as a sport or recreation manager.

Focus Cases

In Chapters 2–19 we present a number of "mini" case opinions, which we call "Focus Cases." These are very condensed (summarized) case opinions chosen to emphasize a key discussion point. You get the "flavor" of a court opinion without reading a lengthy discussion of the case and rationale.

Hypothetical Cases

In most chapters we also present a feature titled, "Considering …"; these are hypothetical "factual situations" to be considered. Although sometimes these fact patterns are taken from actual cases, often they are created composites of fact patterns or legal theory. Each hypothetical situation is followed by questions which can be used as a learning tool comparing students answers to the "Analysis & Discussion" of the situation at the end of the chapter to check and hone student understanding of the material.

Competitive Advantage Strategies

To place particular emphasis upon the managerial law concept, we provide "Competitive Advantage Strategies" throughout each chapter. These strategies suggest practical methods to minimize or eliminate liability, based on the legal concepts discussed in that chapter.

Discussion Questions, Learning Activities, Case Studies, and Website Resources

The discussion questions, learning activities, and case studies found at the end of each chapter emphasize important concepts and will assist in the review of chapter material. Both the questions and the activities require an understanding of the legal principles presented in the chapter and are designed to encourage students to *apply* legal knowledge as an actual sport or recreation manager in a particular factual circumstance. We also include one or more case studies at the end of each chapter providing more in depth analysis of a topic.

What's New in the Fourth Edition

For the fourth edition, we have retained all the Special Features discussed above and used in previous editions. We have also invited contributions from leading experts in the field in the areas of contract negotiations, employment discrimination, harassment, labor relations, risk management, marketing law

and practice, and governance of professional sport organizations. Contributions from these experts have enriched the text with even more real world examples of legal issues confronting sport and recreation managers today. Lastly, we have included more than 25 new Case Opinions and Focus Cases throughout the text.

Further highlights of what's new in the fourth edition include:

Chapters 1, 2, and 3 have now been condensed into two chapters. Chapter 1 provides the foundation for the importance of integrating legal strategy with business strategy, and using the preventive law process to do that. Chapter 2 now contains a condensed discussion of legal research and the legal system to help students access and understand legal information using electronic sources.

Chapters 3–9 now cover the Human Relations Management function. Chapter 3 has been reorganized to facilitate an in-depth understanding of the complexities of college coaches' contracts with expanded discussion of unique clauses in Division 1 coaches contracts. Federal labor laws associated with minor league baseball players and interns has also been updated through 2020 federal statutory changes.

Strategic Management and Governance is now contained in Chapters 10–13. These chapters have been reorganized to provide a solid foundational discussion of Constitutional considerations and relevance to amateur athletic associations early in Chapter 11, so that progressing through high school, college, and Olympic sport, students can better identify when and where Constitution claims are significant considerations for sport managers.

Chapters 14–17 in Part IV now include an expanded foundation for general negligence liability and premise liability. We have also combined our discussion of safety of participants with participant violence so that all aspects of our relationships with participants are presented in a single chapter. Additionally, we have combined our contractual relationships into a single chapter so that students can fully understand the use of contractual agreements across the myriad of relationships existing in the venue and event operations context. And, we have combined planning and accessibility issues into a single chapter with a detailed discussion of the Americans with Disabilities Act.

Lastly, in Chapters 18 and 19 in Part V, Marketing Management, we have moved the discussion of publicity rights into Chapter 18, together with other forms of intellectual property such as trademarks, copyrights, and patents. This is a better placement for this discussion as publicity rights have become a recognized and important form of IP.

In summary, we take a unique approach in this sport law textbook. We hope that you will find this managerial law approach beneficial as you learn how to make legally sound decisions. Your knowledge of the law should help you make your organization more competitive and a better environment for participants and employees when you begin your career in sport and recreation business.

Anita M. Moorman, Editor

ACKNOWLEDGMENTS

This text was inspired by Linda Sharp in 2005 and resulted in an enriching collaboration between Linda, myself, and Cathy Claussen which has endured for more than 15 years. I am so grateful to Linda for including me in this project at its inception and for them both in trusting me to continue our legacy into the fourth edition.

I would like to thank the seven exceptional sport law colleagues who contributed their legal scholarship and expertise to this fourth edition. They all contributed their well-recognized expertise to this endeavor. They brought new voices and perspectives adding greatly to the quality of this text.

I have spent almost my entire academic career at the University of Louisville and have worked with, mentored, and been mentored by some of the most talented and generous colleagues in sport management. I may never know where other paths may have taken me, but am confident I have been blessed to have so many accomplished colleagues and intellectually curious students around me each and every day at UofL.

I want to thank my partner, Alison Miner, who has supported and encouraged me through four editions of this text. She has been a constant source of friendship and positivity even when Covid-19 turned our den into an office, writing room, library, and Zoom conference room.

Lastly a special thanks to my doctoral research assistant Nick Swim. He read, edited, researched, and provided a student perspective on each and every chapter in the text, and I could not have accomplished this without him.

GLOSSARY

Acceptance: An agreement to the terms of an offer as stated.

Act of God: Refers to a natural disaster that resulted in injury to the plaintiff; a defense to negligence. This defense will be upheld only if the Act of God is unforeseeable.

Actual authority: In agency law, the limits of an agent's authority, conveyed to the agent by the principal.

Actual cash value: The replacement value of property, minus depreciation.

Actual notice: Having been informed directly of something or having seen it occur; implies that the landowner knows of a danger through inspection by employees; also known as actual knowledge.

Aesthetic functionality: A doctrine that relates to whether a feature of a product is designed to make it visually appealing, but not source identifying which would preclude the product feature from securing trade dress protection from infringement.

Affirmative action: Preferential treatment to members of protected classes where their qualifications are essentially the same as those of members of a nonprotected class.

Affirmative defense: A defense used between private parties in civil litigation; it works to excuse a defendant's liability even if the plaintiff's claim is true, based on facts additional to those asserted by the plaintiff.

Agency: The relationship arising when one person (a "principal") manifests a desire to have another person (an "agent") act on the principal's behalf and remain subject to the principal's control, which the agent consents to do (Restatement [Third] of Agency § 1.01 Agency Defined).

Agency contract: An agreement in which a student-athlete or professional athlete authorizes a person to negotiate or solicit on behalf of the athlete a professional sports services contract or an endorsement contract.

Agency law: Defines how and when agency relationships are created, what rights and responsibilities exist between a principal and an agent, and what legal effect will be given to the acts of an agent in his or her dealings with third parties.

Agency relationship: A consensual relationship established for a lawful purpose by informal oral or formal written agreements; both parties (agent and principal) must have the legal capacity to enter into an agreement.

Agent: In agency law, the person acting on behalf of another party (the principal).

All risk policy: An insurance policy that seems to be all-encompassing, although some losses may not be covered because they are listed in the "exclusions" section of the policy.

Alternative dispute resolution: Methods other than trial for resolving legal conflict; the most common forms are arbitration and mediation.

Ambush marketing: An intentional effort to weaken or "ambush" a competitor's official association with a sports organization that had acquired its rights through payment of sponsorship fees.

Antitrust law: A body of law with the intent of preventing groups of competitors from reducing competition in the market. Prohibits predatory or exclusionary conduct designed to enable an organization to acquire or maintain monopoly power in a relevant market.

Apparent agency: A relationship that is created by the conduct of the principal that leads a third party to believe another individual serves as her agent.

Apparent authority: An instance when a principal has somehow conveyed to a third party that an agent has the authority to act, even though the agent does not have the actual authority.

Arbitrary mark: Trademark comprising words, names, or symbols that are in common linguistic use but that neither suggest nor describe any quality or characteristic of the good or service.

Arbitration: Submission of a dispute to a neutral decision maker for final and binding resolution.

Assault: An intentional tort involving some type of menacing or threatening behavior.

Assumption of risk: A defense asserting that a participant in an activity knows of the inherent risks (those risks that are obvious and necessary) of an activity; assumption of risk is frequently discussed as being either primary or secondary.

At will: Describes an employment arrangement under which the employer may fire the employee at any time, for any reason or for no reason; the employee also may quit at any time for any reason.

Athlete agent: An individual who enters into an agency contract with a student-athlete or professional athlete or, directly or indirectly, recruits or solicits a student-athlete or professional athlete to enter into an agency contract.

Attractive nuisance doctrine: A doctrine providing that there is an affirmative duty for landowners to use reasonable care to protect child trespassers who may be attracted to the property because of some manmade or artificial feature of the land that poses some serious danger to a child.

Back pay: A remedy for discrimination under Title VII of the Civil Rights Act of 1964; compensation for earnings for work missed due to an adverse employment action.

Bad faith cyber-squatting: Registering an Internet domain name that is similar to a trademark, with the purpose of reselling the name or diverting consumers from their desired website to the cybersquatter's site.

Battery: The unwanted touching or striking of one person by another, with the intention of bringing about a harmful or offensive contact.

Binding precedent: The decisions of higher courts that establish the rule of law to be followed in similar cases in lower courts within the same jurisdiction.

Blurring: The effect of a use of a mark that is similar to a famous trademark, being used by a noncompetitor in a way that, over time, will diminish the famous trademark's value by detracting from its exclusiveness.

Bona fide occupational qualification (BFOQ) defense: A defense to a discrimination claim in which the employer must show that the criteria used that resulted in an adverse employment action were genuine qualifications for the job.

Breach of contract: An instance when one party fails to perform essential aspects of a contract.

Breach of duty: The second element in a negligence case; a failure to meet the required standard of care.

Building ordinance insurance: Insurance that covers the increased cost necessary to rebuild property to meet new building code standards that were not in effect when the building was originally constructed.

Burden of production: The defendant's responsibility to produce evidence supporting the defense without any accompanying burden to prove that the defense is true.

Burden of proof: The responsibility of proving the truth of a claim.

Business interruption insurance: Insurance that compensates for lost income if you have to close your business due to a covered occurrence on your property.

Business invitee: An individual who is on another person's premises with the assent of the landowner and who brings some economic benefit to the landowner.

Buy-out: A provision stating that if the exact amount of damages to be suffered when a party breaches the contract cannot be ascertained at the time the contract is signed, the parties may agree to an amount of damages that reasonably approximates the damages that would be sustained. Another term for liquidated damages.

Canons of interpretation: In contract law, a few basic principles for how courts interpret contracts.

Canons of statutory construction: Time-honored maxims that a court uses to guide and justify its interpretations of statutes.

Capacity: The principle that parties to a contract must be legally competent to enter into a contractual relationship.

Case brief: A succinct one- or two-page summary of a case that allows one to read it quickly and compare it with other cases.

Case law: *See* Common law.

Causation: The third element in a negligence case; the breach of the duty of care must result in damage to the plaintiff.

Caveat emptor: Let the buyer beware.

Certiorari: A request for an appeal to be heard by a higher court.

Choice of law clause: Clause in an agreement stating that the agreement will be governed by the laws of a particular state.

Civil causes of action: The legal grounds upon which to sue.

Civil courts: The location where cases that involve controversies of a noncriminal nature are heard.

Collective bargaining agreement (CBA): The contract that results from collective bargaining negotiations in which employees through their union and employers through a management negotiating team negotiate over mandatory subjects of bargaining.

Collective mark: A trademark that is used to indicate membership in an organization, such as a labor union.

Collective work: Content compiled from a number of contributions, created as separate and independent works, which are assembled into a collective whole for distribution and use; each separate contribution represents a distinct copyright from the work as a whole.

Commercial advantage: Commercial use of an individual's name, images, or other materials in advertising or the promotion and sale of a product or service.

Commercial speech: Speech that does no more than propose a commercial transaction, such as an advertisement.

Common law: The body of law created by courts when they render decisions interpreting existing laws as they apply to a particular case brought before the court.

Community of interests: Similarities in workers' jobs that will lead to common needs, desires, and goals being addressed through collective bargaining to make it more likely to create a labor settlement.

Comparative negligence: A system that allows a plaintiff to recover some portion of the damages caused by defendant's negligence, even if the plaintiff was also partially negligent and responsible for causing the injury.

Compensable injury: A physical injury or illness that a worker must suffer in order to receive workers' compensation.

Compensatory damages: Damages that an injured party can collect to compensate for a loss or injury suffered.

Complaint: A summary of allegations in a case.

Concerted action: Joint action between two or more parties.

Concurrent jurisdiction: The jurisdiction of two or more courts that are each authorized to deal with the same subject matter; for example, certain federal law claims may be heard by either a federal court or a state court.

Consent: The willingness that an act or invasion of an interest will take place.

Consideration: Something of value, such as money or personal services, given by one party to another in exchange for an act or promise.

Constitution: A foundational document that sets forth the basic operating principles of a government or organization, including limits on governmental power.

Constructive discharge: A reassignment of an employee in which the employee has not actually been fired but the impact of the reassignment has been essentially to take away the responsibilities for which he or she was hired.

Constructive notice: Presumed knowledge of dangers that a reasonable prudent facility owner would be aware of; also known as constructive knowledge.

Consumer: Any individual who purchases goods or services for personal or household consumption.

Contract: A promise or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.

Contract damages: Damages designed to put a nonbreaching party in the position it would have held if the contract had been performed as promised.

Contributory negligence: The principle by which a plaintiff who contributed in any way to his or her own injury may not recover any damages.

Counteroffer: An offer made in response to an initial offer.

Covenant not to compete: *See* Restrictive covenant.

Covenant of good faith and fair dealing: An expectation that both parties to a contract act fairly in their contractual dealings.

Criminal courts: The location where persons who are charged with a crime are prosecuted.

Damages: The final element in a negligence case; the loss caused by the defendant to the plaintiff or to his property.

Deceptive advertisement: An advertisement that contains a statement or an omission that is likely to mislead a reasonable consumer and that is important to the consumer's decision to buy or use a product.

Defamatory act: A false statement published to a third party, involving some degree of fault or negligence and causing actual damage.

Defensive lockout: A pre-emptive move by management to block an opportunistic strike by employees.

Denial of certiorari: A decision whereby either the U.S. Supreme Court or the highest state appellate court declines to hear a case and, having done so, allows the decision of the next lower court to stand.

Deposition: Oral testimony obtained under oath from a witness or a party to a case.

Descriptive mark: Trademark that describes the intended purpose, function, or use of the good.

Design defect: A product defect that exists when the very design of the product is flawed so as to render each item of that product unsafe.

Disabling impairment: An impairment that is permanent or long-term and that is not likely to be overcome with rest or treatment.

Disclosed principal: A classification of a principal in which a third party is aware of the identity of the principal and the fact that the agent is acting on behalf of the principal.

Disparate impact: A theory of liability used in deciding Title VII cases in which an employer's neutral employment practice has had a discriminatory effect on a protected class.

Disparate treatment: A theory of liability used in deciding Title VII cases in which an employer has intentionally discriminated against a member of a protected class.

Disparity of bargaining power: A situation in which one party gains an unfair bargaining position because it has much more power to make the contract terms in its favor.

Distraction doctrine: A doctrine providing that, in some cases, even though a condition appears to be open and obvious, the plaintiff may somehow be distracted from appreciating the danger.

Diversity of citizenship jurisdiction: The type of jurisdiction allowing a federal court to hear a case based on a state law claim when the parties to the lawsuit are residents of different states.

Dram shop acts: Statutes that provide for liability against those who commercially serve alcohol to minors or to persons who are visibly intoxicated when the inebriated individual subsequently injures a third party.

Due process: A constitutional provision that guarantees a person fair treatment in the process of a governmental decision to deprive the person of life, liberty, or property.

Duty: The first element in a negligence case; the defendant must have some obligation, imposed by law, to protect the plaintiff from unreasonable risk.

Duty of fair representation: A requirement that a union represent all employees in the bargaining unit fairly, even if the employees are not union members.

Eminent domain: The power of the state to appropriate private property for its own use without the owner's consent.

Employment practices liability (EPL) insurance: Insurance that covers injury to employees caused by wrongful employment practices such as sexual harassment; wrongful termination; defamation; invasion of privacy; breach of the employment contract; discrimination based on race, religion, age, gender, or disability; and so forth.

Enterprise coverage: Coverage that applies to employees who work for certain businesses or organizations that have at least two employees and that do at least $500,000 a year in business.

Equal Protection Clause: Found in the Fourteenth Amendment to the U.S. Constitution; it says that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Errors and omissions insurance: Insurance that covers the negligent or accidental acts of those who have professional knowledge or training.

Essential facility doctrine: A doctrine stating that refusing to share an essential facility that is economically unfeasible for a would-be competitor to duplicate (when that refusal would constitute a severe impediment to prospective market entrants) is an unreasonable restraint of trade.

Establishment Clause: Found in the First Amendment to the Constitution; it protects us from the government establishing a preferred religion; interpreted to mean that the government must be neutral with respect to religious matters.

Exculpatory agreement: Contract in which an individual or entity that is legally at fault tries to excuse itself from fault.

Exculpatory clause: A contractual provision that relieves an individual or entity from any liability resulting from a negligent act.

Express authority: A type of authority created when a principal and an agent make a written or oral agreement specifically defining the scope of the agent's authority.

Express warranty: A warranty that is explicitly made by a manufacturer or seller, either orally, in writing, or as a visual image; it makes an assertion of fact or a promise regarding the quality of the goods.

Fair use: Using a copyrighted work in a reasonable and limited way without the author's permission; fair use is a defense to a copyright infringement claim.

False advertising: A form of unfair and deceptive commerce involving misrepresentation.

Fanciful mark: The most distinctive trademarks; coined words that have been invented for the sole purpose of functioning as a trademark.

Fiduciary: A person who acts primarily for the benefit of another.

Fiduciary relationship: A relationship that is founded on trust or confidence, when one person has entrusted his or her interests to the integrity and fidelity of another.

First use: The first person to use a trademark in commerce has the superior rights to the mark, even if the mark has not been formally registered.

Fixation: A requirement that work being copyrighted be put into a tangible form, such as by being written down or recorded.

Force majeure clause: A contract clause that excuses or relieves a party from having to perform due to natural disasters or other "acts of God," war, or other situations beyond the control of either party.

Fraud: Intentional misrepresentations that are intended to induce action by another party, resulting in harm.

Fraudulent concealment: Occurs when a person knowingly withholds or conceals information from the plaintiff concerning the plaintiff's medical condition.

Free Exercise Clause: Found in the First Amendment to the Constitution; it protects our fundamental right to the free exercise of religious beliefs; interpreted to mean that the government may not target a particular religion for suppression.

Front pay: A remedy for discrimination under Title VII of the Civil Rights Act of 1964; compensation for future earnings that would have been received absent the discrimination.

Functional mark: A trademark that does not describe or distinguish the product or service but that is necessary for the product to exist.

Functionality: A concept used to prevent product designs or features that have a useful purpose from being monopolized under trademark law.

General duty: The duty of an employer to provide a place of employment that is free from hazards that cause or are likely to cause death or serious physical harm to employees.

Generic mark: The common descriptive name of a product or service; considered part of the public domain.

Good cause: A legally sufficient reason, such as unsatisfactory job performance or violation of workplace rules, that allows an employer to discipline or discharge an employee.

Good Samaritan statutes: State statutes providing that persons who act to help others in distress may not be sued for ordinary negligence based on their efforts to assist.

Goods: Tangible moveable objects, not including real estate or securities.

Goodwill: The favor that the management of a business wins from the public.

Guidance document: Interpretations by government agencies responsible for enforcing a variety of statutes such as Title XI, ADA, and Title VII. They can be in the form of letters, policy interpretations, or guidance documents made available to the public and normally entitled to deference by the courts when interpreting the relevant statutes or regulations.

Hazing: Any activity by which a person recklessly endangers the health or safety of an individual, or causes a risk of bodily injury, for purposes of initiation into, admission into, or affiliation with an organization or team.

Hold harmless clause: Contract clause in a lease stating that one party, usually the lessee, assumes the liability in the transaction in question. see also Indemnification clause.

Holding: The final ruling on a specific issue being decided.

Horizontal price fixing: A generally illegal arrangement among competitors to charge the same price for an item.

Horizontal restraints: Agreements between competitors that restrain free trade; for example, the player draft system spreads talent across teams in a league by preventing teams from vying economically for the best players.

Hostile environment harassment: A type of sexual harassment that occurs when an employee is subjected to repeated unwelcome behaviors that do not constitute sexual bribery but are sufficiently severe and pervasive that they create a work environment that interferes with the harassed employee's ability to perform his or her job.

Immunity: The ability to escape legal responsibilities; precludes a suit from being brought against a party.

Impasse: A stalemate in negotiations between a union and an employer, often leading to the use of an economic weapon by the union in the form of a strike or by management in the form of a lockout.

Implied authority: An agent's authority to act on behalf of a principal, implied by the conduct of the parties rather than set out in an oral or written agreement.

Implied warranty of fitness: A warranty that accompanies a sale in which the seller has reason to know the particular purpose of a purchase and the buyer relies on the seller's expertise in providing a product that is appropriate for that purpose.

Implied warranty of merchantability: An implied promise that a product is fit for its ordinary intended use and thus is merchantable.

Indemnification clause: Contract clause that provides for reimbursement to a party for a loss incurred by that party. see also Hold harmless clause.

Independent contractor: A person or business that provides goods or services to another entity under terms specified in a contract; an independent contractor is not an employee.

Individual coverage: Coverage for an employee when the organization that does not qualify as an enterprise and the employee regularly engages in activities involving interstate commerce or the production of goods for interstate commerce.

Individualized inquiry: Requirement under the Americans with Disabilities Act that a fact-specific inquiry relative to the stated purpose of a rule and a person's individual disability and circumstances must be undertaken to determine whether a requested modification of the rule is reasonable.

Injunctive relief: A remedy for discrimination under Title VII of the Civil Rights Act of 1964; orders the employer to cease unlawful practices or to engage in affirmative action.

Intent: The planning and desire to perform an act.

Intentional tort: A category of torts in which someone intentionally causes harm to person or property.

Interest arbitration: A method of settling disputes over the terms of a contract in which a neutral third-party arbitrator chosen by the parties renders a final and binding decision.

Intermediate scrutiny: A test to determine whether the Equal Protection Clause has been violated; assumes that rarely, but occasionally, the government may have an important reason to rely on a rule that contains a quasi-suspect classification (e.g., gender).

Interrogatory: Answers written under oath to a list of written questions.

Invitee: An individual who has a specific invitation to enter another person's property or is a member of the public in a public place.

Job Duties test: Part of a test for exemption from overtime pay; the employee's duties must be primarily involved in the executive, administrative, or professional aspects of the business.

Joint work: A collaboration between two or more authors, in which they are co-owners of the copyright of the work unless they have entered into an agreement to the contrary.

Jurisdiction: The authority to hear a case.

Just cause: Termination of a contract because the employee has engaged in behavior that violates the standards of job performance established by the employer.

Lease agreement: Contract giving rise to the relationship of lessor and lessee; contract for the exclusive possession of lands or premises for a determinate period of time.

Legal error: An erroneous interpretation of the law or application of legal procedure.

Legality: To be enforceable, the subject matter of a contract must not violate state or federal law.

Lessee: One who rents or leases property from another.

Lessor: One who rents or leases property to another.

Liability insurance: Insurance that covers bodily injury or property losses to a third party.

Libel: Written or published defamation of character. Libel has a broader definition than slander, because any number of tangible communications might fall under the heading of written communication.

License: Agreement that creates a privilege to go on the premises of another for a certain purpose but does not operate to confer on the licensee any title or interest in such property.

Licensee: An individual who is on the premises with the consent of the owner but who does not bring any economic benefit to the property owner.

Likelihood of confusion: The evidentiary burden that a trademark owner must meet to prove infringement of the trademark; consumers would be likely to associate the goods or services of one party with those of the other party as a result of the use of the marks at issue.

Limited duty rule: A rule used in baseball that provides a baseball facility has met its duty of care to spectators by providing seating that is protected from projectiles that leave the field of play.

Liquidated damages: A provision that sets up a reasonable approximation of damages required to satisfy a loss resulting from breach of contract. In employment contracts it may also be known as a buy-out clause.

Major life activity: A fundamental aspect of human living, such as walking, seeing, hearing, speaking, breathing, learning, working, and major bodily functions.

Mandatory subjects: Topics that management must bargain over in collective bargaining negotiations or risk being charged with an unfair labor practice; these topics include hours, wages, and terms and conditions of employment.

Manufacturing defect: A product defect that is the result of an error in the manufacturing and production process; one or more of the manufactured items are flawed, even though the design itself is a safe one.

Mediation: Submission of a dispute to an impartial decision maker who assists the parties in negotiating a settlement of their dispute.

Mens rea: The requisite intent to commit a crime; literally, "guilty mind."

Mitigation of damages: A principle that states that a nonbreaching party must act reasonably to lessen the consequences of a breach.

Modified comparative negligence: Generally, a plaintiff may not recover damages if the proportion of his or her negligence exceeds the proportion of the defendant's negligence.

Morals clause: A clause in a contract that provides for just-cause termination based on the employee's immorality, criminal behavior, or behavior that reflects poorly on the employer.

Named peril policy: An insurance policy that covers only the specific risks set forth in the policy.

National Letter of Intent (NLI): An agreement between a college or university and a prospective college student-athlete stating that the student will attend the institution for one year and will be provided with a financial aid award.

Negligence: Conduct that falls below the standard established by law for the protection of others against unreasonable risk of harm.

Negligence per se: Occurs when there is conclusive proof that a defendant has breached the standard of care when an injury is caused by the defendant's failure to meet a statutory requirement that was established for safety reasons.

Negligent hiring: The failure to properly screen employees, resulting in the hiring of someone who is not suitable for the position; the basic question is whether a manager acted reasonably in choosing a particular person to fill a position.

Negligent misrepresentation: A false statement given negligently to another party that the party reasonably relies upon, resulting in harm.

Negligent referral: The failure of an employer to disclose complete and factual information about a former or current employee to another employer when the failure to do so may result in harm to a third party.

Negligent retention: The retention of an employee after the employer became aware of the employee's unsuitability, thereby failing to act on that knowledge; the basic question is whether a manager acted reasonably in retaining an employee's services.

Negligent selection: The failure to properly screen independent contractors, resulting in the hiring of someone who is not suitable; similar to negligent hiring.

Negligent supervision: The failure to provide the necessary monitoring to ensure that employees perform their duties properly; the basic question is whether a manager acted reasonably in providing guidance and in overseeing an employee's actions.

Nonexempt employees: Workers who receive an hourly salary and who are entitled to overtime pay after working more than 40 hours in a five-day work week.

Offensive lockout: A move by management that usually occurs once an impasse is reached in negotiations, intended to pressure the union into accepting terms in an agreement favorable to management.

Offer: A conditional promise made to do or to refrain from doing something.

Open and obvious: A condition that an invitee knows of or that a reasonably careful person would have discovered upon careful inspection.

Originality: Requirement that a work be created by the author himself or herself and that it contain some minimal amount of creativity.

Partially disclosed principal: A classification of a principal in which a third party is aware that an agent is acting on behalf of another but does not know the identity of the principal.

Penalty provision: A damages provision that does not bear a reasonable relationship to the damages to be sustained and that are simply punishing a party for breaching a contract. Courts will not enforce penalty provisions.

Per se violations: Usually related to antitrust law, wrongdoings that are so obviously improper restraints on free trade that little other analysis is needed.

Permissive subjects: Topics that management is not obligated to negotiate over and the union cannot bargain to impasse over.

Perquisites (perks): Benefits that an employee may receive beyond a base salary and fringe benefits; for a coach these may include use of an automobile, payment for housing, or payment from endorsement contracts.

Persuasive precedent: Cases that a court may use but is not required to follow when deciding its cases.

Place of public accommodation: A place that accommodates the paying public; the place must affect interstate commerce and be principally engaged in selling food for consumption on the premises or exist for the purpose of exhibition or entertainment.

Preponderance of the evidence: The level of proof required to prevail in most civil cases; the winning party's evidence is more likely true than the losing party's evidence.

Preventive law: An approach that looks at all risks that could affect an institution's financial health; a broader view of risk management.

Prima facie case: A situation where the plaintiff's evidence is sufficient to prevail unless controverted by a defendant's evidence.

Primary assumption of risk: Occurs when a plaintiff understands and voluntarily agrees to accept the inherent risks of an activity.

Principal: In agency law, the person hiring or engaging an agent to act on behalf of the principal or to perform certain duties for the principal.

Prior similar incidents rule: A rule used to determine whether a certain incident was foreseeable by looking at what has occurred previously at that location; a sufficiently similar incident might make it foreseeable that another occurrence of that kind could happen.

Private right of action: Circumstance under which a court determines that a statute or provision that creates rights also supports a private plaintiff's remedy that can be achieved through a lawsuit, even though no such remedy is explicitly provided for in the statute.

Privity of contract: Occurs when a user and a provider have a direct contractual relationship.

Promissory estoppel: A quasicontractual remedy in which a party may have some recourse despite the fact that all the elements of a contract may not exist, based on reliance on a promise made.

Property right: Provision to the creator or owner of a copyright the exclusive economic and property interests to the work.

Protected classes: Classes of people designated as protected by a law; in the case of Title VII of the Civil Rights Act of 1964, these include race, color, religion, sex, and national origin.

Proximate cause: An act or failure to act, unbroken by any intervening act, that directly produces an event and without which the event would not have occurred.

Public figure: An individual who has, because of his or her activities, commanded sufficient continuing public interest.

Public invitee: An individual who is legally on public land.

Public official: A designation under the law of defamation determining what degree of fault must be proven before an individual can be held liable for false statements. Public officials must prove actual malice to recover for defamation.

Punitive damages: Payment in excess of actual damages that is awarded under certain circumstances, to punish the offender in the case of intentional torts.

Pure comparative negligence: Principle under which a plaintiff may recover damages even if the proportion of his or her negligence exceeds the defendant's negligence.

Qualified privilege: The privilege for employers, acting in good faith, to disclose information concerning an employee's work performance to those inside the current employer's operation or to prospective employers.

Quid pro quo harassment: A type of sexual harassment that occurs when an employer conditions a job-related benefit, such as a promotion or pay raise, on an employee's willingness to engage in sexual behavior; sexual bribery.

Ratification: Occurs when no actual agency exists, but a principal accepts or ratifies an agent's unauthorized acts after the fact.

Ratification/condonation principle: The principle that an act may be accepted or confirmed after the fact.

Rational basis review: The easiest test to determine whether the Equal Protection Clause has been violated; the government must simply have a rational basis for adopting the challenged rule, and it must be adopting the rule in order to accomplish a legitimate goal. This test is used for all group classifications other than suspect (e.g., race) or quasi-suspect (e.g., gender) classifications.

Rationale: The reasoning used by a court to justify its decision.

Reasonable accommodation: A modification in the work or academic environment that enables a qualified person with a disability to apply for a job, perform the essential functions of a job, or have equitable access to an educational program.

Reasonable factors other than age: A defense used when an employer has taken an adverse employment action that was motivated by an age-neutral factor.

Reasonable force: Lawful force that is reasonably necessary to accomplish a particular end, such as defense against attack or, in the case of a coach or teacher, to control, train, or educate a student.

Reasonable person: A reasonable person exercises judgment that meets societal expectations for prudence in decision making; an objective standard applied to judge behavior using a hypothetical individual; also known as reasonably prudent person.

Reasonably prudent person: *See* Reasonable person.

Reasonably prudent plaintiff: A hypothetical individual who is used as a standard to determine what a plaintiff should have done in a particular circumstance to protect his or her own safety.

Reassignment clause: A contract clause that gives an employer the right to transfer an employee to a different employment position in an organization.

Reckless misconduct: Occurs when an individual does an act or intentionally fails to do an act that it is his or her duty to do, knowing or having reason to know not only that the conduct creates an unreasonable risk of physical harm to another but also that such risk is substantially greater than that which is necessary to make the conduct negligent; also known as gross negligence or willful and wanton misconduct.

Recreational use statute: Statute providing some level of immunity for landowners who open their property to recreational use by the public with no fees charged.

Regulations: Rules created to operationalize statutes by providing more specific guidance.

Replacement value: An amount sufficient to replace property or equipment, subject only to the maximum amount set forth in the insurance policy.

Rescission: The right of a party to undo a contract and return the parties to the positions they had prior to the contract.

Reserve clause: A clause that has been used in professional sports contracts that functions to give teams a perpetual right to keep their players unless traded or released.

Respondeat superior: *See* Vicarious liability.

Restitution: An equitable remedy that involves returning the goods and/or property that were transferred under a contract.

Restrictive covenant: A clause in an employment contract that protects the interests of the employer by restricting the ability of the employee to take a comparable position in another organization.

Retaliation: Action taken in return for an injury or offense. Often refers to action by an employer against employees' efforts to obtain justice.

Revocable license: A license that may be revoked, withdrawn, or cancelled.

Right of attribution: A right that prevents others from claiming authorship or attributing authorship falsely to an individual.

Right of integrity: A right that prevents others from distorting, mutilating, or misrepresenting an author's work.

Right of publicity: The right of a famous individual to control the commercial value and use of his or her name, likeness, and image.

Rights arbitration: A method of settling disputes over the interpretation or application of a contract in which a neutral third-party arbitrator chosen by the parties renders a final and binding decision.

Rights to register: Rights that are created by both state and federal statutes and that provide certain benefits to a registrant.

Rights to use: Rights that are grounded in common law and that are created when a mark is used in commerce to identify a product or service.

Risk assessment: The process of determining the probability that particular risks will result in claims during a specific period, as well as determining the magnitude of the potential liability arising from such claims (Prairie & Garfield, 2004).

Risk evaluation: The process in which one assesses risks in conjunction with the mission of the organization and the importance of certain activities to that organization.

Risk management: The function or process by which an organization identifies and manages the risks of liability that rise from its activities (Prairie & Garfield, 2004).

Rollover clause: A clause that provides that, at the end of each year of a contract's term, the contract's term is automatically renewed for another year unless one party notifies the other of the intention not to roll over.

Rule of reason analysis: The requirement that a court balance the (economically) procompetitive effects of a rule against its anticompetitive effects.

Salary basis test: Part of a test for exemption from overtime pay, in which the employee must be paid a set and fixed salary that is not subject to variations because of quantity or quality of work.

Salary test: Part of a test for exemption from overtime pay, in which the amount of salary must meet a minimum level.

Sale: A contract by which title to goods is transferred from one party to another for a price.

Sales puffing: Expressions of opinion that are not made as factual representations about a product or service.

Scope of employment: The range of reasonable and foreseeable activities of an employee that further the business of the employer.

Secondary assumption of risk: Occurs when a plaintiff deliberately chooses to encounter a known risk and, in so doing, acts unreasonably.

Secondary meaning: Requirement that a trademark has become associated in the mind of the public with a particular source or origin; allows descriptive marks to obtain protection that they would otherwise not be entitled to receive.

Section 10(j) injunction: Refers to Section 10(j) of the National Labor Relations Act. It grants the National Labor Relations Board discretionary authority to seek a court order to prohibit an unfair labor practice.

Self-defense: Justified use of force when a person reasonably believes that it is necessary to defend himself or herself from attack.

Service mark: A trademark that relates to a service rather than a good or product.

Shared responsibility statute: A statute stating that participants in an activity assume the risks inherent in the activity; if the participant chooses to assume those risks, the activity provider does not owe a duty of care to the participant relative to those risks.

Slander: Spoken defamation of a person.

Sovereign immunity: A doctrine precluding the institution of a suit against the sovereign government without its consent; rooted in the inherent nature of power and the ability of those who hold power to shield themselves.

Specific hazard standard: A benchmark that must be met by an employer; it requires that employers adopt specific practices, means, methods, or processes that are reasonably necessary and appropriate to protect workers on the job.

Specific performance: A remedy provided by a court that orders a breaching party to perform the contract. May only be used when the subject of the contract is a unique good.

Standard of care: The degree of care a reasonable prudent person would take to prevent an injury to another.

Stare decisis: "Let the decision stand"; a refusal by a court to change a ruling on an issue that has already been decided.

State actor: A term used in constitutional law to describe an entity that is acting with the sufficient authority of the government and, therefore, is subject to regulation under the Fifth and Fourteenth Amendments, which prohibit the federal and state governments, respectively, from violating the rights laid out elsewhere in the Constitution.

Statute of frauds: A statute requiring that certain types of contracts be in writing.

Statute of limitations: A statute defining the time limits to undertaking a cause of action and providing a defense if the cause of action has not been filed in a timely fashion.

Statutes: Written laws created by legislatures, which are law-making bodies composed of elected representatives.

Strict scrutiny: The strictest test applied to determine whether the Equal Protection Clause has been violated; based on the premise that there is almost never a good reason for a law to differentiate on the basis of an immutable characteristic such as race.

Student-athlete: An individual who engages in, is eligible to engage in, or may be eligible in the future to engage in any intercollegiate sport.

Suggestive mark: A mark that subtly connotes something about the service or product but that does not actually describe any specific quality or characteristic of the good or service.

Suspect classification: A classification that is likely to be based on illegal discrimination; includes race, ethnicity, national origin, and alienage.

Tarnishment: The effect of a similar mark being used in such a way as to disparage or harm the reputation of a famous trademark; often used in connection with shoddy products or sexual, obscene, or socially unacceptable activities.

10(j) injunction: A court order to stop an employer from committing an unfair labor practice.

Territorial rights: Franchise relocation restrictions that prevent a competitor franchise from relocating into another team's market territory without league permission and adequate compensation for the potential loss of market share caused by the incursion.

Tort: A civil wrong other than a breach of contract; usually refers to the causing of damage or injury to property, a person, a person's reputation, or a person's commercial interests.

Trade dress: Distinctive packaging, including distinctive shape and appearance of a product or service.

Trade name: Any name used by a person to identify his or her business or vocation.

Trademark: A word, name, symbol, or device that has been adopted and used by a manufacturer or merchant to identify goods and to distinguish them from those manufactured or sold by others.

Trademark dilution: Damage to or weakening of a famous trademark, lessening its distinctiveness, even in the absence of any likelihood of confusion or competition.

Trademark infringement: The unauthorized use of another person's or business's trademark.

Trainee status: The status of a trainee, student, or intern who meets the eligibility criteria for exemption from the minimum wage and overtime pay requirements of the FLSA.

Trespasser: An individual who is on the premises without permission.

Trial on the merits: A trial that includes full arguments before a judge, who renders a final decision; if sufficient controversy remains after discovery is complete, then a trial on the merits will take place.

Undisclosed principal: A classification of a principal in which a third party is not aware that an agent is acting on behalf of another party.

Undue hardship: An accommodation that would impose an excessive cost or administrative burden on an organization; a court will not find an accommodation reasonable if it would impose an undue hardship on the organization.

Unfair dominance: Describes the situation where the party benefiting from a waiver has so much power in the transaction that it is not a fair deal; courts will not uphold the waiver when there is unfair dominance.

Unfair labor practice: According to the National Labor Relations Act, employers may not discriminate in regard to any term or condition of employment to encourage or discourage membership in any labor organization, nor interfere with employees in the exercise of their rights to associate with a labor union.

Unidentified principal: A category of principal in an agency relationship, where a third party is aware that an agent is acting on behalf of another but does not know the identity of the principal.

Unrelated business income tax (UBIT): A tax on income generated by a trade or business carried on by a tax-exempt organization that is not substantially related to the performance of its tax-exempt function.

Utilitarian functionality: A doctrine that relates to whether a product feature is essential to the product's purpose or use which would preclude obtaining trademark protection for that feature.

Vicarious liability: A doctrine that holds an employing organization (employer) responsible for certain acts of its employees, not because of any wrongdoing by the employer, but because the law has deemed it appropriate for the employer to be held accountable for the actions of its employees.

Volunteer: An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered (29 C.F.R. § 553.101(a)).

Waiver: A type of contract in which one party gives up his or her right to sue the other party when that party has been negligent, thus altering the outcome that would transpire under the usual tort law principles.

Warranty: An assertion of fact or promise made by a manufacturer or seller that is relied upon as part of the consumer transaction.

Whistleblower statutes: Statutes that provide a system to protect, against discrimination and retaliation, those employees who report wrongful conduct by their employer to authorities.

White-collar exemption: Exemption from minimum wage and overtime pay received by a worker employed in a bona fide executive, administrative, or professional capacity; the worker is usually salaried and receives a higher rate of pay than an hourly worker.

Willful and wanton misconduct: See Reckless misconduct.

Work for hire: A work prepared by an employee within the scope of his or her employment, or contracted work that has been specially ordered or commissioned.

Work week: A period of 168 hours in seven consecutive days ($7 \times 24 = 168$); may begin on any given day and hour as determined by the employer.

Worst case scenario: In contract law, the worst that could happen; contracts are drafted on the basis of the worst case scenario in order to protect the client's interests.

Writ of certiorari: An order issued by the U.S. Supreme Court or a state's highest appellate court that directs a lower court to send up the case record for review.

Wrongful termination: A termination when the employee has been fired contrary to the terms of the contract or in violation of the law.

Part I

Introductory Concepts

To understand the legal theory in this text and to gain maximum benefit from this textbook, you will need to know some fundamental principles. The first two chapters of this text are intended to give you an overview of these principles. In Chapter 1, you will become familiar with why the study of law is essential for sport managers and how you can use legal theory in a management context to attain a competitive advantage for your sport/recreation organization. You will also learn how to use a proactive law mentality instead of a reactive law mentality as part of your decision-making process for your organization across a spectrum of business problems and challenges. You will learn about the concept of preventive law and how you may develop and implement a preventive law plan for your sport/recreation enterprise.

Chapter 2 provides information regarding the legal system in the United States, the anatomy of a lawsuit, and the way courts decide a variety of legal disputes. You will also learn about primary and secondary legal resources and about the process of conducting legal research. All of this information is necessary for you to be able to appreciate fully the legal theory and cases presented throughout the book. In addition, you will learn how to employee analytical tools based in legal reasoning concepts to improve your writing skills and problem-solving skills.

1 Introduction to Law and Management in Sport

Introduction

Learning legal issues through a management lens adds significant value for a course in the legal aspects of sport and recreation management. As sport and recreation programs become more sophisticated and students strive for sought-after positions in the sport and recreation fields, we need to approach legal material from the viewpoint of how you, as a prospective sport or recreation manager, might best learn and utilize the material. Thus, the term *manager*, as used in this book, refers to anyone, regardless of job title, who performs any of the managerial functions discussed throughout this text.

As you watch ESPN, listen to sports radio, or browse your newsfeed on social media, you will realize that much of the commentary does not deal with what is happening on the field or court. Many of these stories deal with legal issues pertaining to sport figures, sport organizations, and sport/recreational facilities (see Exhibit 1.1 for examples). Whether you become a coach, an athletic director at a high school or college, an administrator in a collegiate athletic conference, a supervisor in a park district, a manager of a fitness club, a social media director for a sport organization, or the commissioner of the National Women's Basketball Association (NWBA), you will find the content of this course, known conventionally as **sport law**, to be very useful to you. This is because managerial activities – such as hiring and overseeing personnel, supervising sport and recreation participants, providing sport and activity programming/instruction, administering sport and recreation facility operations, overseeing games or events, and implementing marketing initiatives – are functions routinely performed by a variety of persons working in sport, educational, and recreation organizations all of which carry with them significant legal implications.

The Need to Understand Legal Issues in Sport

One initial question arises as we begin to study legal issues in sport and recreation: *What is sport law*? Some commentators initially argued that there was no such legal theory as "sport law" (Cozzillio & Levinstein, 1997) and sport law simply referred to areas of the substantive law that relate to the context of sport. These commentators asserted that the legal theories, For example, tort law, contracts, labor relations, administrative law, or constitutional law, are the same regardless of whether the application is in the realm of sport and physical activity or pertains to other businesses or aspects of daily life. Others staked out a middle ground and agreed sport law was mostly traditional substantive law applied in a sport context, but also argued that certain applications make sport sufficiently different that it may be appropriate to characterize a resultant body of knowledge as sport law. These commentators recognized a growing "sport only" corpus of law in areas such as sport agents and Title IX (Gardiner, 1997; Shropshire, 1998). A more modern perspective has now evolved which acknowledges sport-related cases have resulted in the development of a body of sports law that is globally significant, particularly applicable in the sports context, and influential in the development of general legal principles (Lazaroff, 2001; Mitten, Davis, Duru, & Osborne, 2020;

Exhibit 1.1 Sample of legal issues pertaining to sport and recreation.

Situation	*Legal Theory*
A university football coach leaves to coach at another university.	Contract law
A professional sports team has an issue with the "salary cap" in signing a player.	Collective bargaining and contract law
A prosecutor charges an athlete with sexual assault.	Criminal law
A female basketball coach at a college asserts that she should be paid the same as the men's basketball coach.	Equal Pay Act and Title VII (federal statutes)
A youth sport organization is held liable for a coach who molested a team member.	Tort law – negligent hiring
A health club and equipment manufacturer are liable for injury when weight equipment malfunctions.	Tort law – negligence; products liability
Football players sue the NFL and the NCAA regarding the organizations' policies and procedures pertaining to concussions.	Negligence, fraudulent concealment
A sport business names its sports apparel with a name very similar to another product name.	Trademark law
A public high school requires the delivery of a prayer over the public address system before all home football games.	Constitutional law – First Amendment
A company terminates an endorsement contract with an athlete who was accused of criminal conduct.	Contract law
A whitewater rafting company uses a waiver to avoid liability for its own negligence.	Tort and contract law
A university eliminates the women's gymnastics team and the men's baseball team.	Title IX (a federal statute)
NCAA student-athletes sue the NCAA and videogame manufacturers based on their use of athletes' likenesses in games, and regulations prohibiting them from profiting from their name, image, or likeness.	Right of publicity & Anti-trust

Mitten & Opie, 2010). Regardless of which theoretical position you believe is correct, the reality is that the law is inextricably woven into the fabric of sport and recreation organizations and it is imperative that we recognize the pervasiveness of law as it affects sport and recreation.

For example, assume you have just been hired as the administrator of a local youth baseball league. As you begin your first week on the job, you are overwhelmed by how many of your responsibilities have legal implications. Your job requires you to answer questions such as: what provisions should be included in your lease agreement with the city parks department? How do you ensure that your coaches are competent and fit to work with young athletes? Are you permitted to hire seasonal employees and pay them fixed wages instead of minimum wage and overtime pay? What emergency medical care is available for participants? Do you need to have automated external defibrillators (AEDs) on site? What concussion protocols do you need to implement to protect participants? What policies and procedures should you implement to make sure that the crowd does not pose a danger to game officials or to other fans or players? How do you maintain equipment and the playing fields? What provisions should be included in your contracts with the vendors who will provide food and beverages at the games and your game officials? What levels of insurance are necessary? All of these questions have both managerial and legal implications.

In addition to proactively using our legal knowledge to make better management decisions, we must also understand the legal system in our country sometimes invites abuse of the system because of our "open door" philosophy of hearing disputes. Our legal system operates under the belief that we should allow citizens as much access to the formal legal adjudication of disputes as possible. This philosophy is fine when people use the system only to bring claims that are indeed meritorious. However, "Americans will sue each other at the slightest provocation" (Taylor & Thomas, 2003, p. 44). In other words, our country's judicial system allows lawsuits to be filed that may seem nonsensical at first glance, and we, as a very litigious nation, look for responsible parties to blame. So long as a claim has an underlying basis in law, the claim can be filed.

For example, fans often want to sue their own professional sport teams when they are displeased with the team's performance despite a long-standing policy of courts generally refusing to second guess sport leagues in enforcing their rules and regulations. Notwithstanding, New Orleans Saints fans filed three federal lawsuits against the National Football League (NFL) and game officials over the failure to call a blatant penalty during a playoff game in 2019 against the Los Angeles Rams. All three federal suits were dismissed in July of 2019, and one last state court case was finally dismissed by the Louisiana Supreme Court in September of 2019 (Associated Press, 2019; Triplett, 2019). In another example, a woman sued Jelly Belly after she accidentally consumed the company's Sport Beans product which contained more sugar than the company's traditional candy jelly beans. Sport Beans are an exercise supplement containing electrolytes and vitamins. She alleged she had been deceived about the sugar content because Jelly Belly's product label said "evaporated cane juice," which was just a substitute term for sugar. Jelly Belly contended that if she read the evaporated cane juice on the label then she should have also read the total sugar content information (McCleary, 2017). The district court eventually dismissed the case.

Both the *Saints* and the *Jelly Belly* cases highlight that, regardless whether the cases were frivolous or just unwinnable cases, companies must proactively prepare for defending a wide range of lawsuits on an ongoing basis and can also learn from these experiences to potentially prevent such claims (Tsai, 2020). We also need to look more closely at the law as a guide to creating better policies and procedures in our organizations. An understanding of the law certainly helps us to prevent litigation, but more importantly it enables us to make our organizations safer, and more hospitable and effective environments for our internal (employees) and external (clients, customers, athletes) constituencies. This perspective is central to the notion of using legal strategy and legal knowledge to gain a competitive advantage.

Knowledge of the Law as a Competitive Advantage

Although the legal environment surrounding sport and recreation business is just one facet of the managerial landscape, it is an important one to consider. In fact, since the first decade of the 21st century, legal scholars and business practitioners recognized that, "legal issues in general have emerged as the most important factor in the external environment in which business operates" (Siedel, 2002, p. 3). Historically, legal strategy was separate from business strategy and focused mainly on litigation responses and risk management. Instead of approaching legal issues from a negative or reactive perspective, we strive to present these issues in a manner that allows you to use your knowledge of the law to gain a competitive advantage over other organizations. In this way, legal "problems" may be transformed into opportunities for competitive advantage (Siedel, 2002).

As the words suggest, competitive advantage is something that gives an organization an advantage over competitors. This was Siedel's premise in his book *Using the Law for Competitive Advantage* (2002). Later, Siedel (2010) and Siedel and Haapio (2016) discussed the integral intersection of legal strategy and business strategy. Robert Bird (2011) concluded in his analysis of law, strategy, and competitive advantage that the law can be a source of sustainable competitive advantage because it can "confer significant value to firms through the protection of innovation, the enabling of free markets, and the efficient regulation of contracts" (p. 26). Finally, Bagley's book entitled *Winning Legally* (2005) emphasizes that knowledge of legal issues should enable managers to create value, marshal resources, and manage risk in their organizations. Bagley writes, "Managers must ensure that their legal strategy aligns with their business strategy" (p. 5). The legal strategy cannot simply be an afterthought but must be integrated with business strategy. Bagley reframes the relationship of law to business and encourages managers to look at the law not as a constraint but rather as a tool to generate more value for the business.

In keeping with the approach described above, this text emphasizes the competitive benefits of understanding and implementing the law properly within your sport organization. *Competitive advantage*, for our purposes, means not just an ability to make your business more profitable, but an opportunity

to make your sport/recreation organization a superior one operationally. A superior operation translates into a safer and better-run organization, which, in turn, will be one that attracts more clients or participants.

A secondary benefit to recognizing the role of law is maximizing your ability to act assertively and competitively, allowing you to make better use of your legal counsel, whether they are in-house counsel or simply on retainer by your organization. The authors of this text, as attorneys, recognize the degree to which managers often view attorneys as "necessary evils." As you acknowledge the importance of using law as a competitive tool, you will be better able to use the legal counsel that is available to your organization. Instead of using your attorneys as "firefighters" to combat the conflagration of ongoing legal problems, you will learn how to use their talents proactively: to assist you in drafting policies, procedures, and contracts that will help you avoid or minimize liability from the outset. You will be able to integrate your legal decisions with your financial and operational strategies to better "manage" the law and your lawyers.

Using Preventive Law to Manage Risk

Prairie and Garfield (2010) suggest there is a distinct and important difference between risk management and preventive law. These authors define **risk management** as "the function and process by which [an organization] identifies and manages the risks of liability that arise from its activities" (p. 473). They note that the traditional view of risk management is often confined to risks resulting from lawsuits for personal injuries or property damage. While these are important risks for sport managers to consider, organizations would be better served by adopting a macro view of risk as it may impact the financial health or survival of the organization as a whole.

This perspective as identified by Prairie and Garfield is a "**preventive law**" focus. They explain, "The scope of preventive law provides the broader focus, to include environmental, political, economic, regulatory, institutional, and cultural risks" (p. 473) – essentially using the lens of preventive law to guide decision-making across the business. Preventive law's broader focus identifies risks that might not pose a direct monetary threat, but could threaten the success of the organization. For example, during the NCAA investigation into the academic fraud scandal at the University of North Carolina (UNC), a narrow risk management perspective may have only assessed the risk of direct monetary loses for the athletics program in the event the NCAA imposed a post-season or television ban on the men's basketball team, a common penalty used by the NCAA. However, a much greater risk was also present which could have threatened the accreditation of the university as a whole. Ultimately, UNC faced a one-year probation imposed by the Southern Association of Colleges and Schools Commission extending the scandal well beyond the athletics program and threatened the underlying integrity of the institution (New, 2015). Thus, a preventive law focus ensures that we consider all risks across the organization.

Siedel and Haapio (2016) also discuss the preventive law focus in the context of the "proactive law movement," which recommends embedding legal strategy with business strategy. The proactive view corresponds well to the preventive view that the risk management process is holistic and is relevant to every aspect of the organization. We will use these terms interchangeably, since both descriptions define a process of integrating legal strategy and risk management into an organization's overall business strategy to produce better outcomes for the business. Instead of narrowly looking at risk management as a necessary evil to ward off plaintiffs's lawyers, we will suggest ways in which the use of preventive or proactive legal strategies can add value to your organization. Even if there were no such phenomena as lawsuits or legal liability, any manager in a sport or recreation organization would be well-advised to adopt the strategies mentioned in this chapter, not simply to avoid or minimize liability, but to make the organization a better one for employees, participants, and spectators alike.

To begin, your risk management strategies should be congruent with your organizational culture. If you are committed to building a climate of value and responsiveness to the needs of your constituents,

risk management is simply one more business tool to aid in accomplishing that goal (Bagley, 2005; Hanssen, 2005). The underlying culture of an organization and its core values drive an organization's views of risk management and safety concerns. For example, the NFL was characterized as a toxic workplace due to autocratic management, culture of fear, bullying, pervasive insecurity, profit at any price, low job security, and dangerous and life-threatening working conditions (Schwartz, 2014). When describing the NFL, business analysts remarked that "the sport is a total mess, and the league has never made more money" (para. 1), citing flattening ratings, increased competition from live streaming services, the mishandling of the political controversy surrounding Colin Kaepernick's protest against racial injustice, and denials of links between the sport and concussions (Boudway & Novy-Williams, 2018). In 2018, the NFL was tied for sixth place as one of the most polarizing brands, and they have been less than resolute in dealing with several controversies impacting the league and the brand. This example serves as a stark reminder that the cultural priorities of an organization drive all of its policies and practices. Risk management cannot be an afterthought. It cannot be viewed as a necessary evil. Managing risks is at the core of what your organization stands for and must be interwoven with every aspect of your business.

The vision of this book is to tie legal theory to managerial roles and functions to enable you to use the law to make better decisions for your organization. The essence of this vision as it pertains to risk management is to allow you to use these principles to fashion a better organization for all your constituents: employees, participants, and spectators. A better organization is a safer and more efficient one. Thus, this text presents legal issues with a broad focus across organizational functions to enable managers to adopt a **preventive law** posture, one that looks at all risks that could affect the organization's financial health. Next, we introduce the preventive law process.

The Preventive Law Process

Prairie and Garfield (2010) have identified five steps that make up the preventive law process. First, risk identification is undertaken, in which a legal audit is performed to identify all possible risks. Second, an assessment of the risks is undertaken. Third, the risks are evaluated. Fourth, a preventive law plan is designed. Fifth, the preventive law plan is implemented. Below we will elaborate on each of these steps.

Step One: Risk Identification – The Legal Audit

Before any sport or recreation organization can develop a plan to prevent injury or loss, the legal landscape of possible liability must be explored, this is called *the legal audit*. The legal audit is a snapshot of an organization's overall functions, activities, structures, and operations. The legal audit will include policies, procedures, and practices, while also addressing any patterns in lawsuits, claims, or complaints. This legal audit will enable sport managers to identify which practices, policies, or trends pose the most serious risks to the organization. The approach to the legal audit should be holistic. Of course, personal injury is a prime issue in sport/recreation organizations because of the nature of sport and physical activity; however, a review of the topics covered in this text and presented in Exhibit 1.2 will remind the reader that many prospective liabilities stem from issues other than personal injury. Exhibit 1.2 is based on the following hypothetical situation to illustrate the far-ranging nature of these liabilities:

> You are the newly hired general manager of Daily Fit, a health and fitness club. Your club has a gymnasium, a pool, and several exercise and weight rooms. You also have a sauna and offer child care services. You operate a juice bar and a cafe for members, and you serve wine and beer in the cafe. You have contracted with a number of personal trainers to give assistance to your members.
>
> You are a firm believer in preventive law, and you hire a consultant to perform a legal audit so you will have a better sense of what the landscape of liability may be. The consultant has prepared the list of possible concerns shown in Exhibit 1.2.

Exhibit 1.2 Possible risks for a health and fitness club.

Employment Issues	*Premises Liability*
Breach of employment contract	Slip and fall
Wrongful termination suit	***Pool safety & maintenance***
Defamation based on employment references	Security in club and parking lot
	Provision of emergency medical care, including use of automated external defibrillators
Discrimination based on race, gender, disability, age, religion, nationality	Routine maintenance and repair of equipment
Sexual harassment	Other types of emergencies, such as severe weather or a bomb threat
Vicarious liability for actions of employees	General cleaning and maintenance concerns
Negligent hiring/retention/supervision claims	**Client/Participant Concerns**
Contracts with independent contractors, such as personal trainers	Supervision
Working conditions – Occupational Safety & Health Act and Fair Labor Standards Act	Instruction
	Warnings
Workers' compensation	Equipment safety
Labor relations issues, if any employees are unionized	Child care
	Food/drink preparation at juice bar
Employee theft	***Liability related to the service of alcohol***
Facility Issues	Use of waivers/agreements to participate
	Invasion of privacy issues in locker room
Zoning issues	**Intellectual Property/Advertising**
Lease issues	Use of trademarks/copyrights
Disability access – Americans with Disabilities Act	False advertising
Contracts with service providers	Deceptive trade practices

The list in Exhibit 1.2 reflects a holistic approach to preventive law and, although not exhaustive, can serve as a checklist to help you consider where you might have exposure to loss or liability. You will note that the list of concerns covers a wide range of legal issues: tort law, contract law, employment law, administrative law, and intellectual property law concepts are all embedded in the legal audit.

Steps Two and Three: Risk Assessment and Risk Evaluation

The **risk assessment** component of the preventive law process is closely aligned with the **risk evaluation** component, so we will explore these two steps together. Using information developed from the legal audit, you are able to assess the risks in view of their frequency of occurrence and the magnitude of the risk. In this way, you can set priorities as to which risks must be addressed immediately and which can be handled in the normal course of maintenance and repair. **Risk assessment** is the process of "determining the probability that particular risks will result in claims during a specified period and the magnitude of the potential liability arising from such claims" (Prairie & Garfield, 2010, p. 480). This assessment may be done by looking at the history of prior claims at your sport/recreation organization, the types of litigation that have been brought against similar organizations, applicability of statutes and regulations, value of revenues or profits derived from the activity, and the cost to minimize or eliminate the risk. To address these risks, various sources of industry information for a risk assessment are available. For example, a trade association may compile statistics related to claims in your type of sport/recreation business. Many industry publications also discuss current legal issues and pending litigation. Chapter 2 references a number of legal resources for keeping abreast of current litigation in sport and recreation. Trade journals such as *SportsBusiness Journal*, *Athletic Business*, *Athletic Management*, and *Fitness Management* publish articles dealing with current cases and trends in litigation. You should also consult with your legal counsel and attend workshops to stay abreast of the trends in litigation related to your business. Many trade associations and other membership associations frequently host webinars and online groups on social media platforms providing rapid access to current events and trends. For example, during the Covid-19

pandemic an Event Professional Group was created on Facebook to connect event professionals around the world to share and monitor best practices for canceling, rescheduling, and operating events in the post-Covid-19 environment.

Next, **risk evaluation** directs us to evaluate the risks we have assessed in conjunction with the mission of our organization and the importance of the activities to our organization. In essence, during the risk evaluation stage, you are simply asking yourself is this risk something we want to eliminate, or something we should retain but try to minimize the potential for loss. For example, some activities may pose serious risks but are essential to your organization's mission or objectives, while others are outside the core services or products of your organization.

Let's consider the previous health and fitness club example. The club's cafe serves beer and wine and let's assume you have assessed that the sale of alcohol poses a significant risk in terms of: (1) potential liability for overconsumption and drunk driving; (2) potential liability for personal injury; (3) increased financial and administrative costs to secure appropriate licenses and permits; (4) increased employee costs to ensure cafe employees are legally permitted to serve alcohol; and (5) increased inventory costs for the cafe. Now you must evaluate these risks in light of the mission of the organization and the importance of alcohol sales to the overall success of the organization (see Exhibit 1.3). For a health and fitness club, the sale of alcohol is really peripheral to your core business. It is an amenity that you could probably eliminate without causing your clients great inconvenience and would likely be more reflective of the core values of your organization. Thus, in evaluating this risk, you may choose to eliminate the sale of alcohol. However, if you decided to include beer and wine in direct response to customer requests and your revenues from those sales have become an important revenue stream for the club, you may decide you need to evaluate how to continue to offer beer and wine while minimizing or eliminating the risks associated with those sales. The preventive law plan will identify specific strategies to address the risks revealed during the risk assessment and evaluation process.

This process should be used for all the risks identified during the legal audit. You can see from Exhibit 1.3 that it is holistic and uses a broad perspective to better inform our decisions whether to eliminate or retain the risk. As mentioned, even if profitable, you may decide to stop serving alcohol at the club. On the other hand, even though operating swimming pools often engenders much litigation, and if a drowning were to occur any litigation or settlement would be very costly, a swimming pool is at the core of your business activities. It would be inappropriate to shut down the pool operation because of the risk assessment; instead, you would need to develop preventive law strategies to manage those risks. Exhibit 1.4 represents the assessment and evaluation of the pool safety risks.

Exhibit 1.3 Assessment and evaluation of risks – Alcohol sales at health club.

Type of Risk	*Frequency of Risk*	*Magnitude of Risk*	*Handling the Risk*
Potential liability for a member over-consuming or drunk driving	Occasional	Severe – fatality could result	Implement strict purchase limits and review staff training
Potential liability for personal injury	Occasional	Moderate – serious injury could occur	Prohibit use of facility while under the influence; review and update membership agreement and usage policies
Increased costs to secure licenses and permits	Frequent	Slight	Determine cost breakeven point between sales and licensing costs
Increased labor costs	Frequent	Moderate	Determine options to use independent contractors to operate alcohol sales; limit sales to certain hours and use flexible staffing
Increased inventory costs	Occasional	Slight	Track beer and wine sales individually to calculate itemized profit projections

Exhibit 1.4 Assessment and evaluation of pool safety risks.

Type of Risk	*Frequency of Risk*	*Magnitude of Risk*	*Handling the Risk*
Pool does not meet statutory standards regarding drain covers	Occasional	Severe – fatality could result	Install drain covers in the next 24 hours
Bleachers missing some slats	Occasional	Moderate – slip or fall	Repair bleachers before the next event
Slight irregularity in locker room tile – patron could trip	Frequent	Slight – bruised toe	Repair tile during usual maintenance period, post signage
No emergency training for employees in getting outside assistance	Frequent	Fatality could result from delay	Begin training employees by the end of the week

The strategies to minimize or eliminate the risks from the alcohol sales and the pool safety examples are important parts of the preventive law process. Next, we explore how these strategies are developed as part of the preventive law plan.

Step Four: Development of the Preventive Law Plan

We can cope with risks according to four possible strategies: (1) risk elimination; (2) risk retention; (3) risk transfer; and (4) risk control (Prairie & Garfield, 2010).

Risk Elimination

Risk elimination should be used only if the exposure to risk greatly outweighs the benefits of retaining the activity or operation. Recall that the sale of alcohol may be peripheral to a fitness club operation and may be eliminated based on the prospect of huge losses. However, if you were the owner of a pro sport franchise, most likely you would not eliminate the sale of alcoholic beverages at games. In this context, the service of alcohol is a part of the fan experience, and it can be very lucrative. You would most likely adopt transfer and control strategies as discussed below. Risk elimination is not the preferred strategy to deal with most loss exposures. If you have incorporated activities within your business because they are congruent with your mission and core values, you will opt to keep those activities and find ways to control the risk, not eliminate the activities.

Risk Retention

Risk retention means that your organization chooses to bear the financial consequences of an activity. If your business is self-insured, you are retaining all the risk. Or, if you cannot obtain insurance for a particular risk, yet you have chosen to continue the activity, you are retaining the risk. For example, if you choose to run an event without event cancelation insurance (because it is too costly), and the event must be canceled because of extreme weather, your organization will bear the brunt of that financial loss. In this case, you are retaining the risk.

Risk Transfer

Risk transfer shifts the possible financial loss to another party. Organizations attempt risk transfer in a number of ways, including by procuring insurance, hiring independent contractors, and using contractual provisions. We will discuss these methods in more detail in other chapters. The most common risk transfer method is the procurement of insurance. Since any claim for a covered incident is paid by the insurance company, insurance is a risk transfer method. For example, Wimbledon was one of the few organizations to have the foresight to buy event cancelation insurance that included coverage for a pandemic, so when

most event organizers were incurring significant losses during the Covid-19 pandemic, Wimbledon recovered around $141.7 million from its insurer (Turner, 2020).

Engaging an independent contractor, as we will discuss in Chapter 4, means that you shift the possible liability to that contractor. You will require the contractor to procure insurance for its own operations. For example, the vendor you hire to serve alcoholic beverages for a pro sport facility will be an independent contractor that must procure its own insurance. As you will learn in Chapter 4, a major benefit of using an independent contractor is that you avoid vicarious liability based on the actions of the independent contractor. Thus, this method transfers risk to the independent contractor.

Contractual provisions can also transfer risk. Using waivers with activity participants, as we will discuss in Chapter 16, essentially transfers the risk of financial loss to those participants, since they agree not to sue you if you have been negligent (see Chapter 14 for a discussion of negligence). You will also learn in Chapter 16 about the use of the indemnification clause, which essentially provides that Party A agrees to bear the liability of Party B's actions should a lawsuit result in a judgment against Party B. This type of risk transfer is common in commercial undertakings, such as venue lease agreements.

Risk Control

Risk control is the **key aspect of the preventive law plan**, since it involves the actual reduction of risk, not just methods to deal with the financial consequences of the risk. This strategy addresses the risks that you identify in your legal audit and involves developing plans to minimize the risks attendant to your operations. Since a sport or recreation organization, by its very nature, will always have inherent risks related to the activities that it provides, the focus here, relative to possible physical injury, is on reducing those risks that go beyond the inherent risks and arise from poor management, instruction, supervision, and so forth.

Consider our health and fitness club example again. Which preventive law strategies are incorporated into the preventive law analysis? Exhibit 1.5 aligns the suggestions for handling the risks produced by the risk assessment and evaluation with the most likely preventive law strategy. This alignment reveals that multiple strategies can be used together to address a single risk.

Step Five: Implementation of the Preventive Law Plan

A preventive law plan is only useful if it is properly and continuously implemented. As we have discussed, preventive law is simply one more management tool for attaining a competitive advantage in the sport/recreation marketplace. Although a risk management committee or legal counsel may be responsible for the actual development and implementation of the preventive law plan, *all* members of the organization

Exhibit 1.5 Aligning preventive law strategies with risks.

Type of Risk	*Handling the Risk*	*Preventive Law Strategy*
Potential liability for a member drunk driving	Implement strict purchase limits and review staff training; review insurance coverage	Risk Control; Possible Risk Elimination; Risk Transfer
Potential liability for personal injury	Prohibit use of facility while under the influence; review and update membership agreement and usage policies	Risk Control; Risk Transfer
Increased costs to secure licenses and permits	Determine cost breakeven point between sales and licensing costs	Risk Retention
Increased labor costs	Determine options to use independent contractors to operate alcohol sales; limit sales to certain hours and use flexible staffing	Risk Transfer; Risk Retention
Increased inventory costs	Track beer and wine sales individually to calculate itemized profit projections	Risk Retention

must understand the importance of preventive law and implement these strategies in their areas of expertise. Making the organization better for all constituencies is at the heart of preventive law, so the preventive law plan should become a cornerstone of the operation. As a simple example, if the media personnel in your business do not understand their contributions to preventive law, they will not view their role as vital to this agenda – and if they are not engaged, you will likely fail to see the results you want in terms of ensuring your public statements consistently reflect your organization's values, are accurate and timely, and help to persuade or inform your constituents about important organizational actions and positions. This lack of engagement could lead to a press release that may be tone deaf or contain inaccurate information, or a coach's post-game interview excluding important viewpoints or resulting in controversial statements, which could lead to damage the reputation of the organization, loss of fan support, or other financial losses.

A preventive law program may include a range of components, all dependent on the type of organization and the nature of industry in which it functions (Prairie & Garfield, 2010), but central to most preventive law programs are the following important components:

- *Developing unambiguous policies and efficient procedures*
- *Adopting fair complaint procedures and conducting thorough and reliable investigations*
- *Drafting clear and workable contracts and administering them consistently*
- *Designing effective training programs*
- *Creating a positive institutional image and managing media/public relations*

Developing Unambiguous and Efficient Policies and Procedures

Implementation of the preventive law plan begins with the promulgation of effective policies and procedures, such as the protocol to follow in a medical emergency or the protocol for hiring coaches to ensure that they are competent and suitable for your organization. Throughout this text, each chapter will include competitive advantage strategies, which will be helpful as you develop policies and procedures for the legal issues discussed throughout the book. Good policies and procedures not only provide evidence that you are acting reasonably, but they also communicate to all your constituents your commitment and concern. These policies are communication mechanisms for ensuring that all of your organization's personnel are in alignment regarding their obligations and performance standards.

Policies and procedures also ensure fairness and consistency in the workplace. They provide guidance for managers and employees alike in dealing with a variety of possible legal issues. Keep in mind that people may be less likely to bring a claim against your organization if they perceive that you are trying to "do the right thing" in terms of safety and fairness.

Adopting Fair Complaint Procedures and Conducting Thorough and Reliable Investigations

Many sport organizations function in an educational context in the United States and are subject to significant regulation at the state and federal levels. These state and federal regulations often require schools and universities to adopt complaint procedures for students, provide a system to notify and inform students of their rights, and resolve disputes involving students. They also mandate non-discrimination policies and practices across a broad spectrum of activities. Additionally, schools and universities are required to conduct investigations in response to reports of sexual harassment or sexual violence. Their failure to conduct proper investigations is often the basis of claims against schools and universities. In Chapters 11 and 12, we will examine the authority and operations of interscholastic and intercollegiate sport organizations in detail. These procedures may be quite different than requirements used in other business sectors or non-profit sectors dealing primarily with employees but maintaining fair, clear, and consistent complaint procedures can help to avoid numerous claims by employees and also help to comply with federal labor and non-discrimination laws.

Competitive Advantage Strategies

Implementing Preventive Law

- Use the preventive law process as another opportunity to become more competitive in the marketplace.
- Develop the preventive law plan as an extension of your organization's core values and to enhance the experience of all your constituents.
- Do not use the strategy of eliminating activities to reduce risks, unless the risks of an activity greatly outweigh its benefits.
- Use all available risk transfer strategies, including insurance, the use of independent contractors, and contractual means, such as waivers and indemnification clauses.
- Make sure all employees understand and are involved in the development of the preventive law program.
- Allocate sufficient time and resources to the development of the preventive law plan so that employees understand how important it is to your organization.

Drafting Clear and Workable Contracts and Administering Them Consistently

One of the advantages in contract law is that, generally, you have adequate opportunity to conduct negotiations and work through several drafts of a contract in order to produce a document that protects your organization's interests. See Chapter 3 for a discussion of this process in terms of drafting a contract with the "worst case" scenario in mind. The point here is that you have adequate time to assess a contract: you do not have to rush into a contractual undertaking. In this area in particular, you can truly take a preventive law approach.

Be careful to draft contracts that are congruent with your business practice and values. For example, if you are concerned about possible injuries related to alcohol consumption by spectators, your contract with the alcohol concessionaire should ensure that the concessionaire trains employees properly, follows proper protocol in the service of patrons, and offers incentives for drivers to remain sober. Although standard contracts for many transactions are readily available in books and online, they often will not reflect the nuances of your business or particular aspects of your state's laws, and hence may do more harm than good. For example, if you copy a waiver form from a book, but it does not use the language relating to negligence required by your state, the document will not protect you. You should always consult an attorney to develop an effective waiver form for your organization (see Chapter 16 for an in-depth discussion of waivers).

Design Effective Training Programs

The best policies and procedures are useless if they are not reflected in organizational practice. Therefore, effective training programs in such areas as employment practices, inspection and maintenance of facilities, proper supervision and instruction in your programs, and protection of your intellectual property are essential to the implementation of a preventive law program.

All employees, regardless of position, should become aware of the necessity of using preventive law strategies in all their work efforts. Everyone has a responsibility to foster a safe environment and to be cognizant of areas that could pose personal or financial risk. Since your preventive law plan is inextricably tied to your organization's core values, it is important to explain to employees just how the preventive law process enhances those values. As mentioned earlier, we must have fair complaint procedures, but we also must have employees properly trained to follow and implement those procedures.

The increase in employment litigation has particularly emphasized the need for employers to take preventive steps which includes quality training programs related to harassment and discrimination (Chapters 5 and 6 examine discrimination and harassment in employment in detail): "Structured properly, employee training not only mitigates potential liability and eliminates punitive damage awards, but also adds value to an organization and can eliminate problems of harassment and discrimination before they become litigation issues" (McLaughlin & Merchasin, 2001, para. 10). Employees are more likely to follow policies and procedures if they understand the value of those policies and procedures for the organization.

Creating a Positive Institutional Image and Managing Media/Public Relations

Sport and recreation is an essential and important aspect of society with a significant impact on the local and national economy, as well as attracting vast media attention. Sport and recreation combined is roughly valued above $600 billion globally (Business Wire, 2019). As such, how we manage our institutional brand or image in the media can impact whether consumers purchase our products, participate in our programs, watch our events, or hire our services. When consumers buy a product or service they are not just buying a product or service, they are also buying what the organization stands for – that is, its brand and image. Thus, a preventive law plan must include marketing and media plans that identify our management objectives covering our communications with a broad range of constituents, including students, athletes, ticket holders, media, donors, investors, and community organizations. The media plan should distinguish the varied types of media in the sport and recreation industries – broadcast media, print media, and social media; and how these media outlets function in a digital environment. The media plan must also be prepared to handle negative publicity or a crisis. Similarly, our marketing strategies may include advertising, sales promotions, or other marketing tactics, all of which are subject to a variety of consumer protection regulations prohibiting false advertising or deceptive trade practices.

Conclusion

One of the underlying themes of this book is to tie managerial functions to legal theory in an effort to help managers in sport and recreation organizations make their businesses more competitive in the marketplace. Competitive advantage stems, in part, from making your organization a better one for all your constituents. A better organization is one that enhances safety and minimizes loss to the organization. A preventive law program should be an extension of your core values and should be proactive and holistic in identifying all possible exposures for your type of organization. After you identify, assess, and evaluate your possible exposures to loss, you will design and implement a prevention plan. This plan will focus on risk control as you implement strategies to minimize the risks identified. You must have an organizational commitment to the preventive law process. It is not something that can be done once and then forgotten. The cycle of risk identification, assessment, evaluation, plan design, and plan implementation is continual.

Discussion Questions

1. What is the difference between the traditional concept of risk management and preventive law?
2. What are the five steps of the preventive law process? Discuss each.
3. Why is the concept of risk control at the heart of the preventive law process?
4. Discuss the aspects of designing a prevention plan.
5. Explain the necessity for an ongoing plan to address risk in an organization.

Learning Activities

Using the key words "risk management" or "preventive law," conduct an Internet search to find policies and procedures of various sport organizations. Have the organizations adopted a holistic approach to identifying risk? Are there gaps in the risks identified? Does it appear that each organization's philosophy is to incorporate risk management/preventive law into its core values?

Case Study

Assume that you have just been hired as the general manager of a minor league baseball team. Numerous lawsuits have been brought against the team in the past, ranging from personal injury claims to contract disputes, even a trademark infringement suit. You are convinced of the value of preventive law in any organization and feel that you need to begin the process with your franchise as soon as possible. In view of what you have learned in this chapter, discuss the measures you would take to institute the preventive law process in your franchise.

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2 The U.S. Legal System and Using Legal Resources

Introduction

This chapter is intended to provide the reader with a basic understanding of the American legal system, as well as a rudimentary foundation for conducting legal research and accessing legal information. If you have a solid grasp of these fundamentals, you will be in a position to converse intelligently with legal counsel should it become necessary, and you will be capable of exploring the legal ramifications of an issue when it presents itself. Nevertheless, when you are faced with a legal problem, it is prudent to rely on an attorney's advice and use your own more limited research abilities only to develop an informative base upon which to interact with your lawyer.

The U.S. Legal System

The legal system of the United States is based on the balance of power created by having three branches of government – the legislature, the executive, and the judiciary. Each of these three branches is a source of law, and each fulfills a designated role in maintaining our system of government by rule of law (see Exhibit 2.1).

A **constitution** is the foundational document that sets forth the basic operating principles of a government, including limits on governmental power. Each of the 50 states has its own constitution, which usually mirrors the federal Constitution in many of the protections provided to its citizens. **Statutes** are written laws created by legislatures, which are law-making bodies comprised of elected representatives. **Regulations** are rules that are created to operationalize statutes by providing more specific guidance. As you can see in Exhibit 2.1, the legislative branch is not alone in creating new law. The executive branch also establishes law by virtue of its control over administrative agencies which then promulgate regulations to aid in the enforcement of statutes. As enacted by a legislature, statutes are often "bare bones" and require regulations to flesh them out so that people know how the laws are meant to apply to real-world situations. For example, Title IX is one paragraph long, but the U.S. Department of Education is responsible for implementing regulations based on Title IX that fill several pages.

The courts may also create law when they render decisions that interpret existing laws as they apply to a particular case. This type of law is collectively known as **common law**, or **case law**. Nevertheless, creation of new law is not the primary function of the courts, since they must operate within the framework of the laws that already exist, in contrast to the legislatures that are elected to represent the will of the people in creating new laws.

The laws created by these three governmental branches, along with state and federal constitutions, are considered primary legal sources. That is, they *are* law and carry authority as such, in contrast to secondary sources (discussed later in this chapter), which are merely commentary on the law and hold only explanatory or persuasive value.

Exhibit 2.1 Relationship of law to branches of government.

Branch of Government	*Legislative Branch*	*Executive Branch*	*Judicial Branch*
Source of Law	Congress and state legislatures	President or governor, administrative agencies	Federal and state courts
Type of Law	Statutes	Executive orders, agency regulations	Case law/common law
Role of Branch	Enact new laws, amend existing laws	Enforce existing laws	Interpret Constitution and other existing laws

Structure and Functioning of the Judicial System

The courts are the ultimate arbiters of the law, because in the end the courts are where disputes about the appropriate application of all types of laws to real problems are resolved. So let's focus now on understanding the structure and functioning of the judicial system.

Because the United States is a federal union of many states, we have both a federal court system and a state court system. See Exhibit 2.2 below, which depicts the hierarchical nature of the judicial system, and also shows how our judicial structure is split into the two systems. The court system of the state of Idaho is used as an example in this exhibit.

Courts have differing **jurisdiction** – authority to hear a case – depending on the location and subject matter of the case. As a general rule, the federal courts assert jurisdiction only over federal law claims – **federal question jurisdiction**. These are claims that are based on the U.S. Constitution, or federal statutes or regulations. In addition to jurisdiction involving federal laws, federal cases may also arise in the sport industry based on what is called **diversity jurisdiction**. In diversity jurisdiction cases, the case involves a dispute between parties who are citizens of different states where the amount in controversy exceeds $75,000. In these types of disputes, a party may file the lawsuit in federal court and typically the federal court will be applying state law to resolve the controversy. An example of diversity jurisdiction is illustrated in our Focus Case presented later in this chapter, *Pitino v. Adidas America, Inc.* (2018). Coach Pitino brought state tort claims against Adidas, but since the dispute involved alleged damages in excess of $75,000, and Pitino and Adidas were citizens of different states, the federal district court in the Western District of Kentucky had diversity jurisdiction to hear the dispute. For the most part, though, federal courts will hear only federal law claims.

State courts can hear both state law and federal law claims, which is referred to as, **concurrent jurisdiction**. Sometimes it becomes a strategic decision for the attorneys involved as to whether to bring a federal claim in federal court or in state court. For example, federal cases often move more quickly than a state court case, but a jury in a state court case may award more generous verdicts than a federal jury.

In both federal and state court systems, the trial court is the lowest-level court in the hierarchy, with the appellate court as the next level up, and the highest court is usually called the supreme court and is the court of last resort. (This is not always true: the highest court in New York is called the New York Court of Appeals.) An adverse decision by a lower court may be appealed to the next higher court, but the highest court in each jurisdiction may select which cases it does and does not wish to review.

The U.S. Supreme Court is very selective about the cases it chooses to hear. Those who wish to take an appeal to the Supreme Court must petition the Court by requesting **certiorari**. A **denial of certiorari** simply means that the Supreme Court declines to hear the case and, having done so, allows the decision of the lower court to stand. The same is true when a state supreme court refuses to hear an appeal. This does

Exhibit 2.2 Court hierarchies – federal and Idaho.

	Federal Courts	*State Courts*
Highest court	U.S. Supreme Court	Idaho Supreme Court
Appellate court	U.S. Circuit Court of Appeals	Idaho Court of Appeals
Trial court	U.S. District Court	Idaho District Court

not mean that the higher court agrees with or is giving any endorsement to the lower court's decision; it means only that the court is choosing to hear cases that seem more important or urgent at that point in time. Cases that resulted in a split of opinion in several lower appellate courts might be viewed as requiring immediate ultimate resolution.

A case may be appealed only on grounds of a **legal error** – that is, an erroneous interpretation of the law or application of legal procedure by the lower court. The trial court is entrusted with finding the facts – determining the credibility of the witnesses and the evidence. For example, if a professional athlete was put on trial for murdering his partner, the issue of whether the athlete owned a weapon similar to the weapon used in the murder is a factual question for the jury to consider at the trial court level. The jury's conclusion on that issue would not be appealable. However, whether or not the trial court properly admitted his ownership records into evidence would be an evidentiary legal issue that could serve as grounds for appeal, if that evidence should have been excluded as a matter of law. In deciding such issues, appellate courts review the trial court's record and the appellate briefs filed by the parties' attorneys, and they hear the attorneys' oral arguments. They do not hear witness testimony or similar evidence; instead, they simply accept the outcomes of the fact-finding performed by trial courts.

An appellate court may choose to *affirm* the decision of the lower court, to *reverse* the decision (thus transforming the loser into the winner), or to *remand* the case back to the lower court with instructions for it to re-examine the facts in light of the appellate court's interpretation of the legal principles to be applied.

Anatomy of a Lawsuit

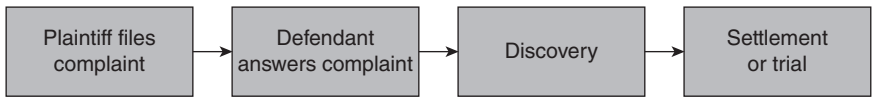
The judiciary is composed of civil courts and criminal courts. **Criminal courts** are where persons charged with a crime against the state are prosecuted. **Civil courts** hear cases that involve controversies of a noncriminal nature. Examples of **civil causes of action** (i.e., legal grounds upon which to sue) include contract disputes, employment discrimination, and torts. A **tort** is a civil wrong other than a breach of contract, usually referring to the causing of damage or harm to property, a person, a person's reputation (e.g., slander or negligence), or a person's commercial interests.

In a criminal case, the defendant has the right to a trial before a jury of his or her peers. Civil suits differ in that some are tried before a jury and some are heard by a judge with no jury. Criminal and civil courts also differ in the burden of proof required. In a criminal case, the prosecution must prove *guilt beyond a reasonable doubt*, or the jury is supposed to vote to acquit the defendant. In contrast, in a civil trial, the burden of proof is much lower. The plaintiff has only to prove his or her case by a *preponderance of the evidence*; that is, that his or her case is more likely than not to be true. Here the scales of justice merely move off center, whereas in a criminal trial one side of the scales must drop all the way down with the weighty assurance of guilt. The composition of juries will also vary depending upon whether a case is in state court or federal court. Most state courts require 12 jurors but permit less than a unanimous verdict depending on whether it is a criminal or civil case, while in federal court the jury can have as few as six jurors but require that their verdict be unanimous.

Most sport law cases are brought in civil court, although occasionally a criminal case will arise that involves sports gambling, bribery, or excessive violence.

For a step by step description of the civil (and criminal) trial processes, as well as more details of the anatomy of a lawsuit, see the website of the Oklahoma federal district court system (the link to their website can be found in the Web Resources section). Further, Exhibit 2.3 below outlines the process followed in a civil trial.

Exhibit 2.3 The civil trial process.



The following hypothetical example illustrates the civil trial process. Susan Spectator is injured in a 15-foot fall when the bridge she is crossing collapses as she and several other spectators follow their favorite professional golfer to the next hole. Susan then hires a tort lawyer with experience in negligence actions, who prepares a written **complaint** summarizing the allegations in Susan's case against the country club. This complaint includes a statement of the cause of action (negligence in this case), the remedy requested, and a brief summary of the facts supporting Susan's claim that the defendant is responsible for her injury.

Susan's complaint is filed with the court. The country club then files an answer to the complaint, admitting or denying each allegation. Alternatively, the country club's attorney can file a motion to dismiss the case, if it is clear that the plaintiff does not have a legitimate case. The judge assigned to the case then orders a period of discovery, during which the lawyers for both parties gather their evidence by such means as **depositions** (oral testimony obtained under oath from witnesses or the parties in the case) and **interrogatories** (answers written under oath to a list of written questions). For example, Susan's lawyer deposes the club's maintenance staff about the condition of the bridge and requests maintenance records to ascertain whether the club acted reasonably to keep the bridge in a safe state of repair.

Often, the results of discovery lead to an out-of-court settlement or to a successful motion for summary judgment (explained below), allowing all parties to avoid the time and expense of a full trial. If, however, a sufficient controversy remains after discovery is complete, then plaintiff Susan will pursue the matter through a full **trial on the merits**, which means that the issues will be fully argued and a final decision reached. If the country club is found to have been negligent in maintaining the bridge or in regulating the traffic flow based on the bridge's weight-bearing capacity, Susan will win her case and be awarded compensatory damages for her injury. **Compensatory damages** are monetary payments for actual injury or economic loss, and may include compensation for such things as medical expenses or property damage. If the country club is found grossly negligent, the court may award punitive damages. **Punitive damages** are payment of an amount beyond that required to compensate for a victim's injuries; the additional damages award is intended to punish the defendant for their grossly negligent or intentional misconduct.

Means of Concluding a Lawsuit

You will encounter three common ways of concluding a trial, other than a decision on the full merits of the case:

1. Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.
2. Motion for summary judgment.
3. Petition for a preliminary injunction.

When a court grants any of these, the case to that point cannot carry any precedential value, because it has not received a full trial on the merits. For researchers, one value of such cases is their ability to shed light on how the courts might reason about the issue involved if the issue ever did reach a full trial. For example, recall the Saints lawsuit against the National Football League (NFL) from Chapter 1. That case was dismissed within just a few months of its filing, which could send a fairly strong signal to other fans, leagues, and teams that these lawsuits do not have much merit and we likely do not need to take immediate steps to modify our policies or practices to avoid future litigation, although the NFL did adopt new replay policies as part of its commitment to improve the replay system. However, had that case "survived" a motion to dismiss (see below) and instead been resolved on a motion for summary judgment it should serve as a greater warning and potential risk. The fact that the plaintiff was able to present a strong enough case to conduct discovery and prepare the case for trial suggests it was a viable claim and a claim that could potentially be raised against our organization if we were in a similar situation. It is useful as a sport manager to recognize the "stage" at which a case has been resolved to gain insight into how relevant the decision could be to her organization.