

NCHERM NEWSLETTER SUMMER 2006

Hello friends and colleagues. Welcome to the Summer 2006 NCHERM Newsletter. In this issue, you will find:

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If you would prefer not to receive our quarterly newsletter, please e-mail us at NCHERM@aol.com and ask to be removed from the subscription list.

1. Update on NCHERM Happenings and Activities

- Spring 2006 was a very busy semester. NCHERM consulted with over 60 colleges and universities, hosted three seminars, and revised conduct codes for eight colleges.
- Cori and Brett Sokolow are expecting baby #2 in early August. Brett would like to thank his son for being considerate enough to plan his arrival prior to the start of orientation.
- NCHERM was a sponsor of the 2006 Violence Goes to College Conference in May, organized by Dr. Sally Spencer-Thomas of Regis University. This was a tremendous conference, and we thank Sally for her hard work and devotion to student health and safety.
- Brett Sokolow Keynoted the West Virginia Foundation for Rape Information and Services Annual Conference in April, 2006.
- Brett Sokolow will address relationship violence as a panelist at the ASJA Circuit Three Drive-in at Lehigh University on June 22nd, 2006.
- Brett Sokolow and Sandra Schuster, Esq. will co-present a concurrent session at the 2006 CUPA-HR Annual Conference in San Diego in September 2006.
- Brett Sokolow will be a plenary speaker at the 2006 National Conference on Sexual Assault in Our Schools in Tampa, Florida in October 2006.
<http://www.safesocietyzone.com/>

- Brett Sokolow will be addressing student suicide issues at two meetings of the Pennsylvania College Personnel Association in November and December, 2006.

2. NCHERM EXPANDS AFFILIATED CONSULTANTS ROSTER

In 2004, NCHERM created the Affiliated Consultants program. This program has enabled us to offer a broader range of consultants to the student affairs profession. Our affiliated consultants have full-time employment on college campuses, but also provide consulting services under NCHERM auspices on an ad hoc basis to other campuses.

Linda Sharp affiliated with NCHERM last year, giving us extended reach into athletics-related risk management. This year, NCHERM is pleased to announce the affiliation of W. Scott Lewis, JD. We have recently formalized a loose relationship between NCHERM and Scott that has existed for six years.

Scott is the Director of Judicial Affairs, the National Student Exchange, and Academic Integrity Initiatives for the University of South Carolina. He also serves as a faculty member for the Colleges of Political Science and Education at USC, and has taught in the Moore College of Business as well. He received his Bachelor of Science degree in Psychology and his Master of Science degree in Higher Education Administration from Texas A&M University in College Station, Texas. He received his Law degree from the University of Houston Law Center in Houston, Texas. Mr. Lewis is also a certified mediator, completing programs with Brazos County, Texas; Harris County, Texas; Texas A&M University and The University of Houston Law Center. In addition to his other duties at USC, Scott also serves as Chair of the campus Behavioral Intervention Team, and is responsible for reviewing system-wide policies and procedures.

Scott's areas of expertise overlap with NCHERM's key areas of focus:

- Sexual Assault and Harassment
- Judicial Affairs and Judicial Board Training
- Suicide & Psychological Distress
- Campus Safety and Security
- Hazing
- Problem drinking and drugs
- Code Analysis
- Litigation review
- Expert Witnessing

The addition of Scott as an Affiliated Consultant allows us to expand our range to better serve large public universities. As you know, NCHERM has traditionally served as counsel to small private institutions, and as a consultant to the full range of public, private, small, large and community colleges. Since 2004, NCHERM has become outside counsel to two mid-size state institutions, taking on new challenges in the process. Scott's involvement with NCHERM will help to increase the knowledge and

expertise we can offer to our public university clients, as well as to colleges and universities of all sizes and types.

3. UPCOMING NCHERM WEBINAR

**Student Suicide:
What College and University Administrators Need to Know About the Law and
Best Practices**

**FRIDAY, JUNE 23RD, 2006
12:00pm--1:30pm Eastern Time**

**Presented by:
Saundra Schuster, Esq., Brett A. Sokolow, J.D., and W. Scott Lewis, J.D.**

College and university administrators are all trying to find the right balance for managing the risk of suicidal students while doing the utmost to support them. We are grappling with tough questions, and this webinar gives you fresh thinking and creative strategies from three attorneys deeply engaged in exploring the best practices for suicidal students that are emerging in our field. Materials prepared by the presenters will be provided to all registrants. This webinar is framed around these key questions that the presenters will address:

1. How do the ADA and Section 504 impact on involuntary withdrawal decisions?
2. What does a suicidal student need to do to qualify as "disabled"?
3. What is the "direct threat" test, and how do we meet it?
4. Is an OCR investigation better than a wrongful death lawsuit?
5. Can your conduct code be used to meet the "direct threat" test, or is a separate procedure necessary?
6. Must a decision to withdraw a student be made in consultation with medical experts?
7. Can we use "disruption" and other code violations to address suicidal students?
8. Is a suicidal student entitled to return to campus after an absence?
9. Does the ADA allow you to force a student into counseling?
10. Can psychologists predict future harm with any accuracy, or is assessment just a fancy term for CYA?
11. Is Jain v. Iowa still the leading case on legal liability for student suicide?
12. Is a disabled student entitled to enhanced due process rights?
13. What are the legal risks of "no harm" agreements and behavioral contracts?
14. What are reasonable accommodations for a suicidal student?
15. When is a suicidal student no longer "otherwise qualified" and what are the legal implications of this?

HOW A WEBINAR WORKS

Webinars are cost-effective because everything you need is already in your office -- a telephone and a computer. Webinars are large-group conference calls where you can

follow along online with our PowerPoint. Each registrant can call in from one telephone line on campus, so you might arrange to use a phone in a conference room, where your staff and administrators can listen and participate via speakerphone. You can also purchase additional lines for multiple campus call-in locations for a moderate surcharge. You will receive a call-in 800 number and a PIN for the day of the event. Once you join the call, you will be able to hear the presenters and ask questions via phone and email.

INTENDED PARTICIPANTS:

Deans of Students, Vice-Presidents, Judicial Affairs Administrators, Student Affairs Administrators, University Counsels, Residential Life Administrators, Campus Law Enforcement, Counselors, Health Service Providers, etc.

PRESENTERS:

- **W. Scott Lewis, J.D.** Scott is the Director of Judicial Affairs and the National Student Exchange for the University of South Carolina. He also serves as a faculty member for the Colleges of Businesses and Education at USC. He received his Bachelor of Science degree in Psychology and his Master of Science degree in Higher Education Administration from Texas A&M University in College Station, Texas. He received his Law degree from the University of Houston Law Center in Houston, Texas. Mr. Lewis is also a certified mediator, completing programs with Brazos County, Texas; Harris County, Texas; Texas A&M University; The University of Houston Law Center; and the Association of Student Judicial Affairs.
- **Sandra K. Schuster, Esq.** Sandra Schuster is General Counsel to Sinclair Community College. She is the former Senior Assistant Attorney General for the State of Ohio in the Higher Education Section, representing public colleges and universities. Prior to joining the Attorney General's staff, she served as the Associate Dean of Students at The Ohio State University. Ms. Schuster has over twenty-five years experience in college administration and teaching. She has served as a consultant to colleges and presented extensively nationally on legal issues in higher education.
- **Brett. A. Sokolow, J.D.** Brett Sokolow is the President of NCHERM and the author of ten books on student affairs law and policy topics. Mr. Sokolow is the Editor of the *Report on Campus Safety and Student Development*, the Editor-in-Chief of *The NCHERM Chronicle of Campus Conduct*, and serves nine campuses as outside counsel. He serves on the Board of Directors of the Council on Law in Higher Education (CLHE), and on the Editorial Advisory Board of CLHE's *Student Affairs Law & Policy Quarterly* and the *College and University Law Advisor* published by the Civic Research Institute. Mr. Sokolow is Vice-Chair for Education of the Directorate Body of ACPA's Commission on Judicial Affairs and Legal Issues.

NCHERM Webinar Registration

Student Suicide:
What College and University Administrators
Need to Know About the Law and Best Practices

Friday, June 23rd, 2006
12:00pm -- 1:30pm, Eastern Time

REGISTRATION BY CHEQUE OR CREDIT CARD

_____ Webinar Fee \$199.99 for one campus call-in line
_____ Registration entitles you to one call-in line per campus. Additional lines
_____ can be added for \$49.99 each (please indicate quantity of additional lines
_____ needed)
_____ CD-ROM of Seminar & Materials--\$149.99 each for registrants:
_____ CD-ROM of Seminar & Materials for non-registrants \$199.99 each

_____ Total

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(Call-in numbers & materials will be e-mailed to the institutional representative listed in the email address above once your registration is received by NCHERM)

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4. NCHERM's *Chronicle of Campus Conduct* to Merge with CLHE's *Student Affairs Law & Policy Weekly*

As the Sokolow family grows, and NCHERM expands, the commitment of a weekly newsletter has become too much of a drain on needed time and energy. Brett Sokolow has enjoyed publishing 60 issues of the NCHERM *Chronicle of Campus Conduct*, but the time has come to scale back. We are grateful to our contributing editors Linda Rowe, Saundra Schuster, Mary Lou Antieau Malcolm Smith, David Shaw, Daren Bakst, Christopher Schmidt, Daniel Kast, Andrew Luptak, Karen Johnson and Scott Lewis.

With a subscriber base of 130 people, we did not want CCC to simply fade into obscurity. Fortunately, we have been able to find a way to perpetuate its fine content and continuity by merging it into *The Student Affairs Law & Policy Weekly*, a publication of the Council on Law in Higher Education (CLHE). Brett Sokolow will become Legal Editor of SALPW, and CLHE has extended an invitation to all of CCC's Contributing Editors to become Contributing Editors to SALPW.

All current CCC subscribers will become SALPW subscribers at the end of June. We look forward to this new collaboration and encourage you to subscribe to SALPW if you do not already by visiting www.clhe.org.

5. RESOURCE SPOTLIGHT—TRAINING DVD-- BEST PRACTICES FOR CAMPUS SEXUAL MISCONDUCT JUDICIAL TRAINING

Looking for a great campus conduct training tool? On September 23rd, 2004, NCHERM held its videoseminar, Best Practices for Campus Sexual Misconduct Judicial Training at the University of Dayton. The seminar was a great success, with more than one hundred participants at campuses across the country. A digital recording was made, and is available as a DVD or videotape. It is a four hour recording, featuring facilitation by Brett Sokolow and Saundra K. Schuster (General Counsel to Sinclair Community College and Assistant Attorney General for the State of Ohio in the Higher Education Section). Training materials accompany the DVD. This seminar sets the standard for best practices for sexual misconduct judicial training. Please visit <http://www.ncherm.org/publications.html> for details.

6. A NEW BOOK FOR COLLEGE ADMINISTRATORS

We are proud to announce a new resource for school and college administrators. In February, Corwin Press released a new book co-authored by Stephen L. Sokolow, Ed.D., Brett's father. The book is entitled, The Spiritual Dimension of Leadership.

This book illuminates many of the core values, beliefs, and principles that can guide, sustain, and inspire school leaders during difficult times. These values and principles have underlying spiritual roots. The authors believe that the more aware of them we are, and the more we express them in leadership practice, the more effective we become.

Co-authors Paul D. Houston, Executive Director of the American Association of School Administrators, and Stephen L. Sokolow, a founding partner and Executive Director of the Center for Empowered Leadership, offer eight key leadership principles to help you become a more enlightened leader:

Reap the many rewards of practicing these principles and journey down a path of awareness and insight that will empower us and those we lead to create the best possible future for our students.

For more information, please visit:

<http://www.corwinpress.com/booksProdDesc.nav?prodId=Book228305>

7. FREE ARTICLE

THE ALCOHOL BLACKOUT: A BOOK REVIEW

In 2003, Mnemosyne Press in Santa Barbara, CA published an important book that should be on the reading list of student conduct professionals. The book is called *The Alcohol Blackout: walking, talking, unconscious and lethal* by Donal F. Sweeney, M.D. and Robert A. Liston. The book promises to answer the questions:

- How to recognize the blacked out person is unconscious and has no idea what he or she is doing;
- How to cope with him or her;
- How to protect the blacked out person and yourself from harm;
- How to drink to prevent blackouts;
- Why blackouts are a huge, misunderstood and unrecognized problem for the law and society.

In this issue, Brett Sokolow reviews the book and its answer to these and other important questions.

In the 1980s, Dr. Sweeney realized that the literature of addiction had failed to explain the phenomenon of the alcohol blackout. As he researched, he learned that the advent of PET and MRI scanning had allowed brain researchers to make astounding insights into brain function, but no one had crossed disciplines to apply that research to the question of alcohol blackouts.

The main contribution of this book is the answer to what was previously a chicken and egg question: Is the individual experiencing a blackout conscious of what they are doing, but simply unable to remember afterward what they have done, or are they incapable of knowing what they are doing while doing it? Dr. Sweeney's answer is that blacking out is an unconscious state that renders the blacked out person incapable of knowing what they are doing. Therefore, memory is never formed, and amnesia—forgetting—is impossible. The blacked out person cannot remember afterward, not because they forgot what happened, but because they never knew. Recalling the

events of a blackout through hypnosis or administration of a truth serum is impossible. Perhaps a better way to understand is to comprehend Dr. Sweeney's assertion that memory and consciousness are not different functions. Consciousness is a function of memory. If memory does not form, conscious intention cannot result. Thus, for example, a blacked out defendant accused of any crime requiring intent as an element could argue persuasively that they were unable to form the intent they were accused of possessing.

PASSING OUT v. BLACKING OUT

Dr. Sweeney draws a meaningful distinction between being passed out—falling asleep in an alcohol-induced stupor—and blacking out, which leaves one awake and operative physically. The physical operation of a person in blackout is described as being wholly impulsive, with no capacity for rational thought or considering the consequences of actions. It is literally an unconscious state, in the true meaning of unconscious as lacking consciousness, and not of the more common association of unconscious as equating to being passed out. Dr. Sweeney underlines that passing out and blacking out are entirely different brain dysfunctions, even though we tend to associate them in non-medical observation of the behavior of others.

NATURE AND FREQUENCY OF BLACKOUTS

Dr. Sweeney believes this association of passing out and blacking out arises from the fact that fatigue is a contributing factor in blackouts. He also believes that the pace of alcohol consumption influences the onset of a blackout more than quantity of alcohol consumed. Blackouts, says Dr. Sweeney, can last for several days depending on how long a drinking episode lasts, but are more likely to last a few hours. He even chronicles one blackout claimed to have continued for four weeks. How frequent an occurrence are blackouts? Dr. Sweeney cites an oft-cited study that showed about 15% of drinkers self-admitted to experiencing blackouts, which does not account for those who had them without knowing.

Other studies indicate, not surprisingly, that this rate climbs to 25% when college students are studied, with women more likely than men to experience blackouts. Dr. Sweeney also describes what he calls a fadeout, which is not a full-on blackout because with help or time, the person does regain quickly some or all of the details which at first they could not recall. It may be similar to (or another term for) what students commonly refer to as a "brownout," meaning something less than a full-on blackout.

SHORT-TERM MEMORY IS THE KEY

Dr. Sweeney gives some illuminating discussion of the varying types of memory—episodic, semantic, procedural, immediate, and working. Remembering all the significant events of your life is episodic memory. Everything you learn and your education are part of your semantic memory. Procedural memory is all that you have learned to do often through repetition—drive a car, ride a bike, etc. Immediate memory

is your impressions or thoughts, and those blacked out continue to have immediate memory, but it is simply replaced by the next fleeting thought. It is impulsive and superficial. The link between current and past knowledge is called working (or more commonly “short-term”) memory.

While we tend to view memory as a single construct—you either do remember something or you don’t—memory functions are much more sophisticated. This sophistication explains why a blacked out person might seem to be responsive to you (immediate memory) and could even continue to consume alcohol (procedural memory), but could be severely impacted by working memory dysfunction. This accounts for pilots who have flown cross-country and surgeons who have operated successfully, all in blackouts. Their procedural and semantic memories were intact. Does this strain credulity or tell us instead that our ignorance or misunderstanding of memory and its functions is dramatic?

Because working memory cannot form, a blacked out person is not oriented spatially to time or place. Many have tried to analogize blackouts to sleepwalking, but Dr. Sweeney makes a distinction in that if you wake a sleepwalker, they reorient as memory suddenly returns. You cannot do this with someone who is in a blackout.

THE HIPPOCAMPUS

Where does working memory exist? Scientists have traced it to the interaction of two C-shaped sections of the brain--referred to as the hippocampus--with the temporal lobe. Apparently, the hippocampus can be incapacitated. *“Just start swilling alcohol at a rapid rate on an empty stomach while in a state of fatigue,”* writes Dr. Sweeney. Sound like any students we know? Though the exact mechanism is unknown, alcohol keeps the hippocampus from receiving the chemical signals that make memory formation possible. One of Dr. Sweeney’s more interesting theories is that blackouts occur not necessarily based on how much someone drinks, but how fast they drink. He cites as critical the possibility that food, fatigue, mood and even medicines ingested also play important roles. While they are more common among alcoholics, blackouts can happen to moderate and even first-time drinkers, as well.

RECOGNIZING BLACKOUTS

Dr. Sweeney suggests, contrary to conventional wisdom, that we may be able to recognize blackouts. He starts by stating something obvious, but often overlooked. The blacked-out person is not falling down drunk. They are passable. They are not passed out. If they sharply consumed great quantities alcohol, they must have also at some point thereafter sharply curtailed their intake, or they would wind up obviously drunk or passed out. He actually conjectures that the act of blacking out itself may curtail or start to curtail consumption.

That could be a sign, but more than curtailing consumption, Dr. Sweeney suggests the answer is in a short-term memory test. If working (short-term memory) is impaired, we

have a clue that a blackout may be taking place. Let me use my own example, rather than Dr. Sweeney's. In my program for students, "Drunk Sex or Date Rape: Can You Tell the Difference?" a key issue in the case study is whether the female student, Amy, is incapacitated. She claims incapacitation as a result of an alcohol blackout. At one point in the morning, Amy runs to the bathroom to vomit, leaving her date Todd sitting on the couch in her room. She comes back to the couch smelling of toothpaste. Let's assume good intentions on Todd's part, such that he wants to know if Amy might be blacked out. As Todd and Amy resume fooling around on the couch, Todd could test Amy's short-term memory, either by asking her if she remembers running to the bathroom to vomit, or by questioning her about brushing her teeth.

Dr. Sweeney argues that a student like Amy, experiencing a blackout, CANNOT remember running to the bathroom or throwing up or brushing her teeth (though procedural memory may have allowed her to physically act to do so). A simple interview should reveal this short-term memory loss. Amy may remember talking with Todd earlier in the evening (episodic memory), or may taste toothpaste in her mouth and conclude she did brush her teeth (semantic memory), but actually having a memory of brushing (did you use mouthwash, brush, just put toothpaste in your mouth?) will not be possible, nor will Amy be able to remember, several minutes later, that Todd even asked her about brushing her teeth as a follow-up to running to the bathroom (working memory).

Dr. Sweeney suggests that interrupting or distracting someone repeatedly, then returning to the subject to see if they can follow is also an easy test of working memory. If they repeatedly cannot follow, they may be blacking out. Or test them overtly, he suggests. Give them three words to remember five minutes from now, and then check back in five minutes. How did they do? Sweeney encourages police, bartenders and others trying to detect blackouts to use this simple approach. If the person being tested can't remember the words, that may be sign of blackout. If they cannot even remember that you said you were going to test them, that is a sure sign. The test must be of working memory, so asking them where they live, or asking their phone number is not testing the correct locus of memory. And, Dr. Sweeney gives us a good reminder that whomever is giving this test needs to be sober or close to it, because "drunks aren't too reliable in testing other drunks."

WHAT LIES AHEAD

Dr. Sweeney calls the medical research field to action. PETs, MRIs and EEGs can offer tremendous insight into what the blacked out person is experiencing or not experiencing. Testing the effects of alcohol with these scans will teach us much about this public health problem, and whether the apparent logic of Dr. Sweeney's arguments is able to withstand the scrutiny of the scientific method.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

Brett A. Sokolow, JD, is President of the National Center for Higher Education Risk Management (NCHERM) in Malvern, Pennsylvania. Mr. Sokolow serves eight colleges as outside counsel, and has served as a consultant to over 500 colleges and universities. Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the American College Personnel Association (ACPA), where he sits on the Directorate Body of the Commission for Campus Judicial Affairs and Legal Issues, and the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees and as Vice-President for Campus Security. He serves as Editor of the Report on Campus Safety and Student Development and is Founder and Editor-in-Chief of The Chronicle of Campus Conduct. Mr. Sokolow has authored ten books and dozens of articles on campus security, Clery Act compliance, judicial affairs, risk management, problem drinking, and sexual misconduct. Articles are archived at www.ncherm.org