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The 2006 Whitepaper:

Our Duty <u>OF</u> Care is a Duty <u>TO</u> Care

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The Duty of Care is a Duty to Care

I am fond of saying that courts these days have never met an injury that was not foreseeable. While this may be a slight overstatement, a long line of cases from Mullins v. Pine Manor to Stanton v. Univ. of Maine to Schieszler v. Ferrum College to Shin v. M.I.T. demonstrate the readiness with which courts see harm as foreseeable. Certainly, notice of someone's intent to harm themselves or others is enough, but courts have also found foreseeability in our stated commitments to eradicate illegal behavior (hazing, as in Furek v. Univ. of Delaware), in our provision of campus security brochures (Stanton), and even in the provision of security itself (Mullins). As far as the courts are concerned, college administrators know that our campuses can be dangerous. We know that burglaries and robberies can occur. We know that hazing may happen. We know that students can overdose on alcohol and other drugs. We know that sexual assault is epidemic. We know some number of our students may try to kill themselves, and some will succeed.

While colleges are not the outright guarantors of student safety, courts looking to shift the burden of student injury to the deepest pockets can find foreseeability when they want to. Which brings us to the duty of care. Even when harm is foreseeable, colleges are not negligent if they meet the duty of care. In some instances, this will be a duty to warn. In others, it will be a duty to prevent harm or protect members of our communities. Today, plaintiffs are well-armed with arguments that establish duty. In response, colleges and universities need to be better armed with the ability to show that if a duty was present, we met or exceeded the standard of care required by the presence of that duty. If we are faced with requirements to warn and requirements to protect, the question I want to ask in this Whitepaper is HOW are we warning? HOW are we protecting?

Are our means of warning and protecting effective enough? What are we telling members of our communities about burglary, robbery, mugging, hazing, sexual assault, suicide, drug use and alcohol? Is it enough to pass out a brochure at orientation? To hang a poster along the hall? Maybe, but we can be more effective than a brochure, and more proactive than a poster. Education is what we do best. What we face is the challenge of educating students on high-risk health and safety issues. This Whitepaper presents that challenge from a risk management perspective. Programming on campuses is often organized by student activities, the lectures committee, athletics, the women's center, the wellness center, health educators, peer educators, etc. Do they know their efforts can help us to meet a legal duty? Can we help them to be better partners in understanding that the duty of care is really a duty to care.

An Insider's View of the Challenge

I spend most of my time representing colleges as an outside counsel, defining my purview as sexual assault, sexual harassment, problem drinking and drugs, suicide and psychological distress, conduct training, campus security and hazing. My clients and I plan culture change strategies that will help to protect students and reduce institutional liability. Any risk manager must work directly to address risks, and on college campuses,

students are amongst our biggest risks. So, for nine years I have also worked as a programmer, doing educational programs for students on sexual assault, problem drinking and hazing. I have been lucky. Some programs and presenters come and go quickly, riding a crest of popularity until the next new presentation comes along. Many people who travel the college lecture circuit burn out pretty quickly. I'm more like the tortoise than the hare, and my visits to campuses have been slow and steady and consistent for nine years. I average about 100 campus visits per year; some years it's 110, some 130, some 90. I think I am right at the 1,000 presentation mark at campuses from California to Delaware. I've presented in 47 states (Wyoming, Alaska and Hawaii are three remaining) and have visited all 50.

If I am ever a millionaire, it will be in frequent flyer miles. I topped 750,000 this year. Every hotel room looks the same as every other when you spend almost half the year on the road. This is not a complaint. I have chosen this life, and I enjoy what I do immensely. I relish my chance to impact the lives of students and campus communities for the better. Let me share with you what I see…

I visit your campus, and usually you have worked hard to make sure you get a good turnout. I average about 400 students per speech. Most of the time, student turnout is voluntary. I wonder how many date rapists self-select to attend the date-rape program? I wonder if I am preaching to the converted? I achieve my best results when turnout is not voluntary, such as at orientation. We all realize that a one-hour speech may impact many, but it will only change the lives of maybe a handful. Are we doing all we can to maximize that impact? Only about twice a year do campuses try to offer small-group breakouts after my program for students to process what they have heard. Rarely am I asked to address single-sex groups, though that may have the most efficacy. When I ask what other efforts are ongoing to address sexual violence, they are frequently minimal. I am often the big event of the semester.

Sometimes, I will get a call inviting me to a campus where Katie Roiphe, Camille Paglia or Christina Hoff Summers has just presented, often delivering a message that date-rape is just bad sex. Do my hosts expect me to undo the harm these neo-feminists have caused? Of course, our programs draw different audiences, so how much of an antidote I really am is questionable. Is this just a spirited debate in the liberal arts tradition, or is the analogy more like putting a social norms poster on alcohol next to a battered car sponsored by SADD? If you mix scare tactics with normative messaging, do you get prevention or confusion? To be proactive on high-risk health and safety issues, I feel that colleges need to learn how to get "on message" and stay "on message." Educating students on these issues is hard enough without diluting the message or being philosophically schizophrenic with your educational approach.

About twice a year, two different departments from the same campus call me to schedule a visit, without any notion that I have already been booked to visit by the other department. I always let them know, and encourage them to coordinate. Master calendars seem to be more of a theory than a reality on some campuses. Master calendars not only let you know if a speaker is already booked, they can help to avoid competing

events. If you bring me in the same night that Green Day is giving a concert on campus, don't be surprised when only twenty students show up for my presentation. Even I would rather be listening to Green Day. On one campus this past fall, I was brought in by the folks from Greek Life, only to find that the sororities had scheduled their own speaker on date rape for the same night, so the sororities did not show up. Duplication of resources is rampant. When I ask what mutually reinforcing efforts are in place along with my visit, or what theme the education for that semester is following, rarely do I get a sense of anything cohesive. This is not to say that there aren't colleges that get it. A good number do, but this Whitepaper is my chance to share with you the programmatic challenge as I see it, and offer solutions that will hopefully be of benefit to all campuses.

Greek Life is a frequent sponsor of my visits (thank you). I like it when departments with student constituencies--such as athletics--co-sponsor my visit, because they often mandate attendance, which I find definitely increases turnout. At some point, administrators realized that 100% of each team or fraternity chapter was not going to meet the mandate, so they implemented some version of the 75% rule. On many campuses, you get credit for attendance if 75% of your organization is present. Do the date-rapists who are potential audience members for my "Drunk Sex or Date Rape?" program wind up in the 25% who do not attend or 75% block who do? Do the ragers who opt out of my "Ten Things" program on problem drinking miss the program because they are out drinking? As long as 75% of the house or team shows, which 75% that is seems less important. But, it is very important. I always ask the greek advisor, coach or athletic director, "what happens if 75% do not show?" Usually, there is a minimal fine. For most of my campus visits, 75% of the target audience does not attend, and they simply write a tiny cheque. The consequence for failing to be educated is a fine. Might it make more sense that the consequence for not being educated is to be educated? Schedule a make-up session, with a video, or a paper. For the 25% who never make it to anything, don't you suspect that they may be among your highest-risk students? I do, and they are shielded by the majority who do show up.

Sometimes, students line up to sign-in as they enter the presentation. You might allot me 90 minutes for my program, but by the time hundreds of students have waited to sign in, I may be left with 60 or 70 minutes. What I do takes 90 minutes. Any less and my educational impact will be commensurately diminished. Why not have students sign out on their time rather than signing in on my time? Signing out may also get around the fact that more than a few students in line sign multiple names, or sign in and promptly leave before hearing a word. I stand at the door and ask them to stay, and occasionally I shame someone into listening. I shouldn't have to.

Another example where educational practices can be improved is when an incident of hazing happens, and Athletics, Greek Life and Student Wellness all plan hazing programs, independently. Other issues take a back seat. We react to a crisis rather than planning for a comprehensive curriculum for our students. We are all programming, but coordination and centralized planning are too rare. Now it is time to evolve from well-intentioned but often scattershot and ad hoc programming efforts to the next paradigm for comprehensive health and safety education: the four-year strategic plan. I'm tired of

talking to half-empty rooms. Yes, I still get paid, but I want to get paid to be effective, not just for talking. So do all the other speakers and educators I know. And you want to stop pretending that you are happy with a turnout of 200 on a campus of 20,000 risk-taking students, because that is settling for what is, rather than demanding what can be. Ask yourselves this question—how is our duty of care best fulfilled? By providing the programming opportunity, even if only 200 students attend? Do we fulfill our duty to warn if 90% of our students do not attend the presentation? Or, is our duty of care a duty to care, to make sure that we are providing warning and prevention information to all the members of our community who may be at risk, athletes, Greeks, intramural players, commuter students, distance-education enrollees, non-traditional-age students, and not just the students mindful enough to voluntarily come to our programs of their own volition. Simply put, is our duty merely to provide the forum, or to deliver the message?

If you truly desire to change your campus culture around any issue, whether it is diversity, drug abuse, eating disorders, sexual assault, problem drinking, etc., education is the core of that effort. A four-year educational strategy addressing that issue is the key to having the educational impact that you desire from your programmatic efforts. A successful four-year educational strategy has a number of elements which will be discussed below. These elements include:

- an attendance mandate or positive incentive mechanism;
- a pre-planned curriculum;
- academic curricular-infusion;
- faculty support;
- centralized organization and coordination;
- assessment;
- make-up program options;
- and enforcement/consequences.

Creating an Attendance Mandate or Positive Incentive Mechanism

Somehow the hallmark of being a liberal arts institution has become the oft-repeated "we can't mandate that students do anything." This hands-off, disengaged ethos is pervasive on many campuses when it comes to campus programming. We view it as our job to organize the event and publicize it, but we view it as the students' job to decide whether they want to attend. Within the next 5-10 years, this laissez-faire approach will give way to the embrace of engagement as colleges widely adopt a risk management mindset. Plaintiffs and their attorneys are litigating the laissez-faire out of us, quite literally. By calling on you to embrace and engage now, I am hoping you will be ahead of the curve by anticipating changes that are making the "we can't mandate" philosophy obsolete.

"We can't mandate" is also a somewhat convenient excuse, right? We actually do mandate quite a bit from our students, including payment, registration, living on campus, buying the meal plan, community service, completing core requirements, class attendance, completion of sanctions, etc. Why do we then deploy the "we can't mandate"

line only for student programming? Is it because the task of creating and enforcing a mandate is monumental?

Maybe it is, but you and I need to make sure that our educational efforts are more than just preaching to the converted. We need to make sure every student is present for the educational opportunities we work so hard to provide, and that every student takes away at least some benefit from our intended learning outcomes. There are two ways to create a mandate—positive incentives or negative consequences. One of the threshold decisions you will need to make is which of these approaches will be most successful for your campus. I prefer a hybrid that starts with the carrot and ends with the stick. A mandate with negative consequences is often easier to create, administer and enforce. But, a positive mandate is more developmental and students may have better learning outcomes from voluntary attendance. Whichever approach you decide to take, creating a successful mandate requires you to develop some sort of bureaucracy. This bureaucracy gives you the mechanism for tracking attendance, so that your mandate has teeth. Some use of sign-out sheets, attendance lists, check-ins, card swipes, password entry, or other proof of attendance will be needed. Many of us like the online educational resources offered now because student use of the courses can be tracked electronically. There is much to recommend automated attendance roll-taking. My caveat is that many campuses-- looking at the cost of courses such as AlcoholEdu--mandate it but use it as the only education they do on alcohol for a semester, or a year. This is not strategic, though it does help us solve the mandatory participation problem.

There are many models for positive and negative mandates, and I will highlight a few here. My hope is that you develop your own, to work with the specific needs of your campus. One New England campus decided to create a broad-spanning lecture series for incoming students. Over the course of the year, each student was required to earn 40 lecture-series points. Over 60 lecture-series point-earning opportunities were provided. The programming committee designed an impressive roster, including John Updike, Maya Angelou, Spike Lee, and other luminaries, distinguished researchers, a comedian or two, and programs that addressed drugs, alcohol, sex, sexual assault, eating disorders, diversity, civility, coping with college, leadership, motivation and organization, etc. Each week, a point-eligible event was offered. Each student who attended Maya Angelou's reading received two points. If you went to hear all the luminaries, you would need to go to 20 lectures to get your required first-year points. But, if you chose to go to the campus safety lecture, that was three points. My sexual assault program was four. Alcohol risk reduction events were three or four points each.

Students quickly figured out the short cut was to go to the highest point events, and the programming committee incentivized the programs that were the most important to health and safety goals. The programming committee also made sure that it chose programs that were worthwhile, and supported the active programming with passive programming support and reinforcement. For my presentation, 1,400 members of a class of 1,600 showed up. Many students liked this lecture series so much that they earned far more than the required points that year. Any student who did not earn sufficient points could research any topic on the roster and write a short paper, write a review of a video

covering the topic, organize a hall program on the topic, or otherwise make-up the credits. This to me is the ideal model to which every campus should aspire.

If you look at all the guest lectures you host in one year on your campus, you might even be able to just formalize each of those visits within a lecture series without adding significant cost or time expenditure. If students don't complete the point requirement, you can provide more of a stick, such as a registration hold, an inability to graduate, etc. I dislike fines, though many campuses use them. I guess if you used them to fund the lecture series that might be productive. Some campuses use conduct sanctions for students who fail to earn the required points, and this is the negative consequence paradigm. The continuum from carrot to stick goes from a need to do make-up education when points are not earned in time—to registration holds or housing lottery implications—to fines and other conduct sanctions—to making points a graduation requirement. This most severe consequence is actually my favorite because when graduation is dependent on the achievement of extra-curricular education, the mandate becomes cultural. There is no better way to infuse it within the academic environment.

While this is my favorite model, others will work well. You could limit your lecture series to a series of narrow topics, eliminating the bands, academics, comedians, etc. You might lose some support from your campus programming board or activities folks, but you would gain a pure focus for the effort. You could have four lectures a semester, for example, and mandate attendance by each student to at least three. Many formats are possible and functional. You could spread your series over four years, blending in poster campaigns, peer education, videos and other passive educational offerings. You could give points for in-class work on the topics you want to highlight.

The Four-Year Strategy

Once you have engineered the mandate as the vehicle for effective content-delivery, you need to develop the content. Your goal should be for your programmatic efforts to be developmental, progressive, consistent, and message-reinforcing. First, that master calendar must be functioning in order for you to make event space and timing decisions. Next, you need a centralized programming office or committee. Maybe your committee includes representatives from all campus departments that have programming responsibilities, so that centralized coordination becomes possible. We need to recognize that student activities personnel and athletics may not be topic specialists in many of the program areas they are called on to address. Maybe there are faculty and student reps., including SGA or campus programming board members who would be helpful. The health educator, alcohol educator, sexual assault educator and other key stakeholders should be involved in the planning process. It may help to require that all programming efforts that are not centralized be pre-approved by the committee, so that the committee has a mechanism for keeping the master calendar accurate. It may also be helpful to centralize programmatic funding with this committee (or at least approval for programmatic expenditures related to its purview) as this will help to stay "on message" campus-wide.

Themes or topics need to be chosen and narrowed. Maybe this year the focus will be on hazing and campus climate, with less emphasis on some other issues. Maybe alcohol and sexual assault are your top priorities. Let's use the example of sexual assault. Centralizing the planning process will allow you to program strategically with respect to timing. Are there times of each year when programming on this topic makes more sense than others? Yes. Ask your conduct officers or campus police, and they may tell you that September, October and April are the months in which they probably receive the most reports. If so, we could then program during or just before these critical periods. Are students vulnerable at orientation? Sure. Before Spring Break? That might be good timing. Before a notorious campus event that is unique to your environment? Definitely.

Once you have highlighted timing that makes sense, you can begin to envision what topics within sexual assault are important to your campus. For example, when I challenge my clients to list the areas of greatest problems for sexual assault, we might come up with a list of topics like this:

- Lack of victim empathy; victim-blaming
- Feelings of invulnerability/NIMBY (not-in-my-backyard)
- Absence of risk-reduction decisions
- Lots of drunk sex
- Students misinterpreting consent
- Students who don't know how to draw the line between seduction and coercion
- Predation issues; characteristics of date rapists
- Rape drugs
- Difference between stranger rape and date rape
- Male defensiveness
- Mens' fear of false accusations
- How to help a victim
- How to intervene in/avoid uncomfortable situations
- Self-defense
- Criminal prosecution of sexual assault
- Male and female socialization and communication
- Gendered assumptions of sexual entitlement/availability
- Sexual respect
- Etcetera

Sometimes, we do not even realize there are so many different issues within sexual assault. There are more, but this gives us a good start. Suppose this became our hit list, and we decided that by the time students graduated, we wanted each of them to be exposed to programming on each of these topics. Then, we can strategize what combination of active and passive programming is going to give us the topical coverage we desire. We set the goal of starting with more basic concepts for first-year students, and progressing to topics of greater sophistication, using each program to build on the ones before it. Many campuses use a program by a survivor at orientation, and this is strategic. The feeling of invulnerability at orientation in an unfamiliar environment may

place potential victims at enhanced risk. Maybe you invite an outside speaker, or an outspoken survivor on your own campus. But, what are you doing to address the potential perpetrators? Could you use small-group discussion following this program, or some other programming opportunity not just to encourage potential victims to reduce their risk, but also to encourage potential perpetrators to learn the rules? Can you facilitate discussion on how consent works? When do alcohol and other drugs cut someone off from sexual permission? How much pressure is too much?

Later in the fall, perhaps in September, what types of messages will build on this beginning? A men's pledge to end sexual violence? A discussion of sexual respect by Jean Kilbourne and/or Jackson Katz? A viewing of the "Spin the Bottle" CD-ROM? Maybe you prefer Sex Signals' humorous introduction to sexual respect over programs that build empathy, so that the topics at orientation aren't too heavy. Move the survivor to a later programming time in the semester. Jay Friedman is pretty funny. Maybe you don't want him if you just had a visit from Sex Signals. Maybe you want Mike Domitrz, Alan Berkowitz, LuoLuo Hong, One-in-Four, Veraunda Jackson, Steve Thompson, Gail Stern or any one of a fine pool of respected educators? There are many wonderful guest lectures available to you, but don't just pick the few who send you a tape or call you on the phone. Pick those who fit best thematically and topically with your goals.

Once you do an introductory program, what can come next? Do you want to get deep into consent, explore male fears and gender stereotypes, talk about helping a victim? All of these topics can give you a cohesive message when you schedule them strategically. And, don't be afraid to ask a programmer to customize his/her program for you. Many will. Do you want us to talk about your policies, your campus survey results, a recent incident? Canned programs are fine, but it doesn't take much effort from us to give you something more focused on YOUR campus, and we will have a better educational impact for you and your students.

Lay out your plan, semester-by-semester. Make sure to discuss how each peer theater program, condom-distribution campaign, poster, Clothesline project, ribbon event, Take Back the Night, Sexual Assault Awareness Week (or Month) will fit into the overall educational objectives you have outlined. Are dating doctors and better sex lecturers going to reinforce a good program on sexual respect, or may they undermine your efforts by a casual approach. Do your students feel tricked when the sex program turns out to be the rape program? How are you marketing your efforts? I am not suggesting these are unwelcome programs. I am suggesting that you inquire into the content to make sure that they are getting your students to where you want them to be, and that you consider being honest with them about the topics to which they are going to be exposed.

Once you launch your four-year strategy, you will need to begin to assess the programs. Assess whether students like them, but also survey to find out what students take from them. There are lots of funny, hip, emotional, or scary programs that connect with students and that they rate highly. But, the educational content is secondary to the gimmick. Not only do students need to enjoy what you provide, assessment needs to show that your learning objectives are being accomplished. If they are not, modifications

to the strategy will be needed. Viewing the strategic plan as a flexible framework rather than as a fixed requirement will help you to adjust as you progress. With each incoming class or generation of students, you may need to alter the strategy to address changing mores or times. I did not include cyber-stalking on my list of topics. Maybe it is a big issue for your students, or perhaps surreptitious picture-taking and harassment are more important to you? We can anticipate some issues, but not all.

Variety, in terms of message, format, delivery and content is something to strive for as you plan. You can plan to segment audiences, if you desire, either by sex, age, affiliation, campus activity, or otherwise. Will programming for your athletes get them to open up more, or will it just reinforce a strong perception of privilege because the campus is willing to cater to them with their own special program? Can you get faculty to support your strategy with curriculum infusion, by giving extra-credit for attendance, or by taking classes to events and lectures? Can first-year experience sections discuss topics that fit into the first-year strategy? Can the library stock and display topical books and articles during theme periods?

Overall, the goal is to achieve a progressive, consistent programmatic strategy. By the time your students graduate, they will have built competencies on a large number of issues by regular attendance at worthwhile events. You should make this strategy transparent to your community, and invite support from off-campus resources as well as your own campus experts, activists, peer educators, and programmers. Hopefully, this Whitepaper has overwhelmed you a little and inspired you a lot. Our job is not just to provide the educational opportunity—we have a moral, legal and ethical obligation to make sure that our message connects with our students.

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