The National Center for Higher Education Risk Management

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The 2007 Whitepaper:

"…Some Kind of Hearing…"

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Introduction

Every year since the National Center was founded, we have published an annual Whitepaper on a topic of special relevance to student affairs professionals, risk managers, student conduct administrators and higher education attorneys.

The Whitepaper is distributed via the NCHERM e-mail subscriber list, posted on the NCHERM website, and distributed at conferences.

- In 2001, NCHERM published *Sexual Assault*, *Sexual Harassment and Title IX: Managing the Risk on Campus.*
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course.*
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*, on campus judicial decision-making.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 21st Century College*.
- Our 2005 topic was *The Typology of Campus Sexual Misconduct Complaints.*
- In 2006, the Whitepaper was entitled *Our Duty OF Care is a Duty TO Care.*

"Some Kind of Hearing"

The title for NCHERM's 2007 Whitepaper is "*Some Kind of Hearing."* The intention of this Whitepaper is to suggest that colleges and universities consider implementing a Civil Rights Investigation Model as the most effective resolution model for student-on-student interpersonal violence and discrimination claims. My sense is that the student conduct administration field is shifting in this direction already. Campuses are embracing investigation-based approaches to greater and lesser extents as more traditional hearing models are proving to be less effective means of resolving disputed claims in which one student claims victim status and another student is accused of the victimization.

The Civil Rights Investigation Model really has no direct applicability to victimless violations (such as alcohol possession), and does not in any way impact on the widespread and welcome implementation of alternative dispute resolution approaches on many campuses, which usually precede or supplant hearings. The greatest applicability of the model is to interpersonal conflicts where what really happened--the facts--do not readily and clearly assert themselves.

The law has imposed upon the student conduct process the general due process requirement that we provide students accused of code violations with "some kind of notice and some kind of hearing." (Goss v. Lopez, 419 U.S. 565 (1975). Wisely, the courts have largely left it up to student affairs professionals to determine what kind of hearing format "some kind of hearing" will take. From early days of paternalistic "Dean's Discipline," we have evolved to adversarial hearings before panels representing a cross-section of the community. From there, many campuses modified the hearing model to prevent direct confrontation, when that proved a detriment to civility and the educational aims of the process. We have also implemented informal proceedings, often applying them to less severe violations and uncontested allegations. A hallmark of these hearings, whether formal or informal, is the passive receipt of information

by the panel from the parties and their witnesses. Where greater information is needed, campus police are often tapped as the most experienced investigators on campus. Today, we see campus conduct administrators occasionally engaged in active acquisition of information, as they take on more of an investigator's role, but it is more by necessity than design.

Same Issue…Different Processes

When I first entered this field, I in part made my mark by asserting the somewhat novel idea that campus sexual violence was a federal civil rights issue, impacted by Title IX and potentially governed by it. Student-on-student sexual assault was a form of egregious sexual harassment. Yet, as I learned about the processes by which colleges resolved sexual harassment complaints, an odd dichotomy became clear. Almost all colleges and universities used a civil rights investigation and complaint process to address sexual harassment between employees. Almost all colleges and universities used a hearing process to address sexual harassment between students. Internal to one institution were two completely different procedures used to address the same issues. Why? Do two divergent resolution procedures make sense? Were we simply failing to realize that date-rape and sexual harassment were on the same continuum of behavior? I tend to think it was more the compartmentalized nature of so many institutions, so that we respectively applied traditional models of employee dispute resolution to the employment realm and traditional models of student conflict resolution to students, seeing the issue as one of constituency rather than as having a common basis in civil rights resolution.

While I have yet to truly understand how two such differing approaches evolved, there exists today a simple important fact. On our campuses, professionals in Human Resources, Affirmative Action, EEO and others offices who deal with employee civil rights issues possess a body of specialized knowledge that is of great potential benefit to the student conduct process. The converse is also true, because student conduct administrators deal with sexual assault more often than do the HR/AA/EEO administrators, who are more accustomed to sexual harassment claims that lack a significant physical component. If nothing else comes out of the writing of this Whitepaper, my hope is that it will encourage you to create liaisons on your campus between student conduct administrators and HR/AA/EEO administrators. Call on each other and get to know your own internal resources. Share information and compare processes and learn from each other specialized knowledge that each of your departments may need to gain from the other.

Investigating Employee Misconduct

The process that HR/AA/EEO uses to address sexual harassment is frequently a civil rights investigation process. Rather than using a hearing model that more-or-less passively relies on the parties to the complaint to prove their positions, an investigation model is an active gathering of information by the investigator or investigators. In the investigation model, it is not the job of the parties to prove whether a policy was violated. It is the job of the institution to determine whether its policies were violated by engaging in an active accumulation of information from all possible sources.

In seminars around the country, I have shared with student conduct administrators my belief that a civil rights investigation process will eventually supplant the adversarial model we mainly use

at present to resolve interpersonal conflict between students. Again, I am assuming those conflicts have not previously been resolved through mediation or other alternative dispute resolution (ADR) approaches. The civil rights investigation model assumes that previous ADR efforts have failed or that the nature of the complaint does not lend itself well to ADR.

Mediation in the Appropriate Context

I am uneasy with applying mediation to violent situations in a campus context. I am not asserting that mediation cannot help in those situations, but I feel that mediation and other ADR approaches are not an effective means of institutional risk management of these conflicts, and may in fact place institutions in a position of greater vulnerability to liability in negligence. In the April 22, 2005 issue of *The Chronicle of Campus Conduct*, I wrote on this issue, stating in part the following reasons for my unease with mediation of violence (specifically sexual assault, in that article):

- Mediation is rarely an effective remedy for violent conduct. Mediation is not a therapeutic session on anger management or a class on higher-order conflict resolution skills. Mediation (when it works) is a monitored airing of grievances, producing at best potential consensus, or a brokering of a truce with terms to which the parties agree. It is a marvelous process for allowing those who have experienced sexual harassment (non-physical) to let the party they believe has harassed them know what conduct they consider problematic, why it is offensive or unwelcome, and what course of action they need in order to feel comfortable again. Often, an apology and an agreement about changed behaviors ensue. That is why mediation works so well. The only times that I've seen parties to sexual assault complaints come out with a sense of satisfaction with the process is when mediation is used. For low level sexual conduct, I can see this point. If your hallmate repeatedly rubs your shoulders and embraces you a little too closely, mediation can help them to understand and end this course of conduct. But, where someone callously ignores your rights and has sexual intercourse with you without your consent, I challenge whether mediation can remedy the underlying behavioral patterns that allow those who commit sexual assault to convince themselves that their actions are permissible. Male privilege does not simply melt when a woman confronts a man about how his actions impacted her. If anything, it teaches those who behave this way how to modify their conduct so as to more effectively fly under the radar screen and avoid being caught in the future. The literature is not at all supportive of the therapeutic efficacy of rehabilitation on those who commit sexual assault. If experienced therapists with years of education and experience cannot change this behavior, what makes us think one quick mediated session between the parties to a sexual interaction gone bad will be more effective?
- Mediation can put colleges on notice of foreseeable harm, without providing an acceptable mechanism for protection of the community. Someone acts violently. We get sued. Our best defense is that the violence was not foreseeable to us, and therefore we owed no duty to the victim. But, once the college becomes party to mediation of a sexual assault, it becomes more difficult for the college to argue that any future assault was not foreseeable, especially given well-founded and well-known research on the "serial" nature of campus sexual predation. Mediation can put us on notice. Are we comfortable

relying on voluntary compliance with the mediated agreement as a safeguard for our community? I'm not. If this isn't enough, I'd commend to you the U.S. Department of Education's Office for Civil Rights Guidance on Sexual Harassment, which recognizes the important use of mediation in sexual harassment, but discourages its application to sexual assault (http://www.ed.gov/about/offices/list/ocr/docs/sexhar00.html).

Immediate and Intuitive Connection

In my seminar presentations, I am struck by how the civil rights investigation model immediately and intuitively connects with the student affairs professionals and student conduct administrators in attendance. They see immediately how it will help them to address their most difficult complaints. They have struggled for years to resolve interpersonal conflicts without adequate information about who did what to whom. Two people occupied the same space for long enough to come into physical conflict, but their stories are 180 degrees from each other. Their filters shape their versions of the event. Getting at the truth is a rarity, often because of the "he said, she saids" flying around, the "but, he started its", the "he wanted us to haze him, he cooperated", excuses and more. Worse, we must acknowledge that our students lie to us. Many of them. Most of them? Some blow opaque smoke into our faces and smugly challenge us to try to see through it. Sometimes we do. Sometimes we can't.

Current Investigation Models

The limitations of the adversarial hearing process have revealed themselves to me over what is as of the publication of this Whitepaper now ten years of work in this field. I have seen hearing boards struggle to decide who did what to whom when both of the parties to the complaint made strategic decisions not to identify a witness who might have been detrimental to both parties. Yet, it was this one witness who would have been in the best position to explain to the board what really happened, and answer the board's questions. But, identifying witnesses was not an administrative function; it was left to the parties. I have seen boards vote to find a student responsible simply because the student was too nervous or not sufficiently erudite to adequately explain himself. I have seen boards go into deliberations without critical information they needed to assess a complaint, because none of the parties or their witnesses provided it. Information about alcohol and how the body processes it was needed for the board to make a cogent determination. Or, the board needed a better understanding of rape trauma syndrome in order to explain the victim's delay in reporting the assault, but they had no access to it. Adversarial models that rely on the parties are going to be limited to the relative skills of the parties and their abilities to anticipate (guess) what questions a board will have and what information it will ultimately need.

Some campuses have adapted, giving an investigative responsibility to a student conduct administrator, or by relying on an investigation by campus police. Both of these adaptations are useful, but still create some limitations that are ameliorated by the civil rights investigation model I propose below. First, let's look at the limitations of investigation by student conduct administrators. The main limitation is that comprehensive investigations of complex interpersonal conflicts are time consuming. Conduct administrators are already overburdened with the caseload, without adding more responsibility to investigate. A second limitation is that

student conduct administrators have to be cautious about wearing too many hats in the process. You cannot be chief investigator, presenter of the complaint, custodian of the conduct process, and implementer of sanctions for the same complaint without an appearance of impropriety or potential compromise of objectivity. If many of our conduct offices are already understaffed, an investigative function will only increase the burden and potentially compromise the objectivity of those who administer the process.

Limitations of Using Police as Investigators of Student Misconduct

Campus police are frequent go-to resources for investigations. They are probably the best trained campus personnel for investigative skill. Yet, if you have a duly constituted police force, their first obligation is to investigate whether the incident violated the law. This is different than investigating a potential violation of policy, in most instances. And, their loyalty must be to sharing investigation results with the prosecutor, and only thereafter (and often much later) with the student conduct office. Even if your campus security function is not provided by a sworn force, limitation abound. Security officers may not have the same level of investigation training and experience as police officers. And, all campus safety personnel, regardless of the formality of the police function, have a limitation that they will immediately agree is the most profound. They are the most authoritative officials on campus, and people are not likely to be as forthcoming in an interview setting with police or public safety officers as they might be in a less formal setting with less authoritative interviewers. The blue uniforms either elicit immediate information as a result of the intimidation of the encounter, or they cause students to clam up for fear that talking is going to get them into trouble. Yet another reason to want, at least in some situations, to avoid police-led interviews is that we have crafted our processes to be educational. Encounters with law enforcement may lack a developmental perspective that confrontations with conduct officers may be better able to provide.

The Civil Rights Investigation Model

Though many of you have experienced my involvement with the field as involvement with the student conduct process, I spend an equal amount of time consulting with the HR/AA/EEO side of the house. I do internal investigations, train investigators, deal with government investigations of our investigations, structure complaint procedures, do sexual harassment and anti-discrimination trainings, etc. I have had the opportunity to structure civil rights complaint and investigation processes for dozens of campuses, and to study and learn from complaint processes that we have improved by tinkering and changing over time. I’ve done dozens of internal investigations, learning more each time I do one. That learning process has informed my desire to encourage conduct administrators to explore the applicability of a version of this model to their toughest complaints.

Maximizing Information Accumulation

What I have learned is that if you have as the simple goal of an investigation process the accumulation of the maximal amount of available information about a complaint, a team-led investigation process is best able to produce that result. For this reason, many HR/AA/EEO offices are shifting from a department-led investigation (often by the Director of HR or a similar

official) to decentralized grievance processes in which faculty members, staff, administrators and students are empowered to do intake of complaints. This also serves well a secondary goal of encouraging more complainants to come forward when their rights are violated.

Consider this question for a moment. If you wanted to obtain information from a student about a conduct complaint, and that student felt it might be in their best interests to be less than fully forthcoming, who on your campus would have the best opportunity to elicit that information from the reluctant student? Would it be campus law enforcement? Maybe, if you feel an authoritative approach might meet with the most respect. Or, it might just as easily cause the student to shut down. Would being questioned by faculty help? How about questioning by someone from HR or a student conduct administrator? No clear advantage there.

Peer-Led Investigation Teams

My answer is that in most situations, questioning by a well-trained fellow student is going to be the means by which we obtain more information and higher quality information as a result of the interview process. This conclusion is based on considerable experience with trying different interview techniques and formats. The most successful interview technique with a reluctant witness is –as any decent investigator will tell you—to build a rapport with the interview subject. This is part of the foundation of the approach often diminished as “Good Cop…Bad Cop.” Good Cop is busy building a rapport. But, it is hard for Good Cop to convince the subject that he is an ally. Imagine how much easier it is for a fellow student to convince an accused student of that. Creating a rapport is often much easier when it is done intra-cohort, whether that cohort is staff, students, faculty or administrators.

The key idea is to structure an investigative team, and to do so strategically, to accrue the information you are seeking. Institutional culture and politics may help you to choose the right investigative team for each complaint. At one institution, faculty are rubbed the wrong way by being investigated by staff, and so the investigations are led by other faculty members. At another institution, senior faculty did not respond well to being questioned by junior faculty, so we adjusted the investigation team to address this power imbalance. While it may not work in every case, peer-led interviewing tends to produce results better than most of the other investigation techniques I have tried, as long as the investigators are well-trained.

One Model of a Civil Rights Investigation Approach

There are many ways to shape a civil investigation model, and many permutations for investigation teams. Let me share the model of one institution as an example. This small university created a Critical Issues Grievance Process. They gave this process exclusive province, university-wide, over all complaints of discrimination, harassment, stalking, relationship violence, generalized violence, sexual assault, and hate acts. They appointed a Critical Issues Board of ten people, two faculty, two staff, two administrators, two students and two university police officers. For each complaint, five members of the Board are designated as hearing officers, in the event that the complaint goes to a hearing.

The remaining five members are detailed to collaborate on the investigation. They determine a witness list, strategize who will interview each witness and collect all available information, and then the team compiles a report. The police members are used when it makes sense to deploy their particular investigation skill set, and when obtaining, maintaining and securing evidence are of importance.

The investigation team reaches a finding based on the results of their investigation. They then share this result with the person accused of the policy violation. If the person accused accepts the findings, the matter is referred to the remaining board members for sanctioning, and they hold a hearing limited to sanction only. If, however, the accused person rejects the finding of the investigation team, the alleged violation is referred to the remaining five board members to hear the complaint, and determine a sanction, if applicable. Normal appeals routes may follow. During the hearing, the board may determine whether it will take cognizance of the findings of the investigation team, which are presented at the hearing by the investigators. The investigation findings are not binding on the board, which may call any or all of the witnesses identified by the investigators. This hearing may be conducted with the parties present, or with separate non-confrontational meetings, depending on whether the board feels it would learn anything from the direct confrontation of the parties.

One of the hallmarks of this process that I think makes it work so well is that it is university-wide, but such a process is not right for every campus. Another success factor for this process is its extreme flexibility. Each complaint is addressed by a process designed to maximize the information available to the board, but that process may differ dramatically from complaint to complaint. Each accused person receives an appropriate measure of fair process and a full opportunity to defend themselves. Our usual result is that the findings of the investigation are compelling enough that the accused person does not dispute them, leaving only the sanction to be resolved.

All board members are astonished at how much more information they have going into hearings than they had with their old model, which was a more passive information-gathering approach. They are also deeply appreciative of the role the investigators play later when there is a hearing. They summarize the interview results, give information about the credibility of interview subjects, and have had a chance to think though and synthesize their findings in advance, which the board has not yet had a chance to do. It is rare that the board disagrees with the findings of the investigation team, but it is important that they reserve the right to do so when the interest of fairness requires it. Another benefit is that sometimes investigators have untangled webs of lies in advance, and the board can confine its inquiry purely to the difference between a party's story to investigators and their later contentions.

As I write this, I regret that we have the need to redesign a process so as to make it harder for parties and witnesses to deceive us. Yet, by lying, participants often inhibit our ability to safeguard our communities and satisfy our legal duties. While this tendency to avoid responsibility is not a situation of our making, it is a situation to which we must respond. I think we need to make it harder for participants to lie to us, and I don't feel that this is adversarial or that we are attempting to "catch" them. Our process is designed to determine whether a policy is more likely than not to have been violated (though some campuses do use a higher standard than

more likely than not), and part of making that determination is sifting the credible from the incredible.

Some Kind of Notice, too.

Another example of the advantage of the civil rights investigation approach is in how notice is handled. In most hearing models, step one is to receive a complaint and step two is to give the accused person notice of the complaint. They then have time to fabricate a story and find friends to swear to it before they respond. This does not allow notice to be strategic. It should be. In an investigation model, we often interview the accused person last. We don't want any party to taint the witness pool by playing on loyalties. It is not just the parties who lie to us, but their partisans as well. Getting statements from witnesses in advance of interviewing the accused student minimizes the potential for coordination of stories, and also gives us the ability to share conflicting accounts with the accused person once we have collected them. With this approach, you often see an accused person attempt to lie to investigators only to find quickly that their ducks are not in a row, and contrary information has already been obtained. Dissembling tends to break down very quickly at this point, and you don't have to deal with the lies that would otherwise vex a board at a hearing under a more traditional model.

Variations on the Model

Some campuses do not use university-wide approaches, instead having parallel processes for student misconduct and employee misconduct. Other campuses use an investigation model for all alleged violations, while others use the investigation approach on a more limited set of complaints than were outlined in the example above. Some boards prefer that the investigators just present the information obtained from interviews rather than reaching a finding, so that the responsibility for reaching a finding remains with the board in all complaints. One small campus did not have the resources for a board or large investigation team, and so deputized one administrator as their lead investigator, and made sure that person was well-trained for the task. Their complaints do not tend to involve multiple witnesses, but another advantage of a large investigation team if you have the resources is that you can divide interviewing responsibilities and interview large numbers of witnesses more quickly than with a smaller pool of investigators.

Often, in the process of investigating the complaint, interviewers find they have need of expertise outside their range. They can then identify additional witnesses or sources of information they need to inform their judgment. This may include information on alcohol, rape trauma, drug interactions, technology, etc. Then, the investigation team can supply this expertise to the board, so that they too can access the level of sophisticated information they need in order to make a determination on the complaint.

The Risk Management Function

Better information leads to better decisions. Peer-led interviews help to invest participants in the process, and instill respect and humanity in the process, all of which has the potential to reduce the risk of lawsuit. A civil rights based process also has great potential to balance the rights of the parties, as it is characterized by an intentional effort to equalize procedural and support

mechanisms. For example, civil rights complaint procedures typically provide a right of appeal for all parties to the complaint, not just the accused person. These procedures usually allow all parties access to advisors/advocates (this does not imply a right to an attorney), and afford the accused person access to findings prior to the hearing, which is a strong procedural protection for the accused person. It often creates a give-and-take between the accused person and the investigators and subsequently the board that is often lacking in more typically adversarial hearings.

How to Train Your Investigation Team

If you decide to implement some form of civil rights investigation model, your investigators will need training, a detailed investigation protocol, recordkeeping procedures and internal communication parameters. When you look for training resources, you may find they are readily available from your HR department or your office of legal counsel. Many institutions seek outside training resources, and there are good online resources available from companies like McGrath Systems, Inc. Several reputable higher education attorneys offer trainings, and NCHERM provides webinars and seminars on investigation training, and provides custom-tailored training for individual institutional clients. We also offer consultation on formulating a civil rights investigation approach that will suit your institutional needs, politics and culture.

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