

**LEGAL LIABILITY AND
STUDY ABROAD FROM THE
PERSPECTIVE OF A LAWYER
AND A CLIENT**

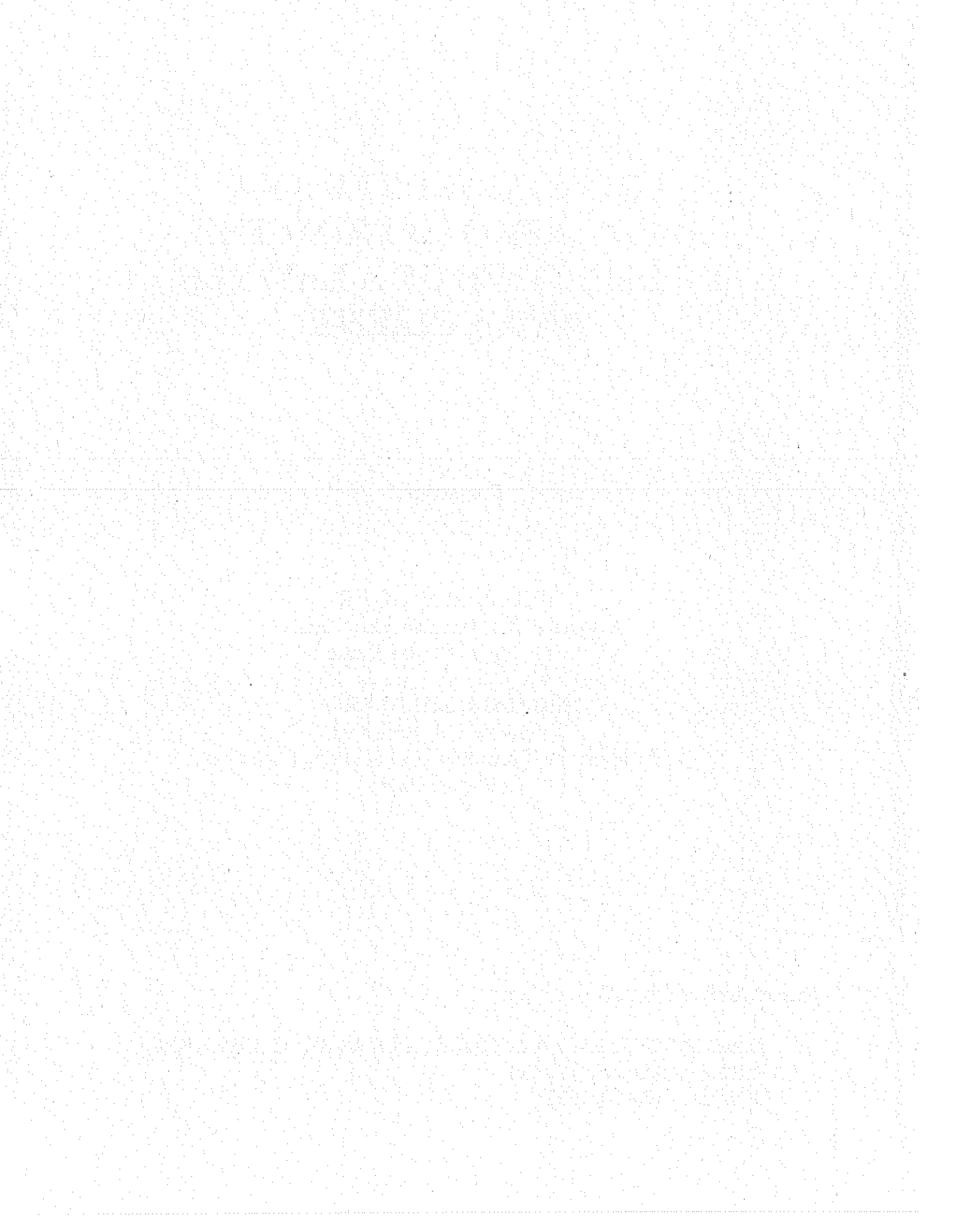
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Stetson University College of Law:

22nd ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 18 - 20, 2001



Legal Liability and Study Abroad
from the Perspective of A Lawyer and A Client

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Annual National Conference on Law and Higher Education
February 20, 2001
Clearwater Beach, Florida

Introduction

The purpose of this presentation is to provide participants with a contextual framework for understanding and managing the risks inherent in the international education field from two distinct perspectives: (1) the perspective of a “client,” in this case a C.E.O. and international educator charged with overseeing a number of international programs around the world; and (2) the perspective of a “lawyer,” in this case an attorney for an educational institution that sponsors international study abroad programs across the globe. After providing a context for the converging forces and the increasingly competitive study abroad environment, the authors will first discuss and analyze the features of the health and safety program for a particular program sponsor (IES), utilizing as examples to illustrate key points a few typical legal cases with which IES has been confronted. Through a lawyer’s perspective, the authors will then provide a context for the apparent increase in recent years in health and safety litigation occurring in the field. Here, the authors will discuss and recommend the use of a critically important tool to help institutions protect students, faculty and staff from harm while concurrently reducing potential institutional liability and better managing the risks inherent in international programs: the risk assessment audit. The discussion will utilize as a model several safety audits recently jointly conducted for certain IES and Notre Dame programs.

The Client's Perspective

Context

The study abroad field began as a post-World War II phenomenon. IES, a few other third party program providers and a small number of colleges and universities began offering overseas undergraduate liberal arts programming for U.S. students as a means of creating a more informed, globally competitive generation of Americans. As an academic consortium of 130 highly ranked U.S. colleges and universities, IES has always had a well-defined mission. After 50 years, the mission of IES remains to provide high quality academic programming while increasing students' intercultural competence. The belief is that U.S. students will not only be able to compete more effectively in a global economy but they also will be more responsible, informed world citizens able to function capably across multiple cultures. Moreover, they will recognize the great benefits and the pitfalls of their own culture, a skill particularly relevant to citizens of the world's super power.

Given this mission for study abroad, there are six major forces that are converging to increase expectations colleges, students and parents have of study abroad program providers—both university and third party program providers.

First, there is a rapidly changing legal environment due to the public's knowledge of safety hazards, an increased knowledge of legal rights and actual cases that have occurred overseas. Although few in number, these cases receive disproportionate news coverage in the media relative to the coverage of U.S. campus crime.

Currently, there is a Web site that uses as its headline: "Travel Abroad, Sue at Home." This Web site is constantly growing as more litigation is referenced. As of January 2001 there were 213 legal cases listed by country. Most of the cases are tourist injuries or health problems but some involve overseas crime and/or terrorist acts. This is indicative of the potential for growing litigation in the study abroad field.

In the field of study abroad, there are few legal precedents, since most of the major, headline-grabbing cases have been settled out of court for undisclosed amounts. The lack of legal precedent has led to confusion among study abroad program providers. Within the study abroad field there are still many university and third party program providers who are uncertain about basic issues such as does the American Disabilities Act apply overseas and if so, to what extent? Does the Campus

Crime Act apply overseas and if so, to what college offices do study abroad program providers report the statistical crime data? Lack of knowledge has resulted in many program providers falsely assuming that ignorance of the law is an excuse for non-compliance or perhaps the best form of legal protection.

Second, student demographics and the locations students choose to study in have changed dramatically over the past 10 years. This has resulted in new, complex challenges for study abroad program providers, some of which are unprepared with insufficient financial resources and expertise to manage these challenges.

In the 1950s through the mid-1980s, most students studying abroad did so for a full year during their junior year of college in a European country. In the U.S. they were more likely to attend private, expensive colleges, be Caucasian females, and major in a foreign language or the humanities.

Today, the number of students annually studying abroad has over doubled in the past 10 years with 129,770 doing so according to 1998 statistics provided by the Institute for International Education. While only 1% of college students study abroad today, 48% of high school students plan on studying abroad according to one recent study reported in *The Chronicle of Higher Education*. Since 1985 the number of students studying in Europe has declined by 18% and those studying in Latin America have increased to 15% of the total market. Students' academic majors are much more varied with 53% of students majoring in business, humanities or the social sciences. Sixty-five percent of students studying abroad are female and 15% are minority students.

Moreover, serious chronic illnesses are on the rise among teenagers such as clinical depression, eating disorders, diabetes and asthma. Students take these health problems with them overseas and program providers need to be prepared to assist students with managing these serious, chronic health problems.

In sum, relative to even 10 years ago, program providers are managing a much more challenging set of student factors.

- There has been a dramatic increase in the number of U.S. students studying abroad.
- The student demographics have changed rapidly;
- There are significant increases in chronic health problems among adolescents; and
- More students are attending programs in developing countries.

The study abroad field has only recently begun to deal with the kind of challenges U.S. colleges have faced on campus for the past 20 years. While colleges are well-prepared to manage these challenges on campus, they frequently are not prepared to adequately manage them overseas.

Additionally, the laws in many countries are at odds with U.S. laws. Understanding and mediating these differences is complex and frequently requires use of both U.S. and foreign based legal counsel.

Third, relatively few Americans travel abroad in their lifetime compared with citizens and residents of other countries. Therefore, Americans tend to erroneously assume that it's less safe in other countries. Media coverage has accentuated this belief. For example, when two students were murdered in Costa Rica last year, NBC network news challenged whether U.S. students should be encouraged to study abroad. They did not provide a reference point by reporting how many students are murdered in the U.S. annually. In fact, crime rates are much lower in most other countries than in the U.S.

Also, many Americans do not know how to take common precautions when we are overseas and we are easily identified as Americans. This can put U.S. students at increased risk if they are not properly prepared for their overseas experience. In a recent safety survey IES conducted, we found that our students were most surprised by the fact that they were sometimes the victims of anti-American rhetoric. They simply assumed that all other countries are in deep admiration of U.S. foreign policies, exporting our popular culture, etc.

Unless U.S. college study abroad offices or the program providers adequately prepare students and their parents prior to students' departure from the U.S., minor problems can be exaggerated on-site and students can lack proper training to know how to avoid problems. On-site staff must be trained adequately to manage significant emergencies, also.

Fourth, parents and students frequently expect the same standard of living overseas as they enjoy in the U.S. This is particularly the case for student support services such as student centers and health services, teaching styles, grade inflation, student housing and computer support. When they arrive and realize that other cultures manage these aspects of education very differently they tend to expect the local culture to change to fit U.S. standards. This disconnect between consumer expectations and international realities fosters threats of litigation.

Fifth, study abroad is an unregulated field. Only one regional academic accrediting body reviews study abroad programs as part of the college accreditation process. Colleges vary dramatically in the extent to which they review their own programs and those of other universities or third party providers. There is no agreed upon set of standards for what constitutes a high quality study abroad program. Some colleges develop their own criteria for program approval and are very rigorous while others are laissez faire in their review.

The majority (approximately 75%) of study abroad programs are sponsored by colleges and universities in a decentralized way which further contributes to lack of appropriate oversight. IES has developed a set of program standards that we have shared with the field. One section of our standards focuses on health and safety. We are improving this section even more. Curiously, it is the aspect of our web site that receives the most hits. This lack of standards in the field at large invites litigation.

Sixth, all of these converging forces are set within the context of a field that has not been accustomed to much competition or competitive behaviors until the past five years. Moreover, study abroad program providers, be they university or third party providers, are not accustomed to managing litigation. Study abroad offices are generally marginalized in academe resulting in these professionals lacking current knowledge of legal risks and risk management best practices. As a fairly isolated field, insular thinking has cropped up and been sustained as purist practices. Up until recently, the field has been very collegial, gentle and unprepared to deal with some of the legal, health and safety risks that are impacting study abroad.

Changing Competitive Market

As mentioned previously, the number of students studying abroad has grown rapidly in the past ten years. The number of competitors that offer study abroad programs has grown dramatically, also. This has invited significant increases in competition among all study abroad program providers. The economy is healthy and colleges have greatly expanded their own programs. Colleges frequently mount monopolistic protections for their programs which can lead to lack of rigorous program evaluation.

As a result of increased competition, pricing sensitivity is significant. Students are studying for shorter periods of time and are choosing the least expensive programs. This has resulted in little

incentive for program providers to add overhead expenses in the form of staff and student training about health and safety risks, adequate insurance, risk audits, labor-intensive policy and protocol development and investment in student affairs and legal staff.

As previously mentioned, the range of program providers is extensive and not all emphasize quality and safety. For example, dot com start-up companies are racing into the field and investing in Web marketing but not necessarily placing priority on program quality or safety procedures. They are significantly under-pricing more reputable, experienced program providers.

These competitive factors place financial pressures on marginal program providers that do not have the financial resources to invest in an emphasis on safety. With lack of regulation in the field, only the most well-established and well-financed program providers have the incentive to make significant investments in health and safety precautions.

IES Safety Program

IES is considered a high end program provider with a very strong 50 year academic reputation in the field of study abroad. We are governed exactly the way a college governs itself which results in a priority being placed upon high quality programming and attention to health and safety.

Our safety program emphasizes preparation and prevention. It consists of the following elements:

- A full-time, senior level dean of students and a full-time assistant at our Chicago headquarters. The cost for these two employees in salaries and benefits is approximately \$125,000. They review all medical forms submitted by our students prior to departure, follow-up with approximately 25% or 200 of the students who report significant health problems every semester, sometimes talk with their parents and generally prepare the students for the additional challenges and precautions they should take overseas. They are constantly improving our health, safety and student discipline policies and protocols to be compliant with U.S. higher education law and compatible with the laws of the 11 countries in which we have academic programs. Additionally, they train staff worldwide on how to manage a full range of student affairs issues and emergencies.
- We have invested in a comprehensive international student health insurance policy for every student at a total cost of \$220,000 per year.
- We have a U.S. based clinical psychologist on retainer at the approximate cost of \$20,000 per year, including absorbing the cost of her malpractice insurance. She is a senior level psychologist who is the director of a top university student counseling center.

Her role is to act as consultant to our staff worldwide, particularly our dean of students, in cases involving serious psychological problems.

- We have identified health professionals and hospitals in every city in which we offer programs. We refer students to these clinicians and health care facilities in the event of a health problem.
- We have clearly documented academic, health, safety, and student discipline policies and procedures that are given to every overseas student services employee, academic center director and student. Students receive this information in a printed guide prior to their departure from the U.S.
- We provide every student an extensive country and city specific printed guide that is mailed to them in advance of their departure from the U.S. These guides explain country specific cultural differences and provide advice on how to manage emergency situations.
- We provide every parent or guardian a family guide that details the stages of culture shock students experience, emergency contact information and other vital information to help the family members assist the students with their adaptation to a foreign culture.
- All IES student recruiters are trained to prepare students for their departure in their phone contacts with the students.
- All IES student recruiters are trained to assist our member colleges with assisting students with reentry to the U.S.
- We invest in on-going staff training overseas in cultures where attitudes and beliefs vary greatly when it comes to health care practices, sexual harassment, sexual assaults, etc. This is a costly investment. One week long training session we offered all student services staff world wide last summer cost \$50,000.
- Within our published program standards we place priority on health and safety. Likewise, this area gets significant attention every year as we set organizational goals.
- We purchase adequate amounts of liability insurance which costs \$77,000.00 per year.
- And we are piloting risk management audits through partnering with Notre Dame. Bill Hoyer will talk about these audits in greater detail.

We think that by making this level of investment we are preventing as many unnecessary risks as we can and preparing our staff to manage emergencies when they occur. It is difficult to acquire necessary know-how at the point of a crisis occurring. Preparation pays off.

Case Examples

Health and safety is paramount for IES and we invest accordingly. However, we can afford to subsidize our programs and we do so at a significant level of funding annually through our investment portfolio. I do not know of another program provider that is making this level of investment. Disincentives are strong for not emphasizing safety since

- this is an unregulated field;

- there are few legal precedents to motivate compliance with a set of standards;
- costs of compliance with U.S. laws and common health and safety practices are high; and
- pricing sensitivity and significant levels of competition drive all program providers (including those sponsored by colleges) to reduce overhead vs. add more expense.

IES has had an outstanding legal record over a 50 year period. However, in the past two years we have experienced a range of legal cases that point to the fact that litigation threats are increasing. Here are the major cases and their resolutions.

Case 1 - We received multiple verbal and written threats from a parent to sue IES due to the theft of his daughter's laptop computer. He attempted to mobilize other parents whose daughters' computers were stolen. He maintained that IES had placed students in an unsafe neighborhood for housing and this increased the risk of theft. The case took place in London where theft in all neighborhoods is increasing dramatically. IES housing is already luxury level housing in London where the city is over 60,000 student beds short of demand. We pay a significant premium for student housing and have not been able to pass the full cost along to students. Also, five other very reputable U.S. colleges and universities were using student housing in the same neighborhood and our experiences with property theft was no greater in that neighborhood than in other neighborhoods in London.

Prior to the threat, IES had already moved the effected students to new housing at our expense, allowed them extensive access to long distance phone services for the remainder of the semester at IES expense, and provided each student with \$500 toward the replacement of the laptops to cover their insurance deductible. The outcome of the case was that we refused to meet the father's demands for more money and he did not sue.

Case 2 - In France, a student alleged that she had been sexually assaulted. Our staff took the student to the local hospital for medical care where the physician confirmed the student was seeking the morning after pill and that there was evidence of sexual activity. In France the law requires that any citizen who knows of a sexual assault report it to the authorities under penalty of law. The student would not report the alleged assault and our employees, along with the university within which we are embedded, felt that they were jeopardized as a result. In the end, the student was

suffering from clinical depression and she continually put herself at physical risk. We felt required to provide 24 hour oversight throughout the entire semester and provide a psychologist for the student to meet with weekly.

The student began not attending classes, not checking in with our staff, staying out to unreasonable hours (to the point that her housing had to be changed), violating a behavioral contract we made with her, and charging that she was sexually assaulted two more times. Her parents refused to assist or accept her return home. They indicated that this had occurred previously in another country. Although the U.S. attorneys at her home college and at IES advised us against sending her home, we have since learned that this probably would have been a more appropriate action to take.

In order to clarify the legal position of our French employees and the French university, the attorney for the French partner university requested that the student write a narrative description of the events that only the attorney would review. The student wrote the narrative and the French attorney determined from the student's description of events that no assault occurred. Therefore, the French employees and the French university did not have to file a report with police.

Case 3 - We had six cases involving medical evacuations two years ago. Five of the cases were students with severe eating disorders, each of whose weight had dropped to approximately 80 pounds. In all but one of the cases the parents resisted their children returning home and all but one parent threatened legal action because they disagreed that their children should be returned home. Our student health insurance covered all expenses.

The sixth medical evacuation case involved a student who had a history of being bipolar and suffering from clinical depression. She was threatening repeatedly to commit suicide at one of our centers. After seeking local health care, a clinical assessment was made by the local psychiatrist and the physician who represents our health insurance company. It was determined that the student should be medi-vaced home because the local health care system was ill-equipped to manage her particular diagnosis.

The student's father threatened to sue. The thrust of the legal argument was that the clinicians and IES could not predict with total certainty that the student would commit suicide and so she should be allowed to stay. We agreed to take the student back after she sought health care in

the U.S. and had a written statement from a physician indicating that she was ready to return. Subsequently, the student spent 3 months in a psychiatric ward in the U.S. and a year later the father requested a refund from IES of tuition and room and board expenses.

These are simply a few examples of legal cases that affect health and safety issues. We also have faced the same complexities any multi-national organization faces in firing employees in countries with much more protective labor laws. Recently, we won a case against a U.S. dot com competitor who had diverted business from IES through using the dot com domain name version of IES's dot org domain name. These are cases that the study abroad field did not face even 10 years ago.

The C.E.O.'s Viewpoint:

From the perspective of a CEO, it is clear that increases in the number of legal actions and the range of such actions is on the rise. The number of cases is not extensive relative to what U.S. colleges face every day. However, the field of study abroad is unaccustomed to managing litigation threats and U.S. colleges are frequently disadvantaged in several ways.

Frequently, the U.S. attorneys lack expertise in the laws of other countries. This necessitates hiring counsel overseas. It is not always easy to identify outstanding legal counsel overseas and, even when you do, coordinating these legal efforts is complex. When colleges do not use foreign legal counsel, they can fall prey to erroneous conclusions and take improper actions.

Also, study abroad office directors tend to have little power on their home campuses. Therefore, they are not involved in setting policies that are effective for oversight of health and safety overseas. Also, they sometimes do not have easy access to their own college's counsel. This results in a failure to identify legal issues in a timely fashion and to seek appropriate assistance. As a result, they are not learning from their legal counsel to prevent future problems.

Additionally, there are high costs involved in being a separate legal entity in some countries. To avoid the payment of high social benefits or legal and accounting costs, faculty and study abroad directors are likely to start programs without establishing legal status in a country. This puts the local employees and the organization at risk when legal cases do emerge. The pressure to reduce overhead costs for study abroad programming will increase the incidence of this problem.

From the perspective of a CEO, one takes the high road and remains committed to high standards of programming and health and safety procedures. The laws, employment and student affairs practices in the U.S. and overseas are complex and expensive to implement. Students do not select study abroad programs based upon the program provider's commitment to or investment in health and safety. Students feel that they are immortal and resent even paying for health insurance, let alone other overhead related to health and safety provisions. Investment in implementation of best practices in health and safety abroad make it difficult for program providers to price their programs competitively. This represents a significant challenge for CEOs to manage without sacrificing program quality.

I would simply add from a CEO perspective that the comprehensive approach to health and safety is the right thing to do. However, unless colleges and universities hold program providers, including their own programs, to these higher standards there is little financial incentive for any study abroad program provider to increase its overhead to this extent. Beyond a moral obligation to protect our students' health and safety, the only other incentive is fear of litigation when something does go wrong. A program provider such as IES is in a position to exercise considerable due diligence. And we believe that this kind of investment in health and safety is a form of preventive medicine.

As CEO of IES my position has been to invest in program quality, including extensive health and safety provisions. My philosophy has been to attempt to prevent problems through this investment in quality. I am hopeful that this will prevent us from receiving as many threats of litigation and put us in good staid should we face a major case.

More importantly, we try to always do what we feel is in the best interest of the student. I would prefer to be in court defending IES for sending a student home against the preference of the student and parents versus trying to explain why IES did not act to avoid a tragedy.

Even with the emphasis IES places on health and safety, I find it a daunting task to achieve compliance across various countries due to local cultural practices and attitudes toward Americans imposing their standards on others. For this reason, the comprehensive risk assessment audits that Bill will propose are very useful for measuring how well we are doing. The most copious policies, goals and training programs still do not always translate into total compliance on the ground.

Conducting risk assessment audits is a good measurement of how well we are achieving our stated goals and priorities in this area.

The Lawyer's Perspective

Although no one seems to maintain comprehensive statistics on the issue, many seem to believe that there has been an increase in recent years in the number or seriousness of accidents, injuries and deaths occurring during international study abroad programs sponsored by U.S. based higher education institutions. The appearance of an increase may be attributable, in part, to a number of factors, including: (1) an increase in the number of American students going abroad; (2) disproportionate coverage in the U.S. media of crime and terrorism incidents involving Americans living and studying abroad; and (3) increased litigiousness in American society generally, which has led to more insurance claims and court cases in every context, including study abroad.

Of course, it is also possible that the number or severity of crime and terrorist incidents involving U.S. citizens studying abroad is actually on the rise. Whether the increase is real or apparent, however, and irrespective of causal factors and statistics, it is undeniable that real incidents have occurred in recent years which have involved acts of rape, robbery, murder, accidental death and terrorism directed against American college students and their professors abroad. To cite just a few recent examples:

- On March 13, 2000, 2 Antioch College students who were engaged in an academic project in Costa Rica were found shot to death in a remote area of the country. *See* "Their Paradise Lost: Two U.S. College Students Dies Brutally in the Costa Rica They Had Both Come to Love," 4/3/00 *People Magazine*, 173, 2000 WL 4137798.
- In January of 1998, 5 St. Mary's College (Maryland) students were brutally raped, and all 16 people in their group (which included 3 professors and thirteen students) were robbed, when a group of armed banditos flagged down their bus at gunpoint during an anthropological tour of Guatemala. *See* W. Dulles, "Inform Yourself Before Studying Abroad," The Toronto Sun, 2/27/2000 *Toronto Sun* T4, 2000 WL 13722977.

- In 1997, Earlham College (Indiana) was sued by a student who alleged she was sexually assaulted by the host father of the family with whom she was assigned to live during a program in Japan. She alleged that she complained to the University about the host father's unwelcome sexual advances prior to the alleged sexual assault; but, that the University took insufficient action in response to her complaint. The University denied the student's allegations and asserted that it did take appropriate action. The case was later settled for an undisclosed sum.
- In 1996, a severe bus accident claimed the lives of four American college students participating in the University of Pittsburgh's Semester at Sea program. *Id.* The driver of the bus had been working thirty to fifty hours and was reportedly intoxicated at the time of the crash, which occurred at night on a road which U.S. Consular reports suggested should not be used after dark. *Id.*
- On April 9, 1995, Alisa M. Flatow, a twenty-year-old Brandeis University student, was killed after a suicide bomber drove a van loaded with explosives into the public passenger bus on which she was riding in Israel.

Even though the study abroad experience remains remarkably safe, statistically and practically speaking, incidents such as these seem to have created a widespread perception that international programs may be more dangerous than life in American society generally. Irrespective of whether that perception is accurate or not, and irrespective of the number of incidents each year, the fact remains that even one serious injury, death or major lawsuit involving a student, faculty member or staff member spells disaster for its victims, and for the academic institution sponsoring the program. As a result, higher education institutions must take very seriously their legal obligations to exercise reasonable care in sponsoring international programs by helping to protect their constituencies (e.g., students, faculty members and staff) from reasonably foreseeable harm abroad.

As Mary Dwyer documents, U.S. educational institutions have been rushing to expand their international program offerings and student participation rates in study abroad have been sharply on the rise. With more and more students participating in study abroad, and programs expanding into venues once thought far too dangerous, the risk of serious catastrophic incidents and of legal liability

logically increases, too. Unfortunately, though, in the rush to globalize program offerings, many institutions have failed to dedicate a commensurate amount of institutional resources to the identification and reduction of risks inherent in such program offerings. There are, of course, exceptions to this rule. In fact, IES may be best such example, especially in light of the substantial investment it has made in health and safety policies and procedures, risk assessment audits, etc. In my experience, though, very few higher education institutions have followed the lead of IES and made a commitment of institutional resources to the reduction of risk and legal liability in the area of international programs. In fact, too often the principle of “out of sight, out of mind,” seems to pervade.

The best solution to this problem need not be extremely expensive or complex. What is needed is a relatively small investment of institutional dollars by American higher education institutions into the establishment of risk assessment audits of the programs which they sponsor, own or operate. As demonstrated below, this simple step can help protect the lives and safety of students, faculty and staff members living, studying and working abroad. It also can help preserve institutional reputation, protect institutional financial resources and reduce potential legal liability by addressing potential problems before they become accidents, injuries, insurance claims or lawsuits. While it is not, of course, possible to eliminate entirely all of the risks and dangers arising out of study abroad programs—or on the home campus, for that matter—a risk assessment audit program can help institutions identify and eliminate unnecessary risk and manage effectively necessary risks which are inherently necessary to maintaining the academic integrity of their international program offerings.

The Risk Assessment Audit:

What is a risk assessment audit? Simply stated, it is a confidential, comprehensive and detailed review of health, safety and liability issues and conditions on the ground at an international program site. See W.Hoye and G.Rhodes, “*An Ounce of Prevention is Worth . . . the Life of a Student: Reducing Risk in International Programs*”, Vol. 27, No. 1, The Journal of College and University Law (Summer 2000). A risk audit involves seven discrete steps, including:

1. A comprehensive review, pre-site visit, by the institution's in-house counsel,¹ of relevant policies and procedures from the home campus with an eye toward whether they can be realistically applied in the overseas venue under study,² or whether they should be supplemented, clarified or replaced with respect to the international program;³
2. A walk through of all on-site university owned, leased, recommended and controlled academic, residential and other facilities affiliated with the program by the risk manager and counsel from the home campus, an on-site employee of the program, and a local insurance representative or expert conversant with local fire, safety and building codes in the venue, as well as applicable zoning laws and ordinances. The

¹ Involvement of counsel throughout this process is a way to utilize the attorney-client privilege to attempt to protect from disclosure, even in the event of future litigation, any reports, memoranda or other documents created in the course of the risk assessment audit process.

² The key is whether the policies and procedures from the home campus can be reasonably and realistically applied or implemented abroad by the skeleton staff of university personnel typically on site at international program venues. If, for example, the institution's sexual or discriminatory harassment policy requires reporting to, and investigation by, particular administrators (e.g., the University Ombudsperson) who are physically located on the home campus, not on-site, with no provision for the reporting or investigation of cases arising during international programs, the policy may need to be amended to address complaints arising abroad during international programs. Alternatively, the institution may choose to adopt a unique policy specially designed for off-campus venues. The adoption of policies that can be realistically applied overseas may mean the difference between institutional liability and exoneration in the event of litigation.

³ Policies must not only be clear in content, they also should be published or adequately distributed to faculty, staff and students going overseas. The institution also should follow and consistently apply the policies and procedures it adopts with respect to all students, faculty members and staff.

purpose of this visit is to examine the compliance of each facility with institutional housing policies, local code requirements, and health and safety protocols from the home campus (e.g., with respect to items such as fire extinguishers, regular inspections, smoke detectors, sprinkler systems, evacuation plans, emergency preparedness, fire drills).⁴

3. Personal interviews of university employed faculty and staff on site, conducted by counsel from the home campus, as well as interviews of randomly selected students participating in the program by the risk manager and counsel from the home campus;
4. A comprehensive review, by in-house counsel, of on-site policies and procedures for the particular program under study, with an eye toward their consistency with policies and procedures on the home campus, their compliance with applicable U.S. law,⁵ and, if relevant, with those policies, procedures and protocols in place at the institution's other university owned/operated international venues;⁶
5. A review by in-house counsel of the orientation, promotional and marketing materials for the international program under study, as well as any agreements the program has entered into and forms or materials provided to participants by the home campus or on-site (e.g., waiver forms, health insurance forms, etc.) to examine

⁴ The institution's local insurance company representative in the venue may provide this service free of charge, since the insurer and the university have a shared interest in the compliance of all university owned/operated facilities with local codes and in following appropriate safety protocols.

⁵ See John R. Robinson, "The Extraterritorial Application of American Anti-Discrimination Law," Vol. 27 J.C.U.L. 1 (Summer 2000).

⁶ Whether policies and procedures comport with the law of the venue where the program is located also should be examined by local counsel in the venue.

whether they make representations or warranties which could lead to potential legal liability or give participants unwarranted expectations.

6. The retention of counsel licensed to practice in the venue under study (preferably an attorney who represents higher education institutions based in the venue) to review the corporate structure, status and governance structure of the program under the law of the venue, as well as any agreements relating to the program. Also, local counsel should examine and give advice concerning the program's compliance with the law of the venue in all of its operations. A meeting between counsel from the home campus and foreign counsel to discuss these issues is recommended during the site visit.
7. The preparation and presentation of a written report by the institution's in-house counsel to the administration on the home campus summarizing the site visit, findings, conclusions and recommendations (including those made by in-house counsel, foreign counsel, risk management and the local insurance expert) for the reduction of risk, compliance with applicable law and the mitigation of potential legal liability for the home campus. The report should explicitly state that it is confidential and protected from disclosure by the attorney-client privilege. It should only be circulated to institutional employees of the home campus on a need-to-know basis. It should not be circulated to non-employees without the prior consent of in-house counsel. Finally, the report should include an action plan identifying the specific steps that need to be undertaken, in both the short and long term, to achieve identified objectives. When those objectives are achieved, the report and any documents connected with it should be destroyed, unless they are then judged by the

institution's in-house counsel to be relevant in pending or threatened litigation against the institution.

Through the use of risk assessment audits of university sponsored, owned and operated programs, risk managers, attorneys and other administrators can address risk management issues abroad precisely as they are addressed on the home campus. Such an approach requires the full support, cooperation and assistance of the senior administration on the home campus. With such support, and a cooperative inter-departmental effort, a risk assessment audit program is an effective tool to help reduce an institution's potential liability exposure and enhance the continued safe operation of its international programs.

The focus of a risk assessment audit program is on protecting students, faculty and staff while limiting institutional legal liability and avoiding legal action. It allows an institution to review current practices, policies and procedures to determine whether they are adequate as applied abroad or need to be improved in order to more effectively support students and help protect the institution from potential future liability.

Assessing the risks associated with the operation of international programs should include the development of a survey or audit instrument to be completed on-site at each venue. This instrument can be adapted to fit each institution's unique programs, requirements and needs. Along with Bob Zerr, I co-authored a sample risk assessment audit guide which was published in April of 1999 by United Educator's Insurance Risk Retention Group. It is detailed, comprehensive and designed to illustrate both the breadth and depth of investigation and analysis needed to explore fully the level of institutional risk presented by the operations of each international program. It is not, of course, intended to be exhaustive. Each institution, moreover, must develop its own personalized audit tools or questionnaires. I believe copies of the guide are still available from United Educators.

There is no substitute for on-site investigation by counsel and an experienced risk manager

from the home campus. To the extent it is feasible and practical, each university sponsored, owned or operated program site should be inspected at least once by counsel and a risk management specialist (or similar university official) from the home campus who is conversant with these issues and the relevant policies and procedures in effect on the home campus. These individuals should personally inspect all of the program facilities on-site (including a sampling of student residences, classrooms, academic buildings and program offices), meet with the faculty members and staff on site, and report back to the senior administration on the home campus concerning each of the risks and areas of concern identified. The report of the visit should include recommendations to help enhance health and safety while minimizing and effectively managing necessary risks, eliminating unnecessary risk wherever possible and reducing the University's potential legal liability exposure. A reasonable period of time after the visit, the home campus should follow-up with the international venue to ensure that each of the recommendations resulting from the on-site visit and report have been implemented.

The Cost of Risk Assessment Audits

A comprehensive risk assessment audit is remarkably inexpensive, especially when viewed in light of the enormous cost of defending even a single liability case. Along with Notre Dame's Director of Risk Management and Safety, I recently undertook a risk assessment audit visit of two separate Notre Dame and IES programs in a Western European city. The two organizations agreed to evenly split the cost of the project. Although all of the bills have not yet been received, on the next page there is a breakdown of the actual and estimated costs of the joint visit to date:

Budget for Joint Risk Assessment Audit
of Notre Dame and IES Programs
November 26, 2000 - December 2, 2000

Estimated foreign counsel fees and expenses for assessment of compliance with local laws, regulations and ordinances and delivery of findings and recommendations:	\$7,500.00
Actual airfare, lodging, meals, and transportation expenses for Bob Zerr and Bill Hoye, November 26 - December 2, 2000:	\$3,520.46
Foreign insurance expert fees for on site inspections to academic and residential facilities for IES and Notre Dame programs to assess compliance with applicable building, fire, safety and other codes and ordinances:	No charge
<hr/>	
TOTAL:	\$11,020.46

Thus, IES and Notre Dame will each pay approximately \$5,510.23 for this joint visit to perform a comprehensive risk audit of two separate international study abroad programs. It is likely that the foreign counsel's bill will be substantially less than the above estimate, too, which would mean that the cost to each institution will be even less. A key cost control measure in this regard is to be very clear with foreign counsel in narrowing the extent and scope of their work, with ceilings placed upon their bills and a request that they contact you for authorization before exceeding a pre-set sum in fees and costs. Of course, foreign counsel should only be used to the extent necessary to save on costs, and services which can competently be performed by in-house counsel on the home campus should be delegated appropriately.

There are also great cost efficiencies to splitting travel and foreign counsel costs by partnering with other sponsors of international programs in the venue to conduct risk assessment

audit visits. Such partnerships have the added benefit of creating unique opportunities for each institution to learn from the other, and to exchange ideas for addressing health, safety and other issues in the venue.

Sample Risk Assessment Audit Recommendations:

In order to illustrate the comprehensiveness of the risk assessment audit process I recommend, below I have reproduced a set of sample recommendations for a typical risk assessment audit visit.

Recommendations

Employment issues

1. Current written employment agreements should be finalized for the Director, Associate Director and Administrative Assistant on-site, who are employees of the home campus. These agreements are required by the law of the venue and should specify the terms and conditions of employment, including employee benefits to which each employee is entitled. For example, if private supplementary health insurance is to be paid for by the University, that fact should be spelled out in the agreement. The foreign counsel we have retained for this project should be involved in the review, creation, and/or updating of employment agreements as needed.

2. There should be appointment letters for each adjunct faculty member who teaches in the University's program, and these agreements should be in a form approved by foreign counsel. They also should be renewed each academic term. Whenever practicable, a minimum period of 3 months should exist between terms to avoid arguments of continuous employment under the law of the venue.

3. Foreign counsel should prepare a brief employee handbook for the program's

employees, which clearly spells out relevant policies and procedures of the University with respect to its employees in the overseas venue. In order to successfully defend an employment claim in the venue, local counsel informs us that such a handbook must be in place before employment problems arise; otherwise, the local courts are likely to simply rule in favor of the employee.

Student Life Issues

1. All violations or suspected violations of the student handbook committed during the University's foreign programs should be promptly reported to Student Services and International Programs on the home campus by on-site staff. Any injuries to students, as well as any crimes committed against students (or their property), during periods when they are participating in the University's programs should immediately be reported by on-site staff as well.

2. Students performing any work for pay in the overseas venue should first be required to have a valid work permit from the foreign government and comply with applicable labor, immigration and other laws and regulations.

3. In-house counsel should prepare an internship agreement for students performing internships or service projects in the venue to sign. It should specify that the University is not sponsoring the internship, contain a waiver, and indicate that the internship is not required as part of the student's academic work.

Contractual and Legal Issues

1. The academic arrangements between the University and its foreign counterpart should be reduced to writing and memorialized in a Memorandum of Understanding or agreement, in order to better clarify the rights and responsibilities of each party.

2. In-house counsel should draft a brief disclaimer for distribution to

students on the program stating that the University is not responsible for caving, cycling, climbing, sports, adventure or similar clubs, and that the University does not sponsor, recommend or endorse the activities of such clubs. The general waiver for the program also should be augmented to include these types of activities and field trips.

Transportation and Insurance Issues

1. Insurance certificates should be forwarded annually by on-site staff to risk managers on the home campus for:
 - a. All common carriers (e.g., charter buses) used to transport students in connection with the program;
 - b. All student clubs in which our students participate, especially those which involve adventure clubs, sports or high risk activities.

Financial Issues

1. The checking account for the program should require counter signatures for all checks over a certain amount. This requirement should be pre-printed on all checks.
2. Student stipends should not be paid in cash but by direct deposit to student bank accounts or by checks drawn on the Program's checking account.

Facilities Issues

1. The program must have a written safety statement under local law, as well as an emergency action plan which in-house counsel will draft. These documents should be updated as needed.
2. A coded keypad access system or a Detex card system should be installed at the door to the program office. Such a system would allow students, faculty and staff to access the office with a Detex card or code but would prohibit unauthorized persons from entering the program office when it is unoccupied or after hours.

3. Fire drills should be conducted at least once each semester at the building while classes are in session.

4. The University should explore with its partner campus in the venue the possibility, advisability, cost feasibility and viability of adding a fire escape to the building housing the program office and classrooms. The present fire escape plan is for occupants of the program office and classrooms to go to the roof of the building if the stairway is inaccessible and to await rescue by the local fire department. A neighboring building has a fire escape even though it is an historic building, too. According to on-site officials, it may be possible for a fire escape to connect to the neighboring fire escape. This would, of course, require appropriate authorization and the agreement of the owners of the neighboring facility. If this recommendation is to be implemented, the home campus might need to be willing to pay for all or part of the project.

5. In the student residences, we suggest the following steps:

- a. Add a mounted fire extinguisher (A-B-C type) in the kitchen;
- b. Add smoke detectors in the second and third floor stairwells;
- c. Repair the lock on the glass door in the dining room at the rear of the apartments (when we visited, the door was unlocked and we could not get it to lock; and, there was a laptop computer sitting on the dining room table immediately inside the door).
- d. Check fire extinguishers annually and have them recharged as needed;
- e. Replace smoke detector batteries at least annually.

General Recommendations

In addition to the foregoing, we have several general recommendations which we believe

would not only be of assistance in reducing risk in the venue but in all of the University's international programs.

1. We believe a health and safety manual or Director's Manual for On-Site Staff should be developed jointly by in-house counsel, the risk managers and international programs for circulation to all overseas on-site faculty and staff. This manual could address University policies with respect to emergencies and campus contact information, facilities, security, housing safety, financial issues, employment issues, student life, health, safety, insurance, risk management, etc. In addition, relevant University policies could be attached, such as non-discrimination, sexual harassment, etc., along with a crisis management plan for major emergencies.
2. To the extent it is financially feasible and otherwise practicable, we suggest that all program directors for the University be brought together for a series of meetings on campus with representatives of Student Services, Risk Management, Human Resources and the General Counsel for a discussion of relevant University policies and procedures affecting employment, risk management, legal, student life, insurance, health and safety issues. If a general meeting is not possible or financially feasible, then perhaps representatives of the above campus departments could meet with directors when they are back on campus individually to discuss these issues.

As these sample recommendations illustrate, a risk assessment audit visit is extremely educational for an institution's senior administration, in-house counsel and risk managers. It is also of tremendous educational benefit to on-site staff in the foreign venue. Issues are identified, solutions are explored and a critically important two-way dialogue can occur concerning health

and safety issues, university policies and procedures, best practices and practical exigencies. It is hard to imagine a scenario when such an exchange would not be of benefit to the home campus, or would not result in a reduction in risk, liability exposure or potential danger to the institution's students, faculty and staff. Of course, not every problem can be immediately solved, and it is impossible to eliminate all of the risks attendant to international study abroad programs. Fortunately, though, the law does not require the complete elimination of all risk or the prevention of all accidents or injuries, it merely requires that an institution exercise reasonable care to address foreseeable dangers and compliance with applicable law. An on-site visit in the form of a comprehensive risk assessment audit can go a long way toward satisfying the applicable legal standard and provide the home campus with reasonable comfort that its students, faculty and staff are not subjected to an unreasonable and foreseeable risk of harm.

CONCLUSION

From the perspective of both lawyer and client, the reasonable reduction of risk and potential legal liability arising out of international programs is a critically important and attainable goal. Through the use of risk assessment audits, higher education institutions can, at minimal cost, reasonably address the inherent health and safety risks attendant to overseas study. Such an outcome requires a comprehensive approach to preventative law and risk management. Institutional compliance with applicable U.S. and foreign laws, regulations, ordinances and university policies should be the starting point, not the ultimate goal of this process. The overarching goal must be the protection of the institution's most valuable resources: its students, faculty and staff, from reasonably foreseeable harm and danger. In the final analysis, avoiding an accident, injury or death in the first instance is always the best and most efficient means of reducing an institution's potential liability exposure. The risk assessment audit is a critically

important, practical and affordable tool for every educational institution in its quest to meet this all-important goal.

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