

Case Law and Legislation – What Can You Do with This Stuff?

By Christopher Schmidt

Within judicial affairs, opportunities abound to become aware of legislation and case law, both current and pending, which impacts our educational pursuits. In its most ultimate sense, law is the one of two foundational pieces to our branch of student affairs, because it defines most often the structure and limits of our educational processes. As we do not want to find ourselves in court, we should abide by the law and come to better understand the flexibility and limits that it allows us.

The challenge often surrounds what you need to look for and what to do with it. When you receive information on the ASJA listserv or from other associations that discuss a case or law, how can that be helpful or how would you use it? In this article, I will first attempt to outline some resources so that you can begin this professional development on your own. Then, I will offer some basic practices for understanding and guidance and then demonstrate an approach our office took to review a case very specific to us. While I certainly am not an expert, I think that our office has taken a good approach to both the review and discussion of case law and legislation. While this might seem rather elementary to some, we recognized that it was necessary to be current and review as those issues as appropriate to support our mission and institutional values.

I offer a bit of a disclaimer first. Let me say that I do not believe one needs to be an expert in law to really understand legal or legislative material. I think it only takes a bit of interest and some research to adequately examine what case law is out there and then to postulate how it might impact your practices. Knowledge of some of the common legal language is helpful, but not necessary. I would say that it is just good practice to know court procedures and how your office might be involved. Regardless of your level of knowledge however, you should consult with your own legal counsel and administration as you attempt to respond to new law or policy. Use your legal experts and support their efforts in reducing your risk of liability or litigation. The court room can be a fun experience, but not if you are being sued.

That being said, the first thing you need to do is familiarize yourself with what is out there. An obvious benefit of ASJA in particular is the wealth of expertise in law and higher education. The old adage about first looking inward to answer questions is especially true here. An invaluable opportunity to consult with each other and help spread the wealth should not be lost or forgotten. The ASJA Annual Conference always has a session on legislation and case review – avail yourself of the chance to listen and speak to the experts in this area. In addition, we have a great relationship with The National Association of College and University Attorneys (NACUA) - and many of them are also part of ASJA. Take note of those cases presented on the Council on Law in Higher Education website (<http://clhe.org/>) and review the Foundation for Individual Rights in Education (FIRE) site (<http://www.thefire.org/>) as well. Take the time to review ASJA Law and Policy reports, both past and current. A recent one concerning *Bowman v White* and limits to freedom of expression was enlightening and demonstrates the resources we have to review and adequately digest law that impacts us.

Beyond ASJA and its related associations that might speak to completed or pending cases, check out the federal and state governments themselves to examine the law. Use the internet to periodically review <http://thomas.loc.gov/>, where you can search on federal legislation that would be of interest or impact. Check out the websites for the U.S. Senate and U.S. House of Representatives (<http://www.senate.gov/> and <http://www.house.gov/> respectively). You can review not only what is going on, but even focus on specific committees and your elected representatives. Another site, <http://www.govtrack.us/>, will allow you to get updates emailed directly to you on committee work, specific bills and individual representatives. Review as well your state government pages and track that which impacts your office (and you personally) most directly. Finally, if your institution has a State/Federal Government Relations Office, review their site too – they often will outline pending legislation in a manner that is understandable to the novice. To quote from my favorite television show “decisions are made by those who show up.” Let us all show up by knowing what is out there and taking the time to understand it. Our students will only benefit from our increased knowledge.

Once you know what is out there, how would I suggest you go about discussing it and making use of it in your offices? An obvious point first is that if there is legislation or case law that resulted directly from your institution, start there! Do not be afraid to discuss what impacts you the most, because doing so can only benefit the practice of your office, especially if there was a procedural loophole or legal question that has not been addressed in your process previously. If the institution was ever taken to court over an issue, start by reviewing the legal briefs, judge’s decisions and any appeals that might have been submitted. Do not be concerned about whether the institution won or lost – all decisions that involve your school are learning opportunities and are appropriate to discuss. These instances most impact your practice and are the ones that you face most directly. Beyond that, review state-specific information first, as state laws are going to again impact you most. Then check out the federal laws that would apply and see if you can find any challenges between state and federal statutes.

So, how did our office begin? We knew that we wanted to bring some professional development into our staff meetings, so we started with a case that we all knew about and one that had impacted us very personally. We started by reviewing *Simpson v University of Colorado* (372 F. Supp. 2d 1229) U.S. Dis. Ct., Dist. Of Colorado, March 31, 2005. As many of you know, this was a high-profile case where two female students alleged that they were sexually assaulted at a party by athletes. They filed a Title IX lawsuit against the institution. The court decided in favor of the university, stating that the university is liable “only when its deliberate indifference effectively caused the discrimination.”

Despite not wanting to involve too much legal stuff, the early stages of review of a case or law is a great time to involve your legal counsel. Whether knee-deep in an ongoing case or after, you can invite your legal counsel to brief you on the situation and keep your staff current on what is or might be affecting your office. Doing so is also of benefit to legal counsel, as it forces them to think of useable language for you and others. It might also help correct any misperceptions that the media might have created about the situation and get your staff on the same page about the meaning of it all.

In our case, we had obviously been in communication with legal counsel on numerous occasions and felt comfortable talking about the relevant issues with our staff. We decided first to review the case in its most simple terms, without trying to argue points of law or critique the judicial merits of the issue. We actually used the summary of the case as provided by Saunie Schuster and Brett Sokolow in the *Chronicle of Campus Conduct*, Vol 2, Issue 4. We thought that would give the brief overview of the case and in language that was practical for all members of our staff. We also thought using that as a basis for the discussion would allow us to use some expert commentary and keep a focused perspective on the issue, rather than trying to decipher legal jargon that might or might not be useful for our purposes. We also considered this an appropriate manner for the first review we were doing – it was a great way for us all to get our feet wet with the issues and the complexity of these situations.

Following the basic review, we discussed how the case had impacted the policy and practice of our office to date. We wanted to use this particular case to demonstrate that case law or legislation can have a very real, defined and noticeable impact in our office. For the *Simpson v University of Colorado* case, we outlined that changes included the addition of clearly defined investigation procedures and the hiring of two additional staff members. We discussed how the new structure of the office would allow us to manage the original legal issue differently and better. We also took the time to discuss how the court decision might have affected us personally and professionally, so that we could as a group, better understand the roles that we might play in a similar situation. While your office may not be impacted in the same way, any similar realizations that can be made should, I believe, be outlined first. Doing so will “bring the ideas home” and also allow the collective staff to broaden the discussion further.

Following our office impact conversation, we decided to shift the focus to our institution and how it was shaped by the case. This was a much broader dialogue, focusing not only the very practical impacts (policy changes, administrative reorganization, etc.), but also less tangible issues like public perception, media attention and the impact on enrollment or university standing. While all of these could not necessarily be quantified, we thought it good to understand how the case might be changing (or have changed) the climate of our institution. As we were continuing to work with others on our campus, we wanted to collectively get a better sense of the lens through which our colleagues would view us and others.

We then expanded the exchange beyond our own borders and discussed the potential impacts of the case to other institutions and judicial affairs. I believe this was one of the better parts of the issue, as it opened our eyes to how different our profession might be because of the case. We realized that other institutions would be talking about the case as well and would be seeking advice from us about what we have done differently and the impact on us. There was also a greater understanding that we face some serious liability as an institution and what the impact of another similar case in the future. Most importantly, we “woke up” a bit with regard the challenges and limitations we often face around litigation and law – most of us had experienced little of it directly, but this was a situation where we ourselves were impacted and were able to understand the experience of others in a way unknown before.

So, after you have reviewed information and jumped head first into litigation, what do you do? I would advise first that you decide whether or not there may be some impact on your policies and

procedures. This is the first step because you ultimately are going to be dealing with it, making changes to your code and implementing the change. If you believe there is some potential impact, take the time to start discussing it with your legal counsel – they will know whether there is state or federal law to consider, whether litigation can come from action or inaction and what liability exists. Additionally, they can support you by helping to draft language that both meet your educational need and any legal obligation.

Secondly, I would begin to consider how the law or decision will impact both your office and your institution. While these perspectives are important, they may not impact your need to implement a new policy or practice. Nevertheless, it is of value to conceptualize how your policy/procedure will be explained and publicized. I think of this as the PR perspective – how will you interact with other constituents, both on and off-campus, regarding this issue? Will it change a working relationship with your Housing department, for example? Will you need to work differently with your alcohol/drug education prevention groups? Will it impact your relationship with any victim advocates or community leaders? Would a discussion about the issue with any other departments or groups be of value, or how might an issue apply throughout all of student affairs? Any of these will teach something and can help your office formulate a more educational process.

Finally, I would encourage you to continually be aware of the changing climate of, students, student affairs and the law. While the experience of review and digestion of a new law or decision is good by itself, recognize that you need to continually review all your policies and procedures because our students change every year too. If we become complacent and continue to practice in the way “we have always done” we fail at the true nature of the educational experience – individual learning. A student’s college experience is shaped not only by what they learn, but how they learn. Our efforts have to be cognizant of the varied learning styles and developmental levels of our students, and while we cannot shun our legal obligations, we cannot forget that our students are our constituents and their learning is our goal.

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