

Is it Defamatory to Accuse a Student of a Conduct Violation?

By: Brett A. Sokolow, JD

Here is another issue of the week, torn straight from the headlines. On a campus I visited last week, a female student has lodged a complaint against a male student for sexual misconduct. Rather than respond to the complaint, the respondent has filed an immediate counter-complaint for defamation, and is insisting that the college protect his good name from baseless accusations. He is now threatening to sue the college if it allows this complaint to go forward. General Counsel and I put our heads together for some research, and in the process I revisited Mallory v. Ohio University, the defamation case in the Court of Appeals of Ohio from 2001. It occurred to me that the defamation issue would be good fodder for an article (a more recent case, Havlik v. Johns and Wales University, should also be referenced by those interested in this topic).

As a threshold question, we know intuitively that the process of accepting a complaint and processing that complaint through the college conduct process is not an act of defamation. Yet, under certain circumstances, it legally could be. Let's look at the complainant's position first. If a complainant comes forward and alleges a violation of the code of conduct, they are accusing a fellow student of wrongdoing, and possibly a criminal act. Such complaints must be made in good faith, and when they are, they will not be defamatory. If a complaint is not made in good faith, and is false, the question of whether the filing of the complaint is an act of defamation depends on whether it meets the elements of a defamation claim in your state. Generally, there must be a factual statement (not opinion) that casts someone in a poor light, and that statement must be made with the knowledge that it is false (or with malice or in some cases with reckless disregard for the truth). The statement must be published, meaning that it is communicated to those with whom it is not a privileged communication. And, the statement must cause reputational harm. Depending on how it is published, it may be slander or libel, and the laws of slander for oral communications differ from the laws of libel for written communications. If a student comes to you and tells you a false story of a conduct violation, it is potentially slanderous. If a student gives you a false written complaint, it is potentially libelous.

Is Reporting to a College Official "Publication" for Defamation Purposes?

I noted above that defamation, to be actionable, must be published. Publishing means communicating the defamatory information to those who are not privileged to receive it. Orally transmitting a report from a complainant to a college administrator might be considered publication, though an argument could be made that a written complaint would be FERPA-protected, and thus entitled to some level of privilege. I don't know that such an argument has ever been tried or has succeeded in court. Certainly, once the administrator transmits the complaint to the respondent, witnesses, other administrators, advocates, campus police, etc., publication has been made. Additionally, the college may at this point have become a party to the defamation, if it re-transmits defamatory information. This is why keeping information within a narrow circle of those who have a

legitimate need-to-know, at least at the initial stages of an investigation, is essential. It could also be argued by legal counsel, I believe, that a qualified privilege should be extended to communicating with those people who must be interviewed as part of an investigation, in order to determine whether a report is supported or false. Such a qualified privilege exists for police who receive crime reports, prosecutors who accuse defendants of crimes, and investigators who investigate alleged crimes.

BEST PRACTICES TIP: If you are investigating student misconduct, and you are not a state agent or acting under color of law, asserting that your communication of potentially defamatory information is privileged is a dubious argument. Therefore, if you have reason to doubt the veracity of a complaint, or believe it to be false, you will do well to use extreme discretion in sharing information about the complaint in a way that can personally identify the accused student, and may be considered a re-publication of the complainant's initial defamatory accusations.

Statements by College/University Officials

You may recall in the case of Mallory v. Ohio University that the associate director of the university's department of Health, Education and Wellness give an interview to a local newspaper in which she said, amongst other information, "He [Mallory] definitely committed a sexual battery, from the information that was gathered." Her assertion came on the heels of a criminal trial in which the jury voted 11-1 to acquit Benjamin Mallory of the sexual battery charge he faced. Ohio University was sued for defamation, because this administrator was acting in her official capacity at the time. She said nothing different than the campus police had said in arresting Mallory, the prosecutor had said in pursuing an indictment, and numerous people testified to at the trial, but their statements were privileged. Hers was not. Her statement was made after a jury failed to convict. And, the record was clear that she had actually not reviewed the information the campus police had about the alleged crime.

It was argued that she was stating an opinion, and there is some good advice for campus officials in the courts exploration of whether an opinion is defamatory. Opinions are not actionable as defamation. Factual statements are. Stating that someone is guilty of a crime is slander per se if it is not true (per se means that damage from the defamation need not be proved; damage is assumed by the court). Couching factual statements as opinion is not enough to remove the taint of defamation. If she had said, "it is my opinion that Mallory was definitely guilty of a battery," the court would still have found the statement defamatory. Had she instead written in an op-ed piece (a classic opinion forum) in the local paper, "In my opinion, the evidence I was aware of was sufficient to support an indictment for sexual battery, and I don't agree with the jury's decision" this would probably have been considered a true statement and/or a non-defamatory statement of opinion.

On many campuses today, we make sure that victims have advocates. The victim in the Mallory case had sought support from the department of Health, Education and Wellness, and they strongly supported her. They believed her, and were outraged at the jury's

decision. Part of the job of an advocate is to advance the cause of the person for whom they are advocating. Yet, advocates are vulnerable to students who want to use the legal system to silence advocacy through defamation suits. Advocates can still advocate successfully, while being strategically circumspect. For example, they can make public statements to the effect that “my client believes she was raped,” rather than “my client was raped.” Or, they can refrain from public commentary on ongoing litigation, which is the rule that most administrators follow in interviews concerning prosecution by or of students. Remember that careful statements may not be defamatory, but you may still have to litigate to prove it. “No comment” is not litigable.

I Fear the Risk of Confused Terminology

I have written on this before, and will not beat it to death. The terms we use to refer to the campus conduct process can easily be confused with crimes, and therefore can seem to impute commission of a crime, rather than a policy violation. It is not defamatory to state that a student has violated your code, if they have. But, if you say “Tommy was found guilty for sexual assault on campus,” that can sound to outside ears like a crime. Advocates, administrators, and other staff should be sure to state accurately that “Tommy was held responsible for a violation of the code of conduct in a campus hearing.” This is not defamatory, and gives us good cause to move our codes of conduct away from statutory crime language, such as sexual assault, burglary, assault, hazing, etc. We do not have legal authority to determine that a crime occurred, and should make sure that the language we use does not make it seem as if we are.

Statements by Alleged Victims

Another area to be cautious is with respect to victims who may not realize that speaking out in pain about their experience can be potentially defamatory, and just as in the case I dealt with last week, more accused students seem to be willing to try to vindicate their positions by resorting to legal action. The idea is not to silence victims, or to intimidate them, but to provide them with realistic notice that their decision to talk widely about their experience can have consequences. There are also redisclosure restrictions placed on victims by FERPA for any hearing outcomes that they might decide to share. While FERPA allows us to communicate outcomes to victims, if we find the respondent not-responsible, FERPA’s redisclosure restrictions apply. A simple caution is all that is needed, as FPCO does not expect us to enforce redisclosure violations. Where a victim of a “crime of violence” chooses to redisclose outcomes from a hearing in which the respondent was found in violation, FERPA’s redisclosure restrictions do not apply.

Various campuses have overstepped, such as when in 2002 William & Mary removed posters by a campus victim who identified her attacker and the administration’s actions on a poster. She truthfully stated that the respondent was found in violation, and her ability to share this information publicly is permitted by FERPA.

Finally, there are some colleges and universities that permit students to file conduct complaints against each other for defamation. More and more campuses seem to be

adding this grievance to the conduct codes, but the wisdom of such a policy is unclear to me. If students have legal causes of action against each other, shouldn't we just let the courts iron out what is and is not defamatory? Defamation law is rather complex. Do we want our defamation findings included in the record of a subsequent civil suit? Why should we inject the campus into such claims? The campus I visited last week has a defamation policy, so we have to entertain a claim by the respondent in the sexual misconduct allegation that he was defamed. It would be much easier to advise him that the college's conduct code addresses false complaints, and he can pursue that, but that we do not address defamation claims under our code. We can advise him of his option to hire an attorney and pursue a suit in the correct forum, which in my opinion, should not be a college campus.

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

Brett A. Sokolow, JD, is President of the National Center for Higher Education Risk Management (NCHERM) in Malvern, Pennsylvania. Mr. Sokolow serves ten colleges as outside counsel, and has served as a consultant to over 650 colleges and universities. Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the American College Personnel Association (ACPA), where he is Vice President for Education of the Commission for Student Conduct and Legal Issues. He is a member of the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees. He is Editor Emeritus of the Report on Campus Safety and Student Development. Mr. Sokolow has authored ten books and dozens of articles on campus security, Clery Act compliance, student conduct, risk management, problem drinking, and sexual misconduct. www.ncherm.org