

The Primacy of Policy

By: Brett A. Sokolow, JD

Several years ago, I developed a values clarification exercise that I use to commence each of the conduct trainings that I do. The exercise is below. Go ahead and complete it, and feel free to make use of it and the ensuing discussion in your campus trainings, if it is helpful.

Campus Conduct Board Values Clarification Exercise

Rank the following values in fulfilling your role in a student conduct hearing 1-10, with one being the highest priority in fulfilling your role, and 10 being the least important.

My highest responsibility in hearing student conduct complaints is...

	Your Rank	Group Rank
A. Finding the truth	_____	_____
B. Providing a just result	_____	_____
C. Providing an educational process	_____	_____
D. Encouraging students' maturation and development	_____	_____
E. Protecting the community	_____	_____
F. Upholding the college's policy	_____	_____
G. Ensuring a fair process	_____	_____
H. Protecting the rights of the accused student	_____	_____
I. Protecting the college from liability	_____	_____
J. Punishing wrongdoing	_____	_____

It is interesting to watch each group of trainees complete this exercise (or a shorter five-item version that I use to save time). Student board members usually zip right through the rankings in less than a minute. Administrators take five minutes. Faculty members take at least ten minutes. Then, I ask each trainee to share their results. Commonly, the highest ranked items are E—Protecting the community and A—Finding the truth, by almost every trainee. Almost always, I—Protecting the college from liability is ranked dead last by most trainees. Shoot me straight through the heart, why don't you? I'm a risk manager, for Pete's sake. Can't concerns about liability be something other than dead last, just once?

No Right Answers

Obviously, an exercise like this has no right answers. All of these values are important. Some compete. Some flow from others, or coexist. I study deliberations quite closely, as many of you are aware. I find the decision-making dynamic fascinating. Most of the time we spend in deliberations is not taken up in deciding what happened, but with board members trying to reconcile differing priorities. Training with this exercise, if nothing else, will demonstrate clearly that your conduct board members are generally coming to the table with differing priorities. This process would be hard enough if we were all trying to accomplish the same things. Instead, our priorities can conflict, and that makes the process of conduct decision-making that much harder.

Thoughts on a Few of These Values

- Finding the Truth. To all of you who rate this as a top priority, I say good luck. I also think you are in for some serious disappointment. Truth is frequently elusive in campus conduct proceedings, especially those involving interpersonal conflict. If you come in looking for truth, you will rarely find it. Instead, look for whom to believe more. Look for what is more likely. What is “more likely” is not truth. It may not even get you close to knowing what truly happened. Truth seekers seem to be our detective-types, and they tend to vote not-responsible when they cannot figure out what really happened. Further work with them on training competencies is critical, so that they become accustomed to the idea that it is not only permissible, but appropriate to sanction students based on what is more likely, rather than what is truth.
- Providing a just result. Yes, none of us wants to be part of a process that is unjust. But, justice is a subjective concept. Your idea of what is just is different from mine. And, justice is an absolute. If a result is just, that result is required. Our process is not required by the courts to be just. It is required to be fair. Fairness implies a weighing of relative values, and a balancing of (forgive me) rights and responsibilities. Fairness is a much more malleable and constructive principle than justice.

Right and Wrong

Folks who tend to rank truth and justice above community-based values in the exercise above can misunderstand a fundamental training competency of the campus conduct process. Many board members and conduct officers believe it is their job to determine whether a student accused of a violation did right or wrong. We must train away that perception, because it is detrimental to the conduct process, even anathema to it.

Let me give you an example, at the risk of providing you with way too much personal information. I'm a romantic. I get home after a long week, and I like some candle-lit reconnection time with my wife, Cori. We really like candles. We have a lot. We have a glass of wine, recap the week, and unwind. On your campus, candles are prohibited in

residence halls. Candles are dangerous on college campuses, despite the fact that I like candles very much. Candles do not violate my cosmic sense of right and wrong. To sanction a student for having a candle is anti-romantic. A student who burns one does not do wrong. And, yet, I must acknowledge that on a college campus, candles are not acceptable, and sanctions should result from using them, in order to protect the community. In a very real sense, I must accept that my personal sense of right and wrong is not in play. Right and wrong has been determined for me, and for every member of a campus conduct board. The student code of conduct tells us what is right and wrong for our community. We may believe the rules violate our personal sense of morality or ethics.

The training competency is to put your personal sense of right and wrong in your back pocket, and put the policies in your front pocket when you enter into the deliberation room to make a decision. Your values, ethics and morality belong in the room, but they are secondary. They are subject to a set of community standards. Out, out brief candle. This is not easy. Many of us have a highly developed sense of right and wrong. We don't want to be forced to vote against our own values. A student at a training last week refused to accept this subservient role, and my advice to the Dean was not make sure this student was not called to serve on any panels, because he cannot do the job. The job is to uphold a set of community standards, and that means all of us have to relegate our personal beliefs and values to a collective set of rules that we may not have had any input in creating. It's a tough training truth. This community set of values leads us to the theme of this article, the Primacy of Policy.

My Answer is F

In the exercise above, F. is Upholding the College's Policy. F. is always my number one priority every time I complete this exercise. I feel it best reinforces the idea that we are not administrators of right and wrong. I think all the other values identified in the exercise can flow from upholding policy, in a well-crafted conduct system. We will be educational. We will protect the community. We will find the truth, if it is there to be found. We will have a developmental impact on students.

If we decide not to uphold policy, it is the campus equivalent of jury nullification. Juries are rarely held accountable when they nullify. But, if we intentional and materially deviate from policy, we can be liable to the students who claim an entitlement to enforcement and application of the policies about which they have notice, as written. And, we can have potential personal liability for such knowing deviations, as well. If you don't like the policy, there is a process to work to change it. The middle of a hearing is not the right time or place to make your moral or ethical Waterloo.

I always think of the example of Dr. Jack Kevorkian (a.k.a Dr. Death). This physician, you may recall, decided a number of years ago that terminally ill patients in Michigan had a right to die, and it was his calling to help them do it. It was a very controversial case, and he was eventually arrested and tried. He admitted that he did it. The laws of Michigan made physician assisted suicide a felony, manslaughter. Americans were

surveyed in polls about this practice. Depending on the poll, 70-80% of us were not happy about what he was doing, but we did not think he should go to jail for it. These people were going to die, and they were in great pain. A jury should look like a cross-section of the community, so it is safe to assume that 70-80% of those 12 jurors did not believe that Dr. Kevoorkian should go to jail. Yet, they voted unanimously to convict him. Some voted against their own consciences, against their own senses of right and wrong. They did their job. They upheld the law, whether they agreed with it or not. That is our job, too. Our code of conduct is our law, and our job descriptions as conduct decision-makers do not include the right of “jury nullification.”

It’s the Policy, Stupid!

When Bill Clinton ran for president in 1990, campaign headquarters featured a prominent poster designed to keep the campaign team “on message.” It read, as many of you recall, “It’s the Economy, Stupid.” It was not meant to be rude. It was meant as a reminder of the simplicity and single-mindedness of focus that was required. For the same reason, we can do well to remind conduct boards that the figurative poster on the wall in their deliberations reads “It’s the Policy, Stupid.” We’re not stupid, but we do need to be reminded now and again of our need to stay “on message.” I use this as a training technique because it sticks in people’s heads, even if it is less polite than I prefer to be. I visit my clients for their annual training, walk into the room a year after our previous meeting, ask what the poster on the wall says, and the returning trainees always remember it. It’s the policy, stupid.

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