

What Role Should Rules of Evidence Play in Campus Conduct Training?

By: Brett A. Sokolow, JD

Many of you are aware that for a lawyer, I am a dedicated developmentalist. I believe the foremost priority of a conduct process should be educational, rather than a legalistic protection of rights. I have made twenty-three campus visits since my fall semester started in earnest in mid-August, and at each campus, I have advanced my call for conduct offices to abandon legal terms and language in our codes and proceedings. I am steadfast in this effort, and will continue to call for us to talk our walk at national and regional conferences and other campus visits throughout the year. Given that I don't see myself as particularly legalistic in terms of my trainings and views of conduct proceedings, I was surprised by a phone call I had with (now former) ASJA President Nona Wood recently.

Just Common Sense

Nona was in attendance during the Basic Track Training that I provided at the Gehring Institute in Utah this summer. Nona informed me that she felt that the training I provided on rules of evidence was not in keeping with the best practices of our field, and that the formality and rigor of my approach was a disservice to the cause of educational conduct processes. As we talked, Nona shared with me her belief that formal rules of evidence have no place in campus hearings, and that all conduct officers and board members need to evaluate evidence is common sense. Clearly, Nona feels that common sense is a more plentiful commodity than I believe it to be. She also seems to think it is more common than I do, in the sense that common sense is a shared way of thinking. I think your common sense and my common sense may differ, so much so that calling it common sense may itself be a misnomer.

Seeing Nose to Eye

Clearly, Nona and I did not and do not see eye-to-eye on the evidence issue, because I did not provide training on *formal* rules of evidence at the Gehring Institute. What I did was provide training on three simple, *informal* rules of evidence at the Basic Track. Informal rules, in my humble opinion, do belong in campus hearings, and I assert that we benefit from training on them and understanding of them. They inform our common sense. A training on formal rules, in my experience, would have explained fairness in terms of admissibility and objections. It would have taught about sidebars, motions *in limine*, evaluating character evidence, and whether we can explore prior bad acts. It would have taught trainees to explore when the prejudicial value of evidence outweighs its probative value. It would even have defined probative. It would have given complex analysis of relevance, personal knowledge, definitions of hearsay and the myriad exceptions to the hearsay rule. Instead, I focused on a simple treatment of relevance, credibility and prejudice, and here is, in overview, what I said.

Relevance

Generally, evidence can be admitted into campus hearings without limitation. The only exception is for prejudicial evidence, and I will discuss that last. Even then, prejudicial evidence can be admitted into a campus hearing, as long as we do not allow it to inform or influence our decision (and we can prove in court that it did not). Evidence that we consider as part of our determination (finding) should generally be both relevant and credible. To determine if evidence is relevant, I offered a non-legalistic test: does it tend to prove or disprove an issue in the complaint? If so, it is relevant. If not, it is not. Regardless, irrelevant evidence can generally be admitted in a hearing without fear that it will impact the fairness of the proceeding. An exception that many campuses subscribe to is that detailed information about an alleged victim's sexual character is not relevant to a campus sexual misconduct complaint. We fear that allowing such evidence to be considered will taint the fairness of the process, and demonstrate prejudice against the alleged victim. If this were just a matter of common sense, we would not have such widespread abuse of the simple element of fairness by so many campus conduct boards and administrators, too many of whom still indulge with great enthusiasm in deliberations about whether the alleged victim had sexual activity with the respondent before or subsequently. That is irrelevant, and it is my position that good training is needed to encourage boards to keep this inquiry out of campus hearings, because once we hear it, it becomes harder for us to see the complaint clearly, and separate out our sexual politics from our decisions about whether our policies were violated.

Credibility

I also trained that we need to base our decisions on evidence that is credible. Rather than offering complex hearsay and personal knowledge rules, I trained that first-hand evidence is the most valuable, and the more distant and attenuated the evidence, its source, or the way in which it came to the witness, the less persuasive value we should give it. I trained that we should inquire of witnesses how they came by the information they possess, and how they reached the conclusions they reached. I trained that we ought to question the motivation of witnesses where evidence is less credible than we might have expected. I noted that when you hear from witnesses things like, "I think that...", "it seems that...", "I heard that..." and similar verbalizations, it can signal to us that we are not hearing a fact, that we are hearing an opinion or circumstantial evidence, and that we should inquire into its validity and ascertain its evidentiary value. We should not leave unsupported assertions untested. And, if we do not believe testimony, we should somehow indicate in our finding that the testimony was not contributory to our finding.

Prejudice

Finally, I suggested that at some extreme level, evidence wholly lacking in relevance or credibility had the power to fundamentally jeopardize the fairness of the process by prejudicing the decision-makers. Developing a tuned ear for such prejudicial evidence, I said, takes knowledge and experience, and every effort should be made to prevent such evidence from even being introduced before the factfinders. Many observers wondered, for example, whether the evidence challenged in Schaer v. Brandeis University might

have been less likely to have been upheld if the case had involved a public university. Regardless, the point of the training was not to be able to win cases like Schaer, but to be able to avoid them altogether. That's where best practices lie, as far as I am concerned.

I think these topics are just right, not too much. So, given our disagreement, I decided to try to turn it into an educational opportunity for members of ASJA. It does not matter whether Nona is right or I am or whether a third view you might hold is the better. What matters is to air these issues, think about them, and decide what level of evidentiary understanding is useful for you to impart to your conduct boards and officers. So, I emailed the Yahoo list, and five worthy debaters agreed to stake out positions on this issue and join me for a concurrent session. Here is how we are going to structure this debate, which may be the first of its kind at an ASJA conference.

The Main Event: A Debate on the Role of Evidence in Campus Hearings

In one corner are those who believe that formal rules of evidence have no place in campus hearings. All we need is common sense, not training on legalistic rules. In the other corner are those who believe that some level of informal knowledge of evidentiary rules is valuable and necessary for conduct training. Come and watch us “duke it out.” On one side, Daniel Kast of the University of Denver, Michael Zajac of Denison University and Heather Kestian, formerly of the University of Colorado and now a law student, represent the “student personnel” position that formal rules of evidence are unnecessary in campus conduct hearings. Following such rules may even be detrimental, by making proceedings overly legalistic and less educational. Insisting on formal rules gives fire to our detractors who want us to increase the formality of the process we provide to students. In the middle but leaning is J. Lauren Wickiewicz from RPI. Which way will she go? Taking the perspective that some level of informal rules of evidence and knowledge of evidentiary application and analysis are both necessary and essential are Brett Sokolow of NCHERM and Mary Lou Antieau of East Carolina University. They believe that training must focus on specific evidentiary issues and that more than common sense is needed. Of course, they are both attorneys. Does that skew their perspective or inform it?—you decide.

This debate is framed around key questions that the presenters and audience will debate, including:

1. What are formal rules of evidence?
2. What are informal rules of evidence?
3. What do you consider irrelevant evidence?
4. How do you (or should you) weigh credibility?
5. What happens when inadmissible evidence is entered into the record of a hearing?
6. Can evidence compromise the fundamental fairness owed to a party?
7. What is a reasonable level of competency for reviewing evidence?
8. Is understanding evidence just common sense?
9. Do rules enhance or detract from objectivity?
10. How does case law inform the debate on the applicability of evidentiary rules?

11. Does more formality of evidence training fuel the arguments of our detractors?
12. Should we prevent our hearings from becoming overly evidence-based? Why or why not?
13. Is it appropriate to hear evidence of mitigating or aggravating circumstances? If so, when is it appropriate?
14. What are some positives of having a system based more on the legal system? What are some drawbacks of such a system?
15. Do our systems and processes need to change for the more legally aware students (and parents) that come through our doors? Why or why not?

We hope you will join us in February for what promises to be a lively and cogent exploration of this important issue. (Subsequent note: The packed audience at this debate voted on which side won the debate. The vote tied 50/50. That doesn't make Nona right, but it also doesn't make my view wrong. Perhaps our field is big enough to disagree. At least, my hope is that it becomes less doctrinaire and more open to a plurality of worthy viewpoints).

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.ncherp.org