

THE SELF DEFENSE DEFENSE

By: Brett A. Sokolow, JD

Mark and Tony have an altercation in the Caf. over a supposed insult. The argument quickly superheats, and civility melts. Mark comes at Tony violently. Tony backs off two steps. Mark continues to come at him and throws the first punch. Tony defends himself, successfully. After Mark gets out of the hospital, he files a conduct complaint against Tony. You invite Tony to your office, where you share the complaint with him. He is accused of “Intentionally or recklessly causing physical harm to another member of the community.” The medical records are pretty clear. Tony broke Mark’s nose, two fingers, and caused a detached retina. Tony is a foot-and-a-half taller than Mark, and probably forty pounds denser. He argues to you that he only acted in self-defense.

And we all allow this. But, why?

I have attended hearings in which conduct boards have entertained hours of testimony over “who started it.” I have listened to deliberations about allowing the argument of self-defense to excuse violence. Does the self-defense defense have any place in a conduct hearing? I do not believe this is a best practice. Let me amplify Tony’s argument:

Conduct Officer: Tony, you are accused of having a fight with Mark. He has filed a complaint against you.

Tony: Yes, we had a fight last Thursday in the Caf. Mark started insulting my defense at the game last week, and kept egging me on. I was just sitting at the table, eating my lunch. I didn’t even know this wacko. He just came up to me and started in on me.

Conduct Officer: So, you hit him?

Tony: No, he kept at me; he was like abusing me verbally about the game. I told him to put a sock in it. He just kept coming at me with insults. I told him I doubted he could have done any better. He said an armless monkey could have blocked better. I said he kind of looked like an armless monkey. Then, he came after me.

Conduct Officer: So, he hit you first?

Tony: Yeah. I didn’t attack him, I just defended myself, and used enough force to make sure he didn’t cause me any harm. I have a right to defend myself. He started this. I ended it.

So my question to all of you is, don’t you have an admitted policy violation right there? If Tony is accused of “Intentionally or recklessly causing physical harm to another member of the community,” he has just admitted to sufficient information to indicate that he engaged in a policy violation. If you have an informal way to resolve conduct complaints without a hearing, I would use it here. If you need a hearing, it should just be

on the issue of sanctions. You should not allow a conduct board to entertain any debate on “who started it” or whether it was self-defense. None of those issues are relevant to whether Tony committed a policy violation. They may be relevant to sanctions, only. “That he committed a violation” goes to the finding. “Why he committed the violation” goes to the sanction. That is a basic premise of well-run conduct processes. We separate the finding from the sanction, and do not allow boards to entertain excuses with respect to the finding.

In a scenario like this, you should either arrange for a cross-complaint by Tony against Mark, or the college needs to file a conduct complaint against Mark, too. Then, you can decide in one process whether policy was violated, and by whom. I would hold them both in violation, if they agree a fight occurred. Then, I would adjust each of their sanctions according to the situation. I would not sanction Tony and Mark equivalently. If someone provokes violence by starting a physical fight, we have a right to sanction them more harshly. If someone is verbally abusive, and the person they abuse responds with violence, I do want to know who incited the fight, and I also want to know who commenced the violence. I may choose to make a distinction in the sanctions.

Isn't this punishing the victim, if they only engaged in violence out of a need to protect themselves from an attack? No. I would distinguish a fight from an attack. If you are attacked, do what you need to do to protect yourself. If your attacker gets hurt in the process, that was not your intention. You will not face a conduct complaint (e.g., a woman is attacked by a would-be-rapist and maces him. Filing a complaint against her could be retaliatory and a violation of Title IX). A fight is different from an attack. It is an escalation of interpersonal conflict. You heighten the tension, rather than defuse it. If you fight, you choose to do so. You resort to physical violence rather than working out your beef via higher-order conflict resolution skills. The policy should promote a culture where, if someone incites you, you walk away. If you choose to engage, there may be a consequence. This isn't blaming the victim, it is requiring the person on the receiving end to choose not to fight, if that choice is possible. This is good policy. The law entitles you to use the argument of self-defense only if self-defense is a last resort. Many states require you to try to retreat first, if retreat is possible. Our policies and practices should reflect this. You are not entitled to use self-defense as a defense, but we may consider it as a mitigating factor in determining your sanctions.

“SETTLING” COMPLAINTS—VERY UNSETTLING

A client called me this week. We have been conferring over a student who stabbed another student. When last we had talked, the complaint was being processed, and it was expected that the student would be expelled in an administrative hearing. When the client called me to debrief, I was surprised at the outcome. The student had presented with an attorney at the hearing (public university), and the attorney had come in with a deal in hand. He had offered to immediately and permanently withdraw his client from the university without any of the hassle of a hearing. And, no conduct record on the

transcript, of course. My client immediately accepted the deal. The student withdrew, and my client called me to report a victory.

My client was surprised when I disagreed. My colleagues, we are not in the business of settling complaints. I don't recall "cutting a deal" as Chickering's eighth vector, do you? If you like to cut deals, you are in the wrong field. I regret to note that some campus conduct systems (and this does seem to afflict large state institutions more so) have become mills for processing complaints. If some complaints just go away, harried conduct officers get a little breathing space. If a student will accept responsibility in return for a break on sanctions, why go through the trouble of a hearing? If we tell the victim of a violent rape, she is "just a woman scorned," maybe she will think twice about pursuing her complaint. Do you see the ethical slippery slope here? The easy way out is almost always the wrong way. We are not mills. Being a mill is entirely antithetical to what we do. Here's why:

- a. Is it not developmental;
- b. It is not ethical;
- c. It does not manage risk;
- d. Sanctions are not the product of compromise, but the product of proportionality;
- e. It causes similarly situated students to be sanctioned differently, without a principled basis for doing so.

When we cut a deal, we run the risk that a student who has committed a violation of our policies will escape with something less than the full developmental impact of our processes. If the student stabber gets to withdraw, he does not have to account for his behavior. He does not get to feel the censure of our disapproval. He is not assessed by a psychologist. He is not mandated to anger management classes. He leaves, and maybe he stabs again at some point. We have not helped him to become a better person. We have not challenged his values, or asked him to grow. The path of least resistance.

Not only is cutting a deal a failure of translating developmental theory to practice, it is unethical. Go back to 1994. Have you ever read the Office for Civil Rights (OCR) Letter of Findings to the University of California, Santa Cruz dated April 1994? Every conduct officer should, as required reading. At one point, OCR notes that a deal was cut on campus, allowing a student to withdraw in the face of a complaint, with the express provision that he not be allowed re-enrollment on any UC campus. The Letter raised the ethical concern, what about non-UC campuses? Doesn't Santa Cruz have some ethical responsibility to do more than just shove this student off on some other unsuspecting college? Why protect your UC system and no others? This is a very legitimate question. Relating back to my phone call this week, by failing to impose an expulsion on the stabber, my client inadvertently opened the door for him to make an easy transfer. No transcript notation. No conduct record. Just go stab somewhere else, as long as it is not in my backyard.

Cutting a deal is also a poor way of managing risk. Expulsion for the stabber would have come with a *Persona Non Grata* order permanently barring that person from campus

upon penalty of trespass. The withdrawal did not. Cutting a deal can directly interfere with your duty and desire to protect your community. Cutting a deal, if it is ever made public, could subject you to a suit for negligent referral and/or negligent supervision. It might also subject you to obstruction of justice charges, if you fail to report a felony to local authorities.

Sanctions are legally and developmentally supposed to be proportionate to the severity of the violation, while also contemplating the attitude of and educational effect on the accused student. Cutting a deal has the potential to undercut this principle. Let me connect this with Tony and Mark, above. Assume that Tony, when called to your office, throws himself on your mercy, rather than arguing he was justified in using self defense. "I know I lost control, and his provocation is no excuse. I am really sorry, I promise you I will work on not losing it, and I accept any sanction you think I deserve." Suppose Mark is called in, and the opposite happens. "Tony started it all. He egged me on, and then he attacked me. He is a real a#\$ho&%. He is totally at fault here. I am just an innocent victim." Assuming none of the self-defense issues we addressed above, we can agree that both of these students violated the policy, because they fought.

I will also assert that though these students committed the same acts, they deserve differing sanctions. I would hold Mark accountable for the normal sanction for such an offense, and I would adjust Tony's to account for his contrition, his willingness to submit to authority, and willingness to grow from his mistake. This is entirely reasonable and appropriate. Does it fail to treat similarly situated students similarly? No. They committed similar acts, but their attitudes and educability are not similar. It is not reasonable and appropriate is to do it as a horse-trade, telling Tony in advance you will go lighter on him if he accepts responsibility. Plea bargaining misses the whole point. It is the students willingness to accept responsibility--of his/her own initiative, because it is the right thing to do, and not because it will help them to cut a deal--that makes the process educational. Otherwise, it is just a mill.

All information offered 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.

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