

## *WORDS HAVE WEIGHT*

By: Brett A. Sokolow, JD

Here are my reasons for urging my clients to banish legalistic language from our policies and procedures:

- 1) Our culture understands criminal rights and processes, though media exposure. In fact, our culture assumes them. Our students arrive on our campuses assuming that campus conduct processes will mirror the rights and procedures of criminal courts. We must understand that our words have great weight in setting up expectations. Policy-based, non-legal terminology can help us to reset student expectations for an educational process with less formality than they are expecting.
- 2) Many of our judges are not as familiar with higher education law as they should be. This is caused in part by how relatively rarely colleges are sued. Talented higher education attorneys keep us out of court, and we tend to settle often and only go to trial on slam-dunks. Yes, we cherry pick. And, we have a pretty high winning average as a result. Because of this, we aren't giving judges enough practice, though we want to keep it that way. Yet, we have an obligation to educate the judges we do come before. Many have neither heard of nor understand student development theory.

They don't educate offenders in their world, they incarcerate or punish them. They need to understand that campus conduct processes are more administrative, and less formal than the criminal and civil matters they are more accustomed to reviewing. If they look at our codes, and see something that looks to them like a criminal statute or an adversarial proceeding, they may be inclined to hold us to the due process standards of the criminal justice system.

Chuck Carletta put it very bluntly at the Stetson conference: No private college should ever use the words due process in any written or oral communication. Never. Ever. Not only is Chuck absolutely right, but a trend in recently lost cases (or motions) shows that substituting "fundamental fairness" for due process can be problematic, too. The Goodman, Ackerman and Gomes cases show that plaintiff's attorneys all got the same memo on that issue, and three cases is enough to be a trend, in my book. (See footnote 34 on p. 11 of the Model Code for citations). This should be an easy one for us to win. My advice is that every private college's code should define "fundamental fairness" if it uses this term. Here is a sample definition that may help to keep the courts off our backs:

Fundamental fairness assures written notice and a hearing before an objective decision-maker, as described within these procedures. No student will be found in violation of university policy without substantial information [or, information showing that it is more likely than not that a

policy violation occurred; or, clear and convincing information, etc], and any sanction will be proportionate to the severity of the violation.

- 3) Colleges do not have legal authority to determine if crimes have occurred. Yet, we borrow liberally from the terminology of criminal statutes in our states. Many campuses prohibit assault, battery, sexual assault, rape, robbery, burglary, hazing, etc. We have no legal authority to do so, and continued use of this terminology will get us into trouble (and already has caused one court to vacate a college's conduct finding, in Hardison v. Florida Agric. and Mech. Univ. 706 So. 2d 111 (Fla. Dist. Ct. App. 1998, which is worth reading). I would also argue that if the campus rape advocate in Mallory v. Ohio had understood that distinction, perhaps she could have saved Ohio University from losing a defamation case when she was quoted as saying "Based on the evidence, Mallory was definitely guilty of a sexual battery." Instead, she could have said "Mallory was found in violation of our college's policy on sexual misconduct," which she would have been well within her rights to say. When we use statutory language, we run the risk of making seem as if we are imputing to the accused student the commission of a crime, which is defamatory if they have not been found to have committed a crime. With respect to avoiding statute-based language, we can prohibit the same behaviors, but with policy-based terminology, such as:
- a. Assault = Threats of physical harm
  - b. Battery = Physical violence
  - c. Sexual assault = Sexual misconduct
  - d. Rape = Sexual misconduct
  - e. Robbery, Burglary, Theft, etc. = Taking the property of another
  - f. Hazing = Abusive affiliation/initiation activities
  - g. Vandalism=Damage to property
- 4) Finally, I fear that if we incorporate state law into our codes, we may take on more of a burden than we realize. Here's an example of one of my favorite policies. This comes from a real code at a private college:

**"Sexual Assault:** The University recognizes and adopts the Florida State statute as appropriate for this particular location..."

This policy shows a common, but incomplete understanding about statutes. Statutes are only part of how offenses are defined. Every statute has hundreds, if not thousands, of cases in that jurisdiction which give interpretive layers to the often skeletal terms of the statute. Do we, as administrators, want to be held to the standing of knowing and understanding the intricacies of a statute and all the cases that interpret it? Our hearings are complicated enough. We'll hold a student accountable, and give some plaintiff's attorney the chance to hunt for the one case in our jurisdiction that proves we misapplied the statute. We'll lose a lawsuit because they knew about the case, and we didn't. So much for judicial deference to the educational decisions of college administrators. That case will control for us if we claim the state law as our policy. Or, worse, we might give

the attorney a backdoor for the assertion of state action, with the argument that a private college is providing a public function by enforcing the law. That may not be a winning argument, but I'd rather not have to defend against it.

### *SOME WORDS ARE WEIGHTIER THAN OTHERS*

Ed Stoner and John Wesley Lowery cogently argue in the Model Code for us to abandon use of the terms “guilty”, “beyond a reasonable doubt”, “trial”, “prosecutor”, “sentence”, “judges”, “evidence”, “defendant” and “victim”. Until the ASJA conference, I thought the idea of not using the word “evidence” was a little silly, because it is a fairly generic term with a non-legal common usage. At Ed’s concurrent session, he made a case that to a judge, the word “evidence” has a very specific legal meaning, and even though we might use “evidence” in a generic sense, those in the legal realm will not necessarily give it that interpretation. Point taken. From here forward, I will join him in recommending that we use the word “information” as a substitute. Here are some other substitutes offered in the Model Code, to which I have made some additions, in italics (which would make it very easy for you to edit your code, using the find and replace function—hint, hint):

- 1) Guilty = responsible *or accountable or in violation*
- 2) Trial = *hearing or meeting*
- 3) Prosecutor = Presenter, witness *or complainant*
- 4) Sentence = Sanction *or consequence (also avoid punishment)*
- 5) Judges = Board members *or fact finders, decision-makers, panelists, administrators, officers, etc.*
- 6) Evidence = Information (*maybe testimony should also = information?*)
- 7) Defendant = Accused student or student respondent
- 8) Victim = Student, witness *or complainant, alleged victim, accusing student*
- 9) Verdict = *Finding or outcome*
- 10) Case = *complaint, allegation, grievance*

(NB: We talk about our “cases” all the time, on the listserv, at conferences, or when my clients call with the latest “case”—but words have weight—and if we call it a case, a student may just take us up on that and make it one. This is an area where we need not only to reset the language of our codes, but also the terminology of our daily discourse).

- 11) Charges = *complaint, allegation, violation*
- 12) Presumption = *a legal concept I'd rather avoid than find a policy equivalent*
- 13) Standard of Proof = *“information must show a violation was more likely than not” or “Our process reaches a reasonable conclusion based upon substantial information”*
- 14) Burden of Proof = *a legal concept I'd rather avoid than find a policy equivalent*
- 15) Right to remain silent = *right to refuse to answer questions/participate\**

How far do we take this sanitizing of our codes, though? I'm on board with evidence = information, but is the use of the term "appeal" too legalistic for your campus? Would you rather use "*secondary review*" or "*final review*?"

*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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