

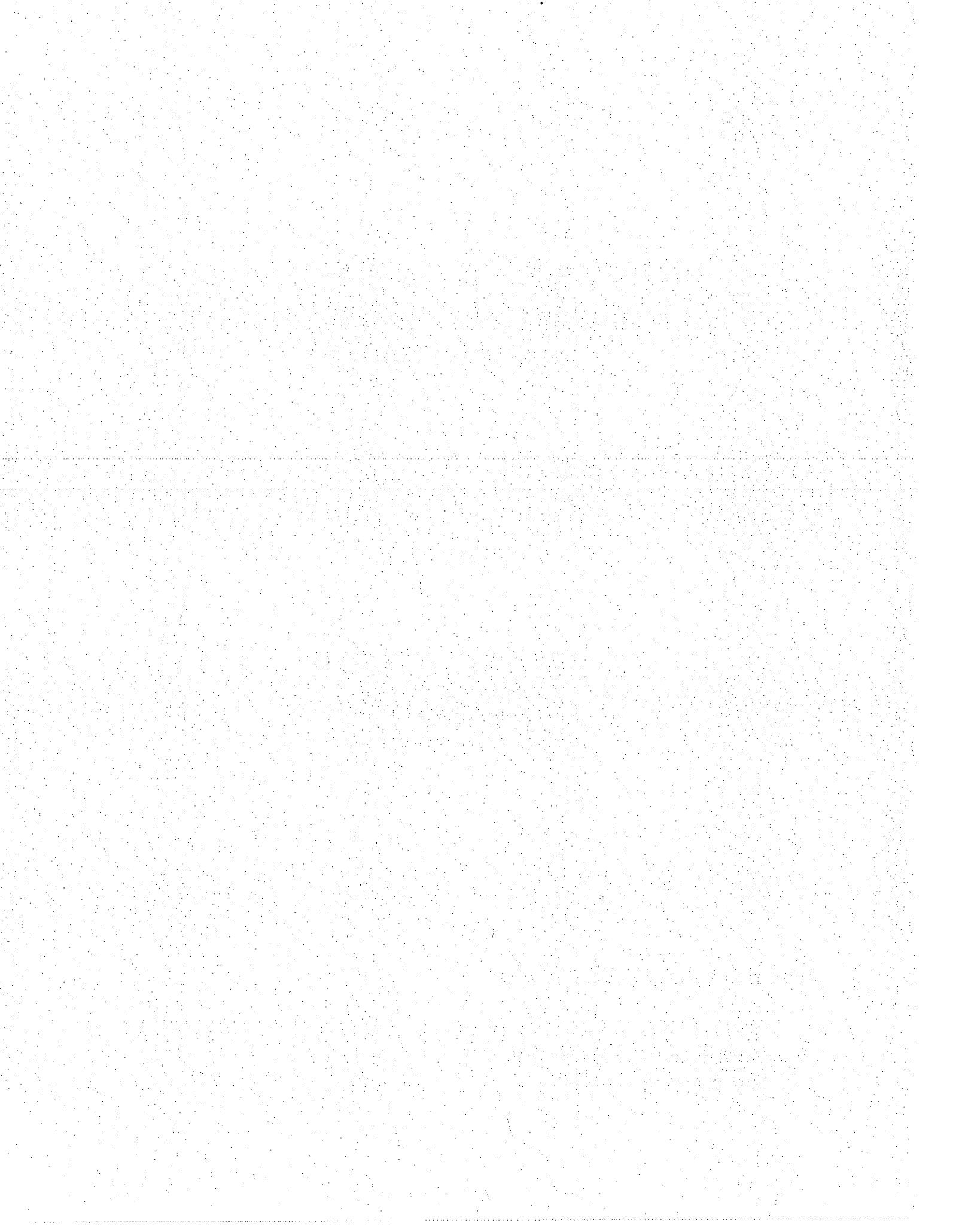
**PREVENTIVE LAWYERING:  
Drafting and Administering Policies  
to Avoid Litigation**

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**PREVENTIVE LAWYERING: DRAFTING AND ADMINISTERING  
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**VII. The Purposes of Policies and Procedures--Student Code Context**

The general overview and principles discussed by Mr. Dunham are also directly relevant when one walks down to the office of the chief student affairs officer. The emphasis he placed on a "contract" law perspective is applicable on this part of campus, too. It is true that college lawyers are sometimes reluctant to characterize student handbooks as "contracts." Sometimes this is because the institution wishes to keep the legal focus on "what Johnny did" rather than engaging in "technical legal arguments." But, in the final analysis, most litigation in which a student attempts to have a Court set aside student discipline turns upon whether the Institution did what it said it would do.

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<sup>1</sup> This paper will focus principally on student conduct related policies, procedures and litigation, although the basic principles, as outlined in Mr. Dunham's paper, apply in other contexts as well.

For the most part, this is an easy standard to meet. Administrators try to do exactly what was outlined in the guiding code or student handbook. Courts respect good faith attempts to do so because courts recognize that dealing with college student conduct is challenging--and beyond the scope of why lawyers want to become Judges!

The student conduct area has some points worth mentioning when we think about how our student affairs policies might avoid litigation while accomplishing our student affairs goals.

The first point is that the institution's Mission Statement is a frequently used point of reference when one is drafting policies in student affairs. Of course, it is a common touchstone all over campus but, because this group of policies always impacts students directly, it is common to regard these policies as being very important in advancing the Institution's Mission.

Thus, it is important to review your Mission statement and to consider whether the policy and the likely impact it will have are consistent with that Mission statement. It is a commonly understood operating point among judges that, when administrators exercise discretion consistent with an institution's Mission, it is much easier for a judge to honor that exercise of discretion.

So, if we keep our policies consistent with our Mission statement and do what we said we would, we will be nicely down the road to avoiding litigation even over the most contentious student conduct situation. It sounds easy, doesn't it! Well, it is not always simple. Often we find judges are put to overseeing our administration of campus student conduct because we varied from these apparently easy guidelines. Why does this happen?

Sometimes, it is because the language we used boxed us in. It did not allow us the flexibility to deal with this "different" situation outside of the policy box we created. The lesson for the drafter, of course, is to draft policies in ways which allows for nimble responses.

Sometimes, it is because we did not deal with a situation in advance, for example, because we had not considered it or because we could not agree how to proceed if such an issue arose. The language used might not be what we would have selected if we had been considering "this scenario."

Sometimes, we feel forced to vary from an exact protocol because, upon consideration, it does not support our Mission statement in the way we had intended. Of course, this is an excellent reason to reevaluate the policy. In the heat of an incident, however, "doing the right thing" must trump an action dictated by an unfortunate choice of words. Nevertheless, it is a situation we would prefer to avoid if we could simply do so by better drafting techniques.

To avoid such unpleasant results, it is important to review each policy to make sure we did not over promise. For example, we cannot provide to keep allegations of sexual misconduct between students "confidential." Many persons think that a general statement of "confidentiality" means it will be kept "secret" and not shared with anyone else. Of course, administrators must act upon such reports and cannot keep them secret, even while they are treating them with care, concern, honor and dignity. This is an example of inadvertent over-promising. This also happens when a drafter uses a legal term without fully appreciating the "hidden meanings" it might contain.

External law, which impacts many areas as Mr. Dunham notes, is not so big a factor in student codes and discipline. The practical reason for this is that

judges do not want to become super-disciplinarians of college students. Thus, judges defer to discipline decisions generally if an Institution did what it said it would do. The legal reason is that, even at state institutions, federal constitutional standards of notice and a hearing, when applicable, are very easy to meet. The understanding environment in which student conduct administrators have traditionally been treated by judges is reflected by this language from one case: "The law indulges the presumption that school authorities act reasonably and fairly and in good faith in exercising the authority with which it clothes them, and casts the burden on him who calls their conduct into question to show that they have not been activated by proper motives." *Baker v. Hardaway*, 283 F.Supp. 228, 237 (S.D. W.Va. 1968), *aff'd* 399 F.2d 638 (4<sup>th</sup> Cir. 1968), *cert. denied* 394 U.S. 905 (1969).

On the other hand, some drafting practices generally applicable on our campuses apply here strongly. For example, it is a common practice that student codes are drafted and reviewed by a committee. This practice makes it necessary to reaffirm the focus on the Institution's Mission because many committee members may not be attuned to it. It also underscores Mr. Dunham's point about watching out for the interest of the Institution during the drafting process.

## **VIII. Drafting Points to Help You Avoid Litigation**

A. "The Brandeis Case...." During the conference, this panelist will discuss a number of conclusions to be drawn from the student conduct code litigation which ended last Fall with a decision by the Supreme Court of Massachusetts. The case illustrates judicial deference to decisions about student discipline. It illustrates the dilemma a college faces (under FERPA and other

touchstones which drive us to protect the confidentiality of student records) in not being able to rebut one student's public statements if it is necessary to discuss a second student's situation in order to do so. The Brandeis code drafters were wise in explicitly stating that courtroom procedures and courtroom rules of evidence did not apply to student discipline hearings. Ultimately, this enabled the court also to rule that educational processes, not courtroom rules of evidence, were the proper touchstone. *Schaer v. Brandeis Univ.*, 432 Mass 474, 735 N.E.2d 373, 2000 Mass LEXIS 576 (Sept. 25, 2000)(Supreme Ct.).

B. Here are several clauses which might appear in a student code. We will identify some of the drafting points which pertain to each, looking at Mr. Dunham's guiding principles. Doubtless, you will see other points illustrated as well.

1. **Language:** *"Any question of interpretation regarding the Student Code shall be referred to the Chief Student Affairs Officer or to his/her designee for final determination."* This is extremely important. Questions do arise about how the Institution ought to proceed. Instead of leaving an ambiguity for a judge to decide, this enables the judge to defer to the educational judgment of the chief student affairs officer. After all, that is what was provided in the code itself. Note that this language also illustrates flexibility in allowing for a "designee" to handle this important job when that is required.

2. **Language.** *"The term 'student' includes all person taking courses at the University, full time or part-time, whether pursuing undergraduate, graduate or professional studies and those who attend post-secondary institutions other than the University and who reside in University residence halls. Persons who are not officially enrolled for a particular term but who have a continuing*

*relationship with the University are considered 'students.'* The definition of the persons covered by a student code is worth considering carefully. This draft reflects a school which had students from other institutions living in its residence halls as well as the Institution's desire to be clear that behavioral rules applies even to persons whose status as 'student' is less than a full time traditional load.

3. **Language.** *"The term 'student conduct advisor' means a University official authorized on a case-by-case basis by the Chief Student Affairs Officer to impose sanctions upon students found responsible for a violations of the student code. The CSAO may authorize a student conduct advisor to serve simultaneously as a student conduct advisor and as the sole member or one of the members of a student conduct panel."* Some drafting points to observe include these. This language is an attempt to clearly define what the role of administrators will be. It recognizes that lean staffing patterns necessarily result in persons "wearing more than one hat." There is nothing intrinsically wrong with that; it is simply a "best practice" to try to identify who will play what role. This language also provides a lot of flexibility to the CSAO in the appointment of student conduct boards. It would, for example, allow the appointment of a single person to serve as a conduct board. Each school might not choose to have this particular arrangement or even all of this leeway for nimble reactions, but this approach maximizes an administration's ability to response to unusual fact patterns in a way which, even though as unusual as the facts--also complies with 'what we said we would do.'

4. **Language.** *"Student Discipline Board." "Student Conduct Code."* For years, it had been a common practice to using courtroom sound-alike words to describe the behavioral responsibilities of students and how misbehavior will be handled. E.g., "student court"; "student judicial system"; "student prosecutor." Such incorrect language has understandably confused judges,



parents, reporters and students into thinking the system was some kind of law school moot court process instead of a serious part of our student mission: dealing with misbehavior. To avoid these unintended consequences, a best practice is not to use courtroom words to describe our educational processes. Similarly, a conduct board does not consider 'evidence' (a word which might imply to some the formal rules of courtroom evidence) but instead evaluates 'information' (a word without the same courtroom connotation).

5. **Language.** *"The Student Conduct Advisor shall determine the composition of student conduct panels and appellate boards and shall determine which conduct panel and appellate board shall be assigned to hear each case."* It is a good drafting technique to confirm when, as in this instance, a drafter might feel that the reservation of discretion is very important. Here, the advisor has reserved the opportunity to make the educationally best decisions in assigning persons to deal with problem situations.

6. **Language.** *"Generally, University jurisdiction over student discipline and conduct shall be applied to conduct which occurs on University premises, which occurs in connection with a University related activity, or which, in the opinion of the CSAO, adversely affects the University community and/or the pursuit of the University's objectives."* This common approach describes the typical situations in which the conduct code would apply and preserves to the institution the opportunity to react appropriately--that is, to do what is educationally appropriate, without having been boxed in by some inflexible definition.

7. **Language.** *"Any student found responsible for having committed the following misconduct is subject to the disciplinary sanctions outlined below:*

*(1) Physical abuse, verbal abuse, threats, intimidation, harassment, coercion and/or other conduct which threatens or endangers the health or safety of any person."* This is a general conduct rule. It is necessary to have a broad clause for the simple reason that it is not possible to list more specifically all the things college students do. The drafter may also include rules directed at specific conduct (for example, inappropriate sexual conduct, fighting, hazing) even though such conduct will also be covered by this rule. This enables the drafter to be confident that no inappropriate conduct "slips through the cracks."

8. **Language.** *"University disciplinary proceedings may be instituted against a student charged with violations of a law which is also a violation of this Student Code, for example, if both violations result from the same factual situation, without regard to the pendency of civil litigation in court or criminal arrest and prosecution. The CSAO shall determine, on a case by case basis, whether proceedings under this Student Code shall be carried out prior to, simultaneously with, or following civil or criminal proceedings off-campus."* This is another example of preserving flexibility for the CSAO to select the right approach to even the most difficult of cases.

9. **Language.** *"Any charge should be submitted as soon as possible after the event takes place, preferably within [specify a time period]."* This allows the institution to choose a guideline for encouraging persons to bring problems forward as soon as possible while allowing for the common fact that some of the most serious problems are not brought forward immediately but we want to hear about them, nonetheless.

10. **Language.** *"A time shall be set for a hearing, not less than five nor more than 15 calendar days after the student has been notified. Maximum*

*time limits for scheduling of hearings may be extended at the discretion of the student conduct advisor.*" This is another simple example of how to clearly state the time cycle in which the process will proceed, while preserving the ability to react flexibly and yet consistent with the foundation document.

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