Standards of Proof in Campus Conduct Hearings

By: Brett A. Sokolow, JD

Standard of Proof: That amount of information needed to establish a violation of policy.

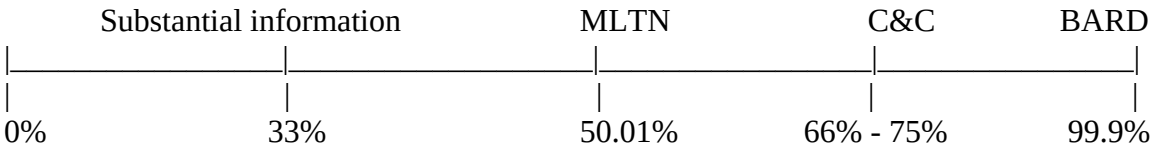
Terminology note: This newsletter uses the word "information" as a policy-based substitute for the more common, but legalistic term "evidence."

Many of you know that I have trained somewhere between 250-300 campus conduct boards. I have lost count of the exact number. Each time I visit a campus, I prepare, so that I can train on their policies and procedures. About half the time that I sit down with a conduct code, to give it a preparatory reading, I cannot find a specific reference to that campuses' standard of proof. So, when I arrive for the training, I ask "what is your standard of proof?" I am often met with a blank stare, especially when training all-student boards on private college campuses. Many of our campus conduct processes appear to operate without any formalized standard of proof. Is this the height of incompetence or the absolute triumph of developmental methods over legalistic proceduralism (My spell-checker insists I made that word up, but I'm liking it a lot, so it is staying, whether it is English or not)? Either way, a failure to elaborate a meaningful standard of proof is a huge impediment to principled decision-making in campus conduct proceedings. Not formalizing a standard of proof enables decision-makers to engage in seat-of-the-pants judgments, rather than in dialectical analysis (see the NCHERM 2003 Whitepaper at www.ncherm.org for a full discussion of dialectical analysis). I think we owe our students some notice of the standard by which we are going to measure their behavior.

1. Risk management piece of advice # 1. *Formalize in writing, in your conduct procedures, a standard of proof*

Choosing a standard of proof should be a principled decision, rather than a random choice or a legacy of institutional history. I know that some campuses, such as Chapel Hill and Stanford, are burdened with a legacy of very high standards of proof that have become part of the fabric of the culture of those campuses, but culture can be changed over time. First, let me review the four main standards of proof in use, and then I will make some recommendations for my preference. The four main standards used in the legal system are "substantial evidence," "preponderance of the evidence," "clear and convincing evidence," and "proof beyond a reasonable doubt." By the way, it is not "proof beyond any reasonable doubt," as it is often misquoted, which I believe creates a very real difference. On campus, we can and should adopt policy-based rather than legally-based language, allowing us to reframe these standards as "substantial information" "more likely than not," "clear and convincing information," and "information beyond a reasonable doubt."

Graphically, these standards can be arranged on an information continuum, as follows:



While this somewhat crude graphic may show a rough correspondence of these standards to the amount of information needed to find a violation, the continuum represents well the progression of these standards, from lowest to most rigorous.

2. Risk management piece of advice #2. *Don't use the words "standard of proof" in your procedures. They are inherently legalistic. Instead, just state your standard, such as "At the College of Knowledge, students will be found in violation of college policies only if the information shows that it is more likely than not that a policy was violated."*

For several reasons, I have a distinct preference for the "more likely than not" standard, and "substantial evidence" is my secondary preference in the campus conduct process. I want to share my reasoning for why these are my preferences. I also want to state up-front that lower standards can increase the risk of railroading accused students, and that I prefer these standards only in an overall environment that is protective of the fairness we owe to those students. It is for me a "both, and" solution, rather than an "either or" approach. We can have minimal standards of proof and we can protect the rights of students who are accused through our processes. Here are my three arguments:

PROTECTING THE CAMPUS COMMUNITY

While students often feel punished by our processes, our intention in sanctioning them is not to punish. When we suspend or expel a student, it is because we need to protect our community from them, and/or because they cannot bring their behaviors into congruency with the standards of our community. Any time we set the bar higher with respect to the standard of proof, we actually make it more difficult to protect these important institutional interests. Imagine that a rape occurs in the town or city in which your institution is sited. The police investigate, an arrest is made, an indictment is handed down, and a trial takes place. The jury feels there is a reasonable doubt, and fails to convict. The defendant goes free. Soon, he commits a second rape. His victim, learning of the first trial, blames the police, the prosecutor, the judge and the jury for her victimization. If they had only locked up this predator, she would never have been raped. She wants to sue. But she cannot. All of these officials have immunity. Juries have no legal duty to protect their communities. They are not accountable to victims.

Place the same event on a college campus, and witness the differences. A male student is alleged to have violated the sexual misconduct policy. You investigate, find reasonable cause for a hearing, and your conduct board finds the accused student not responsible, mainly because of the reluctance of the alleged victim to fully participate in the conduct process. The accused student then returns to your community, finds a second female student, and victimizes her too. She learns of the first, failed hearing, and decides to sue

you. She holds you accountable for her injury. If your conduct board had suspended or expelled this student, she would never have been victimized.

Is she right? Will she win? We owe a duty to reasonably foreseeable victims to warn and protect them from known dangers. Does she have a negligence case against the college? Yes, and the fact that this is the second similar incident will give a court the foreseeability argument, if they are looking for it (see, e.g. Stanton v. Univ. of Maine). We, on college campuses, frequently have a legal duty to protect the members of our community that the courts and juries in our larger communities simply do not have. The law even supports our ready exercise of our right and need to protect our campuses. Legally, college conduct processes are akin to administrative law bodies. The courts require us, at a minimum, to reach "a reasonable conclusion based upon substantial evidence." As we can see from the continuum, "substantial information" is the lowest of the standards. The courts grant us wide discretion to effectuate enforcement of our policies with only minimal information required. They consider this fair, and given the goal of protecting the community, I believe it objectively is.

We also have ethical and moral duties as guardians of our communities that we must hold dear. Thus, setting the bar high with respect to the standard of proof in our hearings will make it more difficult to find accused students in violation of policies. More information will be required under the higher standards. And, while it is important to protect the rights of students who are accused, we must balance those rights with the rights of other members of our community, who have the right to unmolested, peaceful enjoyment of the campus, free from attacks by those whom we may know or suspect to be dangerous.

Most administrators I have talked to whose campuses use higher standards than MLTN would prefer a lower standard. Lacking a clear best practice for the field, they don't have the ammunition they need to persuade their campus constituencies to change. I am hopeful that at some point, ASJA might consider a resolution recommending MLTN as the *preferred* standard for our field. While I know very little is standard amongst conduct programs across campuses, more than half of all colleges already use MLTN, according to one ASJA study, and I suspect that number has grown some since then.

BALANCE

This brings us to my second point. The most successful conduct processes are those that are well-balanced. While due process has always been about the rights of those who are accused, we have experienced 15 years of victims' rights expansion that has shown us that protecting the rights of all students in our conduct processes is a vital interest. We strive to balance the rights of all involved; to be as equitable as we can be. The hallmark of the successful conduct program is one that is fair and balanced. Look at the continuum. By very definition, "more likely than not" is the balanced standard. It sits just slightly off-center. If you view the continuum as a seesaw, balanced on a fulcrum, any of the other standards of proof throw the continuum out of balance. "More likely than not" balances the rights of all the students involved without favoring any. And, it allows the institutional needs to be addressed within the balance. Move up one standard, to "clear

and convincing information" and the process inherently will now favor the accused student. Why should our processes favor anyone? Is it our job to play favorites? It is our job to be balanced. Balance means objectivity, showing favoritism to no one but fairness to all.

> Risk management piece of advice. *Examine the decisions of your conduct boards. Are they studiously adhering to your campus standard of proof? Some do. Others just digest all the information and produce a "reasonable conclusion based upon substantial information". Reaching a reasonable conclusion is sort of the default logical result for many people. If your conduct boards are essentially ignoring your formal standard, you have two choices. One, you can offer more and better training on strict adherence to the standard. Or, two, you can change your standard to reflect the actual practices of what your boards are doing. Either way, you must address this disconnect, if it is occurring. Failure to abide by a formal standard is an intentional deviation from established procedures. That can get us sued, and the last thing any of us wants is some judge to delve so deeply into our decisions that they examine whether we had enough information to reach the conclusion we came to (a case against Colby College right now is asking the judge to do exactly that).*

ARE STANDARDS HIGHER THAN MLTN OUTCOME DETERMINATIVE?

I encourage you to have a conversation with administrators on campuses that use higher standards than MLTN, or to study your own, if you use a higher standard. Look for example, at alcohol-involved physical violence, such as sexual misconduct complaints. He was drinking. She was drinking. How can anything under those circumstances be clear and convincing? I could argue that the very presence of alcohol means that that the facts are neither clear nor convincing. Take it up a level, and ask how such a complaint could ever reach the proof standard of beyond a reasonable doubt? I would assert that, except in very rare circumstances, campuses that use the higher standards almost always find accused students in such complaints to be not responsible. If I am right about that (and having surveyed clients on it, I believe I am), we must accept the possibility that for these types of complaints, any standard higher than MLTN is outcome determinative. If it is outcome determinative, I would argue that it is legally infirm. It is certainly ethically problematic to make something a rule violation, but to lack any meaningful enforcement mechanism for that infraction. Worse, I fear that we are leaving students who are victimized without any meaningful recourse or protection. How can we continue to justify such high standards of proof within rape-prone environments? My concern extends to other offenses involving alcohol, in addition to sexual misconduct.

> Risk management piece of advice. *Beware of "Standard Creep." I know many of us know someone we would consider to be a standard creep, but I am referring to the common phenomenon of conduct boards that either consciously or unconsciously ratchet up the standard of proof when suspension or expulsion or other serious sanctions are in play. Unless your campus policy allows for a higher standard for certain types of offenses, allowing "standard creep" is a violation of your own*

policies, and even though this may be a natural tendency, we would be well-served to try to train around it.

4. Risk management piece of advice. *I'm seeing a trend toward campuses moving to multiple, varying internal standards of proof, depending on whether the issue is academic dishonesty, or depending on the type of misconduct, or the sanctions available. Maybe it's just that there is no cognate for this type of practice in the legal world that makes me instinctively feel that this is not the best practice. Murder charges that do or do not warrant the death penalty do not require varying proof standards depending upon the severity of the outcome. Maybe it is just that I prefer elegant simplicity in an environment where we seem to have a tendency to over-complicate our processes. I can't really give voice to why this practice strikes me as risky, and I know that will be unpersuasive to many of you. But, I have learned to trust my gut, as it tends to guide me well when my head is less than helpful.*

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.

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.ncherm.org