

LECTURE NOTES
LEGAL ISSUES IN STUDENT AFFAIRS
CSD 5760

CHAPTER I (KAPLAN & LEE)
OVERVIEW OF POSTSECONDARY LAW

SOURCES OF POSTSECONDARY EDUCATION LAW

EXTERNAL SOURCES OF LAW: The external law is created and enforced by bodies external to the institution. It circumscribes the internal law, thus limiting the institution's options in the creation of internal law.

FEDERAL AND STATE CONSTITUTIONS

The federal constitution has no provision that specifically refers to education. State constitutions, however, often have specific provisions establishing state colleges and universities (also 'systems'). State constitutions also have provisions establishing a state dept. of educ. or other governing body for higher education.

STATUTES & ORDINANCES

Statutes are enacted by both states and the federal government. Ordinances (local statutes) are enacted by county and city councils. Example I: laws establishing and regulating state postsecondary institutions or systems; laws creating statewide coordinating councils; and laws providing for the licensure of postsecondary institutions. Example II: Higher Education Act of 1965

ADMINISTRATIVE RULES AND REGULATIONS

Most rapidly expanding sources of postsecondary education law are – directives of state and federal administrative agencies. Admin. agency directives are often published as regulations that are as binding as a statute. Federal administrative agencies publish both proposed regulations and final regulations, which have the status of law. Such regulations appear upon issuance in the Federal Register (Fed. Reg.) also in the Code of Federal Regulations (C.F.R.). Methods of publication vary by state and thus difficult to find due to both publication and coding practices.

STATE COMMON LAW

Common law is judge-made law rather than law that originates from constitutions or from legislatures or administrative agencies. Decisions rely on precedents the courts have created themselves.

FOREIGN AND INTERNATIONAL LAW

This source of law comes into play when the institution sends faculty members or students on trips to foreign countries, or engages in business transactions with companies or institutions in foreign countries, or seeks to establish educational programs in foreign countries.

INTERNAL SOURCES OF LAW

The internal law is the law created by the institution for its own governance.

INSTITUTIONAL RULES AND REGULATIONS

These rules and regulations are subject to all the external sources of law and must be consistent with all the legal requirements of those sources that apply to the particular institution and to the subject matter of the internal rule or regulation. Courts interpret them as part of the staff-institution or student-institution contract. Institutions establish judicatory bodies with authority to interpret and enforce institutional rules and regulations.

INSTITUTIONAL CONTRACTS

Automatic contractual relationships exist with faculties, students, government agencies, outside parties (e.g., construction firms, suppliers, research sponsors from private industry, and other institutions). Contracts may incorporate institutional rules and regulations and thus become part of the contract due to academic custom and usage.

ACADEMIC CUSTOM AND USAGE

Sometimes call “campus common” law, academic custom and usage helps define what the various members of the academic community expect of each other as well as of the institution itself. It does not replace formal institutional rules and regulations but supplements them. It differs from institutional rules and regulations in that it is not necessarily written, is far more informal and is often found in policy statements from speeches, internal memoranda, and other such documents within the institution. (Tenure Case: *Perry v. Sinderman*, 408 U.S. 593 (1972)).

THE ROLE OF CASE LAW

Judicial opinions become case law. (Hair Length Case: *Lansdale v. Tyler Junior College* in which court ruled laws applying to K-12 did not apply to college students due to “a student’s hirsute adornment becomes constitutionally irrelevant to the pursuit of educational activities”). A court’s decision has the effect of binding precedent only within its own jurisdiction.

At the state level, a particular decision may be binding either on the entire state or only on a subdivision of the state, depending on the court's jurisdiction.

At the federal level, decisions by district courts and appellate courts are binding within a particular district or region of the country.

A decision of the U.S. Supreme Court binds all lower federal courts, as well as state courts.

Options of state and federal courts are published in the journals of the National Reporter System, comprised of the (1) Atlanta Reporter (cited. A. or A.2d), (2) Northeastern Reporter (N.E. or N.E.2d), (3) Northwestern Reporter (N.W. or N.W.2d), (4) Pacific Reporter (P. or P.2d), (5) Southeastern Reporter (S.E. or S.E.2d), (6) Southwestern Reporter (S.W. or W.W.2d), and (7) Southern Reporter (So. Or So.2d).

LITIGATION IN THE COURTS

THE CHALLENGE OF LITIGATION

Institutions are most concerned about going to court because it is (1) more public and thus subject to closer scrutiny by outsiders; (2) a more formal setting and involves numerous technical matters; thus, requiring more attorney time and expense; (3) courts may order the strongest and widest range of remedies, including compensatory and punitive monetary damages; (4) court's judgments and orders bind the parties; and (5) court's written opinions may also create precedents binding litigants in future disputes.

The vast majority of cases are disputes resolved through settlement negotiation. This process is less protracted, more informal and more private than a trial. Lawsuits can be avoided through careful preventive planning that (a) strengthens the institution's litigation position and narrows the range of viable issues in the case, and (b) helps ensure that the institution retains control of its institutional resources and maintains focus on its institutional mission.

ACCESS TO COURTS

The jurisdictional and technical requirements for access to federal courts differ from those for state courts, and variances exist among the state court systems as well.

A major example is the "Exhaustion-of-Remedies" doctrine, under which prospective plaintiff may sometimes be prevented (or at least delayed) from bringing a court suit unless the plaintiff has exhausted any and all administrative remedies that may be available (e.g., a hearing before an administrative agency or a grievance board).

PRETRIAL AND TRIAL ISSUES

After access to court has clearly been established, attention shifts to the numerous technical and strategic matters regarding the pretrial phase and the trial itself.

PRETRIAL DISCOVERY

A prescribed period of time, during which, depositions, interrogatories and requests for the production of documents, among other things, affords all parties the opportunity to request information to clarify the facts and legal issues in the case.

According to the Buckley Amendment (34 C.F.R. Section 99.31), an institution may disclose the information on grades or social conduct without consent if it does so in compliance with a judicial order or subpoena, but it must make a reasonable effort to notify the party or student before disclosure.

ISSUES REGARDING EVIDENCE

Rules regarding evidence are governed by (1) the rules of civil procedure, (2) the rules of evidence, and (3) the common law of the jurisdiction in which the suit is brought.

During the **discovery period**, each party may object to various discovery requests of the other party on grounds that the information sought is privileged or irrelevant. In pre-trial motions, each party may seek to limit the evidence to be admitted at trial.

During **presentation** of each party's case at trial, one party may object on a variety of grounds to the introduction of information that the other party seeks to present. In addition, parties may seek, and courts may issue, summonses and subpoenas directly to the other party or to witnesses.

The purpose of the **attorney-client privilege** is ...to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that should legal advice or advocacy serve the public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

"Qualified privilege" may protect from disclosure statements of students and employees made in the context of an ombudsperson's investigation.

STANDARDS OF JUDICIAL REVIEW AND BURDENS OF PROOF

The “**substantial evidence**” standard is a gauge of whether the institution’s decision-making body carefully considered the evidence and had a substantial body of evidence on which to base its decision.

The “arbitrary and capricious” standard gauges whether the deciding body acted without reason (irrationally).

The “**de novo**” standard authorizes the court to consider the case from scratch, giving virtually no deference to the decision-making body’s decision, and requiring all evidence to be submitted and considered anew.

JUDICIAL REMEDIES

MONETARY DAMAGES

Depending on the character of the plaintiff’s claim and proof, a court may award “**compensatory**” damages and less often, “**punitive**” damages, as well. Occasionally, even “**treble**” damages may be awarded.

INJUNCTIONS

Injunctions are a type of specific non-monetary, or equitable relief. An injunction may be permanent or temporary and may be either prohibitory (prohibiting the defendant from taking certain actions) or mandatory (requiring the defendant to take certain specific actions).

MANAGING LITIGATION AND THE THREAT OF LITIGATION

Litigation management is a two-way street. It may be employed either in a defensive posture when the institution or its employees are sued or threatened with suit, or in an offensive posture when the institution seeks access to the courts as the best means of protecting its interests in a conflict situation.

Mediation and arbitration are the best methods to avoid litigation and court appearances.

THE PUBLIC-PRIVATE DICHOTOMY

Early institutions were often a mixture of public and private activity (\$ support and control). The law often treats public and private institutions differently.

The court used the “due process” clause to protect against unreasonable governmental interference with teaching and learning in private schools.

However, in so far as the federal constitution is concerned, a private university can engage in private acts of discrimination, prohibit student protests, or expel a student without affording the procedural safeguards that a public university is constitutionally required to provide.

THE STATE ACTION DOCTRINE

Before a court will apply constitutional guarantees of individual rights to a postsecondary institution, public institutions and their officers are fully subject to the constraints of the federal constitution; whereas, private institutions and their officers are not. *The Dartmouth College Case (*Trustees of Dartmouth v. Woodward*, 17 U.S. 518 (1819))

Religion and the Public-Private Dichotomy

Under the establishment clause of the First Amendment, public institutions must maintain a neutral stance regarding religious beliefs and activities. They cannot favor or support religion over non-religion.

The First Amendment contains two “religion” clauses. The first prohibits government from “establishing” religion; the second protects individuals’ “free exercise” of religion from governmental interference.

Private institutions have no obligation of neutrality under these clauses. Moreover, these clauses affirmatively protect the religious beliefs and practices of private institutions from governmental interference.

Landmark Case: *Widmar v. Vincent*, 454 U.S. 263 (1981) in which the U.S. Supreme Court determined that student religious activities on public campuses are also protected by the First Amendment’s free speech clause.

UNDERSTANDING THE POSTSECONDARY INSTITUTION’S LEGAL AFFAIRS

TREATMENT AND PREVENTIVE LAW

Treatment Law is a traditional or practical approach that focuses on actual challenges to institutional practices and on affirmative legal steps by the institution to protect its interests when they are threatened (e.g., when the institution needs formal permission of a government agency to undertake a proposed course of action, when the institution wishes to sue some other party). *The goal is to resolve the specific legal problem at hand.*

Preventive Law focuses on initiatives that the institution can take before actual legal disputes arise. It involves

- (a) Administrators and counsel in a continual process of setting the legal parameters within which the institution will operate to avoid litigation or other legal disputes;
- (b) Counsel identifies the legal consequences of proposed actions;
- (c) Pinpoints the range of alternatives for avoiding problems on the legal risks of each alternative;
- (d) Sensitizes administrators to legal issues and the importance of recognizing them early; and,
- (e) Determines the impact of new or proposed laws and regulations, and new court decisions, on institutional operations.