Some Legal Implications in Academic Advising

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This article is a summary of federal regulations relating to academic advising. Issues covered include defamation, negligence, privacy, disabilities, civil rights, duty to report crimes, and privilege. Relevant state laws, interpretations, hypothetical situations, and the possible institutional and personal penalties—both civil and criminal—for not following the current laws are presented.

The level of legal awareness required of academic advisors has risen substantially in the past generation. Since the consequences for breaking laws can be daunting, academic advisors need some understanding of their legal obligations. This article has no pretense of being a comprehensive or in-depth analysis of current advising laws; instead it is an attempt to summarize regulations in various areas related to advising and to describe the possible personal and institutional penalties for not following these mandates. *The author is not a lawyer, and this is not legal advice.*

Defamation

Given the publicity attached to lawsuits and the volume of litigation in the U.S., it is easy to believe that everything an advisor does can generate liability. However, evaluating students and making judgments about them is an essential university function and by enrolling in a university, a student gives consent to being evaluated. In addition, the courts are hesitant to question the validity of student assessments—as long as they are offered in good faith without traces of malice or improper motives (Bonham, 1989). The First Amendment of the U.S. Constitution, which guarantees free speech, is a strong shield for opinions as long as they are not framed as fact. An expression of opinion, clearly labeled as such, is usually not actionable (Weeks & Davis, 1993). An academic advisor can avoid liability problems by following the above rules and by assessing students only when appropriate as part of the course and scope of the advisor's employment.

States generally recognize an action for defamation, called either "slander" (spoken) or "libel" (written). For a defamation suit to succeed in court, the following elements must all be proven in the case: a) a false statement was made; b) the statement was disseminated to a third party, usually with intent to harm or with reckless disregard for the truth of the statement; and c) actual damage was caused by communication of the false information (Kionka, 1992b). A person cannot be defamed unless a third party becomes aware of the damaging statement.

In other words, an individual cannot be defamed in private. The truth of a statement is always a defense against an action for defamation. Furthermore, it is so difficult for the plaintiff to prove actual damages that these kinds of suits, in the advising context, are unlikely to be won. However, some defamations are so loathsome that damages need not be specifically shown for a defendant to be found liable. Such was the case when a college president falsely claimed that one of his deans had a prison record (Bonham, 1989).

Negligence

> A tort action for negligent advising requires an act or an omission to act when there is a duty or an obligation recognized by law requiring the advisor to conform to a certain standard of conduct, and the failure to conform to that standard of conduct causes actual damage or injury. . . . For a duty to exist, there must be a special relationship between the parties. An individual's status as a student at an educational institution does not in itself create a special relationship between the student and the college or university. In certain circumstances, the court may find that an advisor-advisee relationship creates a special relationship and, consequently, imposes a duty of care. Academic advisors must realize that because they are perceived to have special knowledge and access to certain information, they may be held to have a duty to their advisees. (Bonham, 1989, p. 38)

In practical terms, an academic advisor must make reasonably sure that the information and advice dispensed are accurate and reasonable. The advisor must make a good-faith effort to see his or her work with students through to satisfactory conclusions and try to remedy mistakes. For negligence to be found, there must be actual damage to the victim. The doctrine of comparative

negligence, recognized in many states, may operate to bar or limit recovery if it can be shown that the student was aware or should have been aware of the correct information. Therefore, the advisor should emphasize to the advisee that the university's catalog is the final word about academic requirements (Weeks & Davis, 1993).

Privacy

The Family Educational Rights and Privacy Act of 1974 (FERPA) guarantees access to student educational records for the parents of minor students and once the student reaches the age of 18 or enrolls in a postsecondary institution, for the student (Schatken, 1989). It also prohibits the release of student records to third parties without the consent of the student, with the exception of certain directory information (name, address, phone, birth, major, dates of attendance, degrees earned). The institution must notify students that they have the right and ability to restrict even the release of this basic data. Parents of students over 18 years are considered third parties unless they claim the student as a dependent for federal income tax purposes (Family Educational Rights, 1998). However, a student may be considered a dependent for financial aid purposes, but not under Internal Revenue Service (IRS) guidelines. There is some disagreement about whether the release of student records to parents of IRS-dependent students is optional or mandatory; in any case, parents' access to dependent student information is not prohibited. Two recent amendments allow, under certain circumstances, postsecondary institutions to disclose final results from disciplinary proceedings involving crimes of violence, nonforcible sex offenses, and drug and alcohol infractions. FERPA applies only to current and former students, so an individual who is admitted but not yet enrolled is not covered by FERPA.

An educational record is any information directly related to the student that is in the possession of an institutional employee and is accessible to any other person. Handwritten, electronically stored, printed, and filmed media (and just about anything else) can be considered student records. Among those documents not covered by FERPA include a) private notes held by education personnel that are inaccessible to others; b) records that relate exclusively to a student's employment; c) certain law enforcement records; d) parents' financial information, including that submitted with financial aid applications; and e) certain student medical records. FERPA does not provide an avenue for students to challenge grades, but it does allow for the correction of errors in recording them. An individual also can have access to letters of recommendation written about her or him by employees of the institution, unless the student specifically waives the right in advance (Weeks & Davis, 1993).

The biggest danger in FERPA for an academic advisor is the inadvertent release of information about an advisee. Before communicating with anyone about the student (except, of course, other university employees with a legitimate educational interest in the information) advisors should obtain written permission from the advisee—even if there is supposedly a waiver on file. Most universities have specific forms for this purpose. If not, the advisor can rather easily create one to suit the circumstances. Without specific permission, an advisor should not even give out directory information about the advisee, because the student may have already prohibited the university from doing so.

Violation of FERPA cannot lead to a federal suit against the advisor by the victim (Smith v. Duquesne, 1986). The only remedy provided by FERPA is the cutoff of federal funds to the institution. Even though personal liability is not covered under FERPA, a state civil remedy may be applicable for privacy violations when unreasonable intrusion or public disclosure of private facts is found (Kionka, 1992a, p. 40). For example, unauthorized release of a transcript (especially one with bad grades) could be actionable and damages payable. This case is especially powerful if the offense is committed at a public institution and can thus be portrayed as an excessive governmental intrusion into private affairs; the grades are indeed of no legitimate public concern.

Students with Disabilities

Since academic advisors, especially of the faculty variety, are frequently called upon to make judgments about accommodating students with disabilities, they must understand what is and what is not required by various federal laws. The two most frequently applicable regulations are contained in the Americans With Disabilities Act of 1990 (ADA) and section 504 of the Rehabilitation Act of 1973. The latter states:

> No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his disability, be excluded from the participation in, be denied the benefits of, or

> be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . (Rehabilitation Act, 1973)

Federal regulations state that the institution ". . . may not, on the basis of a handicap, exclude any qualified handicapped student from any course, course of study, or other part of its educational program or activity" (Nondiscrimination Under Federal Grants, 1998). "Otherwise qualified" means that a student with a disability must already have the skills, intelligence, and background necessary for the course of study. A qualified individual is one ". . . who meets the academic and technical standards requisite to admission or participation in the recipient's [*institution's*] educational program or activity . . ." (Nondiscrimination under Federal Grants, 1998).

Do antidiscrimination laws allow students with disabilities access to majors for which they are not otherwise qualified, such as a student with a hearing impairment becoming a music performance major? Note that the above regulation says that exclusion is illegal only if it is based solely on the handicap. Therefore, the prospective student must, like any other aspiring performer, prove his or her ability in music. In other words, these regulations operate to level the playing field, but not to change the standards. In fact, this nondiscrimination law is narrowly drawn and does not give rise to frivolous accommodations.

To be eligible for accommodation, the student with a disability must first make the institution aware of the handicap and then provide the school with appropriate medical documentation of it. This proof, which must usually come from outside the institution, can be quite costly (Rothstein, 1986, p. 236). Without it, the institution is under no legal obligation to provide arrangements for the student. There are three types of accommodations suggested by federal regulations: academic adjustments, modifications of course exams, and availability of auxiliary aids (Nondiscrimination under Federal Grants, 1998). The academic advisor will be primarily concerned with the first and second remedy. In the case of an academic adjustment such as a course substitution, ". . . an accommodation is not reasonable if it would constitute an undue burden or hardship . . . if it would require a fundamental alteration to the institutional program" (Tucker, 1996, pp. 14–15). For instance, a music major with a documented learning disability in math could substitute a logic course for a required math class, but could not justify a substitution for a required music theory course. Federal regulations provide guidelines for practice:

> Academic requirements that the recipient [*institution*] can demonstrate are essential to the program of instruction being pursued by such student and directly related licensing requirements will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted. (Nondiscrimination under Federal Grants, 1998)

For exam alterations, federal regulations stipulate that a college

> . . . shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represent the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure). (Nondiscrimination under Federal Grants, 1998)

The specific test modifications are not dictated by law. Consequently, institutions are given leeway in determining how best to test the achievement of a student with a learning disability. Modifications can be made so that the purpose of the exam is not altered by its format. For example, instructors are not expected to give oral exams in lieu of written assignments or tests (Tucker, 1996).

Mental handicaps are also covered by these disability laws. Federal regulations define an individual with a disability as follows:

> . . . any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. (Nondiscrimination under Federal Grants, 1998)

Physical or mental disabilities are further defined as ". . . any mental or psychological disorder, including emotional or mental illness"

(Nondiscrimination under Federal Grants, 1998). How an institution provides accommodations for a student with emotional or mental illness is probably highly specific to each individual. However, these regulations do not condone misbehavior by students with a mental disability (Pavela, 1985). The Rehabilitation Act and associated regulations were designed to prohibit the exclusion of a student with disabilities only ". . . if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students . . ." (Nondiscrimination under Federal Grants, 1998). An institution may also hold a person with a drug or alcohol addiction to the same behavioral standards as other students (Pavela, 1985):

> . . . a recipient [*institution*] may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. (Nondiscrimination under Federal Grants, 1998)

In short, students living with mental or emotional illness are subject to the requirements of the university's code of conduct. However, according to Pavela (1985, p. 21), Section 504 of the Rehabilitation Act prohibits exclusion "1) simply because the student was suffering from a mental disorder, or had a mental disorder in the past; 2) because it was assumed, without sufficient supporting evidence, that a student would be unable to meet reasonable institutional standards simply because the student was suffering from a particular mental disorder; or 3) because, out of paternalistic concern, it was hoped that a student suffering from a mental disorder (who, nonetheless, continued to meet reasonable academic or conduct standards) would obtain treatment elsewhere."

The remedies set forth for violations of the ADA apparently do not include any specific personal liability, but do include institutional penalties such as loss of funding. However, violations by employees of state institutions may be subject to the personal liability presented in 42 U.S.C.A. §1983, usually known simply as "Section 1983."

Personal Federal Liability

Being an academic advisor in a state institution, as opposed to a private school, has both pluses and minuses. One possible advantage is that a few states still recognize the principle of sovereign immunity from suit to the extent that an advisor cannot be sued for acts or omissions in the course and scope of employment. However, this protection is rare, as sovereign immunity generally safeguards the government but not the individual (Hollander, Young, & Gehring, 1985). One possible drawback of state employment is that the advisor at a public institution could conceivably incur personal liability under the provisions of Section 1983 or under one of the other Reconstruction Era civil rights statutes. Section 1983 provides a description of individual responsibility:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects [*an*]other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . . (Civil Action, 1994)

In essence, any employee of the state or one of its subdivisions or agencies who violates a federal constitutional or statutory right of a student can be held personally liable. "Individual defendants under §1983 are liable not only for compensatory damages but, upon a showing of recklessness or callous indifference to personal rights, for punitive damages as well. . . . In addition to damages, a prevailing party in a §1983 action is generally entitled to an award of reasonable attorney's fees" (Vieira, 1990, p. 251). The corresponding federal criminal conspiracy statute is stated as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same. . . . They shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . . (Conspiracy, 1969)

Advisor transgressions against civil statutes are not as unlikely as they may initially seem and the punishment is not restricted to perpetrators who are state officials. Since it is probably impossible for an individual to be familiar with the constantly increasing list of federally mandated Constitutional and statutory rights, it is conceivable that two people could unintentionally deprive a student of a federally protected right.

Another law ripe for violation by unknowing academic advisors is described in the following section of the federal code:

> Whoever, under color of any law, statute, ordinance, regulation, or custom, willingly subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States, or to different punishment, pain, or penalties, on account of such inhabitant being an alien . . . than are prescribed for the punishment of citizens, shall be fined not more than $1000 or imprisoned not more than one year, or both. . . . (Deprivation of Rights, 1969)

In essence, an advisor could conceivably run afoul of this statute by denying a student some federally protected right because that person was not a U.S. citizen.

Privilege

Some speculate that academic advisors might enjoy the privilege of confidentiality for the communications between advisor and advisee. This wishful thinking is inaccurate, and believing it can lead advisors to problems both with their employers and with the courts. Employer-Employee Relationship (1992) § 110 sets forth the general legal obligations of employees:

> An employee owes a fiduciary duty to his employer, and there is an implied agreement on the part of the employee in every contract that he will serve his employer honestly, faithfully and loyally. The employee has a duty to act for the employer's benefit, and not to injure the business or financial interest of the employer. It is an employee's duty to communicate to his employer all facts which he ought to know. Thus, as a fiduciary, he is obligated to disclose to his employer any information, gained from whatever source, which could damage the employer, or influence the employer's actions in relation to the subject matter of the employment.

Unless the advisor's institution has a clearly written policy of confidentiality between advisor and advisee, the advisor cannot withhold any advisee statement from the institution. The advisor should immediately report to appropriate personnel any advisee information that could negatively affect the institution.

> Federal Courts have recognized as a matter of federal common law the most basic and traditional privileges, but have not been very receptive to more modern, sometimes novel, privileges, which typically have come into existence in various states by statutory enactment. . . . Federal courts recognize a lawyer-client privilege, a spousal testimonial privilege, a spousal confidential communication privilege, a political vote privilege, a clergyman-penitent privilege, and qualified privileges for trade secrets, secrets of state, and informer's identity. Federal courts have not generally recognized a physicians-patient privilege or an accountant-client privilege. (Graham, 1996, p. 151)

The closest thing to an advisor-advisee privilege on the federal arena was the litigation over Secret Service agents regarding overheard presidential conversations. Even this privilege was ultimately denied by the federal courts (Rubin v. United States, 1998). If the federal courts do not recognize the doctor-patient privilege, there clearly is no hope that a privilege for an advisor-advisee relationship will be recognized. Even though state courts are more receptive in their recognition of privilege, none has yet been found for the advisor-advisee relationship.

Under circumstances that vary greatly from state to state, advisors may have an obligation to report crimes of which they become aware, since failure to do so is itself sometimes a crime. At the federal level, failure to report may be prosecutable as misprision of felony (Misprision, 1998). The elements critical for prosecuting an advisor of this crime are a) commission and completion of a federal felony by someone; b) the advisor's knowledge of this crime; c) the failure of the advisor to report it to the proper authorities; and d) some step by the advisor to conceal the felony. A cover-up could consist of an untruthful statement by the advisor about her or his knowledge of the crime (Criminal Law, 1998). Clearly, it is in an advisor's best interest to report crimes that come to his or her attention through the advising process. In addition, the advisor's failure to report knowledge of a crime gained through the course and scope of employment could conceivably subject the employing institution to civil liability.

Indemnification

In a civil suit for damages, the plaintiff will most likely pursue the deep pockets of the institution rather than an individual advisor. Furthermore, advisors at most public institutions are covered by some sort of insurance statute against liability. In Arizona, this regulation reads as follows:

> The Department of Administration shall obtain insurance against loss to the extent it is determined necessary and in the best interests of the State on the following: . . . The state and its departments, agencies, boards and commissions and all officers, agents and employees thereof and such others as may be necessary to accomplish the functions or business of the state and its departments, agencies, boards and commissions against liability for acts or omissions of any nature while acting in authorized governmental or proprietary capacities and in the course and scope of employment or authorization . . . (Purchase of Insurance, 1992)

This, in essence, means that any damages caused by an advisor's act within the proper realm of her or his employment will be paid by the institution. Private universities and colleges usually have similar policies. The two requirements of "acting in an authorized governmental or proprietary capacity" and of being "in the course and scope of employment or authorization" probably mean that an advisor acting reasonably and in good faith will be covered.

Conclusion

With a bit of knowledge about these legal matters, academic advisors will better serve both their advisees and institutions and will have a significantly reduced chance of seeing litigation. However, it will always be wise to take advantage of any relevant training offered by the institution and to consult the university's attorney if any questions arise.

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