



Tales from the Trenches

Real-World Litigation Lessons for Florida's Private Colleges

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Our Presenters



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Mendy Halberstam

Mendy is a Florida Bar Board certified specialist in Labor and Employment Law. He has represented parties before the EEOC and related agencies. He handles cases involving claims of race, age, disability and sex discrimination, as well as harassment, retaliatory discharge, wage and hour and non-compete/restrictive covenant issues. He routinely represents K-12 schools, colleges, and universities across Florida in employment and student litigation, policy guidance, student accommodation and discipline issues, as well as faculty and administration contract issues. Mendy represented several universities as lead counsel in class actions seeking the recovery of tuition and fees resulting from the COVID-19 pandemic. He successfully obtained dismissals or extremely favorable outcomes in multiple high stakes higher education litigation

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Tyler White

Tyler takes pride in being a strategic partner to provide practical advice to educational institutions and all clients to achieve their goals. Tyler's background in Public Relations and Communications makes him uniquely suited to advise clients in high-profile situations and lawsuits involving allegations of a sensitive nature that often attract media attention.

Tyler regularly advises and represents higher education clients in investigations, disputes, and litigation (including class actions) involving allegations of unpaid wages, and race, gender, national origin, disability, age, and religious discrimination. He defends clients in difficult cases involving allegations of defamation, negligence harassment, and whistleblower retaliation. He helps draft handbooks and policy manuals, performs investigations and training, and responds to Equal Employment Opportunity Commission and state and local agency charges of discrimination.

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DISCLAIMER

- This presentation and its accompanying materials should not be used as a substitute for legal advice on a particular matter. Any information provided herein (as well as responses to questions) are necessarily general in nature.
- Attendees should consult with counsel before taking any actions that could affect their legal rights and should not consider these materials or discussions about these materials to be legal or other advice regarding any specific matter.



SESSION OBJECTIVES

- Understand litigation trends and risks impacting colleges and universities in Florida
- Identify common process failures arising from real world cases
- Apply practical, defensible strategies

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FLORIDA / 11TH CIRCUIT RISK THEMES

- Retaliation claims frequently survive
- Timing is heavily scrutinized
- Documentation gaps are decisive

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At-Will Employment?

.....ISN'T ABSOLUTE!

- Even where at-will doctrine applies, we must still have a legitimate, non-discriminatory and non-retaliatory, business reason. Otherwise:
- Liability under Title VII, ADA, ADEA, FMLA, state laws.



Documentation Wins Cases

“.....but I verbally counselled them every week”

Jury: “If the supervisor did not bother putting it in writing, it must **not** have been important!”

"if it isn't in writing, it never happened"



General Points to Consider for all Documentation

Timely	Be timely: Create documentation while events are still fresh (ASAP, within 24 hours)
Specifics	Use specific examples and focus on objective facts, not just feelings or conclusions. Include dates, names, places, witnesses
Policy/Rule	State applicable policy. Explain effect on company and customers, and expectations going forward
Listen	Provide documentation to employee & listen to employee's version of events/explanation
Avoid	Avoid legal conclusions and do not mention or include protected characteristics



Documenting Should Not Need to Be Immobilizing Nor a Novel – But It Should Be Specific

Compare:

- "Johnny is Always Late"

"Sally was 20 minutes late on May 1, May 3, May 8, May 17, May 25"

- "•Tony went nuts and stormed out!"
- **On September 1, Tony threw his phone on the floor, screamed at Elizabeth, calling her "a stupid poopy head" for eating his jelly beans, and left the office without his supervisor's permission for half an hour between 10:15 and 10:45 am. Additional eye-witnesses include: Joe Smith, Sarah Davis and Frank Reynolds**



REAL WORLD CASE: The Retaliation Trap

- Upper Level Administrator is very competent, but a tyrant
 - They are never written up
 - They have overall positive reviews
 - They complain about harassment and discrimination
 - March 1
 - They are fired mid-April
 - They sue, claiming they were subjected to retaliation
 - School argues the administrator was let go for interpersonal problems
- YOU be the judge.....



You Be The Judge

- Same Case as Before (including no "formal discipline") BUT:
- Five months before the employee complains, there was an email from provost to HR saying there are "real and serious concerns" about the administrator's conduct and "we need to begin looking in a different direction."
- There are multiple comments in the annual review re the need to improve communication style
- There are several emails with the administrator raising performance concerns, including one two days before the administrator's internal complaint
- Would your decision be the same?



Real World: Courts Look to Documentation and Timing

Factors to Review in Termination

- How strong is our evidence?
- Sunset Provisions – how many “final” warnings
- Why delayed documentation/discipline/action is problematic
- Do we have documentation or just verbal testimony?
- How reliable and accessible are the witnesses?
- Consistency and past practice are key
- Prior disciplinary record?
- Length of employment
- Does the punishment fit the crime?



CASE ANCHOR: ADA PROCESS

- Ali v. Regan - The EPA offered a take-it-or-leave-it telework accommodation without first engaging in the promised back-and-forth process, ignored the employee's repeated attempts to discuss alternatives, and failed to tailor the accommodation to the employee's specific limitations.
- Court Held: Interactive process was required
- Failure to Do So Creates Jury Issue
- Process can be just as important as intent

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HYPOTHETICAL: ACCOMMODATION DENIED

- Faculty requests an accommodation to their required office hours
- Dean denies ("operational burden")
- No documented process, no escalation, no process
- Question: Is that defensible?

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LITIGATION LENS: ADA

- Focus on process, not denial
- Court asks: Did you engage? Did you document?
- No record = no defense

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LITIGATION LENS: Pregnant Worker's Fairness Act

- Question: if the faculty member was pregnant would that change your analysis?
- Do not forget the PWFA and certain presumptively reasonable accommodations
- EEOC sued an employer claiming a pregnant front desk clerk requested the ability to sit at the front desk rather than stand due to medical needs related to her pregnancy. Although a coworker initially provided her with a suitable chair, company management later took it away, replaced it with a backless stool, and discouraged its use.

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LITIGATION LENS: PWFA BASICS

- Undue hardship is a high burden, and will be more difficult than ADA given temporary nature of pregnancy and related conditions
- Leave is the last resort if employee is able to continue working
- Protections don't end at birth (limitations related to childbirth and related medical conditions also protected)
- When determining whether an accommodation presents an undue hardship, consider whether similar accommodations are provided for religion or disability
- Remember the difference between leave for medical reasons and bonding reasons

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TALES FROM THE TRENCHES



NEGLIGENCE RISK: MENTAL HEALTH & SELF-HARM



Real Example – Student Suicide

- The deceased was a student and RA living on campus.
- University staff knew he was emotionally distressed after a breakup.
- Student refused counseling despite encouragement from his Residential Director.
- On March 29, 2019, student became heavily intoxicated and allegedly attempted suicide by running in front of a car.
- He later told RAs he wanted to die and be left alone.
- The RAs placed him in his dorm room but allegedly did not notify supervisors, parents, emergency contacts, or mental-health professionals.
- The residential director later learned Chandler had been intoxicated and texted him, but allegedly did not immediately check on him.
- Student was found dead by suicide in his room two days later.
- Parents sued and alleged the university lacked adequate RA training and emergency protocols for suicide-risk situations.



What Happened In Court

- The Court dismissed the wrongful death claim, finding the school did not have a duty under the state law at issue to prevent suicide.
- Negligent undertaking and negligent training claims WERE allowed to survive on the theory that the university *acquired a duty* to the student, even where one may not have previously existed, because its agents undertook to ensure the student's well-being after learning of his mental distress and encountering him at the off-campus party.
- "[The Defendants] assumed the duty of monitoring [student] during and after the time that he made allegedly suicidal statements. [The residence director] attempted to refer [student] for counseling and then offered his own services once counselling was rejected."
- Defendants did not exercise reasonable care in providing student with mental-health services by failing to take reasonable and immediate action in response to his emotional distress and suicidal statements.
- The school could have—but failed to—promptly notify supervisors of the suicidal statements.
- Additionally, staff did not coordinate with mental-health staff and professionals at the Counseling Care Center regarding the suicidal statements even though the mental-health professionals could have immediately intervened.
- Finally, the staff did not contact the student's emergency contacts who could have chosen to take immediate action.



Another Real-World Negligence Case

- Student was in sixth grade. Early in the year, she was involved in a verbal conflict with another student; the school used a restorative justice meeting.
- Two weeks later, The student was physically assaulted at school.
- That night, she emailed her teacher about bullying and said she was scared, sad, and had wanted to kill herself since elementary school.
- The teacher forwarded the email to administrators, and the school's mental-health provider was asked to assess her.
- A vice principal told student's mother about the email and suicidal thoughts.
- Counselor assessed student and did not view her as a high suicide risk.
- Over the next two months, student continued emailing teacher about distress, feeling unsafe at school, losing friends, and cutting herself.
- Teacher referred her to counseling and later checked in with her.
- Student said she was "fine" shortly before winter break.
- During winter break, student died by suicide while at home with her father.
- Her family sued the school district, alleging negligent supervision, failure to implement suicide-prevention policies, survival damages, and negligent hiring/supervision.



What Happened In Court

- The parents sued the school for the student's bullying and death, alleging four causes of action: (1) vicarious liability for the negligence of its employees in supervising students on campus and responding to the student's mental distress; (2) breach of duties to fully implement policies for **student suicide** prevention; (3) a survival action for predeath injuries and suffering due to the alleged negligence; and (4) **negligent hiring**, supervision, and retention of employees who did not properly address the bullying or the student's mental condition.
- The trial court allowed the claims to move forward.
- The court explained that where a student "repeatedly expressed suicidal ideation to [the school] and indicated that she had engaged in self-harm there are triable issues of material fact regarding whether [the school] failed to exercise reasonable care in the circumstances.
- The court also determined that the student's "statements of self-harm raise a question of whether she suffered injury on campus due to negligent supervision that [the school] made no effort to correct and [her] parents were not given all information known to [the School] about the situation."
- Ultimately, on appeal, some of the claims were dismissed on a technicality, while others survived.



Other Recent Examples. . .

- The suicidal student and the student health center referral . . . everything went right.....until it did not.
- The Bully and the Broken Review System. . . "[Employee] needs to work on how they communicate with staff and students. Employee's tone can be offensive and abrasive to people who are not used to it, even though I know [employee] is only trying to help and sometimes had an awkward way of expressing it. I've not personally seen a problem because I know [employee] comes from a good place, but it is an opportunity for [employee] to improve."
- Coaches will be Coaches. . .



Suicides: What Can We Learn?

- **Adopt clear written protocols for suicide risk and bullying reports.**
- Policies should specify who must be notified, when parents/emergency contacts are contacted, when outside emergency services are required, and how staff escalate concerns.
- **Train frontline staff and student leaders.** Resident advisors, faculty, coaches, counselors, and administrators should be trained to recognize suicidal ideation, self-harm, bullying, harassment, and threats, and to report concerns immediately rather than handling them informally.
- **Document every report and response.** Universities should keep contemporaneous records of bullying complaints, mental-health disclosures, risk assessments, referrals, parent/emergency-contact communications, safety plans, and follow-up steps.
- **Use qualified mental-health professionals promptly.** When a student expresses suicidal thoughts, self-harm, or serious distress, the response should involve trained counseling or clinical personnel—not just peer leaders, faculty, or residence-life staff.
- **Communicate appropriately with parents, emergency contacts, and outside providers.** Subject to relevant privacy laws, universities should have protocols for contacting emergency contacts or medical professionals when a student presents a serious safety risk.
- **Follow up and monitor after the initial incident.** Liability risk often increases when a school learns of bullying or suicidal ideation but fails to check in, reassess risk, enforce anti-bullying measures, or ensure that referrals and safety plans are actually implemented.



Negligence: What Can We Learn?

- Adopt and enforce clear conduct policies.** Policies should define prohibited conduct, cover staff-to-staff misconduct, retaliation, hostile work environment concerns, and “toxic workplace” behavior, and explain reporting channels and consequences.
- Train supervisors and employees on reporting and escalation duties.** Universities should make clear that managers cannot dismiss complaints informally; they must document, report, and escalate harassment, bullying, retaliation, and workplace-safety concerns to HR, Title IX/EEO, or legal/compliance personnel.
- Create multiple safe reporting channels.** Employees should be able to report concerns to more than one office or person, including HR, EEO/Title IX, an anonymous hotline, ombuds, or compliance office—especially when the alleged bully is a supervisor.
- Investigate promptly and neutrally.** Complaints should trigger a timely, documented review by trained personnel, with interim measures where needed, witness interviews, preservation of evidence, and clear findings or corrective action.
- Protect complainants from retaliation.** Universities should monitor for schedule changes, exclusion, discipline, demotion, poor evaluations, or other adverse treatment after a complaint and act quickly if retaliation occurs.
- Document the response and follow through.** Keep records of the complaint, investigation steps, communications, remedial measures, discipline, training, and post-resolution check-ins to show the university took reasonable care and did not ignore known risks



A Word On Investigations.....

Prompt = Conducted “reasonably soon” after the complaint is filed or the you otherwise have notice (fact-sensitive and depends on such considerations as the nature and severity of the alleged conduct and the reasons for delay)

Adequate = Sufficiently thorough to “arrive at a reasonably fair estimate of truth.”

Not every situation needs to involve a full-blown investigation.

At a minimum, should be conducted by an impartial party and solicit information about the conduct from all parties involved.

An accused should not investigate themselves.....



The Best Investigations.....

- **Do Not Ignore Concerns Or Brush Them Off:** You cannot "unhear" a concern
- Efficient: prompt but well planned; thorough but do not "drag on"
- Impartial, objective, critical; conducted by disinterested and respected persons
- As confidential as reasonable
- Detailed, well-documented
- De-escalates emotions and tension
- Provides a meaningful and effective outcome
- Outlines grounds for responsive action
- Closure – effectively address the situation



CONTRACT RISK



EMPLOYMENT CONTRACT PITFALLS

2. **Term:** This academic appointment begins [REDACTED] 2024 and ends on [REDACTED] 2030. There shall be no expectations implied or stated of a renewal or succeeding appointment unless otherwise notified in writing by the Chief Academic Officer or the President of the University. Appointee shall be notified if a succeeding appointment will be offered no later than [REDACTED] 2029. Succeeding appointments, if offered and accepted, shall replace the current appointment.

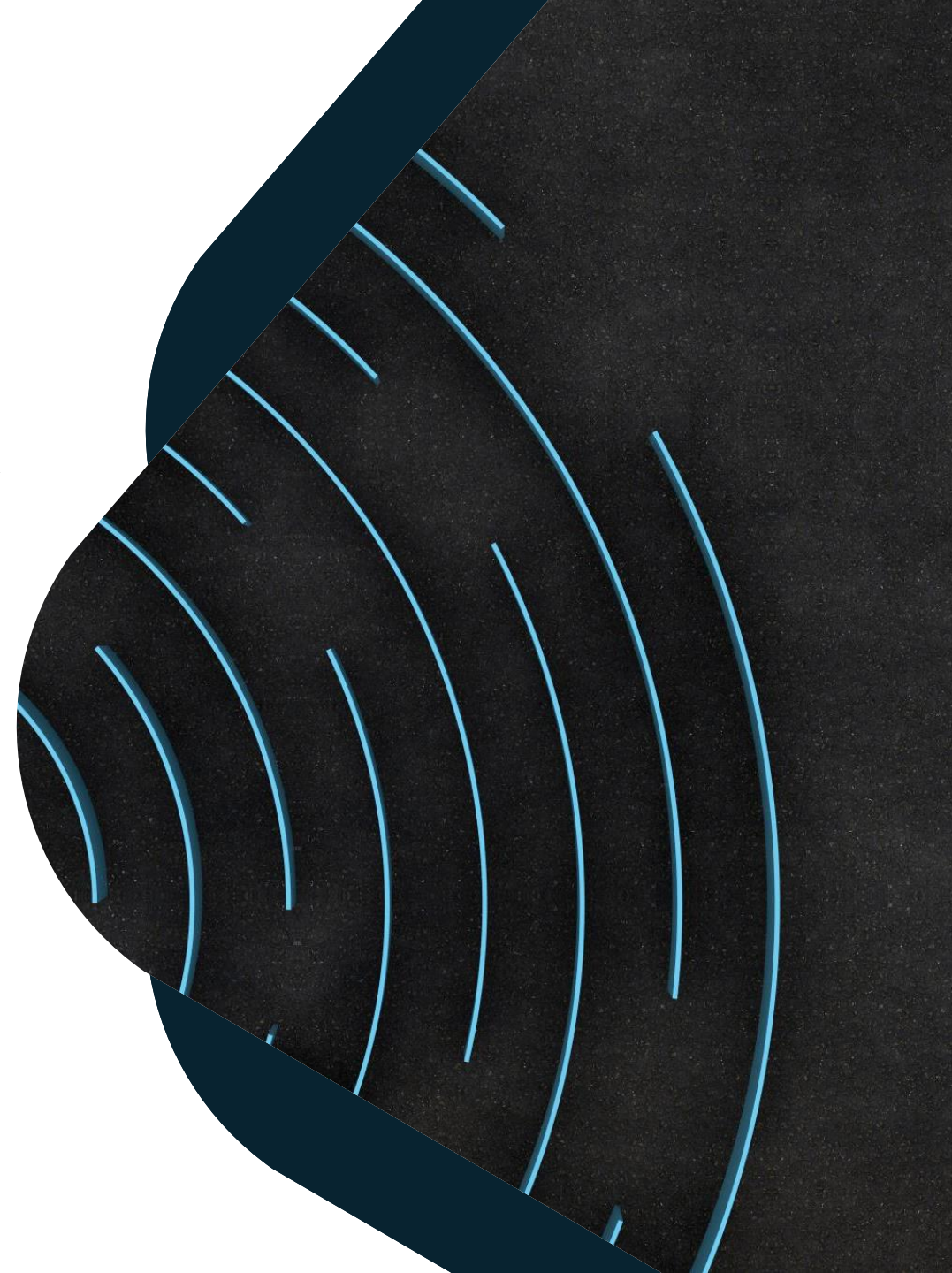
4. **General Policies:** The Faculty Member shall be subject to all faculty and human resources policies duly adopted and periodically revised by [REDACTED] [REDACTED]. The current policies [REDACTED] [REDACTED] [REDACTED] [REDACTED] The policies and procedures are subject to change. [REDACTED] [REDACTED] agrees that no change in policy or procedure will deprive the Faculty Member of any monetary payment that has accrued under the previous policy or procedure.

9. **Limited Offer of Employment:** This agreement for academic appointment expires if not signed by the faculty member within 30 days of the initial offer, as indicated by the signature date of the authorized offeror.

What Concerns Do You See?

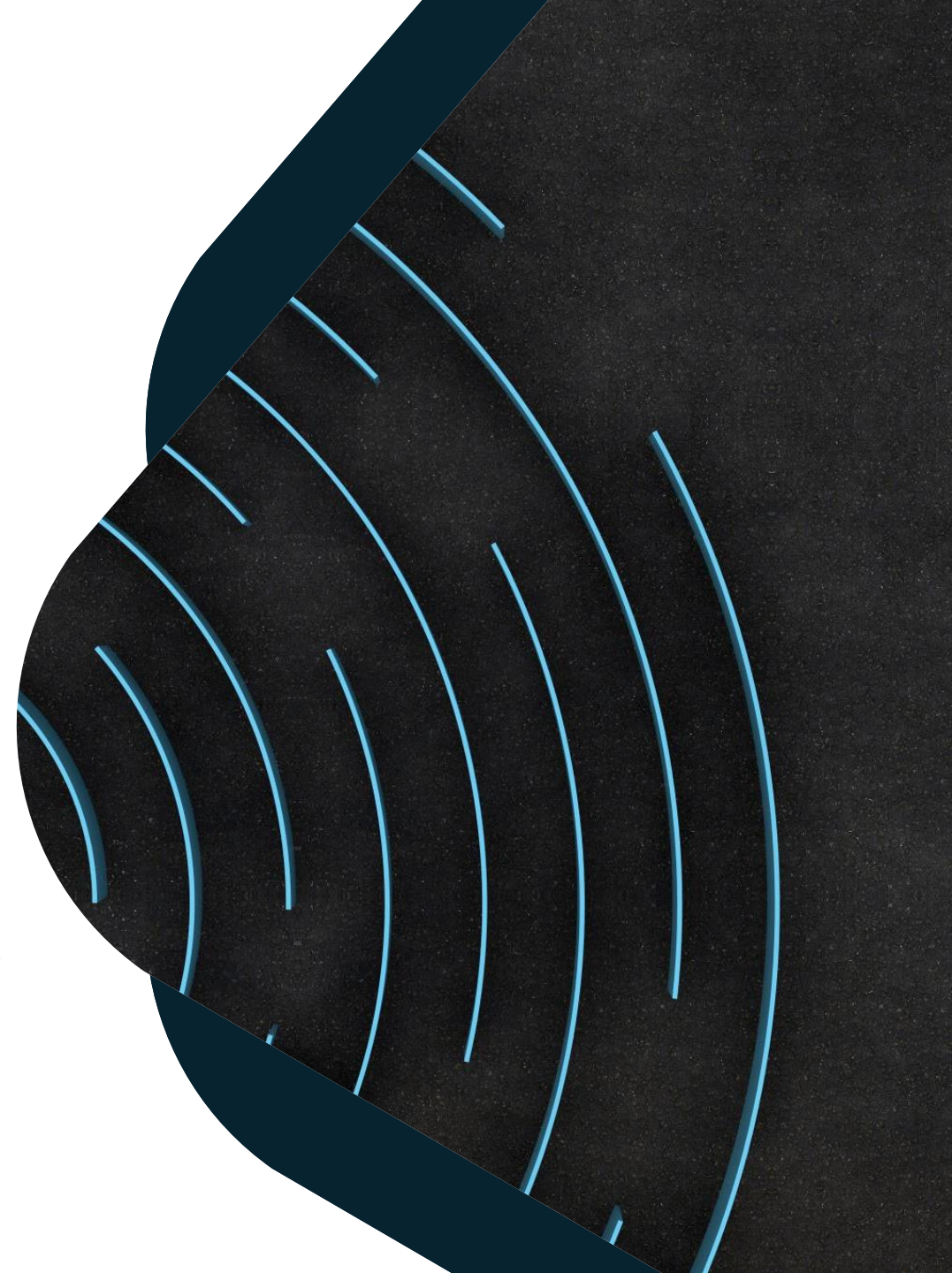
- No at-will employment language
- Very long term
- No escape route – what happens between signing and commencement of term?
 - E.g. term starts August but contract signed prior March
 - Bad Drafting Begets Bad Results
- Subject to the handbook with complicated procedure.
- Handbook also was not necessarily clear about at-will employment.
- What About Auto Renewals?

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Employment Contracts: What Can We Learn?

- How could these provisions have been improved?
 - If the employee is at-will, say so
 - Consider shorter terms
 - Give yourself escape routes at all steps in the process
 - Do not rely on the Handbook to fill contract voids, especially if the policies have not been properly reviewed by legal.
 - Handbooks Should Not Be Contractual
 - **Think about your processes – are you being intentional with each step?**
 - Have administrative stops in place to ensure administration, deans, and HR are all aligned AND communicate before an auto-contract populates



REAL CASES

- A University uses an employment contract without clear “at-will” employment language but incorporates the Employee Handbook by reference. In this case, the handbook directed to a policy that would require following Title IX style proceedings prior to termination.
 - **What problems do you see with this?**
- A School adopts a student discipline policy from another institution. The policy that they have adopted was copied without legal review. The Discipline policy refers to offices, staff members, and forms that do not exist at the adopting School’s facility.
 - **What problems do you see with this?**



PROCESS-BASED CONTRACT CLAIMS



STUDENT DISCIPLINE

Allegations of

- Bias
- Arbitrary outcomes
- Procedural inconsistency

• **Real World Case:**
The Case of the New Evidence

The gap between policy and
practice = litigation risk

FACULTY DISCIPLINE

Allegations of

- Procedural inconsistency
- Fails to Meet Practice or Expectations

- **Real World Case:**
"You Promised Me Due Process"

PROCESS-BASED CLAIMS

The Key to Process-Based Claims:

- **Align written policies with your actual procedures**
- **Do a real-world policy audit**
- **Build in Flexibility – this is critical**
- **"May" vs "Shall" or "Will"**
- **Reserve the Right to Make Changes**
- **Reserve the Right to Consider Evidence**

MITIGATING CONTRACT RISK



STUDENT CONTRACT ISSUES

- What provisions can we include to protect ourselves when litigation arises?
- Liability Limitations
- Jury Waiver
- No “right” to a degree

“



A REAL EXAMPLE

- A Florida university was sued and in its enrollment agreement, the school had specifically limited damages to only what is paid for tuition. For example, damages related to future earnings were prohibited.

Disclaimer/Release of Liability

I understand that by enrolling at [REDACTED] I am not guaranteed a degree. I agree that should I be dismissed for any reason, [REDACTED] liability for any such dismissal would be limited to present damages consisting of lost tuition and any costs associated with attendance [REDACTED] In no event shall [REDACTED] liability exceed the total amount of fees paid to [REDACTED] nor shall [REDACTED] be liable for incidental or consequential damages of any kind. I specifically understand and agree that I will not be entitled to seek future damages for losses incurred as a result of the failure to obtain a degree.

WHAT HAPPENED IN COURT?

- Due to the way that the language was drafted in the enrollment agreement, the Judge GRANTED the University's Motion for Summary Judgment as to the limitation of damages.

This court entered an Order on [REDACTED] denying defendant's Motion for Summary Judgment. That Order did not address Defendant's specific argument found in paragraphs 28-38 of the Motion. After carefully considering the arguments raised and after reading the words contained in the agreement, the other filings and the cases, the court finds the motion should be GRANTED as to [REDACTED] limitation of damages.

DONE AND ORDERED ON _____
[REDACTED] County, Florida.

[Signature]

CIRCUIT JUDGE

Copies furnished: ☐ In Open Court

Consequential Damages Waivers

Managing the Biggest Number in the Case

Litigation Trend

Students claim:

Lost career trajectory

Lifetime earnings impact

Key Legal Concept

- These are consequential damages - and they can potentially be limited or waived in enrollment agreements.

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STUDENT CONTRACT ISSUES (EXAMPLE#2)

Any claim arising out of my agreements with, attendance at, or dismissal or removal from [REDACTED] shall be decided exclusively by a judge without a jury, including without an advisory jury, and to the fullest extent permitted by law, shall be heard exclusively on an individual (and not class or collective) basis. Should any provision of this agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified by the Court to be enforceable, such provision shall immediately become null and void, leaving the remainder of this agreement in full force and effect.

Jury Trial Waivers

Controlling Who Decides the Case

Judges:

- More predictable
- Focus on contracts and standards
- Focus on actual proof and facts, not emotions

Juries:

- More reactive to narrative
- David vs. Goliath
- Higher damages risk

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Key Points to Consider for Contracts

Ask yourselves: “Are we controlling *how* disputes are decided?”

Consider jury waivers in:

- Enrollment agreements
- Faculty contracts

Enrollment agreements should:

- Define scope of relationship
- Limit damages
- Do not promise any outcome or degree



AI RISK



AI, Privilege & Emerging Risk

The Tool You Don't See Creating Exposure

Emerging Legal Issue:

- Inputting sensitive information into AI tools may:
- Constitute disclosure to a third party
- Risk waiver of attorney-client privilege
- **Privilege can be lost not by intent—but by uncontrolled sharing**

Implement AI Use Policies and Restrictions

- Student Discipline
- HR Matters



Real World Example

- A criminal Defendant, indicted on federal securities fraud charges, independently used a consumer AI tool to draft legal arguments and outline potential defenses.
- He later argued these AI-generated materials were privileged because he shared them with his attorneys to obtain legal advice.
- The government sought these materials and his prompts
- **WHAT DO YOU THINK HAPPENED?**



What Happened In Court

- Following the pre-trial privilege ruling, the court allowed the unprivileged consumer AI prompts to be used as active evidence in the trial.

The Court held:

The Communications Were Not Between Client and Counsel: The court rejected the privilege claim, emphasizing that the AI is not a licensed attorney, and the Defendant consulted the tool on his own initiative rather than at the direction of his lawyers.

- No Expectation of Confidentiality:** By inputting sensitive details into a public AI platform with privacy policies that allow for data collection, model training, and third-party disclosures, the Defendant destroyed any reasonable expectation of privacy.

- Waiver of Privilege:** The judge determined that even if some inputted facts originated from his legal counsel, inputting them into the public AI platform actively waived confidentiality and privilege.

- No Work Product Protection:** The court held that the work product doctrine does not apply because the AI materials were neither prepared by an attorney nor drafted at the direction of one



What Can You Learn From This?

- **AI is not your lawyer:** communications with an AI platform are not attorney-client communications.
- **No reasonable expectation of confidentiality:** the court emphasized that the platform's privacy policy allowed collection, use, training, and potential disclosure of user inputs/outputs.
- **Sharing privileged information with AI can waive privilege:** if a user inputs attorney advice or defense strategy into a third-party AI tool, the privilege may be lost.
- **Work product requires lawyer direction or strategy:** materials created by the client using AI on his own initiative were not protected merely because they related to anticipated litigation.
- **Practical takeaway:** institutions should adopt clear AI-use policies: do not enter privileged, confidential, or litigation-strategy information into public AI tools unless approved and protected by counsel-controlled safeguards.



A Word On Crises Management...

- These scenarios and risks can be very stressful.
- How you communicate internally and externally is important.
- “Everything you say can and will be used against you.”
- You need to consider privilege
- What you say – and what you choose not to say - can be just as important as what you do
- Consider looping in counsel before you engage crises communications team so that legal risks and privilege can be considered.



Rapid Scenario Recap

Scenario 1:

- Three informal complaints—no findings—retain or act?

Scenario 2:

- Policy says “will” but practice says “usually”—risk?

Scenario 3:

- “Strong decision, weak documentation”—problem?”



THANK YOU

“Courts don’t evaluate your intentions—
they evaluate your process, your consistency, and your documentation.”