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Is Your Syllabus a Contract? A Comparison of the SoTL Literature and “The Law”

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Who Says a Syllabus is a Contract?

◆ The Academic Literature

- ◆ “The Purpose of of a Syllabus,” *College Teaching* (2002)
- ◆ “An Examination of the Integrity of the Syllabus,” *College Teaching* (2005)
- ◆ “The Course Syllabus: Contract, Culture, and Compass,” *Teaching Professor* (2010)

◆ Colleges

- ◆ <http://www.personal.psu.edu/scs15/idweb/syllabus.htm>
- ◆ <http://wp.auburn.edu/biggio/preparing-to-teach-at-auburn/creating-a-syllabus/>
- ◆ <http://cte.illinois.edu/resources/topics/syllabus/purpose.html>

◆ Professors and Students?

The Academic Literature's View

- ◆ If students sign the last page of a syllabus, then it is a “binding agreement” (Matejka & Kurke, 1994, *College Teaching*)
- ◆ “The first purpose of a syllabus is to serve as a contract between the instructor and student” (Parkes & Harris, 2002, *College Teaching*)
- ◆ A syllabus is a contract (Habaneck, 2005, *College Teaching*, citing the 2002 Parkes & Harris *College Teaching* article)
- ◆ Syllabi are a paper contract between faculty and students (Slattery & Carlson, 2005, *College Teaching*)
- ◆ Syllabi are complex legal contracts (Thompson, 2007, *Communication Education*)
- ◆ A course syllabus is a contract between instructor and student (Zucker, Baker-Schena & Pak, 2010, *The Teaching Professor*)
- ◆ Syllabi are contracts (Ludwig, Bentz & Fynewever, 2011, *Journal of College Science Teaching*, citing the 2002 Parkes & Harris *College Teaching* article)

Do Professors and Students Think a Syllabus is a Contract?

- ◆ In a 2009 survey of 27 nursing faculty and 199 students at an undergraduate nursing program, 74% of faculty and 49% of students believed a syllabus was a contract (Shoni & Schrader, *Journal of Nursing*)

A Primer in Contract Law

- ◆ A contract is an agreement...but, not every agreement is a contract
- ◆ A contract is a legally enforceable agreement made by capable parties over something that is permitted to be done, and is made with consideration
- ◆ A contract requires “consideration,” which is a bargained-for exchange
- ◆ A contract allows one to sue for damages in the event of breach

The Unique Relationship Between College Students and Their Universities

- ◆ Students and their institutions are in a contractual relationship
 - ◆ *Zumbrun v. University of Southern California* (Cal. App. Ct. 1972)
 - ◆ *Ross v. Creighton University* (7th Cir. 1992)
 - ◆ *Gordon v. Purdue University* (Ind. App. Ct. 2007)
 - ◆ *Jamieson v. Vatterott Educational Centers, Inc.* (D. KS 2009)
- ◆ But, institutions and faculty are generally held to an “arbitrary and capricious” standard as it concerns their professional judgment
 - ◆ *Susan M. New York Law School* (NY 1990)
 - ◆ *Gupta v. New Britain General Hospital* (Conn. 1996)
 - ◆ *Amaya v. Brater* (Ind Ct. App. 2013)
- ◆ The arbitrary and capricious, or bad faith, standard provides immunity-like protection to professors
 - ◆ *University of Michigan v. Ewing* (U.S. S. Ct. 1985)
 - ◆ *University of Missouri v. Horowitz* (U.S. S. Ct. 1978)
 - ◆ *Bilut v. Northwestern University* (Ill. App. Ct. 1994)

A Syllabus Does Not Meet the Legal Requirements of a Contract

- ◆ A syllabus lacks consideration
 - ◆ *Di Lella v. University of D.C. David A. Clarke School of Law* (D.D.C 2008)
 - ◆ *Hoppe v. College of Notre Dame of Maryland* (D.Md. 2011)
- ◆ Courts are incapable of being the forum for syllabus-related disputes
 - ◆ Can a professor sue a student for breach of contract, because of the syllabus?
- ◆ Professors have a pre-existing duty, with respect to the students

Courts Have Already Ruled That a Syllabus is *Not* a Contract

- ◆ *Collins v Grier* (Ohio Ct. App. 1983)
- ◆ *Yarcheski v. University of Medicine and Dentistry of New Jersey* (N.J. Super. Ct. 2008)
- ◆ *Miller v. MacMurray College* (Ill. App. Ct. 2011)
- ◆ *Gabriel v. Albany College of Pharmacy and Health Sciences – Vermont Campus* (D. Vt. 2012)

What Courts Have Said About Syllabi

- ◆ “[T]here is no contract between a professor or instructor and a student created by the syllabus or university guidelines. A professor or instructor’s failure to abide by the syllabus or university guidelines will be actionable only under the same circumstances that any other academic evaluation decision is justiciable: that is when the conduct is alleged to be arbitrary or capricious or to constitute bad faith.” *Collins v. Grier* (1983)
- ◆ [A syllabus] “does not contractually obligate the college but instead, is a variable metric devised by the individual course instructor.” *Miller v. MacMurray College* (2011)
- ◆ “The court finds no legal support for treating a course syllabus as a contract. The few courts that have considered the issue have concluded that a syllabus does not constitute a contract....Indeed, a valid contract requires several elements, including mutual agreement and valuable consideration....A course syllabus—which commonly outlines reading requirements, test dates and the like—does not have any such attributes.” *Gabriel v. Albany College of Pharmacy and Health Sciences – Vermont Campus* (2012)

Are Students Intended Third-Party Beneficiaries of a Professor's Contract?

- ◆ Students have been found to be “intended” third-party beneficiaries of contracts made by educational institutions
 - ◆ *Seiwert v. Spencer-Owen Comm. School Corp.* (D.Ind. 2007)
- ◆ But—courts are reticent to make students the intended beneficiaries of faculty employment contracts
 - ◆ *Verni v. Cleveland Chiropractic College* (Miss. 2007)
- ◆ Even if granted third-party status, students would be hard-pressed to bring a syllabus within the ambit of the faculty employment contract
 - ◆ *Reardon v. Allegheny College* (Pa. Sup. Ct. 2007)

Why It is Risky to Call a Syllabus a Contract

- ◆ The doctrine of “estoppel” could apply
 - ◆ Be careful what you wish for
- ◆ If a syllabus were a contract, it would be an “adhesion contract”
- ◆ If a syllabus were a contract, one should consider including an arbitration clause
 - ◆ College students have been bound by arbitration clauses
 - ◆ *Brumley v. Commonwealth Business Educ. Corp.* (Ind. Ct. App. 2011)
 - ◆ *Rosendahl v. Bridgepoint Educ., Inc.* (D. Cal. 2012)

Why It is Good to **Think** Your Syllabus Is a Contract

- ◆ It encourages a heightened focus on policy consistency
- ◆ It might result in a less authoritarian, more collaborative document
- ◆ It causes one to think like a lawyer and plan for the “what ifs”

Contract Drafting Tips for Syllabi Creation

- ◆ Imagine the possibility of your policies
- ◆ Avoid the risk of over promising (and under delivering)
- ◆ Consider using a definitions section
- ◆ Minimize the minutiae through incorporation by reference
- ◆ Include your own version of a “force majeure” clause