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Debra Zumwalt, general counsel of Stanford University, is one of a number of campus counsel who say their schools already had a similar "affirmative consent" standard for sexual assault cases.

University counsel mull new consent law

By Alison Frost
Daily Journal Staff Writer

As the topic of sexual assault has hit the national stage in recent years, a particularly bright spotlight on college campuses has caused university legal departments to feel the heat.

Stanford University's general counsel, Debra Zumwalt, said she may spend 15 to 20 percent of her time on sexual assault issues and that another lawyer in her office spends even more. Scripps College's outside general counsel, Larry Walraven, pegged the portion of his time focused on sexual assault at the school between 50 and 60 percent. And the topic is "always" on the mind of Occidental College General Counsel Leora Freedman. She said she thinks about it in "everything" that she does.

"It's not as if these issues weren't significant before," said Christopher Patti, general counsel of UC Berkeley. "But I would say in the last one-and-a-half years the percentage of time that we've been spending on these issues has gone up three or four times — maybe

more."

Enter California Senate Bill 967, which joins several federal laws, including Title IX and the Clery Act, in directing schools on how to act on this issue. Introduced by Sens. Kevin de Leon and Hannah-Beth Jackson in February, the bill passed the state Senate unanimously on Aug. 28, was signed by Gov. Jerry Brown Sept. 28, and will take effect Jan. 1.

Of more than a dozen California college general counsel interviewed, most agreed that, though "not a sea change," SB 967 is an important law. But what it looks like on the ground can differ widely from school to school.

Nicknamed by many as the "yes means yes" law, SB 967 is the first law in the nation to require schools to adopt an "affirmative consent"

standard for sexual assault cases in order to receive state funding. Affirmative consent is defined as "affirmative, conscious, and voluntary agreement to engage in sexual activity."

Many general counsel were quick to explain that their schools already had such a standard in place before the law came about. Stanford and Occidental enacted affirmative consent language in 2011, their general counsel said. And Charles Robinson, general counsel of the UC Board of Regents, said the University of California system "began its efforts in advance of any request from the Legislature to assist in developing legislation."

According to Walraven, "This affirmative consent law is sort of catching up to where most of the colleges are now."



KEVIN S. REED

“We’ve actually seen a significant upturn in reports of sexual misconduct. We think that is good news, ironically. Our belief is it doesn’t mean there’s more sexual assaults —we’re just creating a culture where a student feels comfortable describing her experience.”

— Kevin S. Reed,
Vice Chancellor for Legal Affairs
UCLA



CHARLES F. ROBINSON

“[SB 967] is certainly on every agenda with the lawyers in my department who are overseeing these issues.”

— Charles F. Robinson,
General Counsel and
Vice President
Regents of the
University of California

“It is impossible to, in situations like this, have everyone come out of it feeling, ‘Okay, that was good.’ Someone’s going to be pissed off. And the challenge is to make sure, from my perspective, that investigations are prompt, thorough and impartial — free from the political dynamics — and that when there’s a finding that it’s warranted by evidence ... ”

— Carl A. Botterud
(Of Counsel, Ritt Tai Thvedt & Hodges LLP)
Former General Counsel
Occidental College



GLEN E. KRAEMER

“I would expect that there’s going to be several states following suit in short.”

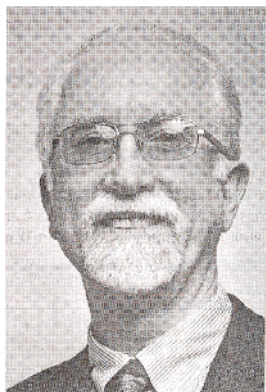
— Glen E. Kraemer,
(Co-founder,
Hirschfeld Kraemer LLP)
Outside General Counsel
Pomona College



LEORA D. FREEDMAN

“The legislation is important, but you really have to put all the pieces together to make it work. Having an affirmative consent model alone won’t solve the problem of sexual assault on campus.”

— Leora D. Freedman,
General Counsel
Occidental College



CHARLES L. CAMPBELL

“Since '92 when I've been formally involved as general counsel we haven't had any complaints of non-consensual sex.”

— Charles L. Campbell,
(Partner, Baker Manock & Jensen PC)
Outside General Counsel
Deep Springs College



FRAMROZE M. VIRJEE

“Both the federal and state governments are continually updating the laws regarding this, which, as a lawyer, can be frustrating, but, in fact, helps us in that it causes us to reevaluate and reexamine what we're doing, and as we do that we look for best practices.”

— Framroze M. Virjee,
Executive Vice Chancellor
and General Counsel
California State University

“I think that the new bill is helpful, at least from our perspective, in trying to develop consent culture.”

— Larry A. Walraven
(Founder, Walraven & Westerfeld LLP)
Outside General Counsel
Scripps College

“I think the kids are a little more interested to read our conduct code now.”

— Janine P. DuMontelle
University Counsel and Associate Vice President for Legal Affairs
Chapman University

“We did roll out new training and education programs for incoming freshmen this year. We had a very high rate of students taking those programs, but [about 440] students have not yet taken them. We are contacting those students. We're letting them know that it's a requirement that they take them and then their registration for next semester's classes will be blocked until they comply with the training.”

— Christopher M. Patti
Chief Campus Counsel and Associate General Counsel
UC Berkeley



WILLIAM R. GROVES

“Because we don't have residence halls or younger students whose frontal lobes haven't developed and we don't have alcohol to deal with, we don't have these kinds of issues.”

— William R. Groves,
General Counsel
Antioch College



DEBRA L. ZUMWALT

“I think affirmative consent is a good policy, but I think it shouldn't just apply to colleges and universities.”

— Debra L. Zumwalt,
Vice President and
General Counsel
Stanford University

Continued from page 1

"It doesn't actually inject a new set of criteria of what traditionally has been used — it just puts it in black and white," said Michael Vartain, who is outside general counsel to a variety of schools in the Bay Area, including Golden Gate University. "I think the colleges are worried about being sued, but they're not worrying about complying."

Yet general counsel said SB 967 has contributed to important changes in campus culture.

"The kids are a little more interested to read our conduct code now," said Janine DuMontelle, general counsel of Chapman University.

"Having this new law is important in getting people to think about the issue of consent," said Occidental Title IX coordinator and attorney Ruth Jones.

Pomona College's outside general counsel, Glen Kraemer, agreed. "I think it's going to allow for greater discussion, understanding and clarity on college campuses," he said.

Zumwalt noted increased attention to sexual assault issues is driving campuses to devote more resources to the area.

"At the end of the day the conversations are making campuses safer," said Carl Botterud, who left his post as general counsel of Occidental in August 2013 after a faculty vote of "no confidence" based on his handling of sexual assaults on campus.

Seemingly contrary to that picture of safety, many general counsel reported significant upticks in their sexual assault reports. Each one contended that's, ironically, a good thing — it means more students feel comfortable coming forward.

There are some exceptions.

Christopher Campbell said there have not been any complaints of non-consensual sex since he started as outside counsel to Deep Springs College in 1992.

That isn't because the school is all-male, he said. "We are a solely male student body but that obviously doesn't mean sex is out of the

question."

Rather, he argued, the lack of reporting is a function of Deep Springs' size, location, drug and alcohol policies and student self-governance. The two-year private, alternative college has between 24 and 28 students in total each year who share a single residence hall on a ranch 45 miles from the nearest town of significant size.

"We don't have strangers coming through — that sort of random attack that obviously is a problem in our wider world is not one in ours," Campbell said. "If there is somebody unusual on campus everybody knows it and finds out who they are and either welcomes them or escorts them off."

He said drugs and alcohol are prohibited for students and the no-tolerance policy is enforced rigorously by the student body itself.

Antioch College is another school that claims assaults are rare. Based in Ohio, the non-residential, alcohol-free school has campuses in Los Angeles and Santa Barbara,

and the students are typically 25 or older.

"Because we don't have residence halls or younger students whose frontal lobes haven't developed and we don't have alcohol to deal with we don't have these kinds of issues," Antioch General Counsel William Groves said. "They just don't come up."

Years ago, Antioch was a pioneer on the "yes means yes" policy. It added affirmative consent language to its policy in the 1990s while under different management. According to Groves, "the college was almost uniformly lampooned for the entire notion throughout higher ed."

Now, neither Deep Springs nor Antioch has an affirmative consent sexual assault policy.

All-women's liberal arts school Scripps College, on the other hand, does have a large number of assaults and does have such a policy, but faces challenges as the only all-women's college in a seven-school consortium. The school received

six reports of sexual assault in 2013, Walraven said, including three that occurred in prior academic years but weren't previously reported.

"One of the unique things about Scripps is that most of our sexual misconduct cases don't involve a Scripps person as the respondent," said Walraven.

Instead, respondents tend to be from one of the undergraduate liberal arts colleges adjacent to Scripps' campus in Claremont: Claremont McKenna College, Harvey Mudd College, Pitzer College and Pomona College.

Because only the school a student attends can discipline him or her, Scripps students are usually subject to hearings at other campuses.

At Pomona, sexual assault reports climbed from one in 2011 to two in 2012 to three in 2013. The school's Title IX coordinator, Daren Mooko, predicted the 2014 numbers would "eclipse" the previous three years' numbers combined.

New regulations in recent years have led the Claremont schools

to revise their policies, with an eye toward common definitions across the consortium. That way, Walraven said, they "never have a situation where the result would be, 'Well it's not a violation of our policy so we're not going to do anything about it.'"

At Stanford, Zumwalt worries SB 967 puts too much of the onus to do something about sexual assault on schools.

"If it's good law, we should apply it more broadly, because there is sexual assault [everywhere]," Zumwalt said.

"Certainly we want to do everything we can, but we don't have the resources to put people in jail and we can't subpoena witnesses from people who are not connected to the university to come testify, and we don't have the criminal labs and the forensic things that other people have.

"We have the criminal justice system for a reason."

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