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April 12, 2010

Michael R. Smith  
University of California at Berkeley  
Assistant Chancellor – Legal Affairs  
200 California Hall #1500  
Berkeley, California 94720-1500

Susan P. Trageser  
Director, Assistant Dean of Students  
Office of Student Conduct  
2536 Channing Way  
Berkeley, CA 94720

Dear Mr. Smith and Assistant Dean Trageser:

We are writing to inform you that the University of California, Berkeley students, for whom we have attached confidentiality waivers, have retained us as counsel for all matters related to Student Conduct proceedings.<sup>1</sup> All of our clients received notices from the Student Conduct Office of these proceedings. These notices concern events that occurred at University properties on October 6, 2009, November 18, 2009, November 20, 2009, and December 11, 2009. The attached confidentiality waivers grant us permission to interact directly with Office of Student Conduct staff on our clients' behalf.<sup>2</sup>

In all future communications with the students we represent, please contact our office as well.

#### Student Right to Procedural Due Process

After reviewing the Code of Student Conduct, we notice that it purports to ban legal counsel from formal disciplinary proceedings. It is our position that state and federal law provides basic constitutional due process rights to students. Although the University has no duty to provide students a lawyer, it cannot restrict the student's right to counsel. *Andersen v. Regents of Univ. of*

<sup>1</sup> Angela Miller is represented by Steve Rosenbaum with respect to her individual student misconduct hearing.

<sup>2</sup> Please be advised that you may be contacted by other attorneys from our firm or law students working under our firm's supervision on this matter.

*Cal.* (1972) 22 Cal. App. 3d 763, 772. While the Berkeley Campus Code of Student Conduct allows students to have advisors interact with University staff on their behalf during informal disciplinary procedures, our clients demand that they be represented by counsel during formal hearings if these charges and investigations are not resolved informally.

UCB's *Policy on Student Conduct and Discipline* makes plain that "[p]rocedural due process is basic to the proper enforcement of University policies and campus regulations .... Consistent with this requirement, procedures specified in such regulations shall be appropriate to the nature of the case and the severity of the potential discipline." § 103.11 (rev. Oct. 20, 2008), UC POLICIES (<http://www.ucop.edu/ucophome/coordrev/ucpolicies/aos/uc100.html>). Contrary to UC's own policies reiterating students' Constitutional rights to due process, *the Berkeley Campus Code of Student Conduct* denies students facing disciplinary charges the right to counsel. Code § I-F.<sup>3</sup> Former versions of the *Berkeley Campus Code of Student Conduct* allowed for the right to counsel for students during student misconduct hearings.

Under longstanding California jurisprudence, however, rules governing disciplinary hearings at public universities are subject to constitutional due process restrictions. *Goldberg v. Regents of Univ. of Cal.* (1967) 248 Cal. App. 2d 867, 875 (holding that "the University's rule-making powers and its relationship with its students are subject to federal constitutional guarantees"). The elements of due process include: "(1) notice containing a statement of specific charges against him/her, the names of witnesses and a statement of the gist of their proposed testimony, and (2) a hearing, the scope and nature of which should vary according to the circumstances of the particular case." *Andersen v. Regents of Univ. of Cal.* (1972) 22 Cal. App. 3d 763, 772. Additionally, federal courts generally find the right to counsel in student hearings. *See Gonzales v. McEuen*, 435 F. Supp. 460, 467 (C.D. Cal. 1977); *Black Coal. v. Portland Sch. Dist.*, 484 F.2d 1040, 1045 (9th Cir. 1973) (affirming district court ruling).

Representation by counsel in these proceedings is an essential component of the requirement for due process. A fair hearing is not a hearing of any sort. A fair hearing contains attributes such as the right of a student to cross-examine adverse witnesses, confront the person accusing him/her of

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<sup>3</sup> "*Students must speak on their own behalf* but may be accompanied by one advisor at any stage of the proceedings, at his or her own expense.... In a formal hearing, the student may consult with his or her advisor throughout the proceedings, however, *advisors may only participate directly if the hearing panel, in its discretion, believes such participation would benefit the proceedings.* The extent of such participation will be determined by the hearing panel." [emphasis added].

wrongdoing, a reasonable evidentiary standard, and such protections for the student as the right to remain silent and testify on his/her own behalf.

Right to inspect files and records

As you know, a number of our clients attended informal interviews at OSC with law student representatives assisting us. At many of these interviews, OSC produced student conduct files containing only a copy of a notice to appear or a police report without any meaningful detail supporting allegations against our clients. If OSC has additional evidence, our clients demand immediate access to that evidence under Cal. Gov. Code § 6250, et seq., Cal. Civ. Code § 1798.24, and the Family Educational Right to Privacy Act 20 U.S.C. § 1232(g). Each student attending an interview was provided with an incomplete record in violation of these statutes.

Request for dismissal of the charges

If there is no additional evidence than that provided at the informal hearing, the charges and investigations are wholly unsupported, and we demand that they be dropped immediately.

If you do find sufficient evidence to support a charge against any student represented by us, please provide a written statement of (1) the offense charged, (2) the specific elements of each offense necessary to find student responsibility, and (3) a document that describes the evidence maintained by your office that reasonably satisfies each element of the offense. Please attribute each piece of evidence to a witness or other source that will be present at the students formal conduct proceeding should one be necessary to resolve these matters.

Request for unrestricted representation

Please consider this to be a formal request on behalf of each of the students listed below to have us represent them in any student disciplinary proceeding. It is simply inconceivable that an untrained student can fully realize adequate due process protections without competent and unrestricted representation. While the representation need not be a lawyer, and a student can choose to proceed without a representative, in this case, these students retained us as their representatives and now formally request that we be included and unrestricted in our participation from this point forward.

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If this request is denied, please provide a written statement explaining why and precisely what role a representative can play in discipline proceedings. Please detail any legal authority that you rely on.

#### Request for public hearings

Each student we represent requests the option of a public hearing. The provision in the Code of Student Conduct that permits closed hearings is understandable in light of some students' strong interest in privacy. In the event that a student waives her privacy interest, and there is no indication that a public hearing would disrupt the formal proceedings, the University should hold a hearing that is open to the public. There is no countervailing University interest at play. A public hearing is one of the foundational elements of due process because it lends legitimacy and fairness to any proceeding.

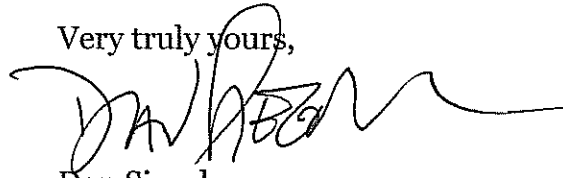
#### Request for timely resolution

As you know, the Code of Student Conduct provides a timeline of 75 days to resolve any conduct proceeding. Our clients are universally outside of that time limit, representing further acts of retaliation against our clients in order to drag this process out and chill their free speech rights, as well as those of the broader student community. An essential component of fair process is the timely resolution of charges, such that a student can move on with his life and academic career. While the Code seems to allow an extension for unusual circumstances, we are not aware of any valid extension of the timeline and insist that proceedings adhere to the published University policy or that the University cease pursuing charges against each of our clients.

We look forward to working with you to resolve these issues and any conduct charges filed with your office against these students. Please respond to each of the requests listed above within ten days. It is our belief that federal due process requires no less than an affirmative response to each request. If you fail to respond or respond with a negative, we will be forced to vigorously and fully investigate each client's legal options so that they can fully exercise their rights.

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Very truly yours,

A handwritten signature in black ink, appearing to read 'Dan Siegel', with a long horizontal flourish extending to the right.

Dan Siegel  
Anne Weills  
Jose Luis Fuentes  
Marc-Tizoc Gonzales