Codes & Judicial Committee

October 22, 2010 Meeting

3:30PM, B12 Day Hall

PROPOSAL FOR AMENDMENT TO CAMPUS CODE, TITLE III, ARTICLE III, § 3.b.(6)(c)

Presented by: Evan Magruder, Law ’11, Sr. Asst. at the Office of the Judicial Codes Counselor

Gleb Drobkov, ILR ’11, Voting Member on the Codes and Judicial Committee

I. Current text

*(c) Members of the Hearing Panel may question witnesses and adduce evidence, but this shall not preclude parties to the hearing from questioning witnesses or*

*introducing evidence. No accused person shall be denied the opportunity to question witnesses or to confront his or her accusers. However, the Hearing Board Chair shall control the hearing. For example, to avoid the risk of intimidation, the Hearing Board Chair may require certain questioning to be conducted by written questions read aloud to the witness by the Hearing Board Chair. \*If an individual complainant does not testify, the Hearing Panel may proceed to decision only if it finds that the complainant’s interests in not testifying outweigh the accused’s interests in confronting his or her accuser.\* In any case, the accused can prevent the introduction of any written, recorded, or oral account of an earlier statement by a nontestifying complainant or victim, unless the Hearing Board Chair finds compelling circumstances of need for and reliability of such statement. If a witness critical to the proof of the charges or to the defense against those charges indicates to the Judicial Administrator or the accused that he or she refuses to testify, the Judicial Administrator or accused may ask the Hearing Board Chair to order the witness to testify. The Hearing Board Chair shall, in his or her sole discretion, grant or deny the request based on the balance of equities for the witness, the complainant, the accused, the victim, and the University. If a witness does not appear for a scheduled hearing, the Hearing Board Chair may decide whether to delay the hearing pending the witness's testimony.*

II. Problems with current text

1. JAO permitted to proceed against accused on behalf of University; University becomes the complainant.
2. Code, page 28 (provision quoted above) permits UHB to decide cases where “an individual complainant does not testify” only where UHB first weighs the interest of complainant in not testifying against interest of accused in confronting his/her accuser.
3. University not “individual complainant.”
4. Balancing test not required where University proceeds as complainant.
5. University proceeds as complainant in many cases where a traditional “victim” exists (i.e., in assault, harassment, endangerment cases) but victim does not want to testify or press the case against the accused.
6. This permits JAO to prosecute accused students while denying the accused the right to confront the real accuser in the case, i.e., the victim or target of the offense.
7. Example: fight between two students, A and B, in May. B graduates and does not file a JA complaint against A. JAO hears of fight and initiates investigation. JAO files endangerment charges (using one’s fists as a weapon) against A. B will not come back and testify against A at the hearing.
8. A can still be convicted of endangerment at a hearing without the board weighting A’s fundamental right to confront his accuser, i.e., B

III. Proposed solution

Goal: when the UHB tries a case against an accused student where a victim exists, if that victim refuses to testify for the JAO against the accused at the hearing, the UHB can only proceed to a decision if it believes the victim’s interest in not testifying outweighs the accused student’s fundamental right of confronting his or her accuser.

*(c) . . . If an individual complainant or a known victim does not testify, the Hearing Panel may proceed to decision only if it finds that the respective individual complainant or victim’s interests in not testifying outweigh the accused’s interests in confronting his or her accuser*

Notes

1. This is simply one drafting proposal to address the confrontation issue.
2. In our example, even if the UHB found that A’s interest in confronting his accuser, B, outweighed B’s interest in not testifying, JAO is not foreclosed from alternative routes of prosecution. For example, JAO can still file disorderly conduct & underage drinking charges against A, if appropriate.
3. The right to confront your accuser is absolutely fundamental to any judicial system. The idea that students can be prosecuted but never have the ability to confront the person allegedly victimized undermines traditional notions of due process and justice.