



An Attorney's Role in the Conduct Process

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The student conduct process, unlike the criminal and civil legal systems, is designed to address the student's relationship to the institution and its behavioral standards and policies. While the process may involve situations that overlap with criminal laws (e.g. theft, drugs, or sexual assault) and civil statutes (e.g. fraud, social host laws, and other neighborhood issues) campus policies and processes are intentionally and appropriately different. Instead, the student conduct process focuses on assessing the impacts of an individual's behavior on the learning environment of others and facilitating student growth, learning, and development. Unlike the criminal justice system, the worst consequence a student may face from a campus student conduct process is not incarceration but, rather that they would no longer be able to attend the institution.

Although some students fear an in-

ability to attend college elsewhere, there are no definitive studies to establish the quantity and frequency that this occurs, and anecdotal evidence suggests that this phenomenon is not widespread.

While courts have clearly and consistently stated that they do not expect student conduct processes to mirror procedures in the legal realm, they acknowledge that students do not forfeit their constitutional rights upon arriving on campus. For example, if a student faces criminal charges for alleged involvement in an incident and is also subject to the student conduct process, they have the right to consult with and be advised by an attorney throughout both processes. Similarly, while postponing the campus student conduct process may clearly assist a student's case in the local court, the campus must proceed with its own resolution process to protect the safety and rights of the campus and its

community members. This is especially crucial for incidents involving sexual assault, physical assault and/or battery, and other forms of violence, all of which may inhibit or prevent other students from actively and safely pursuing their education and resultant extracurricular opportunities.

In 2014, a Negotiated Rule-Making committee for the Violence Against Women Act reauthorization came to consensus on the importance of providing students (complainants and respondents) the right to have an advisor of their choice throughout the student conduct process. The advisor may be a parent, another student, an attorney, clergy, or a faculty member. We recognize that advisors, including attorneys, provide a valuable service for students as they navigate the student conduct process. They provide helpful advice about how to prepare for resolution meetings, hearings, and appeals while giv-

ing valuable emotional support in what is an extremely stressful time for the student. This assistance is also helpful in situations in which a student faces separation from the university, deals with language or other communication barriers, or feels overall mistrust with the system.

While institutions must allow advisors to be part of the process, courts have consistently and clearly held that institutions may institute limits on advisors' level of participation. These limits maintain the focus of the proceedings on the determining responsibility for the alleged violations and facilitating educational and developmental resolutions rather than finding technical loopholes to get a case dismissed on procedural grounds.

A series of federal appellate court decisions have held that campuses meet procedural due process requirements when they allow attorneys to advise their clients during a hearing, even when they are not directly able to participate. In *Wasson v. Trowbridge* (1967), the Second Circuit Court of Appeals specifically held that campus conduct processes did not require active legal representation for students, even in an expulsion proceeding. The court wrote:

"Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events [at issue] should enable him to develop the facts adequately through available sources, and where the other aspects of the hear-

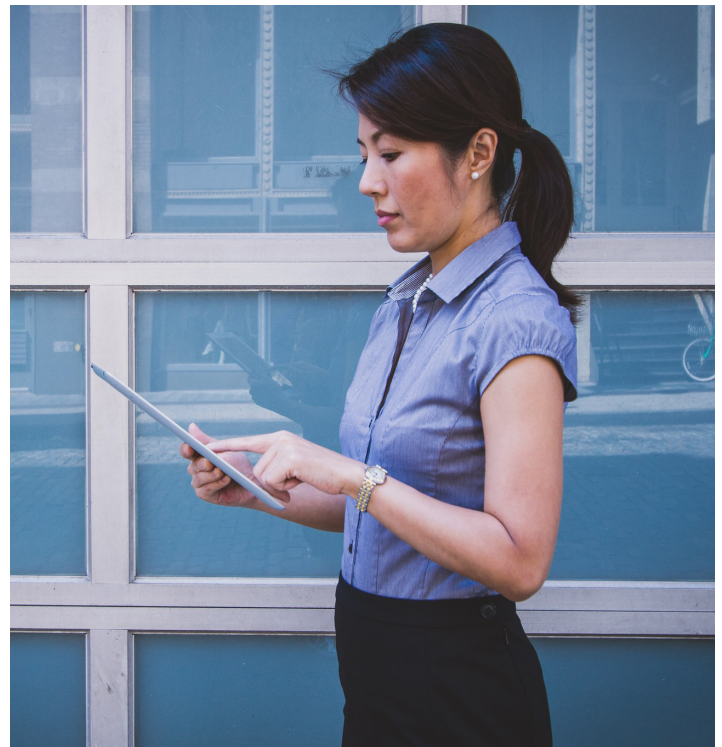
ing taken as a whole are fair, due process does not require representation by counsel. It is significant that in the *Dixon* case where the balancing of government and private interests favored the individual far more than here, the court did not suggest that a student must be represented by counsel in an expulsion proceeding."

Similarly, in *Osteen v. Henley* (1993), a campus student conduct process allowed attorneys to advise students at hearings but they could not participate by asking questions or making statements. In reviewing a challenge to these limits on advisor participation, the Seventh Circuit Court of Appeals held:

"Even if a student has a constitutional right to consult counsel... we don't think he is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise perform the traditional function of a trial lawyer. To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation. The University would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in – from the law faculty or elsewhere – to serve as judges. The cost and complexity of such pro-

ceedings would be increased to the detriment of discipline as well as of the university's fisc (13 F.3d at 225).

The *Osteen* decision clearly acknowledged the significant issues an adversarial model would cause for a student conduct process. One can only imagine the costs associated with a scenario involving so many attorneys being paid to debate whether or not a student violated the rules set forth by a college. Such a model would also create inequities that already exist



in the courtroom – the student or the college who can afford the best attorney might face very different outcomes than those who cannot. Arguments may be made that colleges should allow students to have the same protections that they are permitted in court to ensure that colleges are not issuing the most severe sanction of expulsion in haste; however this opinion is not supported in theory nor by the legal system itself.

Along the same lines, in *Wimmer v. Lehman* (1983), the Fourth Circuit Court of Appeals held that due process requirements were met when the student “could have counsel present to advise him with respect to safeguarding his interests regarding his pending state criminal trial, but that in all other respects he must conduct his own defense.” Similarly the First Circuit emphasized the importance of allowing students to have counsel present when facing criminal charges at the same time as student conduct proceedings. In *Gabrilowicz v. Newman* (1978), the court noted that the student was requesting assistance of counsel to consult with and advise him during the hearing, not to conduct the hearing on his behalf. The court wrote:

“Were the appellee to testify in the disciplinary proceeding, his statement could be used as evidence in the criminal case, either to impeach or as an admission if he did not choose to testify. Appellee contends that he is, therefore, impaled on the horns of a legal dilemma: if he mounts a full defense at the disciplinary hearing without the assistance of counsel and testifies on his own behalf, he might jeopardize his defense in the criminal case; if he fails to fully defend himself or chooses not to testify at all, he risks loss of the college degree he is within weeks of receiving, and his reputation will be seriously blemished.”

These decisions recognize that students have a right to be advised by counsel when facing simultaneous criminal proceedings. However, they limit counsel participation to the interests specifically related to a student’s criminal proceeding and

do not extend to the underlying campus student conduct allegations.

These limits were also supported by the First Circuit Court of Appeals in *Gorman v. University of Rhode Island* (1988). In *Gorman*, a student suspended for a number of student conduct violations argued that the institution’s student conduct process was defective, among other things, because he was denied assistance of counsel at the hearing. In ruling for the institution, the court wrote:

“[T]he courts ought not to extol form over substance, and impose on educational institutions all the procedural requirements of a common law criminal trial. The question presented is not whether the hearing was ideal, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process.

While courts typically provide campuses significant discretion when it comes to their conduct processes, the more complex and court-like these procedures become, the greater argument that can be made for attorney involvement and participation. On this point, in *Jaska v. University of Michigan* (1986), the Sixth Circuit Court of Appeals, noted that a student challenging a one-semester suspension for an academic integrity violation had both a liberty interest and a property interest in continuing his education at the university. The court also held that the absence of “complex rules of evidence or procedure” in the student discipline

hearing helped to support why the accused student was not entitled to any representative to be with him, whether an attorney or lay advisor.

The court’s decision in *Jaska* is instructive for student conduct professionals. While we want to make sure students are afforded robust procedural safeguards and have campuses follow requisite due process requirements, we do not want to emulate the criminal justice system. As pressure increases to handle an increasing number of criminal-type matters (e.g. sexual assault, stalking, domestic violence, etc.), campuses may attempt to protect themselves by expanding and extending legalistic procedures to these complex situations. In order to maintain student conduct systems in an educational and developmental manner, it will be incumbent upon institutions to continue to emphasize reasonably uncomplicated and fair processes that assess the student’s impact of their behavior on the learning environment in a non-legalistic manner. Failing to do so will open the door for quasi-judicial processes that are driven by attorneys and outside agencies rather than by the students, staff, and faculty of the individual campus.

Student conduct professionals’ experience with attorneys (JD/not JD)

Given that students are increasingly looking to attorneys for assistance with their cases, student conduct professionals need specialized training to understand of the role of an attorney, how to “think like a lawyer”, and administer processes in a fair and evenhanded manner.

Some student conduct professionals have a law school education or professional legal background, experiences that provide credibility when working with attorneys and help them understand the attorney's experience, approach, and training. Those without these valuable experiences, however, need equivalent knowledge, skills, and abilities. Therefore, ASCA should ensure that professionals working in student conduct offices who do not have such background attend the Gehring Academy or the equivalent for requisite training in this area. Such training would bridge the gap between those with legal education/experience and those without. It would also provide a base of knowledge for professionals working with attorneys in a confident, reasonable, and non-threatening manner.

In the same sense, student conduct professionals need to know and understand the relevant policies of



their campus better than anyone else, attorneys included. While attorneys have advanced skills and abilities in analyzing and interpreting statutes, laws, and policies, they are not the experts on campus student conduct codes. Student conduct professionals are the experts. But they need to take the time and effort to fully understand

their processes, connect them to student learning and development, and articulate how they operate in a multitude of settings.

Similarly, to increase confidence in interacting with students' attorneys, it is highly recommended that student conduct professionals become familiar and remain current with

Social Justice Concerns

Whether a student is held accountable for their actions should not rest on who can afford to access legal counsel. It is fundamentally unfair to have a student conduct process wherein the outcomes are determined based upon whether the student has the resources to hire an attorney. Students should be treated fairly and equitably regardless of their ability to hire counsel. The squeaky wheel (i.e. the attorney reviewing and questioning every move or decision we make) should not get all of the attention. This practice disregards the vast majority of our students who take full responsibility for their actions, comply with and complete their sanctions, learn from their engagement in the student conduct process, and continue with their educational pursuits.

Our conduct processes are premised in fundamental truth seeking. One, what are the true and accurate facts of the situation?

Two, does that conduct constitute a violation of our institution's student conduct code? Three, if it does not, the case is dismissed. Fourth, if it does constitute a violation, what are the appropriate sanctions, taking into account all of the germane factors? The student conduct process leads to a very different set of outcomes than the criminal court system.

When attorneys are introduced into the equation, the focus shifts from taking responsibility for one's actions to "getting the student off". The attorney is not to blame for this mindset as that is how they have been trained. On the other hand, student conduct professionals are educators first and focus on student learning and development. We wholeheartedly believe that students grow and learn from the consequences of their decisions. Not having them take ownership for their decisions and using legal counsel to exploit technicalities is not educational in nature, thereby creating a significant tension in our process.

student due process case law. From these cases, it is possible to stay on top of current trends and unfortunately, to learn from the mistakes of others. Also, it can be very helpful to have current cases at hand when students' attorneys question the right of the institution to limit attorney participation in the student conduct process [see *Johnson v Temple University*, 2013 WL 5298484 (E.D.Pa. Sept. 19, 2013) for a collection of cases].

Importance of Institutional Action May At Times Guide the Necessity of Having Counsel

There are times when the participation of an attorney in a campus student conduct process would be appropriate. These situations do not include minor infractions and policy violations, (i.e. underage alcohol possession, minor vandalism, or noise violations) but rather more serious violations potentially leading to a separation from the institution. Student conduct professionals understand the importance and career altering scenarios in which the

assistance of legal counsel would be appropriate but believe that the bar should be set high. Such scenarios would include situations in which separation from the institution by suspension or expulsion are potential outcomes and/or facing parallel criminal charges. In addition, when a student is enrolled in a program that involves licensing by a board or state agency, (i.e. applications to practice medicine, nursing, education, or law, or extensive employment background checks; high level governmental security clearances) the assistance of an attorney will likely be important.

There are also times when a student's particular field of study requires they will be judged not only about their conduct in the classroom and on campus, but off campus as well. The standard for admittance in the field is higher and the expectations surrounding one's conduct is crucial in supporting overall professionalism and protecting the public from misconduct. All medical programs advise students of the importance of the maintaining a healthy attitude towards one's work, the professional attitude one must have towards their patients, and appropriate bed-

side manner. Therefore, in the professional school settings in which one's conduct will be extensively and thoroughly reviewed and could lead to dismissal from the program or the inability to obtain the appropriate license, assistance from an attorney may be appropriate. It can often mean the difference between being able to practice law or medicine or not.

Conclusion

There are times when the participation of an attorney in a campus process is appropriate. These situations include when students face parallel criminal charges and/or at risk for suspension and/or dismissal. For these situations, the attorney roles should be clearly defined in the institution's student conduct code. Given the number of student conduct cases each year, however, the situations where attorney's participation is necessary are small in number and scope. Therefore, involvement of attorneys in the process should occur on a very limited basis and no process should be dictated by the financial ability or inability of a student to hire legal counsel.

References

- Gabrilowicz v. Newman (1978) 582 F.2d 100
- Gorman v. University of Rhode Island (1988) 837 F.2d 7
- Jaska v. University of Michigan (1986) 597 F. Supp. 1245
- Johnson v Temple University (2013) CIVIL ACTION NO. 12-515.
- Osteen v. Henley (1993) 13 F.3d 221
- Wasson v. Trowbridge (1967) 382 F.2d 807
- Wimmer v. Lehman (1983) 705 F.2d 1402