

TOO MUCH CIVILITY? THE RIGHT TO CONFRONT IN CAMPUS CONDUCT HEARINGS

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One of the more common discussions I find myself having with my staff centers around a seeming expectation on the part of our community members that their lives will be absent of harassment, discomfort, and strife. While college life is often the first time many students have experienced such a variety of culture and opinion, and it is undeniable that collegians are capable of significant misconduct, such as stalking, hazing, and other anti-social behavior, these conversations invariably reach the conclusion that our students have some very unrealistic expectations. Conflict is inevitable; and while we as judicial officers can protect students from harassment and oppression, we cannot (nor should we) guarantee them relief from dissent or disagreement. In other words, a civil community is not necessarily one free of conflict, and students do not have the right to be free from discomfort.

Yet many students have just such a preconception about college life, that their particular beliefs and opinions will be respected by all (“respect” in this case meaning, of course, accepted without comment)—and perhaps it is this expectation which underlies the claims that universities are a haven for “left wing” ideology at the expense of conservative viewpoints. But that is for another article; our concern right now is how to prevent this culture of non-confrontation from dissolving the effectiveness of what must be, by its very nature, a confrontational process: the conduct hearing.

A first glance at the procedures we use here at the University of Denver (and by extension, since our process is hardly unique, at many colleges and universities across the nation) appears to show that we already allow these expectations to influence our procedures. For example, we make it abundantly clear that a student does not have the right to “confront” his/her accuser:

The respondent has the right to hear, question, and respond to all witnesses and/or information presented during a hearing. This does not include the right to direct cross-examination. (*The Code of Student Conduct at the University of Denver*, III.A.5.a)

Many students challenge this statement at face value as contrary to their Sixth Amendment rights. Setting aside the question of Constitutional relevancy¹ in student conduct hearings, their challenge seems reasonable—common sense would indicate that it is exceedingly difficult to defend oneself without questioning witnesses. If we are to provide a fair hearing, then it would seem that denial of cross-examination and direct confrontation would be undesirable.

¹The exact text of the amendment is as follows:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... (*Constitution of the United States*, Amendment VI)

More than this, to deny such confrontation may give the appearance of cowing to the same perceptions against which my staff and I rant on a regular basis, as described in the first paragraph of this article. How can we, as educational institutions which claim to value the search for knowledge and the development of our students above all else, live with a disciplinary process that denies the crucial role of confrontation in research and investigation, in life as a whole?

It would seem, then, that the best route is to shift to a more adversarial environment, similar to that of the criminal courts. Or is it?

If we were to make such a change, it is my belief that the educational nature of our process would suffer almost immediately. Ironically, in an attempt to assist the teaching of our students in the crucible of confrontational discipline, we would hinder it by encouraging the perception of discipline as a contest, as an argument to be won or lost, rather than as an attempt to dovetail individual values with community expectations. More importantly, perhaps, is the effect such a shift would have on the willingness of victims to report serious violations of policy. Consider, for example, what would happen to the already under-reported instances of date rape on a campus that announced it would allow direct cross-examination of the courtroom variety.

Thankfully, I believe there to be a middle ground—just as civility does not exclude confrontation, confrontation does not imply an adversarial relationship. We can allow for (and even encourage) students to question the evidence and witnesses against them without necessarily letting the matter devolve into true cross-examination. There are two necessities for this distinction to be meaningful: (1) anonymous reporting cannot be allowed, although it may be possible to permit written testimony over a personal appearance at the hearing; and (2) all parties in a hearing must be required to speak exclusively with the hearing officer or review board at all times. The first ensures that a respondent will be given a fair opportunity to confront the information presented against him/her, while the second is necessary to maintain civility.

Below are some suggestions that can assist in revising your procedures to accommodate these conflicting pressures, or if your procedures already do this, in explaining them to students so that they will understand not just the process, but the reasons behind it:

Not being a Constitutional scholar, I cannot be certain of my interpretation, but it would seem to me that the right to “be confronted with” is not the same as the “right to confront”. In other words, the accused has the right to know from whence (or from whom) allegations and evidence are being drawn, but not necessarily to confront the source. In this case, the procedures used at the University of Denver would seem to be Constitutionally sound—but what do I know?

1. *Ensure that all complaints are handled consistently.* I suppose that legally we as institutions of higher education are welcome to employ differing standards of evidence, and potentially a different process altogether, depending upon the nature of the accusation. However, if only for the sake of a judicial officer's sanity, it makes more sense to ensure that all alleged violations are adjudicated in a similar, if not identical, manner. This means that if protections are in place to allow a victim of assault to address a review board without need to be in the presence of his attacker, the same accommodation should be available to any witness and/or aggrieved party; if restrictions are employed regarding the types of questions that can be asked in a sexual misconduct complaint, the same rules should be employed for even a simple "quiet hours" violation. In this way, the process becomes easier to explain (or defend), and can help to remove some of the emotional pressures on a particular complaint.
2. *Have specific boundaries for questioning.* This makes sense from many different perspectives, but for the purposes of this discussion, such boundaries serve to prevent "badgering" or harassment of witnesses without the need for recourse to detailed "rules of evidence". Let everyone know up front that the discussion must focus on matters directly related to the matter at hand. If you are unsure where a student is headed with a particular line of questioning, feel free to call him/her on it, and get clarification. The corollary to this is that the hearing officer or review board must be ready to direct relevant questions to the witness or complainant, regardless of obvious discomfort. The worst outcome would be to deny a responding student the right to directly question a witness and at the same time seem unwilling to follow up on important issues raised in his/her defense.
3. *Enforce your process.* My experience is that over 95% of the time, directing all conversation through the hearing officer or review board is an unnecessary and often confusing requirement. Students are unsure of how to phrase questions, or when (and to whom) to provide answers. I am often guilty of failing to enforce this rule, even though it is explicitly part of the opening statement made at each hearing. Most of the time, this oversight is harmless—but there have been times I have regretted not standing on procedure from the beginning. A perfectly civil hearing can degenerate into bickering in a matter of moments, and it is nearly impossible to shift gears in the middle. Thus it is imperative that, once the rules have been decided upon, they be enforced at all times and in all circumstances, even when they seem inapplicable. At the same time, it is just as important to be clear on the reasons for the rules in place; and if justification cannot be found, be willing to remove them.

Referring back to the title of this article, my answer to the question, "Too much civility?" would be "No"—at least in looking at the written procedures and the intent of most disciplinary processes. However, it is all too easy to allow "too much civility" into the process; it is human nature to dislike conflict, and to deny (or limit) confrontation in an effort to make everyone more comfortable. But comfort is not essential (and perhaps antithetical) to an effective conduct review process.

In the end, the exact nature of questioning and level of confrontation allowed in your process is subject to institutional norms and expectations—but it is essential that whatever your process, students understand the reasoning behind it, and that it be applied evenly and consistently. Only then can we say that civility has been properly balanced with confrontation.

Brett Sokolow responds: I was hoping Dan would adopt the common view that civility is an essential ingredient in campus hearings. It gives me room to be a contrarian. While his article recognizes the sanitizing effect civility can have, he ultimately negates the value of what he calls cross-examination, and what I would call direct confrontation between the parties to a complaint. I am not as opposed to direct confrontation as many judicial officers are. When I ask my clients why students cannot question each other directly, they respond “because we want to keep the process civil.” When I then ask, “why is it important to keep the process civil?” I never get a great answer other than one that values civility as valuable in and of itself. Why? What is so great about civility? When my clients assess their outcomes, one of the consistent frustrations identified by students is that they did not get a chance to confront. They felt their questions were not fully answered, or that they did not get to pose them without filtration and adulteration.

I don't really dislike civility. There is inherent value in civil discourse. But, we have elevated the value of civility in many of our processes above truth, above catharsis, above venting, and—yes-- above education. Is civility that much more valuable? What is wrong with getting angry and expressing it? Psychologists tell us that in the right, controlled environment and conditions, venting is important. Are we strangling student wrath with our prim proceedings? What is wrong with the bickering Dan referenced? There is something pure about anger honestly expressed. We can't get angry, ourselves, though sometimes we just want to scream at students for the things they do. But, why are we imposing the professional civility expected of us on the students who are parties to our proceedings?

My main objection to Dan's thesis is his contention that every conduct hearing ought to be identical. I know simplicity makes life somehow easier on conduct officers, but one of the trends that you will see emerge in the next ten years, and maybe one of the most important in our field is a shift away from rigid procedures to more flexible approaches. It is simply more developmental to shape the process to fit the needs of the students involved. I argue that in some complaints, allowing questioning through the conduct body is the right approach. But, I also argue that in some complaints, letting students directly confront each other is the right approach, and that we need the flexibility to allow that to happen when we believe it is merited.

Dan gave an example of sexual misconduct. If it would be cathartic for an alleged victim to ask her own questions, why should a campus process deprive her of that important healing opportunity just to be civil or consistent? More importantly, and Dan did not address this, why should we assume that the alleged victim cannot present for herself, and should be relegated to witness status, as in many conduct proceedings in which the college stands in place of the victim as complainant? Why can't we have flexible procedures that allow victims who want to serve as their own complainants to do so, and victim's who want a proxy to have one? Why does one size have to fit all? Campuses differ in practice from campus to campus. Why can't some of that variety exist internally on individual campuses?

Finally, civility can help us to find truth, but it can also be antithetical to finding it. Throughout my career, I have seen example after example that has reminded me of this. Many of you have too. Upon investigation, countless complaints have appeared to me and to the campuses I serve as "He Said—She Said" complaints—seemingly even—with no real way to determine who did what to whom. And then, at the hearing, I have seen well-prepared young women face down their perpetrators with composure, anger, passion and righteousness, and convince all of us that the person there were accusing was indeed in violation of our policies. Sometimes, the only way to get to the bottom of "He Said—She Said" complaints is to allow the only two witnesses to the event to go at it. I guarantee you that the credibility issues and believability that emerged in these hearings would never have if we had made all questions go through the Chair, or if someone had presented the complaint instead of the victim. Now, I am not saying that we should throw victims to the wolves, but where THEY want this opportunity, I advocate that we do not deny them.

Civility and education are not inextricably intertwined. Yes, I believe that our processes have the best chance at being educational if a civil tone marks our discourse. But, sometimes we have to get to the truth first before we can be educational, and civility can get in the way of the truth. And, don't forget that teaching someone how to stand up, make an argument, defend their viewpoint, and speak intelligible and persuasively has educational value in itself. Rhetoric is a dying art. Students have made it uncool to volunteer to speak in classes. Does it have to die in campus hearings too? At some point in their lives, all of our students will be called upon to defend themselves and their actions. Will they be able to do so cogently? Or, will our efforts at civility have deprived them of any and all talent for challenge, debate, discomfort, and disagreement.

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