PART IV: THE ELEMENTS OF DUE PROCESS

SECTION I: THE CHARGE

Notice

Due process requires that students facing suspension or expulsion from **public** universities for disciplinary reasons be given appropriate notice of the charges against them (in advance of the constitutionally guaranteed opportunity to be heard on those charges). At a minimum, your university must tell you both that a disciplinary action is pending against you and the charge that you face. The description of the charge should state the rule that you are accused of violating, and should describe, at least briefly, the specific act or acts that allegedly violated the rule.

no need of this guide to protect themselves. If you are in that fortunate category, please use this guide to make your campus one that offers the civilized procedures and protections that you would wish for yourself, your friends, and your loved ones. Justice is an immeasurably precious thing, and due process is an essential part of justice.

The notice requirement for cases involving possible suspension or expulsion from public universities was established by *Goss v. Lopez*, the landmark United States Supreme Court case on student discipline first discussed in Part II. As the U.S. District Court for the Northern District of New York put it in *Donohue v. Baker* (1997), students, under *Goss*, are entitled to notice that "is reasonably calculated, under the circumstances, to apprise [them] of the pendency of the action and afford them an opportunity to present their objections." That is, students must be informed of the disciplinary action that they face, and they must be permitted to challenge the charges against them.

Definition: Notice

A formal announcement, notification, or warning.

—American Heritage Dictionary

The timing and content of such constitutionally required notice varies according to the circumstances. In the case of **less serious misconduct**, notice may be oral and may be given immediately before the informal give-and-take between student and administrator that fulfills the minimal constitutional requirement for a hearing. All that is required in such cases is that students be told of the charges against them before being asked to affirm or deny them. *Goss* also suggests that greater requirements with respect to the timing and substance of

notice may be appropriate in cases that are factually complex or that present the possibility of more severe punishment.

While committed to appropriate notice in theory, the courts, in practice, unfortunately find almost all notice appropriate. The courts indeed have found many circumstances where universities failed to live up to *Goss's* requirement of increasingly formal hearings for increasingly serious charges (see Part IV: Section II). They have not dealt similarly, however, with the issue of greater notice. For the courts, notice would have to be extraordinarily inadequate to be viewed as substantially prejudicing a student's case. Thus, while late or scant notification may in fact deny a student the opportunity to mount the best possible defense, the courts basically care about whether or not a student is actually deprived of a meaningful opportunity to be heard. What the due process clause essentially guarantees is a meaningful and fair opportunity to be heard. Nonetheless, the commitment to appropriate notice is there in court decisions, and you certainly should stake a claim to fairness in that regard. The university might be moved by it; one day, a court might be moved by it.

Even in serious cases, though, in terms of current court decisions, notice need only specify the charges against you (your alleged conduct and the rule you allegedly violated). The Fifth Circuit United States

Court of Appeals, in *Dixon v. Alabama State Board of Education* (1961), suggested that if students were not allowed to attend their own disciplinary hearings, then a list of witnesses and of their expected testimony should be given to them. While the United States Supreme Court cited *Dixon* approvingly in *Goss*, courts in practice have declined to apply the witness list requirement to cases where the student **is** allowed to attend the disciplinary hearing. It now seems that the *Dixon* witness-list requirement stemmed more from students' rights to hear the evidence against them, in order to prepare a defense, than from any right to an advance notice of witnesses.

Although your university may be legally required to provide you merely with basic notice a short time before your disciplinary proceeding begins, you surely will want to fight for timely, detailed notice. Sufficient time and reasonable detail about the nature of the evidence against you are crucial to the preparation of an effective defense. Many schools in fact give greater notice than the law requires. If your school's notice does not give you the information or time you need, a simple request, appealing to fairness and common sense, may get it for you. You should be sure to lodge a formal written objection if the university sets a hearing sooner than you are ready to appear. Write a timely and detailed objection that states the reasons why you cannot be prepared in the

time allowed. This will preserve your right to claim lack of notice in a campus appeal or in a lawsuit. It might well suffice to persuade the university to give you the kind of notice you need and deserve.

Preliminary Screenings

Fair and decent systems of justice do not go directly from what might be wild accusations to a formal hearing on serious charges. Unfortunately, campus judicial systems are not always fair and decent, and nothing compels them to have some system of screening cases prior to a trial. In the criminal justice system, of course, preliminary screenings in the form of grand jury investigations or what are known as "probable cause" hearings before a judge are generally required before charges are issued. As described in Part II of this guide, however, campus courts are not held to the same strictness as the criminal justice system.

As campuses deal with a larger and larger number of cases where there is no firm evidence from which to conclude guilt, there may be changes in the air. Some colleges and universities already provide for a preliminary investigation, often lengthy, before charges are filed. Also, there are campuses that are increasingly frustrated by irresolvable cases (he said; she said; no further evidence) that never should have gone to hearing in the first

place. Thus, while there is apparently no legal right to a preliminary screening before a disciplinary action can be heard, your college or university may have chosen to offer such a screening as part of its own rules. Harvard University drew national attention to due process issues on campus in 2002, when it instituted a procedure to evaluate the merit of allegations of misconduct before beginning formal disciplinary proceedings against students. When a student makes a complaint against another student, for sexual assault or any other disciplinary rule violation, Harvard now requires that the complainant submit a list of possible witnesses or an account of the evidence—**some** measure of **corroborating** evidence—that the disciplinary tribunal might be able to obtain. This effectively operates as a preliminary screening: The college only opens a disciplinary case if these lists of witnesses or these documents suggest that there might be "sufficient corroborating evidence" available to support the charge.

Nonetheless, despite the considerable attention that Harvard's new rule has drawn, due process does not require that campuses conduct a preliminary screening before issuing a complaint and instituting formal disciplinary proceedings against a student. If your campus does not require such a commonsensical practice, it would be a good thing to argue on behalf of such a decent and rational change.

Deferring a Campus Case When There Is a Criminal Prosecution

If you have both a university disciplinary hearing and a criminal trial pending, you will almost always want to get your disciplinary hearing postponed until after the criminal matter is settled. Holding the disciplinary hearing **before** the criminal trial can be very dangerous, because what you say at the campus hearing—where you have far fewer protections than in a court of law—can be used against you in the criminal case. Courts have held, however, that due process does not require campus disciplinary proceedings to be postponed until related criminal matters are settled.

Despite this unfortunate rule, many universities promise students that they will try to postpone campus disciplinary proceedings until the conclusion of related criminal prosecutions. If your university makes this promise, you can usually hold them to it. Note, however, that if you are **convicted** in the criminal case, the university will frequently find you guilty of the student disciplinary charge automatically, on the basis of the criminal conviction. The theory here is that since the standard of proof is so much more stringent in the criminal court, a conviction there means that there was more than sufficient evidence to support the campus charge. On the other hand, **acquittal** in the criminal court does

not always mean that the campus tribunal will acquit, since the level of proof needed to convict you on campus is so much less than in a criminal trial. Still, there is considerable advantage to having the criminal trial go first. For one thing, you would have an opportunity to explore fully the evidence against you, since you are guaranteed highly effective due process—that is, procedural and substantive safeguards of your rights as someone presumed innocent—in a criminal court. **If your college insists that you proceed with your campus disciplinary tribunal before your criminal trial is held, it is essential that you get a lawyer**. At the very least, you need legal advice about how to prevent having what you say at the campus tribunal from being unfairly used against you at a subsequent criminal trial. (See Part IV: Section II for a more detailed discussion of this issue.)

Statutes of Limitations

Definition: Statute of Limitations

A time limit on legal action.

—American Heritage Dictionary

TARDY CHARGES

Rules that set specific statutes of limitations for campus prosecutions ensure that campus cases will be considered while relevant witnesses are still there at the school. Although the issue has not been widely litigated, universities are almost cer-

tainly **not** required to set a statute of limitations for campus disciplinary cases, even though such a statute would ensure that cases are resolved while the evidence is fresh. The amount of due process required in administrative judicial systems is, after all, substantially lower than that required in the criminal justice system. Do not count on common sense to prevail in this matter.

COMPLETION OF ACADEMIC REQUIREMENTS

The fact that you have already completed your graduation requirements but have not yet received your degree does not give you immunity from most schools' disciplinary regulations. Most universities provide that the awarding of a degree is contingent not only on the completion of academic requirements but also on full compliance with the university's regulations throughout your entire career there. The student's time at the university includes the period between the completion of academic requirements and graduation. Where precisely the line is drawn remains unclear. However, when a student at the Johns Hopkins University shot and killed a fellow student in the time between the completion of his academic requirements and graduation exercises in 1996, a court ruled that the university had good cause to dismiss him without a degree. It is best to stay out of even far less serious trouble in the final days before the awarding of your degree.

REVOCATION OF DEGREES FROM ALUMNI

Universities appear to have the authority to revoke degrees from alumni if discoveries are made, after graduation, about the graduates' activities while they were still students. However, because of the extreme nature of revoking a degree, and the possible damages done by such an act, universities must offer a high degree of procedural fairness in such cases.

This unusual issue arises most frequently when universities discover that students who had not in fact completed academic requirements were allowed to graduate as a result of gross error or deliberate fraud. In such cases, courts see the justification for degree revocation in contract law: By the university's contract with the student, the degree was awarded only because of the fulfillment of certain academic requirements. If these requirements were in fact not fulfilled, no degree should have been issued, and the degree can therefore be revoked. While hearings are not usually required in academic cases at public universities (see Part II), they are required in cases where degrees are going to be revoked. This is because taking away a degree already granted is thought to be more serious than deciding not to award a degree in the first place. Contract law also likely binds private universities to offer procedural fairness in degree revocations.

The courts have not yet come to any agreement about

whether degrees may be revoked when universities discover after a student's graduation that he or she committed a serious disciplinary infraction while a student. One case that was litigated concerned a university's claim to have discovered that a recent graduate had embezzled funds from a student club when still a student. In 2000, the U.S. District Court for the Western District of Virginia found no legal problem with the revocation of a degree in such a case. However, in this specific instance, it refused to dismiss the student's lawsuit, because the university might have departed from its disciplinary procedures in hearing his case. The suit was settled before the court had an opportunity to explore the issue further.

One thing, however, is clear in these matters. Although universities may have the right, after affording strong procedural protections, to revoke your degree after graduation for misconduct in your student days, they may not punish you for misconduct that you engaged in after graduation. The university's power has some limits.

Withholding of Degrees or Suspension Pending a Hearing

Universities sometimes suspend students from the moment that charges are brought until the completion of the disciplinary hearing. Some also withhold degrees from seniors who have completed graduation require-

ments but have pending disciplinary hearings (as when a hearing is postponed until after a criminal trial).

Temporary Suspensions

Temporary suspensions are allowed **only when a student poses an immediate danger to persons or property**. A hearing regarding the temporary suspension must be held as soon as practicable.

The United States Supreme Court explicitly stated in *Goss* that due process allows immediate temporary suspension without a hearing if the student poses an **immediate danger** to people or property. In short, a student accused of a violent assault could be suspended pending a hearing, but a student accused of plagiarism could not. The main purpose of the temporary suspension must be to maintain safety. Although any suspension necessarily has a punitive impact, the primary purpose of a temporary suspension cannot be to punish.

Hearings must be held for such preliminary temporary suspensions. When it is impossible or unreasonably difficult to conduct a preliminary hearing, students may be suspended immediately provided that a temporary suspension hearing is held as soon as possible. When emergency circumstances do not exist, the temporary suspension hearing must be held before the temporary suspension is put into effect. As the amount of due process required varies with the seriousness of the possi-

ble sanction, only minimal protections are necessary at temporary suspension hearings. In the case of short preliminary suspensions, your university must give you nothing more than an opportunity to be heard. You can use this opportunity to argue that you do not pose a threat to safety, or that the temporary suspension has a punitive purpose. Universities at such hearings may well be allowed not to consider detailed arguments about why you are innocent, except in cases of obvious error such as mistaken identity. The purpose of such a hearing is to determine if your presence on campus—before your later hearing on the actual charges against you—poses a danger. For longer preliminary suspensions or for longer periods of withholding your degree, the university may be required to meet higher standards of due process.

Substantive Due Process Rights

Distinct from **procedural due process rights**, you enjoy a separate class of rights known as **substantive due process rights** that offer you grounds to challenge vague, overbroad, and unfair rules. In the American understanding of justice, no person may have any of his or her fundamental rights or personal freedoms taken away without both procedural and substantive due process. Public colleges and universities may not improperly or lightly restrict these substantive due process rights by establishing vague or unfair rules.

Definition: Substantive Due Process Rights

Substantive due process rights are those that protect a party from unreasonable, excessive, or uncivilized treatment or punishment. Freedom from cruel and unusual punishments and freedom from invasion of privacy are examples of such rights.

VAGUE RULES

Substantive due process requires that rules must be written with enough clarity that individuals have fair warning about prohibited conduct and that police and courts have clear standards for enforcing the law without arbitrariness. Without a prohibition of vague rules, life would be a nightmare of uncertainty about what one could or could not do. The courts do not demand mathematical certainty in the formulation of rules, but they can find a law "void for vagueness" if people of common intelligence would have to guess at its meaning or would easily disagree about its application. For example, a rule prohibiting "bad conduct" would surely be declared void for vagueness.

For the courts, the strictness of the requirement of clarity in any particular case depends on the extent to which constitutional rights and values are involved. To punish people for conduct that they could not reasonably be expected to know or guess was prohibited itself raises obvious constitutional concerns, so courts insist that the criminal laws be written with the utmost clarity. Likewise, rules related to First Amendment freedoms

must be wholly clear to avoid "chilling" free speech. A rule prohibiting "bad speech," for example, would leave everyone afraid to speak. The courts permit codes that do not directly involve constitutionally protected matters to be written more loosely. For example, ordinary business regulations are not held to the same exacting standard as regulations affecting freedom of the press.

The First Amendment and the "Chilling Effect"

The First Amendment to the United States Constitution provides that "Congress shall make no law… abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble." This rule, that everyone can express himself or herself without undue government interference, is a cornerstone of our liberty and of our democracy.

In free speech cases, the courts have been very careful not to permit any rule that could leave unclear what speech one may or may not utter. If individuals were afraid to speak their minds because of the possibility that their speech may be found to be illegal, the courts have seen, they will likely refrain from speaking at all. Their speech, therefore, would be "chilled," that is, diminished and stifled. Preventing this "chilling effect," so that free people may speak their minds without fear, is one of the essential goals of the First Amendment.

Courts generally have agreed that disciplinary rules at **public** colleges and universities—when those rules do not violate constitutional protections of freedom of speech and freedom of religion—do not have to be painstakingly specific. Disciplinary rules that **might** relate to speech, however, such as rules punishing disorderly protesters, are held to a higher standard, but they still do not need to be as precise as the equivalent rules in the larger society.

If you are charged with violating a vague campus rule, a lawsuit could well defeat the charge if you could show that your conduct might relate to constitutional protections and thus be covered by the rule against vagueness. For example, in the 1969 case of *Soglin v. Kauffman*, the U.S. Court of Appeals for the Seventh Circuit threw out, on grounds of vagueness, the campus conviction of several students for the general crime of "misconduct." The court held that it was unclear whether the students' purposeful blocking of doorways was prohibited under the rule, because the rule "contains no clues which could assist a student, an administrator, or a reviewing judge in determining whether conduct not transgressing statutes is susceptible to punishment."

If your case does not touch on free speech issues, however, you would need evidence of a very striking abuse to get a university rule voided for vagueness. Courts have upheld quite general campus rules in a very wide range

of cases. Further, if you did something **obviously** prohibited even by the vague language of the applicable rule, you usually cannot get your conviction struck down merely because there might be questions about whether **other** conduct is prohibited by the rule. Thus, in *Woodis v. Westark* (1998), the U.S. Court of Appeals for the Eight Circuit found that a criminal conviction for falsifying a drug prescription was enough to violate a college rule requiring that students display "good citizenship" and "conduct themselves in an appropriate manner." The rule was admittedly vague, but despite its inadequacies, it was clear enough that the conduct for which the student was convicted in criminal court was covered by it. The more obviously criminal your conduct is at a college or university, the more likely a court will be to rule that it violated even the vaguest of prohibitions.

Private universities are not bound by constitutional prohibitions against vagueness. However, as described in Part III, courts give students the benefit of the doubt in interpreting the handbooks of private universities—because students have no say in writing the rules—and any vagueness is normally resolved in the student's favor. You can use the vagueness of a private university's rules to your advantage in defending against a disciplinary charge, by arguing that your institution did not give you reasonable grounds for expecting that your conduct was prohibited.

OVERBROAD RULES

Laws are said to be **overbroad** if, in addition to whatever else they prohibit, they significantly restrict protected First Amendment freedoms. The doctrine of overbreadth has its roots not in the due process clause, but in the First Amendment's guarantees of freedom of speech, assembly, and press. Often, however, when a provision of a law violates the First Amendment, it is possible to salvage the rest of the law by cutting out the offending section. A law prohibiting physically assaulting and criticizing an official would be successfully challenged, but that would lead to the removal of the ban on criticism, not to the removal of the ban on physical assault. Laws themselves can only be ruled overbroad if they make it impossible to separate their constitutional and unconstitutional provisions without writing a completely new law.

Laws can be vague without being overbroad, but vagueness often contributes to a finding of overbreadth. For example, in *Soglin v. Kauffman* (see above) the U.S. Court of Appeals for the Seventh Circuit found the university's ban on "misconduct" to be not only vague, but also so overbroad as to allow the university to punish any conduct it wished, including conduct protected by the First Amendment. "Misconduct" was found **vague**, of course, because reasonable people obviously could differ

easily about what it was, and, thus, about what was and was not prohibited conduct. Campus police and university disciplinary administrators could charge students for doing anything that personally offended the officer or administrator, giving such officials a terribly arbitrary power. "Misconduct" was also found **overbroad**, because the term would stop people from engaging in a wide variety of activities out of fear of doing something improper. The rule would discourage much ordinary daily activity.

Courts have held that university disciplinary standards can be a little more overbroad than standards in the world beyond the campus, just as they can be a little more vague. However, because public universities have less leeway on free speech protections, you may have a stronger case than you might imagine against an overbroad campus rule, because overbreadth does tend to threaten First Amendment freedoms.

UNFAIR RULES

Public universities enjoy broad discretion to set their own rules for their students. Because attendance at public colleges and universities is a privilege extended only to a select group of citizens, institutions may require that their students demonstrate superior moral or ethical standards. Even if courts think a university's rules to be

unwise, they do not have the authority to strike them down if these unwise rules nonetheless conceivably relate to legitimate behavioral or academic objectives.

The courts, thus, do give public colleges and universities broad authority to prevent disruptions of the educational process. This, however, most certainly does not give public universities the right to enact rules unrelated to legitimate behavioral or academic objectives. It also does not give them the right to create rules that are arbitrary, that violate the First Amendment, or that intrude unnecessarily upon the rights of privacy or conscience. At a **public** university, you successfully can challenge disciplinary proceedings that are based on an unconstitutional rule.

Public universities are also prohibited from establishing rules that infringe on students' rights of what is known as "personhood," those parts of one's life over which the individuals in a free society are themselves masters. For example, public universities are not allowed to punish students under unnecessarily strict regulations regarding dress and hairstyle. While public **high schools** are allowed to restrict students' personal appearance to some extent in some parts of the country, public **colleges and universities** may make only the narrowest regulations essential to a reasonable and permissible goal. As noted, the law extends more and more rights as students get older. The only regulations of dress

and hairstyle that are generally permitted are those required for safety; those requiring professional students—such as medical students interacting with patients—to conform to standards of dress or cleanliness associated with their trade; and those justified by some similarly reasonable and important purpose.

Keep in mind that while private colleges may not make utterly arbitrary rules, they do have the right, as private associations, to abridge even free speech rights and rights of personhood. They are limited by the rules of civilized society, however. They may not commit fraud in attracting students—advertising one thing but delivering another—and they may not violate their contracts, break the law, or offend civilized standards.

FIRE publishes various guides dealing with some of the dreadful violations of substantive rights common to many contemporary colleges and universities. You will need to consult these guides when preparing to defend yourself against disciplinary charges brought on the basis of conduct that is in fact protected by the First Amendment or by substantive due process. Otherwise your plight will fit into the phrase that lawyers often use for a case where a client is given all due process rights but where the result is a conviction (often for a crime or offense that should not be a legal violation): "being due processed to death." Do not let our emphasis on procedural due process in this guide distract you from the sub-

stantive defense that you must offer if you are charged with conduct that should not be an offense in the first place.

"CONDUCT UNBECOMING A STUDENT"

Some institutions of higher education have rules that prohibit students from engaging in "misconduct," "dishonorable conduct," or "conduct unbecoming a student." These rules all have potential constitutional weaknesses, and all but the "conduct unbecoming" rule would probably be invalid at public institutions.

As discussed above, a rule prohibiting mere unspecified "misconduct" is almost certainly unconstitutional. Such a rule is utterly vague, offering virtually no useful guidance as to what conduct is prohibited. A rule prohibiting "dishonorable conduct" is less vague, because it specifies the conduct that is not allowed, namely, conduct that lacks honor. Although courts have not explicitly addressed the issue, such a rule is probably unconstitutionally overbroad, because much conduct protected by the First Amendment lacks honor. It is dishonorable to speak meanly to or about your mother, but you have a First Amendment right to be mean in speech (as long as your speech does not cross over into some prohibited realm, by including threats of physical violence, for example).

Rules prohibiting unbecoming conduct are probably valid only when the university has made a statement about the general standards to which students must conform, although, again, the issue has not yet been tested in court. Typically, "conduct unbecoming" rules apply to professions or trades with generally established and understood standards of conduct. The standards of conduct for professionals such as doctors, members of the military, and judges, for example, are so long established, widely known, and generally accepted that these standards of conduct do not need to be spelled out in writing. In contrast, students are not part of a profession or trade with quite as generally accepted responsibilities. Norms of conduct vary widely between different types of universities and areas of the country, and, indeed, the history of student life has been one of constant challenges and changes to such norms. To avoid the problem of vagueness, an institution should express its particular standards for students if it wishes to use a "conduct unbecoming" rule. This can be done in the preface to the student handbook, in a statement of rights and responsibilities, or in some other document. (That way, also, a student could decide if he or she wished to attend such a university.) A "conduct unbecoming" rule that was not accompanied by a fuller description of the university's general expectation for student conduct would probably be nullified by a court.

Automatic Discipline After Criminal Convictions

Courts have not frequently visited the question of whether students can be automatically suspended or expelled from public colleges and universities for criminal convictions. In *Paine v. Regents* (1972), the U.S. District Court for the Western District of Texas held that a University of Texas rule providing for automatic suspension or expulsion of students convicted of drug offenses violated procedural due process. The court based its decision on the fact that the criminal justice system and university discipline systems served different interests. Thus, a hearing must be held to determine whether the interests in public justice that merited a criminal conviction coincided with university interests in protecting the campus community and its educational goals. For example, is it obvious that someone who burned a selective service card or broke the public peace in a demonstration for or against the choice of abortion must be disciplined by a university? Lots of students were convicted in criminal courts for burning draft cards or for disorderly conduct at demonstrations in the 1960s and 1970s. Do today's administrators wish to argue that those students also should have been disciplined by campus tribunals?

Infractions Committed Off Campus

Public universities may discipline students for their conduct off campus, even if the conduct at issue has little to do with university life. Off-campus conduct is considered to be indicative of a student's character, and universities do have a legitimate interest in maintaining student bodies that meet certain standards of character.

Although colleges and universities may discipline students for a wide range of behaviors occurring off campus, some universities have policies that restrict their own disciplinary jurisdiction. Don't get too comfortable, however, if your school's handbook limits discipline to offenses "detrimental to the university" or "adversely affecting the interests of the college." Such phrases can be interpreted to cover off-campus offenses that don't involve other students. Some universities, however, specifically restrict off-campus discipline to offenses that affect other students. If this is the case at your university, you may have a strong claim that the institution may not punish you for your off-campus conduct with regard to nonstudents, because, as noted repeatedly, schools must follow their own rules.

Confidentiality and Judicial Proceedings

Federal privacy laws classify materials about your disciplinary case as educational records. Consequently, your university is obliged by the Family Educational Records

Privacy Act (FERPA) to keep them confidential (see Part IV: Section III). If your disciplinary matter has not yet reached the police (at which point a great deal of information about it becomes a matter of public record), it is entirely up to you whether to keep it confidential or to tell others—including, if you choose, the media—about it.

Deciding whether to publicize your case during your investigation or hearing is a complex tactical decision. Publicity can have powerful effects on the fate of a charge and on your chances of receiving a fair determination of guilt or innocence. If there is any ambiguity about your guilt, however, you may want to avoid gaining publicity for your case. The heightened scrutiny that media focus brings may draw attention to the deficiencies of your case, and may provoke university officials to institute more severe sanctions because of public pressure or the effects of negative publicity. If the evidence is overwhelmingly or strongly in your favor, however, and if the administration, despite the lack of evidence or the unfairness of a charge, remains stubbornly determined to convict you (because of campus politics, for example), then publicity can often change everything and prevent a false conviction. However, if you are accused of a serious offense, the stigma of being associated with an accusation—even when false—may outweigh the benefits of publicity.

It is a serious matter for universities to release any

information about your disciplinary case to the media without your consent, before, during, or after your hearing. The disciplinary committee is forbidden from revealing your name to the media, and it is similarly prohibited from leaking information describing your case without using your name. In practice, universities tend to be very careful about observing these restrictions.

In the event of a violation of federal privacy laws, you cannot personally sue your university under FERPA, but you can report the problem to the Department of Education's Family Policy Compliance Office. That office can apply a variety of sanctions against the university, including, at the most extreme, revocation of federal funding.

Typically, however, colleges and universities are perfectly happy to obey FERPA's privacy and confidentiality provisions, because universities in general prefer to operate their disciplinary systems outside of the glare of publicity.

Some colleges and universities have rules requiring student defendants to keep confidential the fact that there are disciplinary proceedings against them or barring them from disclosing the names of their codefendants or accusers. Although universities sometimes claim that FERPA requires such rules, it does not. FERPA restricts disclosure only by universities, not by students. (For obvious example, FERPA prevents **the university** from inappropriately making your grades public. That

does not prevent **you** from talking or complaining about your grades.) However, as previously noted, universities may establish any rules that have a legitimate educational purpose and do not run afoul of constitutional or legal restrictions. Universities may therefore establish rules prohibiting students from publicizing sensitive information about others—even if they establish such rules based on an erroneous belief that they are required to do so by statute.

How to Conduct an Investigation for Your Defense

A thorough investigation is the best way to get the bottom of any complex factual matter. If you are involved in an incident that you think might lead to a complaint against you, it is very much in your interest immediately to gather and preserve any relevant evidence. It is best to be prepared just in case you are charged, especially because charges are so often brought long after the incident, when memories have faded, witnesses have disappeared, and the trail of evidence is cold. You will want to be careful, however, that your manner of gathering evidence does not provoke a formal accusation against you. If you think that the possibility of a formal accusation is particularly remote, it might sometimes be better to let things be.

If a complaint is threatened or brought, you should continue your investigation, or, if you have not already

initiated an inquiry, you should begin work immediately. If your investigation involves the interview of witnesses, it may be best to have a lawyer, a trusted professor, or a professional investigator act on your behalf, in order to avoid allegations of what is known as "witness tampering." It is also useful to have your own witness present during an interview, in case the person interviewed later denies that he or she said something. When the interviewee is willing, you will want to tape-record statements or have them written down.

You need to be active and to anticipate the benefits of conducting an investigation on your own behalf. Your goal is to persuade or embarrass the university, by the weight and quality of your evidence, into dropping unfair charges against you or, if it comes to a hearing, into finding you innocent of false charges. The university is your adversary in a disciplinary case against you—however much you might want to think of it as your friend—and there is no guarantee that it will continue to look for evidence that may help you once it has found evidence against you. Sometimes, it is in an administrator's interest to find a scapegoat for ills at the college or university. Further, if you are charged with conduct that is politically incorrect at a liberal university, or with conduct that runs contrary to traditional values at a conservative or sectarian institution, there may be a tendency for the university to overlook evidence in your favor for ideological reasons. Providing the tribunal with a formal

submission of evidence in your favor may refocus your case upon the actual facts.

If your investigation discovers facts overlooked by the administration's investigators or the disciplinary committee that you wish to bring to the tribunal's attention, you should submit a statement detailing what the school would have learned had it conducted a more thorough investigation. This is somewhat analogous to what is known as an "offer of proof" in a legal proceeding, which is a statement of what the court would have determined if it had ruled differently on the exclusion of a question or piece of evidence.

University rules may not encourage formal submissions of this sort, or may even attempt to ban them outright, but if you make such a submission, the university will almost certainly read it. It does not want to become known as indifferent to facts and to innocence. Even if the university disciplinary committee refuses to read your submission, you have established a record of both your good faith and the committee's bad faith. Further, you can force the university to include your submission of evidence in the file of your disciplinary case. As discussed in Part IV: Section III, universities must accept and include in a student's file student submissions correcting alleged factual inaccuracies in the file. It is a doubly good idea to make a submission of this sort if you are not able to participate in your disciplinary hearing.

Regardless of the structure of your university's disci-

plinary process, you should never let an inadequate investigation by the administration hurt your case. If there is something you found that the administration hasn't uncovered, confront them with it. Let them know that your evidence is there and that, if necessary, it will be public knowledge at some point.

Using the Laws About Educational Records to Your Advantage

In preparing your defense, it may be useful to have two types of information that you can obtain under educational records laws.

The Family Educational and Rights Privacy Act (FERPA) of 1974 (see Part IV: Section III) makes students' records confidential. In 1998, however, the Congress amended the law to allow universities to disclose to the public the names of students convicted by campus courts of violent crimes or of sex offenses, along with information about the final results of their disciplinary proceedings. If you are accused of a crime of violence or a sex offense, you should request the data about other campus cases, so that you know how students previously accused of such offenses were treated. This also gives you the ability to contact students who have been in your situation to ask for advice on preparing your case.

In a disciplinary hearing itself, you also may be able to

use a particular part of FERPA to your advantage. FERPA gives you the right to inspect your educational records. Your university must let you inspect all of your educational records—other than police records or handwritten notes—within 45 days of your request. This presumably gives you the right to inspect materials related to your disciplinary case that may be in the college's files. Reviewing these materials would obviously be very helpful, letting you see the details of the university's case against you. This strategy has not yet been tested, but a recent ruling in FERPA law (see Part IV: Section III), makes this a good time for a trial run.

When Student Groups Face Sanctions

Colleges may sanction a student association that collectively engages in activities prohibited by university rules. However, the misdeeds of a few (or even of a majority) of the members of an association do not always justify disciplinary action against the association as a whole. "Guilt by association," absent other evidence, is rightly viewed as a dreadful thing. For such a collective punishment to be just, the group in its totality should have shared a criminal intent or conspired in the commission or cover-up of a crime. This principle should be particularly strong on a public campus where the First Amendment's protection of freedom of association must be honored to some serious degree. The point at which

an entire group may be punished for the infractions of a few of its members is, nonetheless, a difficult matter to determine. A prosecuted group should remind the tribunal of the injustice of guilt by association without evidence that the offending members were acting in accord with the organization's practices and policies, with the wishes or knowledge of a substantial number of members, or with the approval of the organization's leadership. The First Amendment's guarantee of freedom of association would mean little if an entire group could be prosecuted, or even disbanded, because of the unauthorized actions of a few.

University authority to punish student groups was acknowledged by the United States Supreme Court in *Healy v. James* (1972). Although the Court offered few clues about exactly what steps must be followed in disciplinary proceedings for student groups, it cited a lower court finding that "fair procedures"—that is, due process—must be honored. Because due process is flexible, exactly what procedures are required depends on the particular circumstances. As a general rule, the constitutional guarantee of freedom of association gives more protection to expressive organizations, such as political clubs, than to social associations such as fraternities.

SECTION II: THE HEARING

The Right to Be Heard and to Hear the Evidence Against You

If you face suspension or expulsion from a public university, you have a legal right to hear the evidence against you and to have an opportunity to rebut it. This right, recall, was first recognized by the United States Supreme Court in *Goss v. Lopez*, where it found the brief suspension of high school students unconstitutional because the students had not been told of the evidence against them and had not been given a chance to respond to it. The Court held that any student facing suspension must be given "an explanation of the evidence the authorities have and a chance to present his side of the story."

The right to be heard, however, does not necessarily extend to a right to a **formal hearing**, that is, a live proceeding at which evidence is taken and witnesses are called. Under *Goss*, public universities may establish any type of proceeding or mechanism that allows accused students a **fair opportunity** to hear the evidence against them and to tell their side of the story fully. Because a fact-finding hearing is the most logical and simple way to fulfill *Goss's* requirements, however, the vast majority of public universities hold hearings in serious disciplinary cases.

In fact, hearings may be required in more serious cases, because *Goss* holds that the more serious the potential sanctions, the more elaborate the requirements of due process. However, the courts have not yet decided with any clarity and uniformity that students actually have a right to a truly formal hearing. Courts do not like to guide the internal proceedings of universities with any great specificity, and they permit university disciplinary proceedings to be much less elaborate than those of criminal trials.

Hearing procedures need not be the same for all offenses. Indeed, the idea that greater protections are needed for increasingly serious charges is a basic principle of due process—even the criminal justice system dispenses with jury trials for minor offenses where the maximum penalty is very modest. Nonetheless, due process also requires that similar cases be handled by similar established procedures. Public universities also are obliged to treat similar cases in a similar way under the Fourteenth Amendment's guarantee of "equal protection of the laws," which requires that the government apply the same rules to people in similar circumstances. Your public university must have a very good reason indeed to handle your case differently from similar past cases.

There are some special cases and situations in which hearings clearly are not required. If you admit your guilt

to the charges against you, you waive your right to be heard on the issue of guilt versus innocence. While this may seem obvious, there are cases where students have admitted guilt and then tried to sue their universities for deprivation of due process because they were punished without a hearing. Once guilt is admitted, the reason for a hearing, at least on the issue of guilt, largely disappears. Think about this if your university tries to convince you to plead guilty to a charge of which you know you are innocent. Nonetheless, you might still be entitled to a hearing on the issue of appropriate punishment.

Also, if your university determines that you pose an ongoing threat of disrupting the educational process or an immediate danger of harming persons or property, you may be temporarily suspended without a hearing or notice, provided that a temporary suspension hearing is held as soon as practicable (see Part IV: Section I).

At a private university you do not have a legal right to a hearing—although you certainly should argue for your moral right to one—unless the university promises such a hearing to you and is bound by the principles of contract law in the university's state. Most universities, however, do promise hearings, and if the university says that it will grant you a hearing, you may be able to get the courts to hold them to their word. For example, in *Tedeschi v. Wagner College* (1980), the Court of Appeals of New York ruled that an expelled student who had been

granted something less than the actual hearing promised in a student handbook was entitled to reinstatement pending a new and, this time, adequate hearing.

The Right to Hire a Lawyer

A university may not interfere with your right to retain an attorney to assist you in preparing your case. However, public colleges and universities generally may prohibit you from bringing your attorney to your disciplinary hearings. Some courts, however, have recognized a student's right to bring a lawyer to a university disciplinary proceeding if the university's case is presented by a lawyer, or if the violation charged is also being prosecuted—or is likely to be prosecuted—in the criminal courts. Additionally, some states have laws specifically requiring that persons who face administrative proceedings, such as campus disciplinary proceedings, be allowed to retain counsel to represent them. Know your state's laws.

The Sixth Amendment's celebrated guarantee of the right to counsel applies only to criminal trials. In terms of campus disciplinary cases, a claim of right to counsel would have to stem from the due process clause, and most courts have agreed that due process does not require universities to allow students to bring lawyers into ordinary disciplinary proceedings, even when expul-

sion is at stake. However, since *Goss* does hold that greater due process is required in more serious cases, some courts have taken this to mean that additional procedural protections such as the right to counsel are required in some special circumstances. In *Gabrilowitz v. Newman* (1978), the U.S. Court of Appeals for the First Circuit held that due process requires that students be allowed to retain counsel to advise them at disciplinary hearings when related criminal charges are pending. Because such situations present complicated concerns about self-incrimination, the court held that it would be a denial of due process to force the student to proceed without a lawyer. However, it stated that due process requires only that the lawyer be allowed in the hearing room to advise the student. The college may still ban the lawyer from making arguments and questioning witnesses.

Some courts have also held that when the prosecution's case is presented by a lawyer or another legally experienced person, a university must allow students to retain a lawyer truly to represent them at the hearing, that is, to make arguments and question witnesses on their behalf. In *French v. Bashful* (1969), the U.S. District Court for the Eastern District of Louisiana overturned a disciplinary action against students at a public university because while a third-year law student presented the university's case at the hearing, the students themselves

were not allowed to be represented by counsel. It stopped short, however, of ordering the university to provide free counsel for indigent students.

Some states have also established a right to be represented by hired counsel in all state administrative agency proceedings. Because courts sometimes treat public university disciplinary hearings as such administrative proceedings, you may have a right to be represented by private counsel if you go to school in such a state. In that circumstance, a court might well vacate your conviction if you are denied this right. For example, in *Kusnir v. Leach* (1982), the Commonwealth Court of Pennsylvania vacated a student's suspension at a public college because he was not allowed a lawyer, which it ruled a violation of Pennsylvania law establishing a right to counsel in administrative proceedings. Again, it is important to know and use your state law.

Even though private universities may bar lawyers from their disciplinary proceedings, you nonetheless may wish to seek the **advice** of an attorney—even if he or she may not join you at a hearing—unless your case is very minor. In fact, since most of the work on your defense will be done outside the hearing room, a lawyer can provide a great deal of help. You need to weigh the costs involved against the possible harm that you might suffer from an unjust conviction or punishment. It also never hurts to ask whether you may bring your lawyer

with you to your hearing. As is the case with many of the other protections we discuss, many universities are more flexible in this area than the law requires.

Composition of the Hearing Panel

A hearing before an **impartial** fact-finder and decision-maker is essential to due process. Indeed, the impartiality of tribunals is one of the hallmarks of a decent society. While the basic principle that the body hearing your case must be free of bias applies to academic disciplinary hearings at **public** colleges and universities, courts nevertheless have held that certain accommodations may be made to the unique circumstances of institutions of higher education. Administrators may serve on your hearing panel, and panelists may even have had prior involvement with your case. The rules are loose, in other words, but the fundamental principles of fairness and reasonableness still apply.

Hearing boards in university disciplinary cases must be free from unreasonable bias. If you believe that the tribunal that is hearing your case is biased, you should object in writing before the panel even considers your case. Given human nature, you stand the greatest chance of having biased panelists removed **before** the panel has invested time and effort in your case. When you state your reasons for your challenge, you should be

as specific as possible, placing facts, not speculations, on the record.

If the panel in your case displayed bias, you will want to raise that as a crucial issue in any formal or informal university appeal process. If all else fails you can file, or threaten to file, a lawsuit on the basis of the panel's bias. To succeed in such a lawsuit you will need to show explicitly that a panelist approached his or her duties after having already formed an opinion regarding the charge. (This is easiest, of course, when a panelist has commented publicly on your case before the hearing.) When this standard of unacceptable conduct is reached, courts will sometimes overturn student convictions. For example, in *Marshall v. Maguire* (1980), a New York court vacated the expulsion of a student at a state university because one individual had served on both his hearing and appeals panels. The court concluded logically that someone who already had voted to convict the defendant at a hearing clearly had formed an opinion on the charge before serving on an appeals panel. In this case, such a denial of due process, which also violated the university's own established procedures, cast a shadow on the university's **entire** disciplinary process, and the court overturned the rulings of both the original and the appellate panels.

In the criminal courts, a defendant may ask for a change in the location of a trial (a change of venue) when

too much publicity or a heated atmosphere makes it virtually impossible to secure an impartial jury. Frequently, in campus cases, a defendant faces similar circumstances, but there is no means of changing the location. You face a steep uphill battle if you wish to contend that a general atmosphere on campus denied you an impartial hearing. Even if you show that there was, indeed, an emotionally charged and even poisonous atmosphere against you, you must prove specifically that this atmosphere affected the hearing board's impartiality—a very difficult burden to meet. There have been many cases, however, where a campus atmosphere condemning an alleged offense makes it difficult for students accused of that offense to get a fair hearing. The best thing that you can do if you face a hearing in such circumstances is to tell the board that you share the campus's general sentiment about the heinousness of the crime charged, and remind them of their duty to focus only on the facts of the specific case. Remind them that you are neither a symbol nor a scapegoat, but an individual presumed to be innocent. Point out that there is **no** crime so heinous that **innocence** is an insufficient defense.

Although courts will sometimes overturn your conviction if you demonstrate actual bias, they do permit the presence of panelists who have a prior acquaintance with the matter at hand. In our civil and criminal systems of justice, off campus, judges must disqualify themselves if they have any prior substantial relationship with a mat-

ter before the court. However, courts recognize that in the intimate context of the university community, it is inevitable that fact-finders will have some prior acquaintance with the issues on which they are asked to pass judgment. Because few cases challenging the composition of university hearing boards are brought, it is not clear how much prior knowledge is too much. In *Nash v. Auburn University* (1987), the U.S. Court of Appeals for the Eleventh Circuit did not find a hearing board tainted by a panelist's knowing the suspicions against the defendant before serving on the panel. Indeed, the court found it permissible that the panelist had answered questions from some potential witnesses about how to come forward to offer testimony. Rulings in cases such as *Nash* imply, however, that there **is** a level of more substantial previous involvement, as in *Marshall v. Maguire*, that would constitute a denial of impartiality.

In administrative agency proceedings generally, the individual making the decision to prosecute may not be significantly involved in determining guilt or innocence. In *Goss*, however, the United States Supreme Court refused to require separation of the judging and prosecutorial functions in minor high school disciplinary cases and even assumed that for short suspensions at high schools, the two roles would be performed by the same person.

In more serious cases, however, the prosecutor and judge very likely could **not** be the same person, because

this would result in a decision-maker with an unacceptable degree of bias and prior acquaintance with the matter. At the very least, you should argue that this is an unacceptable conflict if you are faced by such a situation.

Hearing panels need not be of any minimum size, and even single fact-finders are acceptable. Also, there is no hard-and-fast rule about what percentage of the members of a panel is required in order to convict, although naturally it would have to be at least a majority.

The Victim as Prosecutor

In the nonuniversity criminal justice system, the only role that the victim plays is that of witness. Our system views crime as an offense against society rather than merely against the individual victim, and charges are brought by prosecutors as agents of "the people." At some universities, however, a person reporting a disciplinary offense must personally prosecute the case against the defendant at the disciplinary hearing. Such an arrangement, while legally permissible at both public and private universities, is undesirable. Forcing the victim to undertake the burdensome and painful work of prosecuting cases deters the reporting of crimes and makes conviction dependent not on the merits of the case but on the victim's legal skill.

While a victim probably has no legal right to object to a requirement to be the prosecutor at a university hearing, the accused, at a public university, may have a right

to object to such a circumstance. A prosecutor's range of choices—what is known as "prosecutorial discretion"—can have a profound effect on the outcome of a case. Because of that, accused persons, in the nonuniversity context, are entitled to a prosecutor who is impartial before entering the case. Although courts have not considered the question, due process may allow accused students to prevent their accusers from being their prosecutors in the university setting. It may be more effective, however, for either the accuser or the accused, or both, to simply make a nonlegal argument that it is unfair to force the accuser to perform the role of prosecutor.

Proof

BURDEN OF PROOF

The presumption of innocence—"innocent until proven guilty"—is central to both our system and notion of justice. When a public college or university seeks to discipline you, it bears the burden of proving you guilty. Some evidence of your guilt, at least, has to be presented. You then have to be given some opportunity to rebut the evidence.

STANDARD OF PROOF

The standard of proof due process requires in university disciplinary proceedings—that is, the degree of certainty

with which a fact must be established for the fact to be determined true—can be a bewildering topic.

Public universities—and, at least in theory, private universities—are required to base their disciplinary decisions on "substantial evidence." This means that, once again in theory, there must be more than some mere morsel of evidence to support a finding of guilt. There should be enough evidence to convince a reasonable and impartial fact-finder of the conclusion.

In fact, however, courts cannot actually hold disciplinary boards to this standard, which is what makes the issue a bit bewildering for those of us who wish that theory and practice coincided in matters of justice. A deep principle of the law holds that when a higher court reviews certain types of decisions made by lower courts, it must defer to the lower court's judgments on certain particular subjects, avoiding second-guessing its findings in these special areas. This is one such area. In order for a reviewing court to throw out the verdict of a university disciplinary hearing on grounds of the standard of proof, it must go beyond finding that the hearing's decision was not based on "substantial evidence." It must find that the verdict was not based on any evidence at all.

If the court finds there was "some evidence" to support the charge, it must, all other things being equal, uphold the ruling. The "some evidence" standard is satisfied if there is any evidence at all supporting the charge, but not if there is no evidence. Most of the time,

if the court determines that there was "some evidence," but not what it would consider to be "substantial evidence," it must uphold your conviction. As the U.S. District Court for the Northern District of Illinois court ruled in *McDonald v. University of Illinois* (1974), this somewhat confusing state of affairs is a result of the general principle that reviewing courts should give deference to the decisions of administrative panels.

In cases that involve free speech on public campuses, however, reviewing courts may apply a "substantial evidence" standard rather than one of "some evidence." The reason for this higher standard of review is that there are constitutional implications to these cases.

In theory, private university disciplinary panels also must apply the "substantial evidence" standard of proof to disciplinary decisions. This protection flows from the legal doctrine that private university disciplinary decisions may not be "arbitrary and capricious" (see Part III) and the fact that many courts have ruled that verdicts must be based on "substantial evidence" in order to avoid being arbitrary or capricious. If this doctrine were held to, the right to a decision based on "substantial evidence" would be one of the few procedural protections available to private university students. In practice, however, courts are very reluctant to interfere with the disciplinary decisions of private universities, and they will do so only when such decisions are based on virtually no evidence.

Definitions: Standards of Proof

The following different standards of proof are used by various college and university tribunals. They are defined here in the order of how difficult they are to meet, from the most to the least difficult.

Beyond a reasonable doubt: "*fully satisfied, entirely convinced, satisfied to a moral certainty*"

Clear and convincing evidence: "*reasonable certainty of the truth…the truth of the facts asserted is highly probable*"

Preponderance of evidence: "*more probable than not*"

Substantial evidence: "*such evidence that a reasonable mind might accept as adequate to support a conclusion*"

Some evidence: *any evidence at all supporting the charge*

DIRECT QUOTATIONS ARE FROM BLACK'S LAW DICTIONARY

The standards of proof required of colleges and universities by law, then, are a far cry from those of the criminal justice system, where conviction has to rest on guilt "beyond a reasonable doubt." However, many universities employ a much greater standard of proof than the law requires, and they would be unable to defend morally a lesser criterion. Most use the standard of "clear

and convincing" evidence, which requires a reasonable certainty of guilt for conviction. The vast majority of schools employ, at the very least, a "preponderance of evidence" standard, which requires that guilt be more likely than not for conviction. This is a very commonsensical **minimal** standard for proof necessary for conviction. After all, if the "preponderance" guideline is **not** met, this means that most of the evidence argues for innocence rather than guilt. It would be a bizarre system that allowed convictions where innocence was more probable.

In short, you are not likely to win a case against your campus court if your **only** legal claim is that there was some evidence against you, but not enough to establish your guilt with a sufficiently high level of certainty. The court-imposed requirements on issues of standard of proof are very low and very vague. Nonetheless, there are some broad limits to the university's right to convict an individual on little or virtually no evidence, or on the basis of evidence that is overwhelmingly and very reliably contradicted. For example, if someone testified that you committed a crime on campus at a time when you have incontrovertible evidence that you were a thousand miles away, virtually any court would go out of its way to overturn your campus conviction. The victim's testimony that you were the culprit despite that, although constituting "some" evidence, would not very likely satisfy a court's notion of adequacy.

Procedure

FORMAL RULES OF EVIDENCE

What kind of evidence may and may not be used against a defendant in a college or university judicial proceeding? Due process does not force colleges and universities to apply the same rules governing the admissibility of evidence at criminal trials, although many universities in fact employ a few of those rules. In the criminal courts, witnesses may not testify to things that they don't know personally, but about which others have told them. That is called "hearsay," and it is barred from criminal proceedings. By law, however, university disciplinary tribunals may indeed admit hearsay from witnesses as evidence, and most do. In the criminal courts, only sworn testimony is admissible from witnesses. In university tribunals, witnesses do not need to be put under oath. Indeed, at college or university trials, virtually anything may count as evidence. The only requirement is that the rules used allow for basic fairness. If the lack of formal rules of evidence denies you basic fairness, however, then you may have a due process claim.

CROSS-EXAMINATION

On similar grounds of rules essential to basic fairness, you **may** have the right to cross-examine the witnesses against you at a college or university disciplinary hear-

ing, **if such cross-examination is necessary to draw out the truth about the matter at issue.**

The Sixth Amendment guarantees the right to cross-examine witnesses in criminal proceedings. It also gives criminal defendants a right to confront their accusers—that is, to look at them eye to eye when they testify. The Sixth Amendment, however, even as extended by the Fourteenth Amendment, only applies to federal and state criminal proceedings. Whether a right to cross-examination would apply in public college disciplinary hearings would depend upon whether it was essential to the "fair" hearing guaranteed by the due process clause.

Cases where cross-examination is most clearly required are those built solely around factual claims and charges made orally by a witness. For example, in *Donohue v. Baker* (1997), previously discussed, a rape charge against a male student hinged on whether a female had consented to sexual intercourse that both agreed had taken place. The U.S. District Court for the Northern District of New York held that the accused student had the right to cross-examine the alleged victim, because the only evidence that the act had not been consensual was her testimony, and the determination of guilt or innocence therefore rested on her credibility. This case is vitally important, because similar circumstances arise with some frequency. If you are accused of sexual assault, you can use *Donohue*, even if it does not apply directly in your jurisdiction, to argue that basic fairness gives you

the right to cross-examine the complainant. Courts in one jurisdiction are very often persuaded by the reasoning of courts in another jurisdiction.

By contrast, however, the U.S. Court of Appeals for the First Circuit, in *Gorman v. University of Rhode Island* (1988), held that you do not have an obvious right to cross-examine witnesses about the more general subject of their potential biases. However, in a case where the defense specifically rests on the bias of witnesses, cross-examination on this topic may well be permitted.

The specific nature and scope of cross-examination required by due process also depend on the circumstances. In *Donohue*, the court found that it was permissible for the tribunal to allow the accused to question witnesses merely by posing his questions to the panel, which then directed them to the witness. Other courts have approved circumstances in which witnesses could refuse to answer a question in cross-examination. The logic of court decisions on this question is that limits on cross-examination that might be appropriate in one circumstance might be inappropriate in others, if it could be shown that such limits denied fundamental fairness to the accused.

Even though the law only requires cross-examination in a limited set of circumstances, many schools allow for cross-examination at disciplinary hearings in a far greater range of circumstances. Once again, if your school **promises** the right of cross-examination in a

given situation, it may well be legally obliged to live up to that promise.

Due process, as indicated by *Donohue*, does not generally require face-to-face confrontation in campus disciplinary proceedings. However, if a compelling case could be made that such actual confrontation is necessary to a fair judgment (for example, when someone's defense is based on mistaken identity), it might well be required by due process. As in the case of so many other protections, the extent of the "process that is due" depends largely upon the facts and circumstances of the situation. If you want to argue for more process, you need to demonstrate why such procedural rights are made necessary by the facts and circumstances of your particular case.

CALLING EXCULPATORY WITNESSES

"Exculpatory" evidence is evidence that exculpates you of guilt—that is, that proves or serves to prove your innocence. It is the opposite of "inculpatory," or incriminating, evidence. In *Goss*, the United States Supreme Court did not require that students be permitted to call exculpatory witnesses in cases involving suspension of ten days or less. However, courts have long recognized that students have a right to call witnesses in cases where more serious punishment is at stake. This principle, as applied to universities, originates from the previously discussed *Dixon v. Alabama State Board of Education*

(1961), where the United States Court of Appeals for the Fifth Circuit ordered that an accused student, when expulsion was at issue, must be allowed to "produce either oral testimony or written affidavits of witnesses in his behalf." Although few courts have considered cases where this means of defending oneself was denied, it is fairly clear that in a serious case, due process would be violated if the right to call exculpatory witnesses were not granted.

The right to call witnesses, however, does not appear to extend to a right to compel their attendance at the hearing, although to our knowledge this point has not arisen in a case that **depended** on the attendance of such a witness. If you want the campus tribunal to make extra efforts to force or convince a reluctant witness to appear to testify, you should convince the panelists that the witness is essential rather than merely peripheral to your defense. Again, this differs significantly from criminal trials, where you have a right to compel witnesses to testify in person if their testimony is at all relevant.

THE RIGHT TO BE PRESENT AT A FORMAL HEARING

Under *Goss*, you have the right to hear for yourself an "an explanation of the evidence" against you before you present your defense. As a result, if your public university uses a formal hearing to decide your case, you have the right, even where potential punishments are minimal, to

be present at all of the hearing, in order to hear the evidence being used against you. This protection, unlike many of the others we have discussed, applies so broadly because while allowing you to be present creates only a minor burden to the university, it can have a major impact on the fairness of the proceedings.

Courts have overturned convictions in cases where the right to be present at the entirety of a formal hearing was denied. For example, in *Texas Medical School v. Than* (1995), the Supreme Court of Texas overturned the expulsion of a student from a public medical school because the student was not allowed to accompany the hearing officer and a school representative when they visited the site of the alleged offense. Likewise, another court vacated a conviction in a case where new information was given to the hearing board after the conclusion of the hearing and outside of the presence of the accused. This has been an area where obvious doctrines of fairness have generally prevailed.

Open Versus Closed Proceedings

Criminal courts are open to the public in all but the most unusual circumstances. However, under federal laws about educational records, both public and private universities must keep disciplinary hearings closed to the public, **unless the accused student consents to have them open.**

Your right to a closed hearing is guaranteed by the Family Educational Records Privacy Act, or FERPA (see Part IV: Section III). The only other individuals who sometimes have a right to attend disciplinary hearings are university staff members and, perhaps in certain cases, your parents. FERPA allows universities to share your educational records only with those staff members who have a "legitimate educational interest" in them. This means that you may prevent your university from opening your disciplinary hearing to individuals who have no legitimate purpose in being there. You will not be successful, however, if you object to the presence of staff members whose functions at the university relate to the matter.

As you might expect, administrators tend to opt for closed rather than open proceedings, because it is easier to dispense campus justice (or injustice) outside of the public's critical gaze. You face a tough battle if you want your disciplinary hearing open to the public. At a **private** university you naturally have no right to an open hearing, because private universities can set virtually whatever rules they please, within reason. Courts have generally held that at **public** universities, due process does not require that a disciplinary hearing be open to the public, even if the student requests it. If, however, your college or university claims that it would like to grant your request but is prevented from doing so by FERPA, you will prevail. FERPA gives the accused the right to a

closed hearing; it does not prevent the accused from having an open one. You also may find it effective to make at least the moral argument that your hearing should be open to the public, asking your college or university what it has to hide.

Presumptions From Silence

Unlike the circumstances of a criminal trial, the disciplinary hearings of a public university do not give you the right to refuse to testify. Indeed, your silence at such a campus hearing can be used against you.

The Fifth Amendment guarantees that no person shall be compelled to incriminate himself in a criminal proceeding. It reflects a deep respect for the sanctity of a person's innermost being. As a result, accused persons may refuse to answer questions put to them in criminal proceedings—the celebrated "right to remain silent." In criminal law, no inferences whatsoever, negative or positive, may be drawn from the silence of a criminal defendant.

While defendants have a right to remain silent in criminal court, students do **not** enjoy such a right at college disciplinary hearings, although a few universities do voluntarily provide this right. Your university may compel you to give testimony that may hurt you in any number of ways, and it may punish you for refusing to testify.

However, if you make self-incriminatory statements

under compulsion in a public university disciplinary hearing—that is, if you are forced to make statements against your will because of severe penalties for silence—it is possible that these statements may not be used against you in criminal court. In 1967, the United States Supreme Court established a general rule, in the case of *Garrity v. New Jersey*, against the introduction in criminal proceedings of compelled statements from administrative hearings. This precedent has been applied to universities in cases such as *Furutani v. Ewigleben*, decided by the U.S. District Court for the Northern District of California in 1969.

More commonly, universities do not establish special and specific penalties for silence but state, instead, that a failure to testify will be weighed against the student. This is legally acceptable to the courts. The United States Supreme Court, in *Baxter v. Palmigiano* (1976), ruled that interpreting silence negatively is acceptable in administrative hearings if the use of the privilege not to testify is not directly punished. This ruling was applied to university disciplinary hearings in the case of *Morale v. Grigel* (1976).

Unfortunately, testimony given under a threat that harmful inferences will be drawn from silence, rather than under a threat of direct penalties, is usually admissible in a criminal trial. In *Gabrilowitz v. Newman* (1978), the United States Court of Appeals for the First Circuit

ruled that such testimony was voluntary, not compelled in any unconstitutional sense.

In choosing whether or not to make a statement at your disciplinary hearing, you should generally give the highest priority to protecting your interests in a potential criminal case. After all, the consequences of a criminal conviction are in almost all cases much graver than those imposed by a university. It is almost always a good strategy, therefore, to do everything possible to have your disciplinary hearing postponed until **after** the conclusion of your criminal case (see Section IV: Part I). If you are unable to do this, you should never assume that if you testify at the disciplinary proceeding, damaging statements will be inadmissible at a later criminal trial. Consult a lawyer fully familiar with the law in your jurisdiction if you truly need to know whether or not your campus testimony would be admissible in the criminal case. There is a common understanding among most attorneys and people of common sense: If you have something to hide, **for whatever reason**, it is almost always better to remain silent. Even if your university states that it will draw negative inferences from your silence, it is better to say nothing if what you say could potentially be incriminating in a criminal court.

It is painfully easy to suffer from failing to follow this important and reasonable advice. For example, some students have been charged and convicted in criminal court

on the basis of a mere apology given in the context of a campus proceeding. An accused student is sometimes told by a campus advisor that the tribunal might go easier on him if he apologizes, and then this apology is deemed evidence, in a criminal court, of his guilt. When the misconduct with which you are charged on campus is also a violation of the criminal law, proceed with the greatest caution, and only upon the advice of an experienced, skilled criminal defense lawyer.

Tape Recording and Transcript of Proceedings

In the majority of cases, courts have held that due process does not require the college or university holding a hearing to make transcripts or recordings of the proceedings. (To say the least, the absence of a record makes both appeals and suits against the university for wrongful actions far more difficult.) To our knowledge, no test case has arisen in which a student has alleged a due process violation because the right to record a hearing has been denied. However, if a university, public or private, has a rule requiring or permitting a recording or transcript, then that promise generally is enforceable.

This area has not been frequently litigated, and courts have not given extensive explanations of their decisions in such matters. Remarkably, the courts appear to believe that the burden imposed on the university by requiring it to record a hearing outweighs the potential harm done

to the student from the absence of such a record. Some courts, however, have held that universities must allow students to make recordings of disciplinary hearings at the students' own expense. The reasoning here is that this obviously does not impose any cost on the university. Nonetheless, many universities forbid the recording of disciplinary proceedings by anyone. If your university has a ban and you in fact wish a record, you should challenge the rule as being without any reasonable basis or purpose.

Complainants With a History of Lodging False Accusations

In the nonuniversity criminal justice system, the names of alleged crime victims typically become a matter of public record when a criminal case is brought. However, under educational records privacy laws (see Part IV: Section III), universities are obliged to keep confidential the names of persons who make accusations of misconduct. While the secrecy of the university disciplinary process has certain valuable aspects, it removes the great protection against false or malicious accusations that the open nature of the criminal justice system provides. You have no way of knowing whether the person accusing you has made false accusations against other students on other or even many occasions.

While the university itself is prohibited from inform-

ing you that your accuser has a history of lodging similar and demonstrably false accusations, the prior victims of this false accuser are not barred by law from speaking. If you can find these individuals, they may be willing to testify on your behalf or otherwise help you. In a serious case, where you suspect you are being falsely accused by a person with a history of making false accusations, your lawyer may want to hire a professional investigator to examine whether this is the case. If you believe that publicity will not otherwise hurt your case, you may want to make your plight public in order to prompt others who have suffered at the hands of the same accuser to contact you. You might run into difficulty, however, if the university warns you to protect the privacy of your accuser and not to disclose his or her name (see Part IV: Section I). If your university has such a requirement, and you believe that it is hurting your case, you should make a detailed written presentation to the disciplinary tribunal explaining precisely why your defense will be hampered by your inability to conduct an investigation that uses the name of your accuser.

Similarly, if your accuser's name is secret, witnesses to whom the accuser may have made statements that could prove your innocence are less likely to come to light. Gathering evidence in a secret case is always more difficult than doing so in a well-publicized public proceeding.

Charges That Threaten Free Speech

The due process to which you are entitled in a university disciplinary hearing, we see clearly by now, varies by the circumstances of your case. Because First Amendment rights are so sacred, courts often hold that a greater amount of process is due in cases that involve freedom of speech, assembly, and the press. For example, standards of proof must be higher in speech cases, and rules and regulations must be more clear and specific. If your case has First Amendment implications, it is always a good idea to highlight these in order to support your argument for a higher level of due process. Even from a strictly tactical perspective, when you are able to defend yourself on free speech grounds, you almost always find yourself fighting from higher moral ground than would otherwise be the case. Students defending themselves in cases that involve free speech should consult FIRE's *Guide to Free Speech on Campus*.

Acquaintance Rape and Consent

Rape is the most serious crime that frequently comes before campus courts. The great majority of campus rape cases, however, do not involve violent stranger rape.

Most are charges of what is known as "acquaintance rape," or "date rape," where a sexual encounter took place between people previously known to each other, but where one claims afterwards that he or she did not give consent.

Date rape is a painful reality on campuses, as elsewhere in our society. Each offense is an extremely grave matter. If you are the victim of an acquaintance rape on campus, however, you usually have resources open to you that are not generally available off campus. Further, the relative confidentiality of the university disciplinary process guaranteed by federal student records laws makes it easier for you to come forward without your name and accusation immediately becoming a matter of public record, as is sometimes the case in the criminal justice system. The recognition of the incidence of date rape is also greater on campus than off campus, so most colleges also have extensive, free counseling resources that can at least help you to come to terms with what has taken place.

The accessibility of the disciplinary process, and the attention given to date rape on college campuses, however, can have serious negative consequences for the accused (whose innocence always should be presumed). On campus, accusations of date rape might be lodged in cases where there is, at best, ambiguity about whether consent was granted, and, at worst, where consent was

quite clearly granted but where a campus prosecution goes forward anyway. Unfortunately, some campus judicial systems employ procedures that are so deficient that they cannot discriminate between meritorious accusations and accusations completely lacking in merit. College disciplinary procedures are not designed to handle cases involving the subtle and complex issues typically involved in date rape cases. For example, the "substantial evidence" standard of proof, while adequate in simple cases, fails in many date rape cases. In a pure "he-said, she-said" case, accusation alone could be judged as sufficient to meet the burden, since what the alleged victim said might be judged by itself to satisfy such a standard. The heinousness of real rape can also overwhelm campus judicial systems and cause convictions in cases lacking merit, especially where well-meaning campus activists constantly draw attention to the alleged prevalence of date rape. Moreover, mere accusation in the campus disciplinary proceedings is usually sufficient to lead to a full hearing; there is usually no preliminary screening step to protect students from being hauled into a tribunal on the basis of misguided or wholly inadequate accusations.

Unfortunately, there is no magic formula for approaching acquaintance rape allegations. If accused of date rape, you should hire an attorney and argue for the fair hearing to which you are entitled by due process. At

a public university, highlighting the gravity of the charges may help get you greater procedural protections, as more serious charges require greater due process. At a private university, this is also a powerful moral argument. In a civilized society, the more serious the charge, the greater the protections that are offered to a defendant.

If you are falsely accused of date rape in campus courts, the good news is that a parallel criminal action is far from inevitable. The confidential and highly accessible university disciplinary process invites accusations that rightly would not survive, and, in fact, would never be made in the highly public criminal justice system. Furthermore, when date rape charges are reported to the criminal courts, prosecutors often choose not to bring the cases, recognizing when guilt cannot be established beyond a reasonable doubt. (It is one of the sad aspects of acquaintance rape cases, of course, that just as it is easy for the innocent to be convicted, it is also easy for the guilty to go free.)

Ironically, however, it is sometimes advantageous for the accused in a campus disciplinary matter if campus date rape accusations are accompanied by parallel charges in the criminal court. In such a situation, it may be possible to convince your college to postpone campus proceedings until the criminal trial has occurred. In a real court, you have rights to fair process and reasonable

safeguards that are far more rigorous than even the best campuses offer. Your trial may bring to light exculpatory evidence and may produce a favorable verdict that you would not likely achieve if the campus case were tried first. If you are acquitted in a criminal trial, that verdict, in addition to the exculpatory evidence gathered at the trial, can prove very useful in winning your case in the campus tribunal.

Since the prosecution's burden of proof at a criminal trial is "proof beyond a reasonable doubt," campus prosecutors sometimes claim that acquittal in a court of law should not automatically require acquittal in the campus tribunal, where the level of proof needed for conviction is much lower. An acquittal in the criminal courts, however, can make successful campus prosecutions considerably more difficult, because universities may be reluctant to make factual findings that are different from those of other, more rigorous bodies that have considered the same case. Although your first and absolute priority if accused of date rape should always be avoiding criminal exposure, being charged in the criminal court can lead to a favorable campus outcome that you might not be able to obtain otherwise.

Section III: Conviction and Punishment

Notice of Decision

Due process requires that you be informed promptly of the disciplinary board's decision in your case once it has been rendered.

In considering your case, however, the disciplinary panel does not need to come to a verdict. Campus due process permits the panel to decide, in the absence of evidence of your guilt, not to render any verdict at all, or to postpone the proceedings indefinitely until new evidence becomes available. This differs considerably from the criminal justice system, where, once accused, a defendant is entitled to a speedy trial and verdict.

Privacy laws bar universities from revealing the disposition of a disciplinary matter to complainants, except in the case of accusations involving violence or sex (see "Privacy of Records," below).

Written Findings

Courts disagree on whether due process requires written findings in student disciplinary cases.

Many courts have ruled that due process entitles students to at least brief written rulings that state the disciplinary committee's decision. Some courts have gone

further and held that due process requires that such rulings state both the specific rationale for the decision and the factual findings behind it. We know of no case, however, where the lack of written rulings was seen as so outrageous an error that the disciplinary board's findings were overturned. This does not mean that no such case exists, but clearly this is not a common ground for judicially attacking a disciplinary outcome.

Many colleges and universities provide for written findings even where the law does not require them. If your school does not automatically provide written findings, it is a good idea to request them nonetheless. They can be critical to your preparation of an appeal or legal challenge.

If your university has issued written findings in your case, and you believe that they contain lapses in logic, you can use these findings in a lawsuit alleging violation of due process, of the university's rules, or of state rules for administrative hearing boards. Courts indeed have overruled disciplinary decisions on such grounds. In *Hardison v. Florida A&M University* (1998), for example, the Court of Appeal of Florida reversed a disciplinary panel's finding on the basis of the written findings. The university had convicted the student for assault and battery, but the court found that the facts reported in the written decision were insufficient to meet the university's own definition of assault and battery.

Appeal

The law does not require public universities to provide an internal avenue for appeal of student disciplinary decisions. Students have a constitutional right only to a single, reasonably fair internal hearing.

The great majority of universities, however, rightly allow an appeal. Further, irregularities in the appeal process may be grounds for a contract claim against your university. For example, in the case of *Mitchell v. MacGuire* (see Part IV: Section III), a New York state court overturned both a student's original conviction and the appellate decision upholding it because of irregularities in the appeals process. Be aware, however, that an appeal sometimes can result in an **increase** in the severity of punishment. Before you decide to appeal an adverse verdict and punishment, check your college's handbook to see whether an appeal permits such an increase in penalties. If it does, then you need to weigh carefully the risks and rewards of pursuing an appeal.

A meaningful appeal is an extremely important procedural protection, because it helps to ensure that all other procedural protections to which you are entitled actually were given to you. If the body initially hearing your case knows that you have a right to appeal, it is more likely to treat your case properly, to avoid the embarrassment of its decision being reversed. When you argue

for greater procedural protections at your initial hearing, you should make clear that you plan to appeal if you are not granted the safeguards that you believe you need for a fair trial.

Even if your university doesn't allow a formal appeal process, you should not be deterred from writing to administrators to ask for reconsideration. You can write first to the supervisors of the disciplinary process or to the dean of students, and, if this fails, to the provost, president, and board of trustees. Always write as if these higher officials obviously would care about justice, fairness, and the truth of a case.

Writing Letters of Complaint to University Officials

Many universities tell a students involved in campus cases that the disciplinary process being "confidential," defendants may not discuss the cases with anyone other than advisors, attorneys, or family members. Such policies have the effect, and too often the intention, of prohibiting students who are being mistreated from bringing their cases to the attention of the media and the university community. Nothing in federal law, of course, prevents you from discussing your own case.

The administrators in charge of the disciplinary process would be hard pressed, however, to accuse you of

violating the university's confidentiality policy if you spoke about the abuses in disciplinary procedures with their superiors, namely the provost, the president, and even the trustees of your university. Because the duties of these officials include supervising the disciplinary process, it is difficult to argue that it would be a breach of confidentiality to write to them. It is even probable that a public university student is entirely within his or her rights to bring unfair treatment to the attention of political figures such as legislators or the governor, on the theory that they are the ultimate heads of a public university system. (The First Amendment, recall, actually has a provision guaranteeing a citizen the right to "petition the government for a redress of grievances.")

If you find yourself in great difficulty, and facing abuses of power, you may want to write to one or more of these officials, all of whom might well be able to help your case. These officials may notice injustices that lower-level administrators simply ignore. Your very act of complaining to a top university official might produce more meaningful review, because lower-level administrators will be in the unaccustomed position of having their superiors looking over their shoulders. Administrators often take pains to hide abuses from the attention of trustees. Complaining to trustees is a tactic that is too rarely used by aggrieved students. Sunlight, as Justice Louis Brandeis accurately said, is the best disinfectant.

Penalties

Universities enjoy wide discretion in establishing the punishments that they choose for particular infractions. Courts normally will defer to the judgments of university officials on matters of punishment, even if they think that the punishments are unwise, unfair, or excessive.

Nonetheless, the punishments that the university gives to students may not be drastically disproportionate to the offenses of which those students have been convicted. As one court put it in the high school context: "A school board could not constitutionally expel forever a pupil who had committed no offense other than being five minutes tardy one time." A sentence that is wildly out of proportion to the violation committed may cause a court to find a violation of substantive due process. Courts do not like to fine-tune a university's judicial system, but they often will react very negatively to unreasonable punitive extremes.

Student defendants often ask whether public universities may punish them by removing them from extracurricular activities such as sports or by suspending them from aspects of campus life such as on-campus housing. These sanctions are permissible. Universities may also punish students by asking them to attend courses or workshops designed to help them avoid misconduct, such as meetings for alcoholics or anger management

classes. It is probably unlawful, however, for **public** universities to **force** you to attend programs whose goal is your adoption of **officially sanctioned views on controversial topics** such as race, sex, or sexual orientation, even if your offenses relate to your views on these subjects. (See FIRE's *Guide to First-Year Orientation and to Thought Reform on Campus.*)

Fines are also acceptable as punishments, as long as they are not so excessive as to put a grossly unequal burden on rich and poor students. In the latter case, a campus appeal might successfully be pursued on grounds of economic discrimination and disparate treatment on the basis of economic status. Such grounds would not likely succeed in court as a due process claim, but might have substantial moral force in a campus appeal.

Privacy of Records

Federal law requires all colleges and universities—public and private—to keep the records of student disciplinary cases confidential, but to disclose these records to the defendants upon their request.

The Family Educational and Rights Privacy Act (FERPA) of 1974 makes a student's "educational records" confidential, but it gives students and their parents the right to inspect them. FERPA is quite specific in delineating precisely who may and may not see a student's records and under what circumstances. Your rights

under FERPA are much clearer than your due process rights, which come from judicial precedent rather than statute and which vary widely by both specific case and jurisdiction. Furthermore, unlike due process, FERPA applies equally to all institutions, public or private, that receive any Department of Education funding—that is to say, virtually all colleges and universities.

For some time, there was ambiguity over the extent to which FERPA applied to disciplinary records. However, a number of recent cases, including the extremely important 2002 ruling of the U.S. Court of Appeals for the Sixth Circuit in *U.S. v. Miami University*, now make it wholly clear that disciplinary records are "educational records" and are consequently covered by FERPA.

FERPA therefore gives you the right to inspect any and all documents about you created by the university in the course of your disciplinary case. Others may not examine those records. As with your transcript, the substance of your disciplinary file is confidential. The university may not share information in it, even orally, with anyone other than you and certain specific university officers and staff, unless you waive your rights to such confidentiality.

You have the right to see not only material that has been placed in your official file, but all documents about your case created by the university, no matter who created them or where they are stored. You don't have a right to see notes, however, such as the handwritten

notes at meetings that individual administrators or professors made for their personal use and that they have not shared with others. There is no way under FERPA to access a school official's personal notes unless the official gives them to you voluntarily. (It never hurts to ask, however.) Additionally, you don't have a right to see records generated by the campus police that were not turned over to the disciplinary committee. These are considered regular police records. The police may show them to other law enforcement agencies, or to prosecutors, all subject to their normal rules. You can try to see these records under state freedom of information laws, but this is very difficult or even impossible in many jurisdictions.

ACCESS TO RECORDS

If you wish to inspect the records of your disciplinary case, your college or university must gather them and give you access them to them within forty-five days. (See Part IV: Section I, on how you can use this right to your advantage in preparing your defense.) Your university is not required to let you photocopy these records, and many universities do not allow students to copy them. Universities are required to allow you to copy them, however, if preventing you from doing so effectively prohibits you from seeing them.

At the conclusion of your case, if your university has decided to permanently retain documents about you that

you would rather see destroyed, you may ask the university to discard them. If administrators refuse to do so, you have the right to a hearing before an impartial officer of the university to ask that the materials be removed. If you can demonstrate at that hearing that the information in your file is inaccurate, misleading, or otherwise in violation of your privacy rights, the university must correct your records. The law specifically allows the university to maintain records about disciplinary actions taken against you, however, so it is unlikely that you will succeed in having your disciplinary record expunged at such a hearing. However, FERPA requires that you be allowed to place a statement in your file explaining any problems you see with any aspects of your educational records, which the university must release if, under circumstances such as a court order, it releases the records themselves.

Your college or university has the right to disclose information about your disciplinary case to your professors or university officials **if they have a "legitimate educational interest" in them**. When you apply to graduate or professional school, or seek to transfer schools, your college may forward any records related to you, including information about your disciplinary record. In such a case, however, it must inform you that this is its policy or make a reasonable attempt to contact you with regard to the transmission of the records.

RELEASE OF RECORDS

If you are found responsible for **certain types of misconduct**, the Higher Education Amendments of 1998 give your university the right to report your name and the final result of your case to specific categories of people.

If you are found responsible for a crime of violence or a sex offense, your university **may** disclose your name, the violation you committed, and the punishment you received to any member of the public, including the news media. Universities do **not** have an **obligation** under FERPA to reveal this information. They may refuse requests to divulge it. Even if your university chooses to speak to the press, however, it may disclose only the final result of your case, keeping the documents related to it confidential. You should note, though, that under the Clery Act of 1990, universities are **required** to make reports to the general campus community about certain very serious crimes that are reported to campus security or the local police. (See the next section for more on when universities must report crimes to the police.) The content of these reports, however, may not be such that it will violate your rights under FERPA.

If you are charged with an act of violence, your college or university **may** tell the victim whether or not you were found responsible. If you are charged with a sex offense, the university **must** tell the victim whether or

not you were found responsible. The university is **not allowed** to tell the victim about the outcome of cases involving any violations or rules beyond these categories, such as nonviolent theft.

Whether a school may tell your parents about your disciplinary case depends on the nature of the accusation, whether your parents claim you as a dependent on their tax return, and, for some types of accusations, your age. If your parents declare you as a dependent on their tax return, your school may show them all of your educational records, including your disciplinary file. Most parents declare their college-age children as dependents on their tax return, so if you are a college student your parents likely have access to your disciplinary file. Whether or not your parents claim you as a dependent, a university may tell your parents if you are found responsible for an offense involving drugs or alcohol, if you are under twenty-one at the time of disclosure. Also, as noted above, the university may tell anyone it pleases—including your parents—if you are found responsible for a violation of disciplinary rules involving violence or sex. Within the boundaries of the law, however, universities may set their own policies about when to divulge disciplinary records to students' parents. Under no circumstances, however, is a college or university **required** to tell a student's parents of the student's record. Except in the circumstances mentioned above, your university has an affirmative obligation not to tell

your parents about the final result of your case. Thus, if you are not a dependent and are found responsible for nonviolent theft, for example, your university may not reveal this information to your parents.

Universities take their obligations under FERPA very seriously. Although, as noted, you may not directly sue your university for improperly disclosing your records, you may file a complaint with the Department of Education's Family Policy Compliance Office (www.ed.gov/offices/OM/fpco/) if you believe that your university has acted improperly on a FERPA issue. The Department of Education can cut off federal funding from universities that have a practice or policy of violating FERPA.

The Victim's Right to Confidentiality

Colleges and universities may not reveal the names of witnesses or crime victims without their consent. However, if your university creates records about the allegations that you made or crimes that you witnessed, your parents may see them if your university grants them the right to review your file. A university may let your parents see your file only if you are declared a dependent on your parents' most recent tax return. If a notation that you were the victim of or witness to a crime is placed in your permanent file and you do not wish it to be there, you have the right to ask your university to remove it and,

Typically, however, individual violations of FERPA do not tend to result in significant sanctions.

Reporting of Crimes to Police and Prosecutors

If you are found responsible for a crime of violence or a sex offense, your university may choose to report your name and the fact of the finding of responsibility to the police and to the local district attorney. The university does not need to inform you when it has done so, but must make a notation in your file that the records have been disclosed. Unless your case is in juvenile court, however, the university may not disclose any information

if the school refuses, you have a right to a hearing before an impartial officer of the university. The hearing officer has the power to order that your records be modified if they are inaccurate, misleading or otherwise in violation of your privacy rights.

Universities may send reports containing the names of witnesses or crime victims to the police or prosecutors under certain circumstances. At this point, the fact that you were the victim of or witness to a crime may become available under public records laws, and may be accessible to your parents and the larger public.

about the case, other than your name, the accusation, and the final result, without a subpoena—that is, without a formal, written and (usually) court-authorized order. Nonetheless, it is easy for police, grand juries, or, in some jurisdictions, attorneys seeking monetary damages in civil suits for the victims to obtain a subpoena for all of the university's records related to your case. The university is required to make a reasonable effort to inform you that it received a subpoena of your records before complying with it, unless the subpoena requires the university not to give such notice. Individuals can be subpoenaed as well: If university officials are subpoenaed and asked questions about your records, they must answer. Additionally, if the campus police independently of the university administration created its own files on you, related to the disciplinary charge, they may freely share these records with prosecutors.

The university administration may not report to the campus or local police allegations of misconduct that they receive, unless such reports are necessary to protect the safety of others in an emergency. If school officials receive a complaint of illegal gambling, for example, they may not tell the campus police, since there is no immediate danger to persons or property. However, if the university receives a complaint of a disciplinary offense that suggests a risk to safety, it may, at the time the complaint is filed, inform the campus police.

When very serious crimes have been reported to the local police or campus security, the university has a responsibility to warn the campus community that such crimes have occurred under the Clery Act of 1990 (see previous section).

CONCLUSION

Forewarned is forearmed. Despite certain rights of privacy, you enjoy far fewer protections and safeguards on campus than off campus if you are accused of wrongdoing. There are limits, however, to the arbitrary authority of college and university administrators over you, especially at public colleges and universities, but also at private ones. This guide has sought to inform you of your legal rights. It has sought throughout to clarify the moral arguments on behalf of the procedural and substantive safeguards that should be given to the individuals of a free and decent society. It has explained to you the means at your disposal to defend yourself, your honor, and your rights. If you have to use this guide, we hope fervently that it increases the justice and fairness with which you are treated, and that it aids you in establishing the truth. We also hope that many readers have