

Cornell University University Assembly

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Agenda

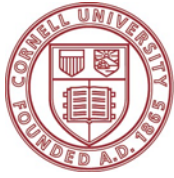
Codes and Judicial Committee
University Assembly
November 29th, 2017
4:30pm - 5:45pm
316 Day Hall

- I. Call to Order (Chair)**
 - i. Call to Order (2 minutes)
- II. Approval of Minutes (Chair)**
 - i. November 15, 2017 (1 minute)
- III. Business of the Day**
 - i. End of Semester Outlook and Thank You (Chair) (3 minutes)
 - ii. Discussion with Hearing and Review Board Chairs (Facilitated by Chair) (45 minutes) ^[1] ^[2]
 - iii. For Discussion: University Hearing and Review Boards Staffing Update and Discussion (5 minutes) ^[3]
 - iv. For Discussion: Hate Speech Working Group Update and Discussion (8 minutes)
 - v. For Discussion: Concerning the Holistic Approach to Addressing the Campus Code (5 minutes)
 - vi. For Discussion: Discussing recent Department of Education Policy Shifts, our Quantum of Proof, and Policy 6.4 (5 minutes)
- IV. Adjournment (Chair)**
 - i. Adjournment (1 minute)

Attachments

1. "Who's Who in Cornell University's Disciplinary System"
2. Procedures of the University Hearing Board
3. UHRB 2017 Questions (Edited)

If you are in need of special accommodations, contact Office of the Assemblies at (607) 255-3715 or Student Disability Services at (607) 254-4545 prior to the meeting.



Cornell University

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120 Day Hall
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Who's Who in Cornell University's Disciplinary System

Hearing Board Chairs	Review Board Chair
Timothy Devoogd tjd5@cornell.edu Clare Fewtrell cmf3@cornell.edu Thomas R. Overton Tro2@cornell.edu Rocco Scanza rms43@cornell.edu	Andrea Mooney ajm31@cornell.edu

Administrative Chair
Joel Cisne cisne@cornell.edu

Office of the Judicial Administrator 120 Day Hall; judadmin@cornell.edu (607) 255-4680	Office of the Judicial Codes Counselor jccoffice@cornell.edu
Michelle R. Horvath Judicial Administrator mrh263@cornell.edu Christina Liang Associate Judicial Administrator Vincent J. C Associate Judicial Administrator Janey Bosch ; jl259@cornell.edu Office Manager Steve Morey Administrative Assistant	Kendall Karr Judicial Codes Counselor Ryan Parker Associate Judicial Codes Counselor Mark Carper Assistant Judicial Codes Counselor Doug Wagner Assistant Judicial Codes Counselor Kevin M. Clermont Advisor

**Procedures of the University Hearing Board
Adopted by the University and Hearing Boards on
October 22, 2013**

- I. Overriding Principles.**
- II. Procedures That Apply to All Hearings.**
- III. Types of Hearings and Unique Procedures for Each.**
- IV. Dates of Acceptance of Procedures, Publication in the *Chronicle* and When Procedures Effective.**
- V. Miscellaneous.**

I. Overriding Principles.

A. Every person involved in Cornell University's disciplinary system is expected to follow the procedures and policies of the Cornell University Campus Code of Conduct (Code) and the procedures articulated in this document (UHB Procedures).

B. The UHB Procedures explain and interpret the Code. To the extent the UHB Procedures, or any individual procedure, is determined to be inconsistent with the Code, it is null and void.

II. Procedures That Apply to All Hearings.

A. Selection of the Five-person Panel.

1. Random selection of panel members. The Administrative Chair¹ shall, in the presence of the Judicial Administrator or his/her designated representative, randomly select the members and alternates for a hearing panel from the pool of qualified University Hearing and Review Board members. The Judicial Administrator or his/her designated representative and the Administrative Chair shall certify in writing the random selection of hearing panels and alternates.

2. Unavailable panel members. Should a panel member be unable to attend a hearing, he/she shall notify the Judicial Administrator of the reason for his/her inability to attend as far in advance of the hearing as possible so that another panel member may be selected. The UHB Chair may remove from the pool any UHB member if the member is not honoring his/her commitment to the university to communicate promptly with the Chair or the Judicial Administrator's office, to participate in hearings, to arrive punctually, and otherwise to participate responsibly in this process. *Code*, Title

¹ The Code provides, "All the members of the University Hearing Board and University Review Board pool shall annually elect one Administrative ChairChair from among those members." *Code*, Title Two, Article IV, Section C.4.

3. Removal of panel members.

a. Name recognition; certification of being fair and impartial.

Each panel member will contact the JA prior to the hearing to learn the names of the parties and the general nature of the hearing. The panel member must certify to the JA that she or he will be able to be fair and impartial at the hearing, even if she or he knows one of the parties or has some indirect knowledge of the underlying incident.

b. Removal of panel member by himself or herself. If a panel member knows she or he has a conflict of interest, cannot be fair and impartial, or has any other good cause, she or he may voluntarily remove herself or himself from the panel. While it is preferable that this would be determined prior to the commencement of the hearing and communicated to the JA, if the panel member determines this during the hearing, she or he should ask for a break in the proceedings, speak to the UHB Chair about the situation and remove herself or himself at that time. The Chair, in his or her sole discretion, will determine whether to proceed with the remaining panel members or to recommence the hearing with a new panel at a later date.

c. Removal of a panel member at the request of a party. As noted in the Code, "Knowledge of the events at issue shall not disqualify a member, unless he or she has first-hand knowledge of the events at issue, has been directly involved in those events, or is personally interested with regard to the outcome. . ." (*Code*, Title Three, Article III., E.3.a.(5)) If the JA, the complainant, or the accused person believes one or more of the panel members would be unable to serve based on this criteria, he or she will bring a pre-hearing motion to the Chair (via electronic mail) and copied to the other party stating the basis for the concern and requesting the Chair to interview the panel member regarding his/her ability to serve. The opposing party must respond promptly to allow the Chair to take the next steps.

The Chair may recommend to the panel member that she or he voluntarily withdraw from the panel. If the panel member continues to wish to serve, the Chair will contact the remaining panel members, inform them of the information gathered by the Chair, and ask the remaining panel members to vote on the pre-hearing motion. A majority or a tie vote will result in disqualification of the panel member.

The JA will endeavor to provide notice to the parties of the names and

constituency of panel members 48 hours in advance and the moving party will bring its pre-hearing motion to the Chair 24 hours in advance, unless good cause is shown why the motion was brought less than 24 hours in advance. Additionally, it is acknowledged that panels are sometimes not established until right before a hearing, in which case the JA and parties will operate in good faith to accomplish these things as soon as practicable to avoid the necessity of a continuance.

d. Replacement of removed panel member. If a panel member is removed, the next eligible and available UHB member of that constituency group chosen by the Administrative Chair will serve on the panel instead.

B. Pre-hearing motions. If the JA or a party has a pre-hearing motion, it must be submitted to the Chair (via electronic mail) and copied to the opposing party no later than 48 hours before the hearing, unless good cause is shown why the motion was brought less than 48 hours in advance. The opposing party must respond promptly to allow the Chair the opportunity to rule on the motion prior to the hearing.

C. Appropriate decorum. All hearings shall be conducted in an orderly manner. No smoking, photography, or tape recording is permitted during the hearing. All persons involved in the process must be treated with dignity and respect and are expected to treat others in the process with dignity and respect. The Chair may request that anyone disrupting the decorum refrain from further disruption or leave. If that person shall continue to be disruptive, he/she may be excluded from the hearing. If the Chair excludes a person from the hearing, any rights attendant to his/her presence at the hearing will be deemed to have been waived.

D. Decisions of the UHB Panel. Decisions of a panel shall be based solely on the information gathered at the hearing, not information learned through media, gossip or other sources prior to the hearing. The Chair does not have a vote and shall remain neutral, but may lead the discussion of the panel members, including but not limited to: ensuring that all panel members have a chance to be heard; offering information about the Code, precedent and procedures; and reminding the panel of the availability of counsel. Three panel members must agree on any particular decision; the Chair may not break a tie.

E. Confidentiality. Members of the panel of the hearing board and all participants in the hearing shall consider all information at the hearing to be of a confidential nature and shall in no way divulge the information. In public hearings, only members of the panel shall consider all information at the hearing to be of a confidential nature and shall in no way divulge the information. All deliberations of the panel shall be held in a closed session and shall at all times be strictly confidential. The confidentiality described in this paragraph must be maintained even from other members of the hearing and review boards who were not on the panel at the hearing.

F. Written Decision. The UHB Chair will write the decision with input from the panel, and sign it on behalf of the panel. All decisions shall include:

1. the Code sections charged and the final disposition of each charge;
2. the panel's bases for each decision;
3. the penalty and/or remedy (if any) imposed with respect to each charge;
4. names and constituencies of panel members; and
5. any panelist who intends to file a separate opinion (dissenting or concurring), must notify the Chair within (48) hours of the conclusion of the hearing;
6. the dissenting or concurring opinion must be filed within (72) hours of the circulation of the majority opinion.

III. Types of Hearings and Unique Procedures for Each.

A. Hearings based on written petitions. The Code references several types of hearings that are based on the written petition of one of the parties, including request by the complainant for a review of the nonaction or summary action by the Judicial Administrator (JA), appeals of temporary suspensions, request to return from an indefinite suspension, and review of penalty imposed by JA for noncompliance or violation of probation. (*See, Code*, Title Three, Article III, E.1.).

1. The format for these hearings will be: motion, reply, response. Typically, this means the accused person or the complainant writes to the UHB to explain what it wants to happen.² The JA has forms available that the party may fill out to guide its request.³ The JA replies in writing. Then the party responds to the issues the JA raised that he/she did not anticipate in his/her motion.

2. The UHB Chair will determine due dates for the various written documents described above.

3. While it is anticipated that these hearings will be exclusively in writing, the panel of the UHB may request live argument if needed to reach a decision. At its initial meeting, the panel would consider whether it needs oral argument and, if so, would pick a date and time (typically a few days later) to hear from the parties. Or, the panel may simply have some questions and ask the parties these questions via telephone conference call on the same day. Any oral arguments or questioning of parties must be recorded.

4. The UHB Chair will then issue a written decision on behalf of the panel.

B. Hearings on the Merits of a Case. The most common type of hearing is a hearing on the merits of a case. (*See, Code*, Title Three, Article III, E.1.d.).

² Drop this off at the JA's Office or send it via electronic mail to judadmin@cornell.edu. The JA's Office will deliver it to the UHB members.

³ These forms are available from the JA's Office or on line at judicialadministrator.cornell.edu.

1. Bifurcated hearing. The panel of the UHB must first determine whether there is clear and convincing evidence that the accused violated the Code. The panel will typically hear testimony, receive exhibits and hear arguments before reaching this conclusion; other times the parties may have stipulated to facts or to the fact of a violation. If, at the conclusion of the “violation stage” the panel determines there is not clear and convincing evidence, the hearing ends. If it determines that there is clear and convincing evidence of a violation, the hearing will resume to the “sanction stage” and the panel will consider what the appropriate sanction should be. Information about the prior misconduct of the accused will be reserved for the sanction stage of the hearing, except if the accused or other witness testifies at the violation stage, and if the prior misconduct is relevant with respect to credibility (for example, if the prior offense dealt with dishonesty or if the accused person asserts he/she has no prior disciplinary record, etc.), then the opposing party may have the option to examine the witness on this testimony or present rebuttal evidence. In such circumstance, only directly relevant prior misconduct may be addressed, and the examination or rebuttal should be specific and relevant. Whenever a party intends to use such evidence, the issue of relevancy should be addressed in the pre-hearing motions, to the extent practicable, in an attempt to determine the issue before the hearing.

2. Order of the hearing. The UHB Chair runs the hearing as would a Chair of a meeting. The order of the hearing, like an agenda, typically follows this format, subject to changes by the Chair as needed:

1. Call to order.
2. State constituency of panel members for record.
3. State names of accused, complainant, counsel and others present for the record.
4. Cite case and accused's name.
5. Be assured that accused is aware of the protections afforded to him or her by the Code, Title Three, Article III (for example, the ability to be represented by the Judicial Codes Counselor, to refuse to comment on the matter, to confront accusers and to produce his or her own witnesses and evidence).
6. Ask Judicial Administrator to read charge against the accused.
7. Ask the accused if he or she understands the charge. Ask whether the accused believes he or she violated the Code.
8. Request Judicial Administrator to present opening statement.
9. Request accused to present opening statement.
10. Request Judicial Administrator to present case and witnesses, allowing questions from accused (or his/her advisor) and board.
11. Request accused to present case and witnesses, allowing questions from the Judicial Administrator and board.
12. Any final questions?
13. Judicial Administrator presents summation.
14. Accused presents summation.
15. Final and concluding questions?
16. Panel deliberation in closed session.
17. Read decision into minutes.

18. If accused is found in violation, request the Judicial Administrator to present arguments and/or witnesses regarding sanction.
19. Accused may present arguments and/or witnesses regarding sanction.
20. Any response from the Judicial Administrator?
21. Any response from the accused?
22. Any final questions?
23. Closed session -- panel deliberation on sanction.
24. Read decision into minutes.
25. Inform accused of the right to appeal.
26. Close case if there are no further comments.

3. Common procedural issues. Following are a list of procedural issues that are common in hearings on the merits of cases. These particular procedures are documented here to provide comparable treatment of issues regardless of composition of the panel or who is the Chair.

a. Panel overruling the Chair. As noted in the Code, the Chair makes initial rulings on procedural issues that are subject to being overruled by the UHB panel. *Code*, Title Three, Article III. E.3.b.(1). For matters determined by the Chair prior to the hearing, the Chair will state the pre-hearing motion and his/her ruling on the record at the outset of the hearing. Other rulings will be made during the course of the hearing. Any party has the right to ask the panel to overrule the Chair's procedural rulings. Any panel member has the right at any time to request a closed session to discuss a procedural or substantive point material to the hearing. For purposes of this provision, a procedural point shall include all action taken by the Chair.

b. Panel asking questions. Panel members may direct questions to the complainant, witnesses, and accused at any time, subject only to the Chair's responsibility of maintaining an orderly hearing.

c. Exhibits. Exhibits are exchanged by the parties three days before a hearing and objections are heard by the Chair the day before the hearing, pursuant to *Code*, Title Three, Article III.E.2.d. If there are no objections to an exhibit, it is admitted into evidence prior to the hearing and provided to the board at the outset of the hearing. If there is an objection to an exhibit and the Chair overrules the objection, the party who wishes to keep the exhibit out of evidence may request that the exhibit be withheld from the panel to allow the party to ask the panel to overrule the Chair. If there is an objection to an exhibit and the Chair sustains the objection, the party who wishes to submit the exhibit may propose its admission into evidence at the appropriate time in the hearing, allowing the Chair to reconsider his/her prior ruling or the panel to overrule the Chair. The parties must provide at least 10 hard copies of each documentary exhibit to the JA's Office.

d. Affirmative defenses. The JA has the burden of proof and persuasion to prove a violation of the Code. The accused, however, shall have the burden of proof and persuasion for any affirmative defenses asserted. An affirmative defense is a new matter that constitutes a defense to the complaint; for example, an accused charged with theft could raise a prior payment as an affirmative defense.

e. Evidence. While the strict rules of evidence do not apply, the panel may admit all of the relevant evidence of a given case that is not unduly prejudicial or unfair. A hearing panel shall, in every case, admit evidence it considers necessary to make a fair decision. The Chair should make the initial determination of whether a particular piece of evidence (particularly hearsay) is relevant and not unduly prejudicial. For example, while the notes taken by a party or the JA of a conversation are not automatically admissible (and JA notes should not be used during the presentation of the JA's case), they may be used on cross examination to demonstrate a prior inconsistent statement of a witness; a statement of a non-testifying witness may serve as corroborating evidence; or business records may be used to establish details witnesses cannot remember.

g. Use of screens. When measures are taken to separate the parties (most commonly a screen that prevents them from seeing each other) (*see, Code, Title Three, Article III, E.*), efforts will be made to allow the accused person's advisor and the JA to see all witnesses. The advisor and the JA will maintain a respectful distance from opposing parties and witnesses.

h. Use of cross-examination through UHB Chair. When cross-examination is conducted through the UHB Chair (*see, Code, Title Three, Article III, E.*), efforts will be made to ensure a full and speedy cross-examination. For example, technology such as "Instant Messaging" might allow more flexibility and speed.

i. Limitations on testimony. The Chair may fix a limit to the length of a witness' testimony should it appear to belabor the point or become too repetitious.

j. Need for additional or clarifying information. In the event the panel feels the need for additional or clarifying information, whether prior to or after entering a closed session, the Chair may:

- order a continuance of the hearing and re-opening the investigation for good cause shown;
- recall a witness immediately for the purpose of clarifying

specified points of that witness' testimony, if s/he is still available and the information is desired;

- order a continuance until a witness may be recalled if the witness has departed and the clarifying information is necessary. This privilege shall not impair the right of the accused, complainant, or Judicial Administrator to question the witness; or

- allow the panel to interrupt its closed session prior to reaching a decision, for the purpose of clarifying specific aspects of testimony heard or other matters on which the panel feels the need for further information, from any parties to the hearing who might be present. The specific reasons for interrupting the closed session shall be stated for the record. The panel shall not ask questions or receive responses, which, in the opinion of the Chair, are not germane to the stated reason for interrupting the closed session. All parties must be present for these discussions and the discussions shall be held on the record.

k. Continuance, including based on the late hour. The Chair may adjourn the hearing until another day for good cause shown, including lateness of the hour. Typically, hearings should not go past midnight on any given night to allow parties sufficient rest for their work and classes the following day. The Chair shall consult all interested parties before fixing the rescheduled date. The JA and the accused shall be notified of the new date.

l. Joinder of cases. When cases are joined pursuant to *Code*, Title Three, Article III. E.3.b.(3), it is contemplated that the joinder will be for the violation stage of the hearing, not the sanction phase of the hearing. The parties, the JA, the Chair or a member of the panel may request joinder of the sanction phase, however, if it serves the interests of justice. Once all parties have opined on the issue, the decision is left to the Chair, subject to being overruled by the panel.

m. No jurisdiction. In cases in which the panel of the UHB finds there is no jurisdiction, the Chair shall notify the Codes and Judicial Committee of the rationale of the panel.

4. Procedural Issues Unique to Public Hearings. The procedures for a public hearing shall be the same as for a regular hearing, except that:

- a. The accused and the JA shall submit to the Chair and opposing party (i.) a list of witnesses who will be called at the hearing and (ii.) a designation of advisor. The list and designation shall be presented no later than 48 hours prior to the commencement of the hearing. The JA will provide both lists to the panel 24 hours in advance of the hearing.

- b. A reasonable effort shall be made to accommodate an expected

audience.

c. Those directly involved in the hearing (parties, counsel, etc.) shall be located separately from the public.

d. The Chair must exclude witnesses from the hearing so that witnesses may not listen to the testimony of other witnesses who testify prior to them.

e. Either the JA, the complainant, the accused student or a witness may request that some testimony remain private. The panel, in its sole discretion, may grant this request, removing the public during such testimony. Such private testimony will be summarized for the benefit of the public at its conclusion, deleting the witness' name.

IV. Dates of Acceptance of Procedures, Publication in the *Cornell Chronicle* and When Procedures Effective.

These procedures were approved by a majority of the University Hearing and Review Board pool on October 22, 2013. They were published in the *Cornell Chronicle* on _____, and became effective thirty days later, that is on _____.

V. Miscellaneous

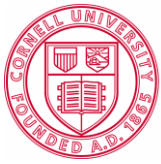
A. The University Hearing Board should meet at least once each academic year for the purpose of reviewing and updating these procedures of the University Hearing Board. Amendments shall be made by majority vote of the membership of the Board.

B. The term of office of the Administrative Chair shall be one (1) academic year. Elections shall be held as early in the academic year as possible.

C. These Procedures have been developed in accordance with the Cornell Campus Code of Conduct and augment the procedures outlined therein. Any current or future Code provisions that contradict these Procedures shall supersede these Procedures or sections thereof.

D. A copy of these Procedures of the University Hearing Board shall be made available as follows:

1. to all parties - at the time the Office of the Judicial Administrator notifies the parties of the charge and date of hearing, or upon request;
2. to other interested parties - in the offices of the Judicial Administrator and Judicial Codes Counselor upon request.



Cornell University University Assembly

UHRB Application Questions - 2017 Cycle:

1. For Students, please provide the expected semester and year of your graduation.
2. There are only a few hearings each year, but when they occur they often happen at night and can go late or span across multiple dates. Are you able to commit to complete a hearing once you start?
3. If selected to be a member of the University Hearing and Review Boards, you would be expected to undergo a couple of hours of training at the start of the academic year. Can you commit to undergo that training?
4. Please describe in your own words what the University Hearing and Review Boards are and the role they play in Cornell's judicial system.
5. Hearing panels must occasionally convene in the summer months. Although you are not expected to be available in the summer it is helpful for us to know. Do you anticipate being available in the summer months?
6. How often do you check email and how long does it take you to respond on average?
7. If you were subject to discipline either at Cornell or elsewhere, please explain how this experience will serve to make you a more conscientious board member. We expect you to share all instances of discipline, but having been disciplined does not automatically exclude you from service on the boards. Such disclosures will be treated confidentially.

8. For this question, assume the Code requires the Judicial Administrator's office (JAO) to provide notice of a hearing to the accused individual at least one week before a hearing. Further, at least three days before a hearing, the JAO must provide a list of witnesses and exhibits that will be presented at the hearing.

Suppose you are on a panel hearing a case in which you believe the accused individual violated the Code. However, the JAO provided notice to the accused five days prior to the hearing, and the list of witnesses one day in advance. The advisor representing the accused individual has not raised these procedural flaws as problematic. What would you do?

9. Assume that you are asked to serve on a hearing panel concerning a provision of the Code with which you personally disagree. How would you respond? Would you recuse yourself from the hearing panel, potentially penalize an individual for a violation of the Code with which you disagree, or take a different course of action? Please explain your reasoning.
10. Discuss which violations of the Campus Code of Conduct, if any, you believe to potentially warrant suspension, expulsion, and/or transcript annotation as penalties. Please explain your reasoning.
11. How do you believe the Campus Code of Conduct should be applied when an ambiguity arises? (Discussion around turning this into a hypothetical instead of an abstract question)
12. As a member of the University Hearing and Review Boards, you would be expected to recuse yourself from a particular panel if you doubt your ability to assess the case fairly. If asked to serve on a hearing panel, under which potential cases, if any, would you recuse yourself and why?
- a. a case involving an alleged Code infraction that you had witnessed?
 - b. a case involving an acquaintance of yours?
 - c. a case which you had read or heard a fair amount?
13. If there is anything else you wish to discuss, please do so below (250 word limit).