

Cornell University
University Assembly

Agenda

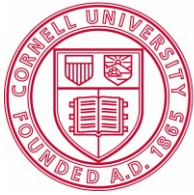
Codes and Judicial Committee

Cornell University Assembly
Agenda of the September 30, 2019 Meeting
1:00 PM – 2:30 PM
305 Day Hall

- I. Call to Order (Chair)**
 - a. Call to Order
- II. Approval of the Minutes (Chair)**
 - a. September 23, 2019
- III. Business of the Day**
 - a. Campus Code of Conduct
 - i. M. Hatch Proposed Resolution
 - ii. Continuation of recommendations through Google Docs
 - b. University Hearing and Review Boards
- IV. Adjournment**

Attachments

- 1. CJC Meeting Minutes 09/23/2019
- 2. Proposed Resolution
- 3. Kevin Clermont Memorandum I
- 4. Kevin Clermont Memorandum II



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Minutes

Codes and Judicial Committee
University Assembly
September 23rd, 2019
1:15pm – 2:45pm
316 Day Hall

I. Call to Order

- a. Call to Order
 - i. L. Kenney called the meeting to order at 1:28pm.
- b. Roll Call
 - i. *Present:* L. Kenney, J. Anderson, R. Bensel, J. Bogdanowicz, M. Hatch, R. Lieberwitz, G. Martin, J. Michael, L. Taylor, K. Wondimu
 - ii. *Absent:*
 - iii. *Others Present:* G. Giambattista, M. Horvath, A. Kaufman, M. Lee

II. Approval of Minutes

- a. April 30, 2019
 - i. G. Martin moved to approve the minutes.
 1. Minutes **approved** by unanimous consent.
- b. September 17, 2019
 - i. L. Kenney recommended to amend section a under Business of the Day to incorporate the discussion on working drafts of the Code of Conduct from both last year's Codes and Judicial Committee (CJC) and the University Counsel.
 - ii. R. Lieberwitz recommended to remove "Employee Assembly" from page 4 section xi subsection 3 for accuracy.
 - iii. R. Lieberwitz said that Tuesdays would generally not work for her, not all faculty members, in reference to page 6 section c subsection i.
 - iv. R. Bensel moved to **amend** the minutes.
 - v. M. Hartin said that a question on jurisdiction was raised during the last meeting regarding whether the Code would be separate for undergraduate and graduate students, faculty and staff.
 - vi. R. Lieberwitz recommended to amend page 4 section xi subsection 3 as a general discussion on what the roles of the Faculty Senate, Student Assembly, Employee Assembly and Graduate and Professional Students Assembly would be if there were separate Codes for students, staff and faculty.
 - vii. R. Bensel moved to accept the friendly amendments and approve the minutes.
 1. Minutes **approved** by unanimous consent.

III. Business of the Day

a. Discussion on Meeting Times

- i. L. Kenney said that she sent out a doodle poll which was not filled out by all members. She said that the Committee would unfortunately not be able to accommodate Judicial Codes Counselor (JCC) G. Kanter's schedule in order to incorporate all voting members. She recommended that someone else from the JCC's office attend the meetings regularly in her absence. She opened the floor for discussion.
- ii. L. Taylor made a motion to meet regularly at 12pm on Mondays.
 1. A. Kaufman said that she would be unable to attend until 12:30pm.
 2. K. Wondimu said that his class ends at 1pm.
 3. L. Taylor **withdrew** her motion.
- iii. R. Bensel asked if 1pm to 2:30pm would work.
 1. L. Kenney said that the time appears to work based on responses from the doodle poll.
 2. K. Wondimu said that he would be around 10 minutes late to the meeting start time.
- iv. R. Bensel moved to set the CJC regular meetings for Mondays from 1pm to 2:30pm.
 1. G. Giambattista asked what the frequency of the meetings would be.
 2. L. Kenney requested to first decide on the meeting time.
 3. Motion **approved** by unanimous consent.
- v. L. Kenney said that she would be comfortable returning to a biweekly meeting schedule as the Committee has done so in the past. She said that if there are strong opinions to meet on a weekly basis, the Committee can discuss that. If the Committee meets biweekly, the next meeting would be on October 7 and there would be no conflicts with the University Assembly (UA) meeting.
- vi. J. Michael said that she is required to attend another meeting every third Monday of the month.
 1. R. Lieberwitz said that she would also be out of town on October 21st.
 2. J. Michael moved that next meetings take place on October 7th and 28th, and then proceed with a biweekly schedule.
 3. Motion **approved** by unanimous consent.

b. Resolution to the UA

- i. L. Kenney requested members of the Committee to read over the draft resolution to ensure that it accurately represents the morale of the Committee, recommends the correct avenues, and is phrased in a way that is respectful, transparent and clear.
- ii. G. Martin recommended that the word "future" be added to drafts under "Be it finally resolved".
- iii. R. Bensel recommended to amend "provide final approval of any and all" to "approve" under the same section.

1. R. Lieberwitz said that this may seem like the Committee is required to approve. She recommended the amendment “only upon a formal approval”.
- iv. M. Hartin recommended including dates of when the drafts were posted.
 1. L. Kenney said that she has no information as to when the University Counsel’s draft to the Code were posted. She said that the CJC’s working draft was posted about a week and a half ago and was promptly removed after the last CJC meeting, but the University Counsel’s draft remains.
- v. L. Kenney asked if there were any issues with the first “Whereas” section.
 1. M. Hartin recommended adding “as accepted by Cornell University President and Board of Trustees” in reference to the UA bylaws.
- vi. M. Hartin recommended including “of the Campus Code of Conduct and other related documents under purview of the CJC will be” in the “Be it finally resolved” section.
- vii. R. Lieberwitz recommended amending “are removed” to “be removed” in the “Resolved” section.
- viii. R. Bensel said that the Committee should make clear that the University Counsel draft should not have been on the Dean of Faculty website.
 1. R. Lieberwitz said that the draft should have been posted for public comment only after going through the proper channels.
 2. L. Kenney said that it may seem as if the UA and CJC are endorsing the document without context regarding origin and uses.
- ix. R. Bensel moved to accept the recommended amendments in the resolution.
 1. Motion **approved** by unanimous consent.
- c. UHRB Staffing
 - i. L. Kenney recommended tabling the UHRB staffing issue to the next meeting, after a clearer process has been established.
 - ii. R. Bensel moved to table the item.
 1. Motion **approved** by unanimous consent.
- d. CJC Working Draft of the Campus Code of Conduct
 - i. M. Hartin: said that from the perspective of someone who was involved in the original formulation and revisions of the Code, the question of why the Code should cover everyone on campus was discussed thoroughly at the time of formulation and subsequent revisions. He said that elaborate discussions took place, the Code was passed and accepted by the President and Board of Trustees as a Campus Code of Conduct.
 - ii. M. Hartin said that some of the past concerns raised by the President were discussed, resolved, approved and included as a part of the Code. He also said that regarding the concern that the Code was too difficult to read, this is as clear as it can get without oversimplification. He added that the Code was designed to be different from that of other universities because Cornell was founded upon a premise of uniqueness.
 - iii. M. Hartin said that there is no reason to make the Code of Conduct a student Code of Conduct. He said that the Code is a community Code, and it should be kept that way.
 - iv. L. Kenney said that in the last meeting, the Committee agreed to first work on the portion that specifically deals with student issues within the greater

- university Code. She said that the Committee discussed to have a student Code within a broader campus Code.
- v. J. Anderson said that the undergraduate student body would prefer a student Code of Conduct, as it would keep the university in line with peers and would focus on educational rather than punitive aspects. He said that such revisions would foster a more equitable system that benefits the university in the long run.
 - vi. G. Martin said that the Code should not remain a campus Code simply for uniqueness. He said that incorporating Greek organizations under the Code would be something that the university could do uniquely.
 - vii. R. Bensel moved to draft a resolution to reaffirm that the Committee would work on the student portion within the greater Code of Conduct.
 1. M. Hatch said that the word “within” is important. He said that student conduct would be a subset of campus conduct.
 2. L. Kenney said that the Committee aims to move forward and work on the student portion within the greater community, not to take away any rights from any group or create an entirely new student Code of Conduct. She said that the resolution would solidify that faculty and employee rights are also important.
 3. Motion **approved** by unanimous consent.
 4. L. Kenney strongly recommended for R. Bensel and M. Hatch to help in drafting this resolution, to ensure that the CJC is represented to the UA as it wants to be.
 - viii. L. Kenney opened the floor for discussion on the Google doc of the working draft.
 - ix. R. Lieberwitz said that some of the terms within the document are confusing and need clarification. She said that based on her reading of the draft from the Counsel’s office, it seems that they would not include procedures as a part of the Code. She said that doing so would be a mistake.
 1. L. Kenney said she spoke to the Counsel’s office and they will be sending the procedural portion by the end of this week. She said that her understanding is that they envision it as a separate document, but this would be mere speculation until the Committee receives the remaining portion. She said that the Committee should wait to address this issue until it receives it.
 - x. R. Bensel asked what other portions the Committee has not received from the Counsel’s office.
 1. L. Kenney said that there are no other portions.
 - xi. R. Lieberwitz said that she supports the first paragraph under the “Principles and Values” section composed by R. Bensel. She recommended that the Committee go through all of the suggestions.
 - xii. M. Horvath said that the first paragraph as drafted by R. Bensel omits guests to campus or students on university-sponsored externships or study abroad. She said that as the language is currently written, guests involved with matters on campus would not be covered.
 1. R. Bensel said that this document is a student Code, and that visitors will be specified in the overarching Code of Conduct. He said that within the current draft, there are references to other relevant sites that are covered.
 2. L. Kenney said that this discussion will be flagged for later discussion.

- xiii. J. Anderson said that a student involved in a university-sponsored experience abroad who follows their host country's laws but is in violation of the Code may be confused based on M. Horvath's suggestion.
 - 1. M. Horvath said that the Code currently only involves students on-campus. She said, however, that if a student is involved in a university-sponsored program abroad and were in violation, they would be considered on-campus based on past interpretations.
 - 2. R. Bensel said that events taking place during a study abroad program is not at a Cornell site and would thus not be on-campus.
 - 3. L. Kenney suggested that M. Horvath provide information regarding this matter at the next meeting.
 - 4. M. Hatch said that M. Horvath suggested adding "guests" to the constituents that the Code would govern, but the conversation has gone beyond that point. He asked whether a student would be governed by the Campus Code of Conduct if they were involved in a program beyond campus boundaries.
 - 5. K. Wondimu said that it may be more reasonable for students studying abroad to be governed under Cornell's Code as they may not be as familiar to the Code of Conduct of another university.
 - 6. R. Lieberwitz made a point of order to table this discussion until the Committee receives the proposal portion from the University Counsel that deals with these issues.
 - 7. L. Kenney agreed.
 - 8. J. Anderson yielded.
 - 9. L. Taylor said that the Committee should discuss what is considered a campus at a later time.
 - 10. R. Bensel said that some of these issues are discussed in Section 2.00.
- xiv. L. Kenney asked whether the Committee would prefer creating a new draft that incorporates all amended language or working with the current draft and deleting language that would not be used.
 - 1. L. Taylor moved to edit the existing document to incorporate changes.
 - a. **Approved** by unanimous consent.
- xv. L. Kenney suggested discussing Section A before discussing processes.
- xvi. M. Horvath said that the university promulgated core values over the summer and that this section would benefit from including those values.
- xvii. J. Anderson said that the language should include both recognized and unrecognized organizations, since the university wouldn't have jurisdiction over issues arising within unrecognized organizations under the current language.
- xviii. M. Horvath said that one of the reasons why unrecognized organizations become unrecognized is because this limits the university's responsibility for their behaviors. She suggested adding some language of how unrecognized behavior would be considered for future return to become a recognized organization.
- xix. R. Bensel said that members of an unrecognized organization would be addressed as individuals under the Code.
- xx. J. Anderson suggested discussing this issue in Section 3.12.
- xxi. M. Hatch moved to accept R. Bensel's language in the working draft.

1. Motion **approved** by unanimous consent. The first paragraph from the University Counsel's draft language was replaced with R. Bensel's amendments.
- xxii. M. Hatch agreed with R. Lieberwitz's comment regarding the term "civility" in that it could be problematic in terms of free speech.
- xxiii. R. Lieberwitz said that the concept of civility is developed in ways that appears as if an individual may be removed of protections if they are not considered civil. She said that the term "civil discourse" is already used elsewhere and moved to remove the term "civility".
 1. R. Bensel seconded and said that civility sets a higher standard for freedom of speech than desired.
 2. G. Martin asked what R. Bensel meant by higher standard.
 3. R. Bensel said that it would be more restrictive. He said that the term civility is too impressionable and subject to personal judgment.
 4. The motion was **approved** by a vote of 8-0-2.
- xxiv. R. Bensel asked why R. Lieberwitz suggested adding "statutory colleges" in the second paragraph.
 1. R. Lieberwitz said statutory colleges are distinct from the land-grant mission.
 2. M. Horvath recommended asking Counsel about this matter.
 3. R. Lieberwitz said that consulting with the Counsel's office would be fine. She also said that it is a point of pride to identify aspects of the university that make it unique, as statutory colleges such as the ILR School would not exist without those statutes.
- xxv. R. Bensel suggested striking "combined with its public land-grant mission" mean as it is confusing and irrelevant to a student Code.
 1. R. Lieberwitz said that the fact that the university is beyond a mere private university with a land-grant mission and statutory colleges is what makes it special and informs principles and values.
- xxvi. M. Hatch moved to extend the meeting by 15 minutes. He said that the Committee would not be fully acting upon its duty with infrequent meetings.
 1. M. Hatch **withdrew** his motion.
- xxvii. M. Hatch moved to meet next Monday.
 1. L. Taylor said that she would not be able to make the meeting.
 2. G. Martin said that the frequency of meetings does not determine the quality of work that the CJC is producing.
 3. L. Kenney agreed. She said that members have commitments outside of the Committee and that the Committee has shown much progress so far.
 4. Motion **approved** by unanimous consent – the Committee will meet on Monday, September 30th at 1pm.

IV. Adjournment

- a. Adjournment
 - i. M. Hatch moved to adjourn the meeting.
 - ii. The meeting was adjourned at 2:49pm.

Respectfully submitted,
Dongyeon (Margaret) Lee
Codes and Judicial Committee Clerk

Proposed by: Martin Hatch

Whereas the bylaws of the Cornell University Assembly (accepted by the President of Cornell University and its Board of Trustees), specify that the University Assembly's Codes and Judicial Committee (hereafter CJC) "will review any proposed motion related to the Campus Code of Conduct;...may propose, review and amend resolutions as it deems appropriate...must approve resolutions referred for its consideration before they can be advanced to the Assembly..."; and

Whereas Article 1, section C.2 of the CCC states that "The [CCC] is the University community's code, and hence is the responsibility of all community members"; and

Whereas the several amendments to and reformulations of the Cornell University Campus Code of Conduct (hereafter CCC) have been proposed by agencies and divisions of the university over the course of the spring, summer, and fall of 2019; and

Whereas one or more of these amendments and reformulations have advanced the idea of the development of a "Student Code of Conduct" (hereafter SCC); and

Whereas the CJC, cognizant of its responsibility to act in accordance with its role as specified in the Bylaws of the Cornell University Assembly;

Be it therefore Resolved that the CJC hereby reaffirms its jurisdiction over the CCC; and

Be it further resolved that the CJC will continue to consider any and all proposals and resolutions concerning changes to the CCC that pertain to any and "all community members", as specified in Article 1, section C.2 of the CCC.

MEMORANDUM

To: CJC
From: Kevin Clermont, Professor of Law
Date: September 18, 2019
Subject: Proposed Changes to Campus Code Violations

As to my overall view of the draft, I think it is important to note that this list combines [3.II.A](#) and [4.II.A](#) , but it can apply only to Title 3. The UA and CJC cannot alter Title 4 (RMPO, a sort of martial-law provision that the Board of Trustees had to adopt). Title 4 has a much more limited list of violations, which are incorporated by reference in current Title 3. State law requires a separate Title 4 to be continued in some form. See NY Education Law § 6430:

The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature and which maintains a campus, unless otherwise provided, shall adopt written rules for implementing all policies required pursuant to this article and for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules shall prohibit, among other things, any action or situation which recklessly or intentionally endangers mental or physical health or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization. Such rules shall govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, in the case of a student or faculty violator his or her suspension, expulsion, or other appropriate disciplinary action, and in the case of an organization which authorizes such conduct, rescision of permission for that organization to operate on campus property. Such penalties shall be in addition to any penalty pursuant to the penal law or any other law to which a violator or organization may be subject.

So I take it that the CJC will redraft only Titles 1 to 3, and the Counsel's proposed draft can apply only to what is now Title 3.

As to the contents of the proposal, it is a good job. They seem to have been careful and neutral. But there are of course a bunch of things that need attention:

1. The order of the sections is mystifying. For example, why are 3.1 (alcohol) and 3.6 (drugs) so far apart? The grouping should be by type of activity. And 3.2, 3.8, and 3.9 should be together because of their link to discrimination. And 3.3 should be treated with “attempt” in the preamble and with a restored provision on incitement.
2. Some violations have been omitted. This is troublesome because every provision was added in response to a felt need. (That is why the Code is such a hodgepodge.) The omitted stuff includes:

To incite another person toward a likely and imminent violation of this Title.

To defraud, including by such acts as failure to redeem a bad check.

3. The proposed 3.8 tries to codify the protected activity that the Campus Code tried to exempt by its reference to free speech. I think Counsel’s Office made a good try. But the CJC really has to think about whether Counsel captured everything that free speech takes out of Harassment. I’ll run that by some First Amendment experts here, and let you know if they have anything useful to say.
4. The language “Subjecting another person or group to abusive, threatening, intimidating, harassing, or humiliating actions” in 3.2 seems out of place and unauthorized. This idea appears in the new provision on Hazing. It is not an Assault. **Omit it.**
5. The Campus Code makes the following a violation in Three.II.A.3.k:

To refuse to participate, without a substantial reason, as a witness in the campus judicial system, as outlined in Title Three, Article III.E.3.b(6)(c).

The latter cross-reference to the hearing procedure provides:

If a witness critical to the proof of the charges or to the defense against those charges indicates to the Judicial Administrator or the accused that he or she refuses to testify, the Judicial Administrator or accused may ask the Hearing Board Chair to order the witness to testify. The Hearing Board Chair shall, in his or her sole discretion, grant or deny the request based on the balance of equities for the witness, the complainant, the accused, the victim, and the University.

This provision certainly implies that the OJA itself has no “subpoena” power in the investigative phase. But recently there have been abusive invocations of such a power. The JA has gone after uncooperative investigation witnesses who don’t show by charging violation of "g. To destroy evidence or otherwise obstruct the application of this Code" and is active in charging witnesses who lie with "e. To furnish false information to the University with intent to deceive." This has enabled them to go after hazing victims who refused to cooperate! Not so bad? But think of this. Police are called to home on domestic violence. The wife, to keep the peace, says nothing happened. Can she then be prosecuted for lying?

The proposal in 3.5 says:

Refusing to participate, without a substantial reason, as a witness in an investigation of or proceeding brought to enforce potential violations of this Code.

This represents a huge and ill-advised expansion of the JA’s powers. It should say:

Refusing to participate, without a substantial reason, as a witness **in a hearing after being ordered to testify by the Hearing Board Chair.**

Moreover, the next provision in 3.5 should read:

Destroying evidence or otherwise ~~obstructing~~ **actively impeding** the application of this Code.

6. The new 3.17 omits the needed qualifier of “**in or upon University premises, except by law enforcement officers or except as specifically authorized by the University.**” Don’t forget the Code reaches behavior anywhere.
7. The new 3.5 is a bit messy, as you can see by a careful reading that the meaning of Title 4 has been perverted by the new phrasing. At the least, the first bullet needs to be amended to avoid a major cutback in scope from the current Campus Code: add at the end “any action including but not limited to” so that it reads: “Disrupting, obstructing, or interfering with the lawful exercise of freedom of speech, freedom of movement, freedom of peaceable assembly, or other right of an individual, by **any action including but not limited to:**”.

MEMORANDUM

To: CJC
From: Kevin Clermont, Professor of Law
Date: September 19, 2019
Subject: Addendum: Proposed Changes to Campus Code Violations

I have spoken to the JCC about all this. And so I am speaking for the JCC Office on these matters.

1. She made the excellent point that these big sections in the new draft present a real problem because records will say, for example, "Convicted of violation of Section 3.4," but that section covers everything from public urination to violent behavior. You have to insert many numbered subdivisions.
2. I have spoken to Mike Dorf about the free speech provision, mentioned in my previous point #3. You will recall that the General Counsel has proposed to codify the protected activity exempted by the Campus Code in its reference to free speech. I think Counsel's Office made a good try. But I don't know whether they captured everything that free speech takes out of Harassment.

Here is the old language:

To harass another person (1) by following that person or (2) by acting toward that person in a manner that is by objective measure threatening, abusive, or severely annoying and that is beyond the scope of **free speech**.

And the proposed language:

3.8 Harassment

Subjecting another person or group to uninvited or unwelcome behaviors that are abusive, threatening, intimidating, or humiliating, when the conditions outlined in (1) or (2) below, are present.

1. Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of an individual's participation in any of the University programs or activities or is used as the basis for a decision affecting the individual.

2. Such conduct creates a hostile environment. A hostile environment exists when the conduct unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the University's programs or activities. Conduct must cause unreasonable interference from both a subjective and an objective perspective. The fact that the conduct targets a group that has historically experienced discrimination may be relevant to a contextualized judgment about whether the conduct creates a hostile environment.

Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one or both of the following criteria:

- it is meant to be either abusive or humiliating toward a specific person or persons, or
- it persists despite the reasonable objection of the person or person targeted by the speech.

Offensive conduct that does not by itself amount to harassment as defined above may be the basis for educational or other non-punitive interventions to prevent such conduct from becoming harassment if it were repeated or intensified. Mere disagreement with a particular viewpoint of another person – as opposed to the means or manner by which the person communicates – shall not be the basis for any intervention, even a non-punitive one.

Actions that constitute stalking or sexual harassment as defined by Policy 6.4 (“Prohibited Bias, Discrimination, Harassment, and Sexual and Related Misconduct”) shall be handled pursuant to that Policy and its associated Procedures.

I have spoken to Mike Dorf about this section, and he made several good points. He suggested “Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one or both of the following criteria: it is meant to be either abusive or humiliating toward a specific person or persons” should read “Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one ~~or both~~ of the following criteria: it is meant to be ~~either~~ abusive, **threatening**, or humiliating toward a specific person or persons **who hear the expression**”.

3. I have spoken to the JA about my point #5. She indeed does claim a general subpoena power. She bases it on Campus Code 1.I.B.2's “duty to cooperate.” That provision is, however, aspirational. Uncooperativeness does not constitute a violation.

Accordingly, I would amend my insertion of “actively impeding” to “otherwise actively impeding,” making clearer that the impeding must be like destroying

evidence. Maybe the prohibition on a subpoena power should be made even more express.

If you do conclude that the subpoena power is a good idea, however, it should be provided in a new provision of the code, so that limitations could be considered and delineated. The power is currently unlimited because the JA just made up the power.