Memo

TO: Codes and Judicial Committee
FR: Kevin Clermont, member
DA: February 27, 2012
RE: Temporary Suspension Changes

I propose two changes to the procedures for temporary suspension.

A. To remedy the current lack of standards for imposing this serious remedy, I would add a second sentence in Title Three-III-B-3-a:

> After considering alternative remedies such as monitoring, counseling, or isolating the accused, the President or his or her designee shall suspend the accused only if the expected harms of wrongfully declining to suspend outweigh the expected harms of suspending should it turn out that the suspension were wrongful.

B. To clarify the standard of review, I would change Title Three-III-B-3-c-(2) from "If the University Hearing Board determine that (1) good cause has not been shown for the exercise of the President's suspension power" to

> If the University Hearing Board determine that (1) President and his or her designee has not shown good cause for the exercise of the President's suspension power . . . .

Reasons for Proposal

Temporary remedies can have terrible effects, yet they must be imposed without the ordinary procedural protections. Thus, the few procedural protections that are feasible must be carefully considered and stated.

A. Standard

The Campus Code currently limits suspension to "extraordinary circumstances and for the purpose of ensuring public order and safety." But various defense advocates complain that this in effect leaves the matter to the unguided discretion of the JA—"we have seen an increase in borderline cases where its use is questionable—at best inconsistent." Another says:

> With regard to temporary suspension, it seems to me that [the JA's] concerns were

heavily focused on the nature of the conduct alleged, in contrast with the evidence to support the potential for the individual to harm him or her self or others.

While I fully appreciate that the obligations of a private university are different than the public sector, once an individual has expended tens of thousands of dollars, academic and lifelong pursuit of a Cornell education, the temporary suspension can be tantamount to economic disaster and personal and academic tragedy. While that is merited upon allegations of serious assault and when there is the risk to the individual, the alleged victim or others in the Cornell community, it needs to be balanced against a variety of other factors.

The first factor would be the passage of time and compliance with any stay-away order or other limitation on the student's activities. The JA should consider any counseling or programs undertaken to address underlying concerns (e.g. alcohol, emotional problems). Options of voluntary withdrawal pending further prosecution should be fully explored.

The disruption to the accused student should also be considered in light of employment, extra circular community and university involvement. Not only would these factors weigh in favor of the defendant not being a further risk, but they add to the panoply of significant and unfair consequences.

The biggest concern I have is the growing capacity of students to bring serious assault and related charges against another student with the awareness that the consequence of temporary suspension will be seriously considered and impose a huge undeserved interim penalty.

In closing, I would like to urge the University consider the similar concerns that Judges and Probation Departments have and the alternatives the employ (ankle bracelets, monitoring devices and day reporting). If alcohol or drugs are involved, regular urine tests or regular counseling are further alternatives.

The proposed standard is the law's formulation for a preliminary injunction. It would serve to focus the arguments and thinking on whether to suspend. It advises the JA to consider alternatives. But if suspension is to come, it should come only if the expected harms of wrongfully not suspending outweigh the expected harms of wrongfully suspending. And "wrongfully" means that the costs are to be discounted by the likelihood that the affected person will eventually prevail on the facts.

B. Review

The Code currently allows the suspended person to petition for review. But apparently that has worked out to be a rubber stamp, because from nowhere the UHB has decided that the suspended person must show that the JA's action was arbitrary and capricious. That standard of review is impossible to meet.

Again, the word from the trenches is this:

In my opinion, the "petition" process is hopeless. The "arbitrary and capricious" standard applied to the JA's decision—which the UHB conjured last Spring—makes it all but impossible for an accused person to succeed. So long as the JA did not flip a coin in deciding on Temporary Suspension, there is no check on this power. The arbitrary and capricious standard is not in the Code, and I believe it is wrong; the Code requires that the UHB must determine whether the JA has shown "good cause," suggesting that the burden is on the JA, not on the accused person to show that the JA's decision was arbitrary and capricious. I can't imagine that good cause is a high hurdle (especially in cases of physical or sexual violence, or where the accused is otherwise a threat to the community or him / herself), but it's certainly higher than arbitrary and capricious.