Public Access to Law School Honor Code Proceedings

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Many people view lawyers with suspicion, with few members of the public believing that attorneys have high ethical standards. To ensure that students learning to become lawyers act ethically while in school, many law schools adopt honor codes. Unfortunately, the strict confidentiality provisions of these honor code proceedings leave the rest of the law school community and the public at large with virtually no access to information about the ethical misconduct of these future lawyers. Professional attorney bar associations are left with the task of certifying a graduate as fit to practice by contacting the individual law schools.

1. A 1999 Gallup Poll ranks lawyers 37th out of 45 professional occupations based on the percentage of the public saying that people in these professions have “very high” or “high” honesty and ethical standards. The Gallup Organization, Gallup Poll Topics: A-Z, Honesty/Ethics in Professions, at http://www.gallup.com/poll/indicators/indhnsty_ethcs.asp (last visited April 1, 2000). People were asked to “[p]lease tell me how you would rate the honesty and ethical standards of people in these different fields—very high, high, average, low, or very low?” Lawyers only ranked above gun salesmen, congressmen, internet journalists, insurance salesmen, HMO managers, advertising practitioners, telemarketers, and car salesmen. Since 1977, when Gallup began tracking public opinion about lawyer ethics, the percentage of people rating lawyers “very high” or “high” has dropped from 26% to 13%. Id. at http://www.gallup.com/poll/indicators/indhnsty_ethcs2.asp.

2. A controversy at George Mason University Law School (G.M.U.) in Virginia illustrates the problem of honor code proceedings that are conducted in confidence. Ashley Disque, G.M.U.’s prosecutor in the fall of 1999, wrote in the school’s paper, The Docket:

Secrecy in the proceedings protects only the guilty... The dual goals of an Honor Code are to fairly prosecute and bring public rebuke on those who break the rules thereby deterring others from doing the same thing. With secret proceedings and failure to publish the name of individuals who violate the code, neither goal can be well accomplished.

Ashley Disque, Have You No Honor? Why Honor Committee Secrecy Must be Abolished (on file with author). Although secret honor code proceedings may result in sanctioning unethical students, most processes provide little or no means for holding the unethical student publicly accountable for unethical misconduct.
One way to give the public more confidence in attorneys' ethics would be to decrease the secrecy of law school honor code proceedings and make it clear to law students that they will be held publicly accountable for their ethical misconduct. Most law school honor codes presume that the accused student's privacy should be protected during the investigation of an honor code violation and any subsequent hearings. Consequently, most law schools close disciplinary hearings to the community. Many codes go further to say that if any notice of the disciplinary proceeding's disposition is posted in the law school, all identifying information of the student must be removed first. Only a few law school honor codes allow the accused student to open the disciplinary hearing up to the law school community. Several schools restrict this option by leaving the ultimate decision up to the Dean or hearing panel, and even fewer schools call the option to an open hearing a right.

3. See, e.g., Emory University School of Law, Student Honor Code § VII(2)(f) (1998) [hereinafter Emory Honor Code] (on file with author) ("Hearings shall be closed to all members of the University community or general public. . . ."); George Washington University Law School, Policy on Academic Integrity § 7.2.2.9 (Feb. 15, 1999) [hereinafter George Washington Policy] (on file with author) ("The hearing shall be confidential."). For further comparison of law school honor code provisions on confidentiality, please refer to Appendix A.

4. See, e.g., George Washington Policy, supra note 3, § 9.4 ("The Designated Dean shall, annually, prepare and distribute a report summarizing all charges made under this Policy in the previous academic year and the disposition of such charges, including the sanctions imposed, if any. The report shall not give the names of the students involved.").

5. See, e.g., University of Minnesota Law School, Law School Honor Code § 4.06(b)(4) (Feb. 3, 1993) [hereinafter Minnesota Honor Code] (on file with author) ("The hearing shall not be open to the public unless the Hearing Panel opens the proceeding, or any part of it, upon written request by the accused."). See also Appendix A.

6. See, e.g., University of Chicago, Student Manual of University Policies and Regulations: All-University Disciplinary System § 5 (1998-99) [hereinafter Chicago Disciplinary System] (on file with author) ("The student may have a private hearing at which a few observers of his own choosing are present as well as his chosen representative, or with the approval of the Committee, a public hearing at which members of the University community and other persons are freely admitted within such limits and under such conditions as the Committee deems consistent with orderly conduct of the hearing."). See also Appendix A.

7. See, e.g., Georgetown University Law Center, Student Disciplinary Code § 501 [hereinafter Georgetown Disciplinary Code] (on file with author) ("Confidentiality shall be maintained with respect to all proceedings under this code, except that students charged with disciplinary violations have a right to a public hearing if they so desire."). See also Appendix A.
The variety of law school confidentiality provisions indicates that schools have varying responses to the need to protect an accused student's privacy while also holding the student accountable for ethical misconduct. Part I of this Note will first explore the purposes of codes of ethics, especially those devoted to promoting law student academic integrity. Then, Part II will compare various confidentiality provisions from several law school honor codes to assess how some schools protect the accused student's interest in confidential academic disciplinary hearings. In Part III, this Note will argue that open proceedings help fulfill the purposes of law school honor codes and are analogous to both attorney disciplinary proceedings and juvenile court proceedings, which are becoming more accessible to the public. Part IV will acknowledge the difficulties with dispensing with confidentiality altogether, including the limitations imposed by due process requirements and the Family Educational Rights and Privacy Act (F.E.R.P.A.). In the end, this Note encourages law schools to eliminate some of the secrecy of honor code proceedings, but to do so without trampling the accused student's privacy interests. While honor code provisions should protect the accused student from unnecessary breaches of confidentiality, law school honor code proceedings should not be so secretive that the public cannot trust the lawyers produced.

I. PURPOSES OF HONOR CODES

A. General Functions of Professional Ethics Codes

Professional associations adopt codes of ethics to improve the public perception of the profession and to encourage its members to behave in ethical ways. Codes provide "education, reinforcement, and deterrence." A "clear and fair" code may educate "by instructing receptive readers on what is considered right and wrong." The enumeration of explicit rules and regulations reinforces "preexisting inclinations" and serves as a "pub-

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10. Wolfram, supra note 9, at 48 (citation omitted). See also Lichtenberg, supra note 9, at 120-21 ("[C]ode[s] of ethics can increase the probability that one will think about [what one is doing] . . . by describing explicitly behavior that is undesirable or unacceptable.").
lic justification” for conduct already preferred. And finally, professional codes of ethics are a way of sanctioning inappropriate behavior.

In essence, “[c]odes of ethics, like legal rules, publicly announce a group’s commitment to a certain moral standard.” Professional groups such as bar associations establish codes of ethics to publicize and promote their ethical standards. The written words allow a group’s members, and the people they serve, to easily identify types of appropriate and inappropriate behavior. When a member of the group fails to meet that standard, the code provides for appropriate consequences.

B. Expressed Purposes of Law School Honor Codes

Honor codes, like ethics codes adopted by bar associations and other professional groups, publicly announce the law school’s ethical standards. Law schools hope to ensure that law students—our nation’s future lawyers—conduct themselves with honesty and integrity. “It is hoped that by using honor codes, this commitment [to honesty and personal integrity] will be embraced and carried forward by each and every law student into the legal profession.” Lawyers, entrusted with the responsibility of practicing the law that governs the community, must practice that law with honesty and integrity. As future lawyers, law students, early in their careers, should learn the implications of dishonesty and a lack of integrity. Student-based honor codes are

11. Wolfram, supra note 9, at 48 (citation omitted). See also Lichtenberg, supra note 9, at 119 (“A code of ethics can give a person a reason, sometimes, a decisive reason, to act in one way rather than another. . . .”).
12. Wolfram, supra note 9, at 48. See also Lichtenberg, supra note 9, at 121 (A code “can also change the nature, implications, or consequences of the behavior required.”).
13. Lichtenberg, supra note 9, at 122.
15. The debate surrounding the first code of ethics for the legal profession provides historical precedent for this concept. The 1906 A.B.A. Committee on the Code of Professional Ethics wrote that “the future of the republic depends upon our maintenance of the shrine of justice” and a “code of ethics . . . is one method in furtherance of this end.” American Bar Association Report of the Committee on the Code of Professional Ethics 600-04, in Deborah L. Rhode and David Luban, Legal Ethics 112, 113 (1995) [hereinafter A.B.A., 1906 Report].
16. The preamble of the Model Rules of Professional Conduct states that “[a] lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” Model Rules of Professional Conduct Preamble § 1; available in American Bar
a natural parallel to the *Model Rules of Professional Conduct* and other similar bar standards. Often, the preamble of a law school’s honor code will indicate the purposes for its promulgation. These purposes include: (1) to educate the students about appropriate ethical conduct; (2) to reinforce ethical principles already considered important; and (3) to serve as an incentive for students to act in ethical ways.

First, some law school honor codes express an intention to educate students about expectations for ethical conduct. The *University of Minnesota Law School Honor Code* states that “[t]he purpose of this Honor Code is to establish the rules by which the faculty and students of the University . . . govern their conduct with respect to any academic matter.” Likewise, the honor code at the University of Akron aims “to establish rules by which the students of the School of Law shall govern their conduct with respect to academic and other matters affecting the School of Law.” In short, law schools establish honor codes to enumerate the rules governing academic integrity as a means of educating students about their responsibilities as law students.

The language of several honor codes suggests a second purpose: reinforcement of the principles of ethics essential to being a lawyer. Columbia University states that “[a]s future members of an honorable profession . . . students at Columbia Law School should conduct themselves with honesty, integrity and responsibility.” Many schools expressly acknowledge the connection between ethical conduct in law school and ethical conduct as an attorney. For example, Boston College distributes a *Code of Academic Conduct* every year “to insure that there is no gap between students’ mores in the conduct of their work at the Law School

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17. "Honor codes can be seen to serve the same function as professional ethics codes, thus creating a system of self-governance and self-regulation." Carlos, *supra* note 14, at 942.


20. Some other law schools stating establishment of rules of academic conduct as a purpose of the code include Baylor University, University of Colorado, University of Minnesota, and Syracuse University.

and that standard of integrity expected of future members of the bar."^{22}

Some schools even argue that law students should maintain higher standards of honor and integrity than other students should because the legal profession aspires to heightened ethical standards. George Washington University's Policy on Academic Integrity states that "[a]cademic excellence, in any discipline, depends on an environment of honesty, integrity, and fairness. This general requirement is heightened by the special mission of a law school—to prepare students for a practice that relies heavily on the honor of its participants."^{23} Southern Methodist University combines the recognition of a higher standard with the link between students and the profession:

The law is a learned profession that demands from its members standards of honesty and integrity that are far higher than those imposed on society as a whole. A dishonest attorney is a menace to the profession and to society. Because there is no reason to believe that dishonest students will become honest attorneys, insistence on the highest ethical standards must begin in Law School. This Student Code of Professional Responsibility is dedicated to that end.^{24}

As lawyers in training, law students should be subject to heightened standards of ethical conduct.

Law school honor codes also state a third purpose: to provide consequences if a student fails to satisfy the expectations set by the code. The College of William and Mary code declares that "[a] person who has violated the Honor Code must be sanctioned for compromising the community of trust and honor."^{25} Some schools even require students to sign an honor pledge to acknowledge their awareness of the rules of the honor code and the possible sanctions for violating such rules.^{26}

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23. GEORGE WASHINGTON POLICY, supra note 3, § 1.1.
26. See, e.g., GEORGE WASHINGTON POLICY, supra note 3, at § 4; STANFORD UNIVERSITY, STUDENT HANDBOOK, Official Examination Book Page (on file with author).
The University of Colorado declares the purpose of its honor code as "to provide the procedures by which claimed violations of those [professional] obligations are to be determined, and, when found to have occurred, be dealt with in an appropriate manner."27 The Pepperdine honor code asserts a similar purpose when it states that "[t]he success or failure of this Honor Code is dependent on the willingness of those governed by the code to enforce it and to make an individual commitment to comply with its provisions."28 Lawyers—and therefore law students—must be honest and ethical and to ensure this, law schools must be willing to promulgate rules that, if violated, carry sanctions.29

II. CONFIDENTIALITY PROVISIONS OF HONOR CODES

Many of the honor codes that law schools establish to maintain heightened ethical standards also contain protections for the confidentiality of a person accused of violating those standards. Current versions of law school honor codes address the issue of confidentiality with a wide variety of measures. In an attempt to provide law students and law school administrators with an overview of several types of confidentiality provisions, this Note will compare honor codes from a broad spectrum of law schools—both public and private, as well as regional and national schools.30 Although some schools did not make express reference to confidentiality,31 most specified that confidentiality


29. "The honor code at Florida Coastal School of Law states 'maintain[ing] confidence that the system will work [and] that violators will be punished' as primary goals of its system." FLORIDA COASTAL SCHOOL OF LAW, HONOR CODE § 1, at http://www.fcs1.edu/students/sba/code9.htm (last visited Nov. 27, 2000). See also UNIVERSITY OF DAYTON SCHOOL OF LAW, HONOR CODE, Introduction (Final Proposed Revision) ("Mere adherence to the rules is not enough. The next step in safeguarding the nobility of the legal profession involves our willingness to take on the affirmative duty of policing the conduct of our colleagues who would enter with us into the legal profession."). at http:// www.udayton.edu/~lawsba/honor/honll-1l.html (last visited Oct. 23, 2000).

30. The law schools selected had honor codes readily available either through the school's website or already on file with the author. A summary of each school's different provisions on confidentiality can be found in Appendix A of this note.

31. See, e.g., Creighton University, Duke University, and George Mason University.
was a concern at some point during the honor code disciplinary process. The level of confidentiality provided by the written honor codes, however, varies from school to school.

The codes can be distinguished on three different levels. The first distinction emerges by comparing the time during the process when a code expressly guarantees confidentiality to the accused. Confidentiality during the investigation differs from confidentiality during a disciplinary hearing and from confidentiality after the disposition.

Second, within the context of a disciplinary hearing, law schools give different weight to confidentiality. The accused is given the benefit of confidentiality most by schools that expressly state that the hearing shall be closed to the law school community. In contrast, the accused receives no benefit of confidentiality when the law school makes the hearing presumptively open to the community. In between are codes that have a presumption of closed hearings, but allow accused students the option of opening the hearing. Of the codes surveyed, seven call this option a "right" while seven others put restrictions on the students' ability to select an open hearing.

Finally, a third distinction occurs after a hearing has been settled when law schools must decide how much to publicize the outcome of an alleged violation. Some schools have expressly provided for post-hearing disclosure of the outcomes of disciplinary hearings. Of those that provide for disclosure, only three presumptively reveal the identity of students found guilty. Most of the schools with post-hearing disclosure reveal only the alleged violation, the verdict of the hearing panel, and the sanction (if any) imposed by the panel. Seven other schools publish a statement of the facts of the case, as well as the panel's reasoning for its decision, but remove all identifying information from the posted notice.

If put on a continuum showing the greatest and least amount of confidentiality, these various honor code provisions could be summarized as follows:
Those law school honor codes that fall at the bottom of this continuum provide the least amount of protection for the accused student while those at the top of the continuum protect the accused student's privacy the most. Comparing the specific language of various honor codes will illustrate their differences and may shed light on the rationale for confidentiality during an honor code investigation or hearing, or after final disposition.

A. Confidential Investigations

A law school's confidentiality provision may be a broad statement prohibiting anyone with knowledge of a violation from discussing it outside the context of the discipline procedures provided for in the code itself. The Georgetown Law Center code states that "[c]onfidentiality shall be maintained with respect to all proceedings under this code . . . ."\(^{32}\) While Georgetown's sweeping statement implies that investigations are confidential, other schools specify that the investigation, apart from the hearing or disposition, must be kept confidential. For example, the honor code at Baylor University provides for a confidential investigation "to protect the identity and reputation of the accused."\(^{33}\) In statements such as these, accused students retain a special interest in seeing that their names are not mud-died during the process of investigating and evaluating a violation.

Protecting the confidentiality of the investigation, however, does not mean that schools intend these provisions to prevent an investigation or hearing from going forward. The University of

\(^{32}\) GEORGETOWN DISCIPLINARY CODE, supra note 7, § 501.

Akron makes this point explicit by stating, "The investigation shall be kept confidential except to the extent that disclosure of information may be necessary to complete the investigation successfully." Similarly, the College of William and Mary code provides for separate sections of rights and duties for the accused, the accuser, witnesses, and the Council with the result that different people have different degrees of the duty to maintain confidentiality. While the Council possesses the duty generally, as does the accuser (who seems to be targeted as a possible source of gossip), the witnesses only have to keep the investigation and hearing confidential. Consequently, the code makes it clear that the confidentiality provision is not intended to apply to witness testimony.

At Florida Coastal School of Law, the honor code protects the privacy interests of all accused students during the investigation, and retains this protection after a hearing if the panel finds a student not guilty. The code states, "Participants in the process shall not engage in any discussion, that is not necessary to their functions, either during a pending case or after a case which does not result in a finding of a violation." The provision applies to "participants in the process," and, as such, broadly encompasses both administrators of the code, as well as witnesses. Additionally, students found not guilty continue to enjoy the protection of the confidentiality provision, helping them avoid even the slightest hint of unethical behavior.

Law school confidentiality provisions may also protect accusers who might face social stigma for "ratting" on a classmate. The code at Southern Methodist University provides that if, after an investigation, no formal charges are brought, "the [Honor] Council shall submit a written report to the Dean giving its reasons. [And,] [t]he Council may publish its decision, but in doing so no information identifying the accused or the accuser shall be revealed." In this way, confidentiality during an investigation may help fulfill the enforcement purpose of honor codes by cre-

35. **William and Mary Honor Code**, supra note 25, ¶ 3. While the Council has a "duty to maintain confidentiality," id. ¶ 3.5(3), witnesses have a "duty to maintain the confidentiality of the investigation and the hearing," id. ¶ 3.4(3), and the accuser has a "duty to preserve the confidentiality of all matters relating to the alleged violation." Id. ¶ 3.3(4). The effect of these separate provisions, while intended to ensure that the confidentiality provision applies to everyone involved in the process, is such that different participants will have varying degrees of a duty.
37. **Southern Methodist University School of Law, Student Code of Professional Responsibility** ¶ VIII(c) (on file with author).
ating a safe environment for students and faculty to expose academic misconduct.

Some schools even state that breaking the confidentiality of the process is itself a violation of the honor code. For example, Emory University calls confidentiality a duty and states:

Any student, other than the accused, who has obtained knowledge of an Honor Court proceeding has the duty to keep such knowledge confidential except that the duty of confidentiality does not apply to disclosure required by public law or disclosure to University officials acting in their capacity as such. Violation of this subsection constitutes a violation of this Code.38

By calling respect of the confidentiality of the discipline process a duty, law schools indicate that those who do not live up to this provision violate the honor of the profession to which they aspire.

B. Open vs. Closed Hearings

How law schools treat the issue of confidentiality during disciplinary hearings often indicates what the school intends to protect through the confidentiality provision. For example, some schools do not expressly state that the disciplinary hearing shall be closed. Rather, they identify those individuals allowed to be present at the hearing.39 Other schools explicitly state that the hearing shall be closed to all those not enumerated in the code. For example, Emory University states that:

Hearings shall be closed to all members of the University community or general public except members of the [Honor] Court, the student prosecutor, parties, student advisor and witnesses. The [Honor] Court shall have the authority to maintain an orderly and efficient hearing consistent with a full and thorough review of all issues raised.40

Similarly, the University of Chicago states that even though the accused may request an open hearing, this request is subject to

38. Emory Honor Code, supra note 3, § VIII(3).
39. See, e.g., Cornell University, Law School Code of Academic Integrity § II(B)(3) (on file with author) ("At the primary hearing the following shall be present: the faculty member concerned, the student in question, and a third party independent witness . . . appointed by the Hearing Board Chairperson or the chairperson of the faculty member's department. The student may also bring to the hearing an advisor and additional witnesses to testify to his/her innocence.").
40. Emory Honor Code, supra note 3, § VII(2)(f).
the Honor Committee's approval.\textsuperscript{41} The Emory and Chicago provisions imply that closed hearings not only promote the confidentiality of the accused student, but also maintain order and avoid disruptions.

Some schools have incorporated the underlying educational purposes as one rationale for opening disciplinary hearings subject to the consent of both parties. The University of Michigan code states, "To ensure the privacy of the parties and to maximize the educational potential of the process, both parties must agree to the admission of any other people."\textsuperscript{42}

An honor code may also restrict the accused student's ability to open a disciplinary hearing to protect the witnesses involved. For example, Southern Methodist University allows a request to be made for an open hearing, but states that such request "shall not preclude the [Honor] Council, by majority vote of those present, from closing the hearing during the testimony of any witness who may be extraordinarily embarrassed by public testimony."\textsuperscript{43}

Although some schools restrict the accused student's ability to open the hearing process, several other schools refrain from imposing such restrictions on the option for an open hearing. Schools, such as the University of Minnesota, leave the decision of whether to proceed with an open or a closed hearing entirely up to the student's choice, provided they make such a request in writing.\textsuperscript{44} Still others specify that the student's choice to select an open hearing is a "right." For example, the Notre Dame Law School Honor Code states that "[d]uring the course of the hearing, the accused shall have the following rights: . . . To elect either a closed hearing or an open hearing not subject to closure by the council."\textsuperscript{45} Schools like Minnesota and Notre Dame, which allow the student to make the choice, imply that the accused student retains a strong interest in controlling who has access to information about the student's hearing.

\textsuperscript{41} "The student may have a private hearing at which a few observers of his own choosing are present as well as his chosen representative, or with the approval of the Committee a public hearing at which members of the University community and other persons are freely admitted within such limits and under such conditions as the Committee deems consistent with orderly conduct of the hearing." \textit{CHICAGO DISCIPLINARY SYSTEM}, supra note 6, § 5.

\textsuperscript{42} \textit{UNIVERSITY OF MICHIGAN—ANN ARBOR, CODE OF STUDENT CONDUCT, Procedures, Stage 2} (on file with author).

\textsuperscript{43} \textit{SOUTHERN METHODIST STUDENT CODE}, supra note 24, § IX(B)(3).

\textsuperscript{44} \textit{MINNESOTA HONOR CODE}, supra note 5, § 4.06(b)(4).

\textsuperscript{45} \textit{UNIVERSITY OF NOTRE DAME, HONOR CODE} § 3.6.2.6 (on file with author).
C. Confidentiality After Disposition

The majority of law school honor codes studied provide some means of communicating the outcome of academic disciplinary matters to the wider law school community. Only three of these schools expressly allow the accused student’s identity to be revealed in the course of posting this notice.46

Law schools could write their honor codes to protect the confidentiality of both the guilty and the not guilty students. For example, the Emory code states:

After any Honor Court hearing where there has been a verdict of acquittal or where a guilty verdict of the Honor Court has been reversed on appeal, the Dean shall publicly post the fact that there has been a hearing and a final determination of not guilty, without posting the name of the accused.

Where the accused has been found guilty and sanctions have been imposed, the Dean shall publicly post the offense, the verdict, and the sanctions, without posting the name of the offender.47

But some schools, like Washburn University, may want to allow the honor code provision to give accused students, later exonerated, the opportunity for public vindication.48

Some schools require annual or quarterly reporting.49 By separating the outcome of an alleged violation and the posting of its disposition, many law schools may hope to avoid gossip in the community about the identity of the accused and convicted student. Washington and Lee University attempted to avoid this kind of gossip by providing for posting of disposition announcements after the effective withdrawal or dismissal date rather than its customary quarterly publication.50

One option for post-hearing disclosure compromises between maintaining the privacy of the accused student and wit-

46. See Appendix A.
47. EMORY HONOR CODE, supra note 3, § VIII.
48. If no violation is found, the proceedings will be confidential unless the Dean thinks that a substantial segment of the student body is aware of the pendency of the Honor Code proceeding, and the Dean believes that not posting a notice will be detrimental to the accused and the law school community. WASHBURN UNIVERSITY SCHOOL OF LAW, HONOR CODE AND PROCEDURE FOR LAW STUDENTS, pt. IV(G) (revised June 9, 1998) (emphasis added), at http://washburnlaw.edu/policies/hrcoctxt.htm (last visited Nov. 19, 2000).
49. See, e.g., George Washington University, Georgia State University, University of Michigan and Washington and Lee University.
nesses and allowing adequate publication of the process as a means of ensuring the integrity of the discipline process itself. The University of Minnesota incorporates such a compromise in its honor code by providing for both a public file and a non-public file. While the nonpublic file "will be complete and shall contain the identity of the accused," the public file will maintain the student’s anonymity. In making the public file, "the Hearing Panel shall remove all identifying material" in order to "preserve the anonymity of the accused." While the public report is given to the larger law school community, the nonpublic file is given only to "the accused, the Honor Code Investigator, and the Dean." As a result of the two files, the law school continues to protect the accused student's privacy. At the same time, disclosing detailed results of the proceedings allows the whole law school community to learn the particular types of conduct that the code encompasses. Disclosure also affords the community the opportunity to apply the code consistently so that similar offenses receive similar sanctions.

Some schools allow disclosure of the hearing details, as well as the identity of the accused in limited instances. Although its post-hearing disclosures usually maintain the confidentiality of the accused student, Southern Methodist University allows that "in exceptional circumstances the Council may reveal the name of the student found guilty of the violation(s)." This provision signifies that the school recognizes that in some instances, complete disclosure may benefit the law school community.

III. SUPPORT FOR PUBLIC ACCESS TO HONOR CODE PROCEEDINGS

The confidentiality provisions above protect a number of sometimes competing interests. Law schools must learn to delicately balance these interests. In a 1998 article on student-run honor codes, the associate dean of Catholic University School of Law noted that the "secrecy provision" in its honor code—which allows students the option of an open or a closed hearing—"shuts out the administration from most hearings, so that stu-

51. "One file (the 'nonpublic file') shall contain copies of the 'nonpublic' version of the Hearing Panel's reports, as defined in § 4.06(c). The other file (the 'public file') shall contain copies of the 'public' version of the Hearing Panel's reports, as defined in § 4.06(c)." MINNESOTA HONOR CODE, supra note 5, § 4.02(1)(c).
52. Id. § 4.06(c)(1).
53. Id.
54. Id. § 4.06(c)(2).
55. SOUTHERN METHODIST STUDENT CODE, supra note 23, § IX(K).
dents' rights may wrongly be given more protection than the needs of the institution.6 If an honor code protects confidentiality too much, the accused student may attempt to undermine the law school discipline process by presenting students and faculty with one version of the situation, while the hearing panel is privy to a wealth of information which depicts a different situation. As a result, some members of the larger law school community may criticize the honor code and discipline process for being arbitrary and capricious.

This section explores several arguments for greater openness during honor code proceedings. First, more open proceedings may be more consistent with the express purposes of law school honor codes. Second, several court decisions support the proposition that the public has a vested interest in ethical lawyers and thus in knowing about lawyer misconduct—even a lawyer's previous academic misconduct. Third, just as several states have justified opening juvenile court proceedings to the public, law schools can similarly justify opening honor code proceedings.

A. Honor Code Purposes Revisited

Affording the accused student too much protection may ultimately undermine the purposes of adopting an honor code. An honor code exists, in part, to ensure that law students know the standards of behavior appropriate (and inappropriate) in the academic environment. Before the establishment of the first American Bar Association (A.B.A.) code of ethics, the committee recommending its promulgation wrote:

A further reason why we report the advisability of canons of ethics being authoritatively promulgated arises from the fact that many men depart from honorable and accepted standards of practice early in their careers as the result of actual ignorance of the ethical requirements of the situation. Habits acquired when professional character is forming are lasting in their effects.57

As these founders of the Model Code of Professional Responsibility noted, lawyers and law students should know the types of behavior expected of them. "[T]he best way to learn professional responsibility is by being professionally responsible. Students can best learn to adhere to rules of professional conduct by

adhering to rules." Thus, law school honor codes should not be so confidential that they fail to provide law students with clear ethical guidelines.

Despite their value in upholding ethical standards, law school honor codes may be limited in what they can achieve in teaching students about moral reasoning. After conducting a study on the moral reasoning of lawyers, Susan Daicoff concluded that for lawyers, codes of ethics function as minimum standards of conduct in their decision-making. She argues that "lawyers view ethics codes based on the Model Rules of Professional Conduct as a minimum standard for behavior rather than as an ideal towards which lawyers should strive." Rather, "[i]n articulating ideal behavior, it appears that attorneys look to their own personal values and standards." Daicoff goes on to conclude that "this empirical result indirectly suggests that such codes of ethics are insufficient and inadequate in assisting lawyers to identify ideal or optimal ethical behavior." Assuming that law students' and attorneys' moral reasoning is substantially similar, this research fundamentally challenges the argument that law school honor codes can be used as a tool to teach ethical behavior.

The MacCrate Report on legal education argues that model codes of conduct, although insufficient, are necessary to teach new lawyers to practice within certain ethical parameters. The report states that "training in professional responsibility should involve more than just the specifics of the Code of Professional Responsibility and the Model Rules of Professional Conduct; it should encompass 'the values of the profession,' including 'the obligations and accountability of a professional dealing with the lives and affairs of clients.'" But as the MacCrate Report also notes,

58. Repa, supra note 56, at 27 (quoting an interview with Leonard Biernat, an associate professor at Hamline University School of Law).
60. Id. at 245.
61. Id.
law students must learn the value of representing clients in a competent manner which must include "[r]epresenting the client in a manner that is consistent with the ethical rules of the profession." The rules serve as a necessary, but not sufficient, aspect of training to be part of the legal profession. It is not enough for students simply to sit passively in a classroom and learn the Model Rules of Professional Conduct. It is important to give students the opportunity to be challenged to live under a specific code while they are in school learning the law. Professional self-development demands that lawyers critically assess their "own performance so as to evaluate . . . [t]he extent to which ethical issues were properly identified and resolved." If lawyers are expected to learn professional self-development, law schools cannot send them into the world unprepared—they must give students the tools in law school to learn to evaluate themselves and their competence as a professional.

Although honor codes may be somewhat limited in their ability to teach legal ethics, they are still necessary to uphold standards of ethical behavior. In upholding these standards of behavior, law school honor codes must determine the degree to which they will attempt to educate students about specific examples of ethical misconduct. Honor codes that lessen the secrecy of disciplinary hearings by allowing the release of a redacted version of the disposition attempt to educate students more fully. Reading about a specific example states clearly for the student what constitutes ethical misconduct and how it is sanctioned.

B. Public Access to Ethical Misconduct Hearings

Since many honor codes aspire to instill the values of honesty and integrity in students in order to make them more ethical lawyers, it seems only natural to look to the A.B.A. for guidance on confidentiality. The A.B.A. Standards for Imposing Lawyer Sanctions indicate that the level of publicity of a lawyer's ethical violation depends on the degree of the violation. The A.B.A. recommends that "[u]ltimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer,

64. MacCrate Report, supra note 63, at 203.
65. Id. at 212-13.
should private discipline be imposed.”67 This type of provision acknowledges that revealing a lawyer’s minor misconduct may be unnecessarily embarrassing, but that the public also has an interest in knowing when a lawyer commits a major ethical violation.

For similar reasons, bar associations want to know instances of law student misconduct. Academic dishonesty arguably has a bearing on a law student’s character and fitness to practice. In his attempt to define the “Ultimate Lawyer,” C.M. Steven Aron says that the ultimate lawyer—the one that is more than just good—is “a good lawyer with wisdom and honor.”68 Aron also notes that today’s law students:

[W]ith ideals and powerful—but vague—ambitions, are transformed into wanderers in the tall grass. Without assistance from the professionals whom they should be striving to emulate, and with no guiding light except the glow of the dollar sign, they are left to make up their own definition of success.69

Only by demanding that law students remain publicly accountable for their behavior can law schools show that lawyers should place the utmost importance on the principles of honesty and integrity.

Just as the A.B.A. argues that bar association proceedings should not be kept confidential forever, law school honor code proceedings should not be subject to a permanent veil of secrecy. Whether a law student acts professionally—especially in the areas of honesty and integrity—should be known to the bar associations which must determine whether to admit a student to practice in the state. Many bar associations do request information from a prospective lawyer’s law school about the student’s character and fitness to practice. But, arguably, the greater public also has an interest in direct knowledge about a law student’s ethical misconduct. Several courts have held that the public has an interest in attorney disciplinary hearings based on the Supreme Court’s grant of public access to criminal trials.

C. Public Access in Criminal Trials

Although the Supreme Court has not specifically addressed the issue of confidentiality and public access in the context of

67. AMERICAN BAR ASSOCIATION, Standards for Imposing Lawyer Sanctions § III(A) (1.2), in COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 342 (1997).


69. Id. at 515.
attorney or academic disciplinary hearings, the Court has established that the public retains a right of access to criminal trials. In *Richmond Newspapers, Inc. v. Virginia*, where a newspaper sought admittance to a murder trial the trial judge had closed to the public, the Supreme Court held that "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." The Court based this conclusion on both the "unbroken, uncontradicted history" of presumptively open public trials and the First Amendment, which contains an implicit guarantee of the right to attend a criminal trial. In discussing these foundations of the right to access, the Court noted "the importance of openness to the proper functioning of a trial." Public access ensures that a trial is conducted fairly, and discourages perjury and other misconduct. Additionally, "public trials had a significant community therapeutic value" because public access allowed the community to express its "concern, hostility, and emotion." Furthermore, public trials also provide an attractive educational component.

In *Globe Newspaper Co. v. Superior Court*, the Supreme Court affirmed the right of public access in criminal trials. In this case, the trial judge relied on a Massachusetts statute to close the criminal trial of a man accused of raping three girls—all minors at the time of the trial. The Court applied *Richmond Newspapers* saying that the public right of access should be protected for two reasons: first, because "the criminal trial historically has been open to the press and general public"; and second, because "the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process." After noting the benefits of public trials as stated in *Richmond Newspapers*, the Court concluded that "the institutional value of the open criminal trial is recognized in both logic and experience." Furthermore, although there may be times when a criminal trial

72. Id. at 573.
73. Id. at 580.
74. Id. at 569.
75. Id.
76. Id. at 570.
77. Id. at 572.
81. Id. at 606.
82. Id.
should be closed "in order to inhibit the disclosure of sensitive information," the Court stated that before closure, "it must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest." In *Globe Newspaper*, the Massachusetts statute—attempting to protect the minor victims of sex crimes from trauma and embarrassment and to encourage their truthful testimony—failed this test because the law was too broad. After *Globe Newspaper*, the public right of access to criminal trials seems to be virtually impenetrable.

D. Extending the Public Access to Ethical Misconduct Hearings

Although the Supreme Court has not addressed the issue of public access in the context of non-criminal trials, several lower courts have. "The Court's analysis in these right-of-access cases provides clear guidance for determining whether the right extends to other proceedings." Public access has been granted in the context of civil cases, bankruptcy proceedings, juvenile delinquency proceedings, and competency hearings, as well as numerous other types of cases. "It appears that the only cases in which courts fail to find a qualified right of access under the First Amendment are those in which some element of the proceeding under consideration is fundamentally inconsistent with publicity." Thus, it seems the right of public access could be extended to apply to ethical misconduct hearings.

For example, the court in *Daily Gazette Co., Inc. v. Committee on Legal Ethics* held that the public has a right to know about attorney disciplinary hearings. The Supreme Court of Appeals of West Virginia stated that, under the West Virginia's constitution, when "probable cause exists to substantiate allegations of an ethical violation," the public has a right of access to attorney disciplinary proceedings. The court argued that the "principle purpose of attorney disciplinary proceedings is to safeguard the

83. *Id.* at 606-07.
84. *Id.* at 607-09.
85. Sokol, supra note 70, at 896.
86. *Id.* at 885.
87. *Id.* at 896-98.
88. *Id.* at 898.
90. *Id.* at 713. Two years later, the Supreme Court of Appeals of West Virginia ruled that the public also has a right of access to disciplinary action taken against medical professionals. *Daily Gazette Co. v. W. Va. Bd. of Med.*, 352 S.E.2d 66 (W. Va. 1986).
public's interest in the administration of justice." Additional-ly, "this fundamental constitutional right of access is not limited to formal trials, but extends to other types of judicial and quasi-judicial proceedings." The public interest in attorney discipline for ethical violations is of the utmost importance; thus, when attorneys are disciplined for unethical conduct, the public has a right to know about it. A similar argument can be made about law school disciplinary hearings—the public has an interest in knowing about the ethical misconduct of law students who intend on becoming lawyers to serve the public through the legal system.

Arguably, the public's interest in law student ethical misconduct is not as great as the interest in misconduct committed by admitted attorneys currently practicing. Some would argue that the sins of youth should not be held against the students indefinitely. But, as the Supreme Court of South Dakota has ruled, "the same zeal to protect the public from the unfit within the bar must also be applied to the unfit who would seek to enter the bar." In the South Dakota case, an applicant to the South Dakota bar association committed plagiarism on multiple occasions during law school—ethical misconduct that contributed significantly to his denial of admission to the bar. At a minimum, the bar association should be involved in the protection of the public from unethical law students trying to become lawyers. And the case can even be made that the protection of the public's interest should go further and allow the public direct access to information about ethical misconduct.

The Supreme Court of Illinois has also held that an attorney's conduct in academia has a significant bearing on his fitness to practice. Although the court left it up to the law schools to protect honest scholars harmed by a dishonest students' ethical misconduct, it did issue a public censure against a lawyer who committed plagiarism in submitting his L.L.M. thesis "because both the extent of the appropriated material and the purpose for which it was used evidence the respondent's complete disregard for values that are most fundamental in the legal profession." As these court opinions show, what a law student does during law school does have a bearing on one's fitness to practice. Discipline should be imposed "to protect members of the public,

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92. *Id.*
93. *Id.*
95. *Id.* at 673-74.
97. *Id.* at 551.
to maintain the integrity of the legal profession and to safeguard the administration of justice from reproach."98 Furthermore, when a school takes disciplinary action, the public has an interest in knowing the circumstances. Ultimately, secret disciplinary proceedings may undermine the purpose of honor codes: to protect the public from unethical lawyers.

E. Juvenile Court Proceedings

Like those courts granting public access in attorney disciplinary hearings, courts that have granted public access to juvenile proceedings have relied on the principles articulated in Richmond Newspapers. Public access can play a positive role in juvenile proceedings.99 These positive values include: (1) to promote informed discussion and education; (2) to ensure fairness and promote public confidence in the process; (3) to provide the community with an opportunity to express concern, hostility, and emotion; (4) to check corruption; (5) to enhance the performance of individuals involved; and (6) to discourage perjury.100 Public access to juvenile proceedings challenges the assumption that we should protect the young from a lifetime of being haunted by their youthful indiscretions. Closed juvenile proceedings, like closed law school honor code hearings, attempt to protect a person from embarrassment. It may be time, however, to re-evaluate the value of this protection.

Several states have recognized the value of public access by enacting laws creating a presumption of open, public juvenile court proceedings. In 1998, the Supreme Court of Florida issued a Rule of Procedure Ruling stating that "closure of court proceedings or records should occur only under limited circumstances and in this regard family law proceedings should not be given special consideration . . . [F]amily law proceedings must be cloaked with a presumption of openness."101 The court noted that its ruling is supported by the newly amended Florida Constitution which guarantees that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or

98. Id. at 551 (quoting In re Nowak, 62 Ill.2d 279, 283 (Ill. 1976)).
100. Id. (citing United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 555 (1980)).
employee of the state. . . ." 102 Given its breadth, this state constitutional provision may apply to the Florida Bar Association, making the association’s records of attorney disciplinary hearings—and possibly bar applications as well—available to the public. Additionally, Florida’s constitutional provision indicates that public law schools might be required to give the public access to records of student discipline hearings.

Also in 1998, the Supreme Court of Minnesota began a pilot project where, with some rare exceptions, juvenile court proceedings are presumptively open to the public. 103 The openness of the proceedings is quite broad, stating that “[e]xcept as otherwise provided in this rule, all case records relating to the pilot project on open juvenile protection proceedings are presumed to be accessible to any member of the public for inspection, copying, or release.” 104 Houston County District Judge Duane Peterson said that “[t]he open hearings allowed for fair and accurate reporting.” 105 Supreme Court Chief Justice Kathleen Blatz hopes the open hearing system will make those working in the juvenile system “more accountable” and thereby result in “better decisions for children and families.” 106

Florida and Minnesota are not alone in this trend towards opening juvenile court hearings, indicating that there is a growing concern for accountability in the process. 107 It has even been argued that “[d]espite broad judicial assertions that juvenile court proceedings have historically been closed, there is ample evidence that such proceedings have historically been accessible to the public.” 108 A similar argument can be made about honor code proceedings. Some may argue that because honor code proceedings have historically been closed to the public and little information about their disposition released, honor codes

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102. Id. (quoting Fla. Const. art. I, § 24(a)). The only exception is records explicitly made confidential by the Constitution. Since the Florida Constitution does not make juvenile court proceedings confidential, they are presumptively open to the public.

103. See David Chanen, Child Protection System’s Opening Creates Few Ripples, STAR-TRIBUNE NEWSPAPER OF THE TWIN CITIES, June 22, 1999, at 1A.


105. Chanen, supra note 103, at 1A.

106. Id.

107. The State of Michigan has had open juvenile court proceedings for over eleven years. See id. The Michigan Rules of Court state that “[e]xcept as provided in subrule (A) (2), juvenile court proceedings on the formal calendar and preliminary hearings shall be open to the public.” Mich. Ct. R., ch. 5, Subch. 5.900, r. 5.925. For a list of other states and countries that have instituted greater openness in juvenile court proceedings, see Sokol, supra note 70, at 911 n.224.

108. Id. at 910.
should continue to maintain strict confidentiality requirements. But the differences discovered in Part II’s exploration of different honor code confidentiality provisions question the assumption that honor codes have historically maintained strict rules of confidentiality.

This shift in thinking about the confidentiality of juvenile court proceedings indicates that it may be time to shift the thinking about the confidentiality of law school academic disciplinary hearings. Although many law schools close their disciplinary hearings, several allow open hearings and some even create a presumption of openness. Public hearings could offer the law school community greater accountability of the process and an opportunity for other students to learn to recognize appropriate and inappropriate ethical behavior. Greater openness during the disciplinary process may also promote discussion within the law school community about appropriate ethical conduct. Just as many states are now moving to open juvenile court hearings to the public, law schools should begin to consider whether, in some circumstances, public hearings might be more beneficial to the community.

IV. LIMITS ON LESS CONFIDENTIAL HONOR CODES

Although less confidential honor codes are appealing, several factors currently limit the extent to which law schools can embrace more open hearings. Both legal considerations, such as F.E.R.P.A. and due process requirements, and law school community concerns, inhibit the ability of law schools to lessen the confidentiality requirements of their honor codes.

A. F.E.R.P.A.

Despite the arguments in favor of opening law school disciplinary hearings, F.E.R.P.A. restricts the ability of law schools to open honor code proceedings and release the results of such proceedings to the public. F.E.R.P.A. permits the federal government to withhold education funds from any “educational agency or institution” that “has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, or as is permitted under paragraph (1) of this subsection.”

Definitions of these F.E.R.P.A. terms are broad. “‘Educational agency or institution’ means any public or private agency

or institution which is the recipient of funds under any applicable program."\textsuperscript{10} An "applicable program" is one:

[F]or which the Secretary or the Department has administrative responsibility as provided by law or by delegation of authority pursuant to law. The term includes each program for which the Secretary or the Department has administrative responsibility under the Department of Education Organization Act or under Federal law effective after the effective date of that Act.\textsuperscript{11}

F.E.R.P.A. makes some exceptions to the prohibition on release of student educational records.\textsuperscript{12} For example, the law permits a school to release confidential information to school officials who have "legitimate educational interests."\textsuperscript{13} Similarly, a law school could release otherwise confidential information to the American Bar Association for accreditation purposes.\textsuperscript{14} Aside from these and other specific exceptions listed in F.E.R.P.A., a school may release confidential information to third parties only if either (1) the school obtains written consent from the student's parents\textsuperscript{15} (or the student if aged eighteen or enrolled in a post-secondary institution)\textsuperscript{16} or (2) the school must release the information to comply with a judicial order or lawfully issued subpoena.\textsuperscript{17}

Given this broad sweep, nearly every law school must comply with F.E.R.P.A. restrictions regarding the release of information contained in a student's "education records." F.E.R.P.A. defines "educational records" broadly as "those records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."\textsuperscript{18} This broad definition of educational records probably includes academic disciplinary records.

1. Distinguishing Academic and Non-Academic Conduct and Disciplinary Actions

The language of F.E.R.P.A. itself does not specifically exempt academic disciplinary matters from these confidentiality

\textsuperscript{10} § 1232g(a)(3).
\textsuperscript{11} § 1221(c)(1).
\textsuperscript{12} See generally § 1232g(b)(1).
\textsuperscript{13} § 1232g(b)(1)(A).
\textsuperscript{14} § 1232g(b)(1)(G).
\textsuperscript{15} § 1232g(b)(2)(A).
\textsuperscript{16} § 1232g(d).
\textsuperscript{17} § 1232g(b)(2)(B).
\textsuperscript{18} § 1232g(a)(4)(A).
requirements. Rather, the Department of Education (D.O.E.) has issued regulations and an explanation of F.E.R.P.A. indicating that such disciplinary records are included in the term “education records” and therefore are protected by F.E.R.P.A.’s confidentiality provisions.119 D.O.E. regulations say, “’Disciplinary action or proceeding’ means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.”120 The explanation of this regulation noted that the public had expressed an interest “that records of institutional disciplinary proceedings taken against students accused of criminal and other non-academic misconduct should not be considered ‘education records’ under FERPA.”121 Despite this public interest, the explanation states that “the Secretary remains legally constrained to conclude that [all] records of an institution’s disciplinary action or proceeding are ‘education records’ under FERPA.”122

Exceptions to the confidentiality requirements of F.E.R.P.A. seem to support the Department of Education’s stance that the definition of “educational records” includes disciplinary action taken by an educational institution. Congress has amended F.E.R.P.A. to permit limited disclosure of certain disciplinary hearing records related to non-academic conduct.123 F.E.R.P.A. does not prevent a school from disclosing this type of information to teachers and school officials with “legitimate educational interests in the behavior of the student” where the “disciplinary action taken against such student [was] for conduct that posed a significant risk to the safety or well-being of that student, other students, or other members of the school community.”124 Additionally, when disciplinary action is taken against the perpetrator of a “sex offense,” post-secondary schools may disclose the disposition of such proceedings to the victim.125

Furthermore, at least two state courts have held that where a school took disciplinary action against non-academic conduct, those records were not within the definition of “educational records” and therefore were not protected by F.E.R.P.A.’s confi-

120. Id.
122. Id.
123. See 20 U.S.C. §§ 1232g(b)(6) and 1232g(h).
124. § 1232g(h).
125. § 1232g(b)(6).
dentaility provisions. In contrast to disciplinary action taken for things such as sexual assault or underage drinking, action taken by a law school against a student who cheats on an exam or commits another form of academic misconduct seems to be well within the purview of the F.E.R.P.A. confidentiality provisions. Honor code proceedings and the results of such proceedings, typically used to prohibit academic misconduct, are probably "disciplinary actions or proceedings" which F.E.R.P.A. protects from disclosure.


F.E.R.P.A. provisions protect the confidentiality of most student records, but these protections may conflict with other laws providing for a right of public access. "The greatest burden [FERPA] places on schools is dealing with its conflicts with other laws." Because "Congress has never focused its attention spe-


127. Note, however, that one commenter on the D.O.E. federal regulations argued, "[T]he definition of 'law enforcement unit' was potentially confusing because student conduct code offenses are considered violations of the 'law' and that an office that is responsible for student conduct might be considered a 'law enforcement unit' under the definition." 60 Fed. Reg. 3466. The Secretary of Education responded to this argument by saying, "[T]he second part of the definition of law enforcement unit makes it clear that a security department retains its status as a 'law enforcement unit' even if it also has responsibility for enforcing the institution's code of student conduct." Id. This discussion makes the matter less clear than without the commentary. Seemingly, under the D.O.E.'s interpretive regulations, a university which has an office designated to enforce a student code of conduct may be exempt from F.E.R.P.A. so long as they label the code "law." In later discussion, the D.O.E. regulations say that where a law enforcement unit performs multiple functions, "[o]nly records that were created and maintained by the unit exclusively for a non-law enforcement purpose will not be considered records of a law enforcement unit." Id. at 3467. Thus, in determining whether disciplinary records are excluded from F.E.R.P.A. protections because they are the product of a law enforcement unit, the school must determine the purpose in developing those records. If the purpose is exclusively to pursue internal disciplinary sanction, then the records are "educational records" within the meaning of F.E.R.P.A. Thus, if a school wanted to try to get around the confidentiality limits, one possibility would be to argue that the code is law and that a law enforcement unit is responsible for investigating and evaluating the action as a possible violation of the law. This approach, however, would seem to disregard the language in the regulations distinguishing between academic and non-academic misconduct. Consequently, it is not a recommended approach.

specifically on student records,”

courts are left with little guidance
to interpret the meaning of F.E.R.P.A. and must do so knowing
that other laws protect conflicting interests.

For example, a school in Ohio that accepts funds from both
the federal and state government must comply first with the pro-
visions of F.E.R.P.A. and then with the provisions of the Ohio
Public Records Act. The Ohio law requires all public records,
including those kept by school district units, to be made available
to the public upon request. It is important to note that the
Ohio law exempts from this public access requirement, “records
the release of which is prohibited by state or federal law.” In
theory, if F.E.R.P.A. protects a particular student record, the
Ohio Public Records Act would not permit its release. But, as the
following discussion demonstrates, it is not always easy to deter-
mine when a student record falls within the definition of educa-
tional records, and consequently, contradictory court decisions
may result.

In 1997, the Ohio Supreme Court ruled that disciplinary
records were not within the definition of “educational records”
under F.E.R.P.A.; therefore, they could properly be released
under the Ohio Public Records Act. But in the spring of 2000,
a federal district court in Ohio ruled that two state universities,
which followed the rule established by this state court decision
permitting the disclosure of public records, violated F.E.R.P.A. by
releasing student disciplinary records containing personally iden-
tifiable information. The Ohio Supreme Court ruled that the
term “educational records” did not include disciplinary records
that were “nonacademic in nature” because they “do not contain
educationally related information, such as grades or other aca-
demic data, and are unrelated to academic performance, financial
aid, or scholastic performance.” In contrast, the federal

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129. Id. at 618.
130. Ohio Rev. Code Ann. § 149.43 (West 2000). The Ohio law requires
that “upon request, a public office or person responsible for public records
shall make copies available at cost, within a reasonable period of time. In order
to facilitate broader access to public records, public offices shall maintain pub-
lic records in a manner that they can be made available for inspection in accord-
ance with this division.” Id. § 149.43(B)(1).
131. Id. § 149.43(A)(1).
132. Id. § 149.43(A)(1)(s).
135. Id. at 2 (quoting Miami Student, 680 N.E.2d at 956). See also Red &
Black Publ'g Co. v. Bd. of Regents of Univ. Sys. of Ga., 427 S.E.2d 257 (Ga.
district court held that disciplinary records are "educational records" within the meaning of F.E.R.P.A. The federal district court found that the plain meaning of the statute indicated the term included disciplinary records and that the legislative history suggested nothing to contradict this plain meaning.

The federal district court also held that "the First Amendment does not confer a public right of access to university disciplinary records." Additionally, the court declined to expand Richmond Newspapers and Globe Newspaper to give the public a right of access to student disciplinary proceedings protected by F.E.R.P.A. This decision to limit the public's right of access to criminal proceedings contradicts other courts' decisions expanding the public's right of access to quasi-judicial proceedings involving the discipline of lawyers and law students. The essential conflict is that the Ohio Supreme Court allowed the state law to prevail while the federal district court determined that the federal law was controlling. As a result of this conflict between the courts, the schools involved were hit with the expense of two lawsuits.

F.E.R.P.A. may also conflict with federal public right to access laws. At least one lawsuit has challenged the failure of a school to disclose disciplinary records on the basis that such confidentiality contravened the Freedom of Information Act. In Department of Air Force v. Rose, the Supreme Court held that under this law, the Air Force Academy must release redacted versions of case summaries of Honor and Ethics Code violations. The Court argued:

[Even without such official encouragement [like the Freedom of Information Act], there would be interest in the treatment of cadets, whose education is publicly financed and who furnish a good portion of the country's future military leadership. Indeed, all sectors of our society, including the cadets themselves, have a stake in the fairness of any system that leads, in many instances, to the forced resignation of some cadets.]

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137. Id. at 1152.
138. Id. at 1154.
139. Id. at 1157.
140. See discussion infra Part III.B.2.
142. Id. at 369.
But, the Court stopped short of allowing the complete records to be released. Rather, the release of a redacted version was appropriate. The Court agreed that while "redaction cannot eliminate all risks of identifiability . . . and the consequences of exposure of identity can admittedly be severe . . . . [R]edaction is a familiar technique in other contexts." The Supreme Court's approach to allowing the disclosure of honor code proceedings in Rose may be a suitable compromise for law schools that wish to reduce the secrecy of honor code proceedings. Law schools could release redacted versions of the resulting decision in honor code hearings. In this way, the law school community would have the benefit of illustrations of prohibited conduct and the types of consequences associated with different types of academic misconduct, but the school would also be able to comply with F.E.R.P.A. requirements and to protect the student's interest in confidentiality.

B. Procedural Requirements of Due Process

The protection of an accused student's privacy through confidentiality rules and laws, such as F.E.R.P.A., leads to a second limiting factor for greater openness in law school honor code proceedings: due process requirements. Public commentary on D.O.E. regulations interpreting F.E.R.P.A. argues that if disciplinary hearings and their results are not "educational records" protected by F.E.R.P.A., then these hearing procedures must be revised to incorporate greater due process protections.

The student's due process rights create a major obstacle to law schools attempting to lessen the degree of confidentiality in academic disciplinary proceedings. Columbia University law professors Curtis J. Berger and Vivian Berger argue that "all students [at both public and private universities] accused of academic misconduct are entitled to certain procedural safeguards" in the discipline process. Minimum procedural requirements for public universities were set out by the Supreme Court in Goss

143. Id. at 381.
144. Id. (citation omitted).
145. 60 Fed. Reg. 3464 ("Several commenters [sic] also stated that if FERPA were amended to allow such disclosures, institutions would have to amend their disciplinary procedures to incorporate greater due process protections.").
146. Curtis J. Berger & Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 COLUM. L. REV. 289, 354 (1999). See also Carlos, supra note 14, at 944 ("[R]egardless of whether an institution is private or public, some type of due process protection should be provided in honor code violation cases.").
v. Lopez. The Bergers argue on the basis of contract theory that these procedural safeguards should also be extended to students at private universities.

They then go on to recommend several procedural requirements that should be present in hearings on violations of academic integrity, including: the right to legal counsel, the right to a hearing transcript, the right to adequate preparation time, the right to confront and cross-examine witnesses, notice of the school's witnesses and evidence, and the privilege of calling one's own witnesses. In addition, in their "Proposed Model Guidelines," the Bergers provide for private, confidential hearings unless "(1) the student consents in writing to their disclosure, or (2) state or federal law requires disclosure." The only other exception to the confidentiality requirement in this proposed honor code is the provision allowing the judgment and opinion to be put in the official file of students found guilty.

Due Process requirements indicate that law schools should examine provisions for greater openness of honor code proceedings within the larger context of the process. For example, if a school would like to allow accused students to open honor code hearings to the public, other safeguards, such as a higher threshold to pass from the investigation to hearing stage, should be put in place to account for this public access. If a school wishes to release the results of honor code proceedings to the wider law school community, it should first allow the results to be thoroughly appealed. If schools wish to offer the accused student the option of either an open or a closed hearing, the schools should make the student give written consent to the open hearing.

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147. 419 U.S. 565 (1975) ("'At the very minimum,' the Court held, due process requires notice and an informal hearing prior to the students' suspension. Had punishment exceeded the ten days' suspension several students suffered, the Court might have required 'more formal procedures.'" Berger & Berger, supra note 146, at 308 (footnotes omitted)).
Id. at 416. "Litigation over academic or disciplinary matters at private colleges and universities is almost always based on contract theories and almost never involves due process issues." Id. at 417.).
149. See Berger & Berger, supra note 146, at 338-56. See also Carlos, supra note 14, at 946-50 (exploring the procedural due process rights of notice, a hearing, and legal counsel).
151. Id. at 364.
C. Concerns of the Law School Community

In addition to the limits imposed by F.E.R.P.A. and due process requirements, a law school may find it unwise to open honor code proceedings because of concerns unique to the individual community. As a result of post-hearing disclosure, the law school community may form judgments about a student or hearing panel without having the benefit of observing the hearing firsthand. Consequently, open hearings, or posting detailed results of the proceedings, may not lessen law school gossip as intended. Additionally, in the case of open hearings, if a law school publishes notice of the hearing prior to the actual date, the accused may be treated unfairly by his colleagues and professors even though he has not yet been found guilty. One way to prevent this problem is to reveal information about the details of honor code proceedings only after a student has been found guilty. But in doing this, the code may sacrifice its intended teaching function because the ethical lesson will make the most dramatic impact if students see the process firsthand.

Another potential problem for law schools which provide for more open disciplinary proceedings is that "the law school community may harass members of the court." While law schools should not try to create an undue burden for the members of its community charged with enforcing the community standards, the schools should consider whether less confidentiality will enhance the process by making the honor council more accountable to the law school community. Additionally, although witnesses may be reluctant to come forward when they know their accusations will be made public, witnesses may be more accountable for their statements, ultimately making the process more credible. Each law school must decide whether it is willing to risk some violations going unpunished if a greater degree of publication would make the procedural aspect of the code more reliable.

In assessing the value of confidential academic disciplinary hearings, one must ultimately look at the relationship of the student to the law school community. "The educational process is not by nature adversary [sic]; instead it centers around a continu-

152. See, e.g., The University of Arizona College of Law, Honor Code § 5(B)(7) ("If the hearing is open to the public, the time and place of the hearing shall be posted on the bulletin board used for official Law College announcements.").

153. Carlos, supra note 14, at 968.

154. Id.
ing relationship between faculty and students." At the same
\(155\) time, if honor code proceedings become open to the law school
community, the accused student must then face peers and
professors aware that they know of the accusations. And if con-
victed, the community will likely form a lasting opinion of the
student's character as a person and ultimately as a lawyer. Even
an acquitted student may face a community which continues to
consider the student's character suspect. For this reason, if law
schools do decide to open their proceedings, they should do so
only after a thorough investigation and after some initial finding
that there is probable cause that a violation was committed.

Law schools wishing to make the disciplinary process more
accountable may use a method of post-hearing disclosure which
reveals as much as possible about the proceedings without actu-
ally revealing the identity of the student. Publishing more details
of an academic violation without the student's name may bring
more healing to the community than presumptively open hear-
ings. In this way, the law school community is able to identify the
type of conduct found unacceptable without having to "pin the
blame" on a single student. The community as a whole reaps the
benefit of a more clearly defined honor code while the student
still enjoys a measure of privacy.

**Conclusion**

Ultimately, each individual law school must decide the
extent of revelation of an honor code proceeding. Different
levels of confidentiality present different potential risks and ben-
efits. And each law school will have different community needs
and particular goals they would like the honor code to effectuate.
Hopefully, law schools find it helpful to refer to the continuum
of confidentiality discussed in Part II to explore their options for
balancing confidentiality and public access. Because the law
school and the public have such a strong interest in knowing that
attorneys are ethical, law schools should consider opening honor
code proceedings as much as possible while also complying with
F.E.R.P.A. and due process requirements.

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### APPENDIX A

<table>
<thead>
<tr>
<th>Law School</th>
<th>Investigation</th>
<th>Disciplinary Hearing</th>
<th>Post-Hearing Disclosure</th>
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<tr>
<td></td>
<td>Explicitly made Confidential</td>
<td>Presumption of Open</td>
<td>Student has option of</td>
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<td>Presumption of Closed</td>
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<td>Option called a &quot;Right&quot;</td>
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<td>Creighton U.</td>
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156. Limitations may include giving the Dean, the hearing panel, or possibly even witnesses, something akin to a "veto power" over the accused student's request to open the hearing.

157. But note that the accused can specifically request that his or her name be published with the otherwise confidential disclosure statement. See University of Arizona College of Law, Honor Code, § 5(C)(5), at http://www.law.arizona.edu/handbook/handbook.html (last visited Nov. 8, 2000).


159. Note that although there is a provision to publish the results of disciplinary procedures "in such a way as to ensure their general availability to all students," it does not specify the extent of the information revealed in the publication. University of Chicago, Student Manual of University Policies and Regulations: All University Disciplinary System § 9 (1998-1999) (on file with author).

160. This report is to be given only to the Dean at the end of the academic year and without identifying any particular students. See Cornell Law School Code of Academic Integrity § II(C)(6) (on file with author). However, students may waive confidentiality and allow disclosure of the outcome after final disposition. Id. § II(C)(8).

162. The issue of confidentiality of the accused's identity is not explicitly addressed. See Duke University School of Law, Student Misconduct Policies, at http://www.law.duke.edu/general/info/s05.html (last visited Nov. 19, 2000).

163. Although Duquesne provides for taping of its hearings, it does not address the issue of open versus closed. It is assumed that since they remove all identifying material from the post-hearing disclosure, that the hearings are confidential in nature. See Duquesne University School of Law, Disciplinary Code §§ III(F) and V(C), at http://www.duq.edu/law/code.html (last visited Nov. 19, 2000). Note that the code also allows for the sanction of public reprimand if the panel deems appropriate. Id. § IV(A)(1)(c).

164. The code leaves disclosure up to the Dean who could reveal the identity of the student if it is “in the interest of justice.” Florida Coastal School of Law, Honor Code § XI(C), at http://www.fcs.l-edu/students/sba/code9.htm (last visited Nov. 27, 2000).

165. The issue of an open or a closed hearing is not explicitly addressed. Although records of the hearing are kept, it is not clear from the code whether they are made available to the school community. Note, however, that the issue of confidentiality has been raised by former student prosecutor Ashley Disque and it is assumed that there are some honor code procedures normally followed that are not made explicit in the code itself. See Ashley Disque, Have You No Honor? Why Honor Committee Secrecy Must Be Abolished (on file with author).

166. (a) indicates that publication is only done annually.

167. Note, however, that the student who is the subject of a hearing may request that the findings are made public. See Georgia State University, Honor Code § 12(h)(2)(F), at http://law.gsu.edu/registrar/bulletin/honorcode.htm (last visited Nov. 19, 2000).

168. (w) indicates that the student must waive confidentiality in writing.

169. Although the annual disclosure does not reveal any student names, the code does not have an explicit confidentiality provision. See Northwestern School of Law of Lewis & Clark College, Honor Code, at http://www.lclark.edu/~lawac/LC/whatswhat/honor_code.htm (last visited Nov. 8, 2000).
170. Note that the code simply states that brief reports about proceedings should be periodically published. Although confidentiality shall be maintained, it is not clear how much information (such as non-identifying facts) is revealed. See University of Michigan Law School, Rules of Conduct and Disciplinary Procedures § 13 (on file with author).

171. The student has the option of opening the hearing before the Honor Court. There is a separate Grand Jury hearing which is part of the investigation and students do not have the option of opening this proceeding. See University of Missouri at Kansas City School of Law, Honor Code § 6.05(d), at http://www.law.umkc.edu/academic/honor.htm (last visited Nov. 8, 2000).


173. The issue of confidentiality is not explicitly addressed. See University of Southern California, University Student Conduct Code (on file with author).

174. Shepard Broad Law Center.

175. Pettit College of Law.

176. But note that the Adjudication Committee may close the hearing at the request of the respondent. See Pettit College of Law, Student Code of Professional Responsibility, Art. 2.6 § (1), at http://www.law.onu.edu/faculty/haight/scpr/part_two.html (last visited Nov. 19, 2000).

177. The Adjudication Committee’s full opinion is initially posted for two weeks. Id. Art. 2.7 §§ (C) & (E). After that, a public record is made containing a brief syllabus of each opinion that does not include the identity of the respondent. Id. Art. 2.7 § (F).

178. If a student is found not guilty, the investigation and trial are confidential, “unless the accused requests that they be made public.” See University of Richmond School of Law, Honor Code § 3.5(14), at http://law.richmond.edu/general/honored.htm (last visited Nov. 27, 2000). If a student is found guilty and a sanction is imposed, the student’s identity, the charge made, and the sanction
<table>
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<th>Institution</th>
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imposed are revealed to the Dean and the President of the Student Bar Association in a written statement. It is then up to the Dean and S.B.A. president to notify the faculty, administration, and student body. It is unclear from the text of the code whether this means the guilty student’s identity is revealed to the larger law school community. *Id.* § 3.8(2).

179. Confidentiality during the hearing and afterwards is not specifically addressed. See Seattle University, Code of Student Conduct (on file with author).

180. The code allows the Honor Council to publish the results of its decision “in any way it considers appropriate” except that it “shall not publish the name of any participant, except that in exceptional circumstances the Council may reveal the name of the subject found guilty of the violation(s).” Southern Methodist University School of Law, Student Code of Professional Responsibility § IX(K) (on file with author).

181. The issue of confidentiality is not explicitly addressed. See Stanford University, Honor Code (on file with author).

182. If no violation is found, the proceedings will be confidential unless the Dean thinks that “a substantial segment of the student body is aware of the pendency of the Honor Code proceeding, and the Dean believes that *not* posting a notice will be detrimental to the accused and the law school community.” Washburn University School of Law, Honor Code and Procedure for Law Students, Part IV (G), at http://washburnlaw.edu/policies/hrcodtxt.htm (last visited Nov. 19, 2000) (emphasis added). Also note that “for good cause shown,” the Dean “may order that the violation and sanction(s) not be posted.” *Id.*

183. Reports are made quarterly. Also, if a student withdraws in the face of a hearing, or a student is dismissed as a result of a hearing, notice of such action will be posted after its effective date. Washington & Lee University, The Honor System, Student Body Announcements § 1 (on file with author).