Eight Steps in Representing an Accused in College Sexual Misconduct Disciplinary Proceedings

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Sexual misconduct and assault on college campuses have taken center stage in America in the recent times. Students—typically young men—find themselves in the midst of a veritable minefield in which institutions of higher education are using their internal disciplinary procedures to try students for claims of sexual misconduct and assault and to mete out penalties, including expulsion, suspension, and a permanent scar on their academic record. The impetus behind these disciplinary proceedings is the interpretation given by the U.S. Department of Education to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

In a letter dated April 4, 2011, the Department of Education's assistant secretary for civil rights at the time, Russlynn Ali, issued what has become known as the "Dear Colleague" letter to every college and university receiving federal funding (which is to say, most colleges and universities in the United States). The 19-page letter contains guidance and directives on how schools are to address sexual assault and misconduct allegations in order to comply with the department's view of Title IX.

Since the issuance of the letter, there has been a marked increase in the number of colleges and universities under investigation by the department's Office for Civil Rights for Title IX violations, and an increasing number of students have been the subject of sexual misconduct complaints adjudicated in school disciplinary proceedings. Sanctions imposed in these proceedings range from probation to expulsion, all of which make continuing education and later job prospects very difficult, if not impossible, for the accused student to pursue, despite high grades and previously unblemished academic records.

Despite their serious consequences, these disciplinary proceedings differ dramatically from cases handled in court and are often marked by a lack of due process. To fully understand the manner in which due process has fallen by the wayside in these proceedings, a brief description of them is necessary.

How College Proceedings Work

Generally speaking, university and college disciplinary proceedings adjudicating complaints of sexual assault and misconduct follow the "single investigator" model. When a sexual assault or misconduct complaint is filed, the accused receives notice and is supposed to receive guidance on the process involved. A Title IX investigator employed by the school is assigned to conduct a full investigation by interviewing witnesses and collecting documents, such as police reports, university security records, and

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social media communications made by the complainant and the accused. The letter, recognizing the importance of this role, specifically notes that investigators must conduct "[a]dequate, reliable, and impartial investigation of complaints." Unfortunately, however, the letter does not lay out the procedure for investigating such complaints. Therefore, the manner in which Title IX investigators operate varies from school to school.

Some investigators interview the parties and witnesses in narrative form, asking them to describe what happened from their personal knowledge. Other investigators take a question-and-answer approach and, in some cases, cross-examine the parties and any witnesses and may even press the accused for an admission. The investigator also exercises discretion in determining whom to question as part of the investigation. In some cases, the investigator will record statements from any witness that either party recommended to the investigator; in other cases, the investigator may deem some witnesses to be irrelevant, despite the parties' recommendations. Also, the investigator is typically given discretion about whether consideration of other evidence, such as videotapes and rape tests (or the lack thereof), is appropriate.

After performing the investigation, the investigator prepares a report. Like the manner of investigation, the nature of the

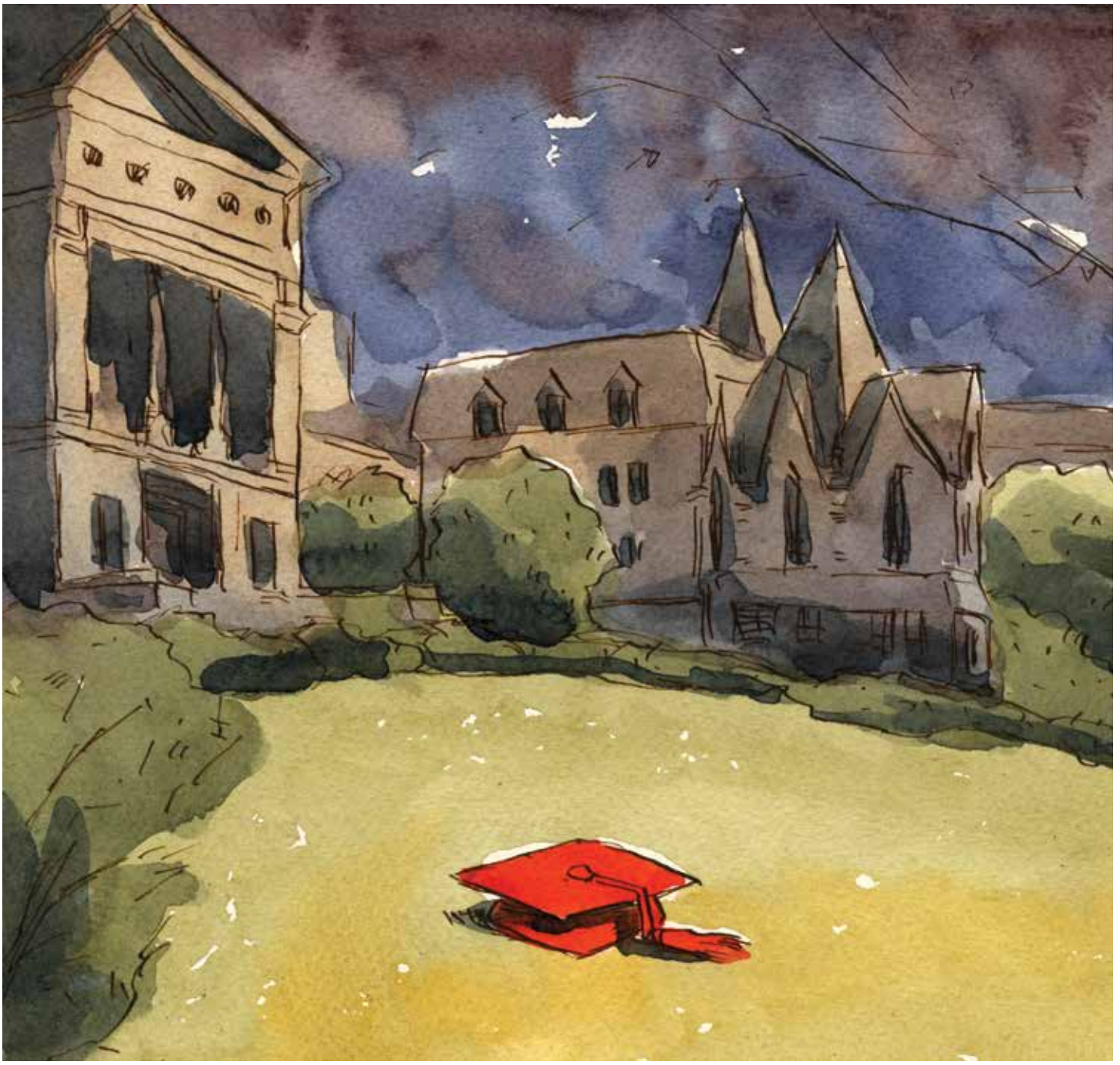

Illustration by Darren Thompson

report can vary from school to school. Some investigators draft the report as descriptions of the accounts given by the complainant, the accused, and any witness. In other cases, the report is effectively drafted as a recommendation and includes only selections of the results of the investigation. Some investigators provide the parties with an opportunity to comment on inaccuracies or omissions and object to the report, while other investigators refuse to consider modifications to the report, despite inaccuracies or omissions. The very purpose of the report also varies from school to school. In some proceedings, the report forms the basis for deciding whether a hearing is required to determine whether the accused student is responsible for sexual assault or misconduct; at other schools, the report may constitute the final decision.

Once the investigation is complete, a hearing is held before a hearing officer or a hearing panel. A panel usually consists of university officials and faculty members and sometimes includes a graduate or undergraduate student. The complainant and the accused are permitted to be accompanied by a supporter (such as a lawyer), but that supporter may not speak. The hearing typically begins with the investigator presenting his or her report.

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Questions may then be asked by the hearing officer or panel members and sometimes by the complainant and the accused. The complainant and then the accused are given the opportunity to give narrative statements, albeit not under oath, about the events in question. The hearing officer or panel may ask questions of the complainant and the accused, but, in accordance with the recommendation of the "Dear Colleague" letter, neither are allowed to ask questions of each other directly. Instead, the complainant and the accused may write questions that are submitted to the hearing officer or panel, and the hearing officer or panel determine whether to ask the questions and also whether to insist on answers to the questions that are actually posed.

Following the statements of the parties, witnesses are then asked to make statements, also in narrative form. The witnesses may also be asked questions by the hearing officer or panel. The complainant and the accused are not allowed to ask questions of any nonparty witness. Instead, following the same procedure by which they ask questions of each other, the complainant and the accused write questions that are submitted to the hearing officer or panel, and the hearing officer or panel determine whether to ask the questions of the nonparty witness. The complainant and the accused are then typically permitted to give a closing statement.

At the conclusion of this proceeding, the hearing officer or panel renders a decision that is typically summary in nature, often finding the respondent responsible without explanation. Typically, the proceedings employ a preponderance of the evidence standard, although often the burden of proof standard applied is not referenced in the decision. If the accused is found responsible, the sanction is then imposed by the school dean, sometimes on the recommendation of the hearing officer or panel and sometimes based on the dean's own review of the case.

Also as recommended by the letter, both parties are permitted to appeal. The grounds of appeal are typically restricted to error with respect to (1) the school's procedures, (2) the availability of new evidence, or (3) the disproportionate nature of the sanction in comparison with the severity of the violation. Typically, either the school dean or a small panel of faculty members, as well as the dean, is entrusted with the disposition of appeals.

Differences with Court

As described, the typical college disciplinary process lacks protective guarantees considered essential to court proceedings, particularly when dealing with serious allegations such as sexual misconduct. For example, in criminal cases, there is a right to counsel, and the prosecutor bringing the charge is bound by *Brady v. Maryland* to turn over exonerating evidence to the defense. Witness testimony may only be taken subject to the laws of perjury, and the accused has the right to cross-examine witnesses. Also important, there is a right not to be subjected unfairly to prejudicial pretrial publicity. Even civil cases in many ways afford more protection than those provided to the accused in college disciplinary proceedings involving sexual misconduct. Litigants in civil cases enjoy the right to pretrial discovery, to witness testimony taken subject to the laws of perjury, and to cross-examination of those witnesses. There are rules of evidence to exclude inadmissible hearsay or other irrelevant or unreliable evidence.

Furthermore, much of what happens in a college or university disciplinary proceeding would never occur in a criminal or civil case. For example, in civil or criminal proceedings, the accused has a right to counsel and would not be restricted from consulting with his or her attorney. In addition, at civil and criminal

trials, unsworn narrative statements are not permitted; the parties to the trial decide which witnesses to call, not the judges; and the parties may conduct their cross-examinations freely without submitting questions to the judge. The departures in college disciplinary proceedings raise questions about the integrity of the overall process. The role of the Title IX investigator is a prime example. The investigator plays the crucial role of gathering evidence and drafting the report; in essence, the entire case often hinges on the investigator's report. In a civil or criminal proceeding, an investigator's report may inform the parties with regard to presenting the case, but the investigator would not in effect testify at trial unless subject to cross-examination. In addition, the investigator's report would likely not be received in evidence because the investigator does not have personal knowledge of the events in question and the investigator's testimony and report would constitute hearsay under the rules of evidence. This is perhaps the most disconcerting divergence from traditional criminal proceedings: When an investigator's report is effectively a prosecutorial brief against the respondent accused and is received in evidence, as it so often is in these college and university proceedings, the unfair prejudice is manifest; the guilt of the accused becomes the default key, and the burden of proof is effectively placed on the accused.

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Another troubling feature of these proceedings is the use of the preponderance of the evidence standard. This is the standard dictated by the "Dear Colleague" letter. The letter's rationale behind this departure from the regular "beyond a reasonable doubt" standard applicable in criminal cases is that unlawful sexual harassment may occur that is not a violation of the criminal law. The notion that there is sexual assault and misconduct not involving criminal behavior contradicts how states define sexual crimes; all kinds of non-consensual sex are invariably proscribed in some manner by state law. Unless the college or university has unreasonably defined consent so narrowly as to exclude behavior that would generally be considered to be consensual sex, accusations of sexual assault and misconduct, if true, involve criminal conduct with serious consequences. Yet, the burden applied is not consistent with the nature of the crime charged.

It is critical for colleges (even private ones) to ensure that their disciplinary proceedings, which by their nature are extrajudicial, nevertheless follow due process requirements set by the courts. Due process matters because it reduces the likelihood of unjust outcomes and ensures that cases are not decided based on what the Supreme Court has called "an erroneous or distorted conception of the facts or the law." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Indeed, even the letter recognizes the need for due process for the accused students.

Steps to Take

Given these startling divergences from traditional criminal and civil proceedings, it is important that lawyers representing an accused student carefully consider the relevant issues early on. The following are the steps that, in our experience, maximize the chances that an accused student will avoid the life-altering penalties that may arise out of college or university disciplinary proceedings.

The first step is to meet with the client, perhaps several times, to thoroughly review the facts of the case, discuss the school's policies defining sexual misconduct and consent, and inform the client as to what has been going on generally in college and university disciplinary proceedings involving complaints of sexual misconduct and non-consensual sex. The facts of the case must be carefully elicited from the respondent accused to a level of detail that may seem to reflect a prurient interest, although the purpose is quite different: The details must be reviewed to develop a defense to the accuser's claim that the sexual conduct involved was not consensual. In many cases, consent to sexual intercourse is not spoken. Consequently, the client must identify the specific actions from which he or she reasonably understood that there was an agreement on the part of both the complainant and the accused to engage in sexual activity.

The initial interviews should pin down specifically what the complainant and accused were doing the day leading up to the sexual contact because these events can provide evidence that the parties consented to the activity. How much interaction did the two parties have prior to the sexual contact? Had the two parties been in contact for several hours prior to the sexual activity? Had they participated in school activities together? Had there been flirting? How much alcohol was involved in the hours before the sexual contact?

The initial interviews should also pin down the specific actions that the accused believed constituted consent. Did the accusing party initiate the original contact? Did the accusing

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party undress? Did the accusing party provide the condom? What physical position were the parties in during the sexual encounter? Was the accusing party "on top" and thus more easily able to cease the sexual activity? Did the accusing party ever direct the accused's hands or body movements? Did the accusing party ever say during the sexual contact that he or she "liked it"? Did the accusing party orgasm? Was the accusing party more sexually experienced than the respondent? Was the respondent sexually inexperienced?

The initial interviews should further detail the events after the sexual contact. Was there any post-sex communication? Did the accusing party send the accused any social media texts indicating that she or he had a good time? Did the accusing party post anything else on social media suggesting there had been consent? Did the accusing party post or send any messages suggesting a motive for the eventual accusation? For example, communications made after the sexual contact in which the accuser expressed hope that "friends wouldn't find out" can be relevant to explain an alternative motive to the complaint. Did the accusing party ever file a complaint with the police or campus security? Did the accusing party ever seek medical attention or take a rape test?

These interviews should also specifically pin down how long it took before the complainant brought the complaint with the university or college. In a number of cases we have handled, the complainant waited up to a year to come forward, and there was evidence that the complaint was made only after regrets set in.

A lawyer must also, early on, review with the client the school's policies defining sexual misconduct and consent so that the accused understands how the policies may be applied by the school to find the accused responsible for sexual misconduct and non-consensual sex. Arming the client with the knowledge of what constitutes sexual misconduct and non-consensual sex under the school's policies can help the client remember minute details about the encounter that may not initially seem important. This is especially important when the Title IX investigator takes a more prosecutorial approach to the investigation. In such cases, the accused may be forced to deal with a school investigator who seeks to elicit admissions based on school policies. The accused may have to explain to the hearing officer or panel the facts and answer questions to support the accused's position that the school policies defining sexual misconduct and non-consensual sex were not violated. A comprehensive understanding of the school's policy is particularly critical because the attorney will not be permitted to speak for or shield the respondent accused from unfair questions at the hearing.

The second step is to quietly let the college or university know that the respondent is represented by outside counsel; rather than sending a letter, a scheduling adjustment or routine communication may present the best opportunity. Although the school will continue to communicate directly with the respondent accused, our experience has been that the school will act more carefully, which can have a salutary effect.

The third step is to evaluate whether the school's Title IX investigator has been conducting an adequate, reliable, and impartial investigation. In the "single investigator" model that most college and university disciplinary proceedings employ, the investigator plays a key role; therefore, where investigators are not "adequate, reliable, and impartial" as required under the letter, an incorrect and unjust result may follow.

Unfortunately, this situation is not uncommon. During the investigation of one client, the Title IX investigator refused to follow up with witnesses who could attest to the absence of force, threats, coercion, alcohol, or drugs on the night in question; failed to advise the accused that he could submit a statement to her and to the hearing panel and that the accused was entitled to a supporter during the process; failed to include in the report the accused's statement that the complainant had expressed clear spoken consent on the night in question; failed to give adequate weight in the report to exculpatory evidence, such as the fact that the complainant undressed herself and provided the condom; omitted from the report the absence of any police reports or medical reports supporting the alleged misconduct; and refused to permit the accused to correct, or even note on the record, mistakes in the report.

In situations such as these, lawyers must act quickly to carefully record the investigator's action, engage the investigator in what one might hope are constructive conversations about why the investigator's behavior may lead to an unjust result, and take initiative in conducting their own investigation and preserving evidence, as described below.

The dissatisfaction that we have felt at our firm concerning the overall performance of school Title IX investigators appears to be due to a number of factors. One is the background of some investigators; the previous employment of the Title IX investigator referred to above was at a not-for-profit organization dedicated to women's special needs, and she appeared to carry with her a prosecutorial-minded suspicion of males generally. Another factor appears to be an insufficient understanding and training that conducting an "adequate, reliable, and impartial" investigation means fairly treating evidence and being even-handed with the accuser and accused.

In several instances, the investigator made no effort to obtain such evidence, even though such evidence would have confirmed or impeached the complainant's story.

The fourth step is to identify areas of investigation that the school's Title IX investigator is not pursuing but that, if investigated, could be of critical benefit to the client. For example, security camera footage may be helpful to a defense, but a lawyer would need to act quickly to preserve the tapes before they

are recycled in their regular course. By way of another example, in one of our firm's cases, the school investigator stated in the investigation report that the complainant had said she took the rape test, which supported the allegation of rape. Critically, however, the investigator made no effort to obtain the actual rape test results. We conducted our own investigation and uncovered that the rape test had never been analyzed by the hospital and that the police had early on closed the police file because of the problems with the complainant's account.

The Hearing Itself

The fifth step is to prepare the client for the hearing itself. Regardless of how much time has been spent reviewing the facts of the case and discussing the school policies defining sexual misconduct and consent, new preparation is required to equip the client for a hearing. Because, at the hearing, the lawyer is merely a "supporter," the client must be in effect his or her own lawyer.

As part of the hearing preparation, the lawyer should walk the client carefully through the hearing process so he or she will know what to expect. Each step of the hearing must be carefully considered: The client must be prepared to give a full and compelling narrative of sexual activity that is honest and respectful. The client must be prepared to answer any questions (both anticipated and unanticipated) from the hearing panel or even the accused. The lawyer should conduct "mock questioning" of the client. The sample questions used must prepare the client to articulate succinctly why there was consent to sex and enable the client to build credibility by telling the story in his or her own words. The client must also be prepared to write questions in a manner that the panel will feel compelled to address.

The lawyer should also discuss with the client what type of questions should be provided to the hearing officer or panel to be asked of both the accusing party and other witnesses and how to phrase these questions in a manner that encourages the hearing officer or panel to actually ask the questions. The lawyer should also prepare the client to make any concluding comments; the client must be prepared not only to relay the points most vital to his or her case but also to adjust the concluding comments based on evidence presented at the hearing. Generally, however, those points should reflect the bottom-line conclusion that the hearing evidence shows there was no sexual misconduct; that, rather, there was consent.

Hearing preparation may also include consideration of the composition of the hearing panel. Typically, the college or university will have policies for the composition of hearing panels to avoid overt bias; however, these policies can be inadequate in some cases. In one case, the complainant was the daughter of a senior faculty member, and the panel consisted entirely of other faculty members. Hearing panels composed entirely of one gender may also be the source of objections. Where lawyers have concerns about the composition of a hearing panel, they should be prepared to make respectful objections early and in a formal manner so that those objections are clearly recorded.

The sixth step is to accompany the client to the hearing as the "supporter." The lawyer must be disciplined and observe the school's rules for the hearing, particularly the rule that the supporter cannot speak on behalf of the respondent accused, and show respect for the hearing officer or panel, even in situations where the hearing officer or panel appear to be conducting an unfair hearing. The attorney's demeanor and conduct should communicate that the attorney is there out of concern for the respondent accused, not to hinder the investigation or resolution of the case.

During the hearing, the lawyer must be prepared to adjust the role as supporter as required. For example, in some cases, the respondent is permitted a break to consult with the lawyer. In other cases, any help from the lawyer must be accomplished by quietly handing notes to the respondent without any break from the hearing. The lawyer must take copious notes during the hearing so that, if litigation later needs to be brought to challenge the outcome of the disciplinary proceeding on Title IX or state law grounds, a court complaint can be drafted with sufficient detail to support the conclusion that there was an erroneous outcome.

If the client is found responsible for sexual misconduct and non-consensual sex, the seventh step is to assist the client in submitting an appeal. It is important to note that all the steps taken in assisting the client through the disciplinary proceedings should be undertaken with discretion; if litigation beyond the college proceeding is necessary, the lawyer will have a careful and accurate record to support the claim. Appeals can be successful, which makes it important to work with the client on the appeal. A client left to his or her own devices will not likely present an appeal in an effective way. Also, given the adverse result by the hearing officer or panel, the appeal should be done with an eye to the lawsuit that may need to be filed.

If the appeal is unsuccessful, the eighth step is to counsel the respondent about bringing a court suit to challenge the outcome of the disciplinary proceeding under Title IX and state law.

University disciplinary hearings are not only confusing and difficult to navigate for college students; their consequences can be life-altering. A lawyer representing the accused in these proceedings must be prepared to provide not only guidance as to the process but also emotional support and an intellectual understanding stemming from the lawyer's own experience. ■