 February 3, 2015

Board of Curators

University of Missouri

 RE: Proposed Rules for Sexual Harassment and Discrimination Complaints Against University of Missouri Faculty, CRR 600.040

To the Board of Curators:

On February 5, 2015, the Board of Curators is scheduled to consider adoption of a new component of the Collected Rules of the University of Missouri governing allegations against University faculty of sexual harassment or other forms of discrimination. CRR 600.040. The proposed rules emerged from a compressed period of consultation between the University’s administration and representatives of the Inter-Faculty Council. Overall, the proposed rules have much to commend them and the hard work of those involved in their drafting should be applauded. However, the accelerated timeline on which these rules were produced prevented full consultation by the IFC with all of its constituencies and in particular with faculty members with experience and expertise in investigating and adjudicating allegations of sexual assault, sexual harassment, and other forms of serious discriminatory behavior.

A review of proposed CRR 600.040 by those with such expertise revealed one critical defect in the rule which went undetected, or at least underappreciated, during the period when the IFC was being consulted. In sum, the new rule deprives both faculty members accused of sexual harassment or discrimination *and* the victim/complainants in such cases of the right to an advisor empowered to speak and ask questions on their behalf during the formal hearing at which disputed claims are adjudicated. See Proposed CRR 600.040(I).

In the view of the undersigned members of the University of Missouri faculty, this new hearing process is objectionable for three reasons:

* First, the new rule would strip faculty members of a vital procedural protection they now enjoy under the University’s current rules.
* Second, the justifications advanced for deprivation of this existing right are unconvincing.
* Third, and perhaps most important, although this new rule is advanced in the name of empowering victim/complainants, its practical effect will surely be the reverse. Sexual misconduct cases are both emotionally wrenching and fraught with life-altering consequences for both parties. Expecting either party to act as an effective oral advocate for him or herself is unreasonable; expecting the victim/complainant to do so is both unrealistic and cruel.

This letter: (1) explains the details of proposed CRR 600.040 relevant to representation of the parties and how it differs from existing rules; (2) sets out the three primary arguments against the proposed rule; and (3) offers an amendment to CRR 600.040(I) that would retain the faculty’s existing right to active representation and simultaneously give a greater voice to victim/complainants.

1. Comparing Proposed CRR 600.040 and Existing Rules on Faculty Misconduct
2. Current Rules Governing Faculty Misconduct

At present, there are three different procedures that involve finding facts in relation to dismissible faculty misconduct at University of Missouri-Columbia: (a) the “faculty irresponsibility” rules, CRR 300.010, (b) the research misconduct rules, CRR 420.010, and (c) the dismissal for cause rules, CRR 310.060.

FACULTY IRRESPONSIBILITY: The Faculty Bylaws of MU-Columbia, CRR 300.010(C)(2), set out general faculty obligations and responsibilities, including proper treatment of students, colleagues, staff, and others. At present, an allegation of faculty violation of anti-discrimination rules, including rules against sexual harassment, would be brought under this set of rules. CRR 300.010(L)(8)(b)(3) creates a right to a formal hearing on charges of faculty irresponsibility and provides that:

The accused shall have the right to be present at the hearing, **to have counsel of his/her choice present with him/her at the hearing**, *to address the committee at any reasonable time upon request, to offer and present evidence, to examine all documents offered at the hearing and challenge their validity or admissibility, to question all witnesses*, and **to have his/her counsel perform any and all of these acts in his/her behalf**.

RESEARCH MISCONDUCT: Allegations of research misconduct are governed by CRR 420.010, which provides for a formal fact-finding hearing. CRR 420.010(F)(11)(b)(3) provides that, at such a hearing:

**An advisor or counselor [for the accused] shall be permitted to address the Committee and to question witnesses**. An advisor or counselor may request clarification of a procedural matter or may object on the basis of procedure at any time by addressing the Chairperson after recognition.

DISMISSAL FOR CAUSE: If, as a result of either a finding of faculty irresponsibility or research misconduct or for any other permitted reason, proceedings are initiated to dismiss for cause a regular faculty member, whether tenured or untenured, the existing rule governing dismissal for cause provides for a formal hearing at which facts are found. CRR 310.060(B)(8)(b)(3) provides that, at such a hearing:

**An advisor or counselor [for the accused] shall be permitted to address the Committee and to question witnesses**. An advisor or counselor may request clarification of a procedural matter or may object on the basis of procedure at any time by addressing the Chairman after recognition.

At UMKC, UMSL, and UM S&T, there are differing procedures for preliminary processing of allegations which at MU-Columbia would be dealt with under the "faculty irresponsibility" rubric. However, the research misconduct rules, CRR 420.010, apply to all campuses. And at all four MU campuses, no regular faculty member, whether tenured or untenured, can now be dismissed for cause without recourse to the dismissal for cause process of CRR 310.060. In sum, under existing rules, in every hearing procedure involving faculty misconduct at the University of Missouri - Columbia, the accused faculty member has a right to an advisor who may actively participate in the hearing – including addressing the tribunal and questioning witnesses. And at all four campuses in the MU system, no regular faculty member may be dismissed for cause without passing through at least one formal process in which the faculty member has a right to active representation by an advisor.

1. The Proposed Rule on Sexual Harassment, CRR 600.040

The proposed rule creates a unique process limited to sexual harassment and discrimination cases that bars advisors for both complainants and accused faculty from speaking or asking questions.

1. Investigation and Informal Resolution Processes

Under proposed CRR 600.040, once a complaint is received, if either the complainant or the University wants to pursue an investigation, it is conducted by a designated Title IX investigator. CRR 600.040(J). The investigator is to conclude the investigation and provide a report of her findings within 30 days. CRR 600.040(J). Thereafter, the rules provide three means of resolving the matter short of a formal hearing:

* “Summary Resolution,” meaning dismissal of the matter if the Provost or Provost’s Designee decides that no reasonable person could find the accused guilty (though this can be appealed by the complainant). CRR 600.040(K).
* “Conflict Resolution,” a form of mediation between the parties, if the parties agree. CRR 600.040(L).
* “Administrative Resolution,” in which, if the parties agree, the Provost or Provost’s Designee acts as fact-finder, but does not conduct a hearing. CRR 600.040(N).

2. Formal hearing by "Equity Resolution Panel"

If the complaint cannot be resolved by any of these methods, then the matter goes for formal adjudication to the “Equity Resolution Panel,” a group of three persons drawn from a pool of administrators and faculty. A hearing before the Equity Resolution Panel is conducted as follows:

The Title IX investigator will be present, and both the complainant and the accused have the right to be present, throughout the hearing. Both the complainant and the accused have a right to have an “advisor” present. The advisor may, but need not, be an attorney. However, the advisor may not speak at any point during the proceeding. CRR 600.040(I) states:

**The Advisor may not make a presentation or represent the Complainant or the Accused during any meeting or proceeding. The Parties are expected to ask and respond to questions on their own behalf, without representation by their Advisor. The Advisor may consult with the advisee quietly or in writing, or outside the meeting or proceeding during breaks, but may not speak on behalf of the advisee at any point throughout the process***.* Advisors who do not follow these guidelines will be warned or dismissed from the meeting or proceeding at the discretion of the Investigator(s) during the investigation, the Provost or Provost Designee during the Administrative Resolution process, or the Chair of the Hearing Panel during the Hearing Panel process.

Once the hearing begins, the first witness is, by rule, always the Title IX investigator who presents the results of her investigation in the form of her written report and such additional verbal testimony as she may wish to give. CRR 600.040(O)(7)(a). The Title IX investigator may then call other witnesses and question them. The members of the hearing panel may question the investigator and her witnesses, CRR 600.040(O)(8)(b), as may the complainant and the accused. CRR 600.040(O)(8)(b), But the complainant and accused must ask the questions themselves, with no assistance beyond whispered advice from their advisors. Once the Title IX investigator finishes presenting her case, the complainant and accused may testify themselves, call other witnesses on their behalf, and submit documentary evidence. CRR 600.040(O)(7)(b) and (c). If the parties testify, they can be questioned by the panel, the Title IX investigator, or the opposing party, but their own advisors may not ask them questions, even for clarification. If a party testifies, the other party may not directly question him or her, but must direct questions through the chair of the hearing panel. CRR 600.040(M)(6).

In short, during the critical fact-finding phase of the adjudicative hearing, neither the accused faculty member nor the complainant has a right to the active assistance of an advisor, whether lawyer or not. Both must speak and act entirely for themselves.

3. Sanctions

If the accused faculty member is found guilty of a violation of sexual harassment or discrimination rules, he or she is subject to an array of sanctions, including dismissal. CRR 600.040(P)(2). The hearing panel will make recommendations regarding sanction, but the decision rests with the Chancellor. In the case of a tenured faculty member, the Chancellor cannot order immediate dismissal, but must refer the matter to the dismissal for cause process under CRR 310.060. Under the proposed rules, all other faculty members may be dismissed immediately. CRR 600.040(P)(2)(h).

Tenured faculty members referred to the CRR 310.060 dismissal for cause process have a right to the active assistance of an advisor who may be a lawyer. However, the proposal before the Board of Curators would amend CRR 310.060 to provide that, in sexual harassment and discrimination cases only, the factual record of the Title IX hearing panel will be the only evidence the Tenure Committee is allowed to receive on the alleged misconduct. No additional evidence is allowable (unless "newly discovered"). In short, while tenured faculty members will have the right to active advisors in the penalty phase of the dismissal process, advisors will have no meaningful opportunity to participate in the fact-finding phase of the case – because that phase will be closed before the tenure removal proceeding begins.

As for untenured faculty members, they may be found guilty of sexual harassment or discrimination and dismissed in a process during the entirety of which they will never enjoy the right to have an advisor speak or ask questions on their behalf.

It is critical to understand that these new restrictions on the participation of advisors in faculty disciplinary proceedings are limited to sexual harassment and discrimination matters. Thus, the proposed rules create a glaring anomaly – faculty accused of professional incompetence, research misconduct, academic irresponsibility, lying to or stealing from the university, or even physical violence (so long as unmotivated by racial or sexual animus) will have a right to the active assistance of an advisor throughout the disciplinary process, including the critical fact-finding phase, but faculty accused of any of the many possible ways of violating Title IX or the university’s broad-ranging anti-discrimination policies will be deprived of that right.

II. Faculty Accused of Misconduct Should Have a Speaking Advisor in All Types of Cases

The undersigned do not object to the proposed rule merely because it selectively deprives faculty members of a procedural protection they now enjoy in all misconduct cases. Rather, they object because this protection is included in the current rules for an important reason and is more, not less, vital in Title IX cases. Any disciplinary action that can result in job loss is a matter of surpassing importance to the accused. But an adverse result in a case of serious sexual harassment can result not only in loss of employment, but total destruction of career, marriage, and family life, and could even contribute evidence to a criminal prosecution. In the crucible of a hearing deciding matters of this importance, it is utterly unrealistic and deeply unfair to expect anyone to act as his own advocate.

Any rule that would denude a person accused of serious sexual misconduct of an advisor to speak on his behalf should only be accepted if supported by powerful justifications. As demonstrated below, no such justifications have been advanced.

III. Responses to the Arguments in Favor of the New Rule

The proponents of silencing the parties’ advisors in Title IX matters make two classes of arguments. First, that allowing the accused's advisor to speak or ask questions would discourage complainants from reporting offenses, and second that allowing a speaking advisor for the accused would be unfair to the complainant if the accused secured the services of lawyer and the complainant did not. Neither argument is convincing.

A. The Reporting Argument

The claim here is that if a victim of sexual violence, sexual harassment, or other forms of discrimination realizes that a representative of the accused will be able to ask her questions in the formal adjudicative hearing of the University's Title IX process, she will be substantially less likely to report an offense. This assertion cannot withstand scrutiny.

First, as those among the signatories to this letter who have some experience with sexual and intimate partner violence can attest, the reluctance of victims to come forward is a genuine problem. But as we can also attest, the sources of that reluctance have little or nothing to do with the procedural details of any university disciplinary hearing. Victim worries are far more immediate. They worry about the first occasion when they will have to talk about the intimate details of a traumatic experience to a stranger, whether a university Title IX investigator or a police officer. If the event was sexual and recent, they worry about pregnancy and disease and being examined and probed by a doctor or nurse. They worry about retaliation from the accused, and in some cases about their physical safety. They worry about how to tell their parents and families. They worry about what their friends will think if word gets out. They worry about broader public humiliation if their complaint attracts media attention. When, as will always be the case under the rules being considered here, they are accusing a faculty member, they worry about being ostracized by other faculty members or students who admire the accused. If undergraduates, they worry about repercussions to their grades. If graduates, they worry about their position in a lab and whether they'll be able to get vital recommendations. If staff or faculty, they worry about the effect on their jobs or careers.

Some victims contemplating reporting might be concerned at the prospect of having to testify at all in a formal proceeding, whether in the courts or at the university. But even among these, few if any would be focused on the procedural details of a hearing under CRR 600.040.

Second, even if a particularly farsighted victim had actually read proposed CRR 600.040, she would find: (1) that she is *not required* to attend the Equity Resolution Panel hearing, CRR 600.040(G)(12)(d); (2) that if she attends, she is *not required* to testify or to submit to questioning, CRR 600.040(G)(12)(g); but (3) that if she does testify, she will be subject to questioning from the Title IX investigator and the members of the hearing panel. Moreover, if she testifies, she will also be subject to questioning by the person she has accused. Of course, the rules provide that questioning by the accused will not be "direct," in the sense that, when the parties question one another, each question must be routed through the panel chair who may elect not to compel an answer. The amendment we propose would retain this provision and require the advisor to a party to direct questions to the opposite party through the chair. It is difficult to imagine that a complainant would decide not to report her victimization if she knew that the accused's advisor, rather than the accused himself, would be formulating the questions being routed to her through the panel chair.

B. The Fairness Argument

The proponents of CRR 600.040 also justify silencing advisors for both parties in the service of a specious vision of equity. The basic argument runs like this – If a faculty member is accused of a serious Title IX/discrimination infraction, he or she has a right to an “advisor” and is likely to retain a lawyer to fill that role in the ensuing proceeding because an adverse finding could end or cripple a career. Of course, the Rules provide that the victim/complainant also has a right to an advisor, who could be a lawyer, and if requested, the University will provide the complainant at no cost a university-trained advisor to assist during the proceeding. However, the university-provided advisor probably would not be a lawyer and the complainant might not want or have the financial means to hire a lawyer. Thus, so goes the argument, in a case where the accused faculty member secures a lawyer, but the complainant does not, the process is unfairly skewed toward the accused because he has a legally trained advocate to speak for him while the complainant does not.

The responses to the fairness argument are three:

 (a) *The Title IX Investigator*: It is simply not true that the interests of the complainant will be unrepresented by a legally trained advocate who can speak and ask questions at the fact-finding hearing. The proposed rules create the office of Title IX investigator. The only Title IX investigator now employed by the University is a lawyer, a recent graduate of the MU Law School, and the University will undoubtedly continue to hire lawyers to fill this role. The Title IX investigator conducts a factual investigation of allegations and writes a report of her findings. That report will be the basis upon which the appropriate administrative officer decides whether to move forward with charges. More importantly, once charges have been brought and a hearing commenced, the Title IX investigator will (i) be the first witness, presenting the results of her investigation, (ii) have the right to call and question her own witnesses, (iii) have the right to present exhibits or evidence, and (iv) have the right to question witnesses called by the complainant or accused, including the parties themselves if they elect to testify. In short, the Title IX investigator will present the case against the accused – which means that the investigator will act as the voice of the complainant in the same way a criminal prosecutor acts as the voice of the victim in a criminal trial.

 The drafters of the proposed rule have contended that the Title IX investigator will not be an advocate for one side or the other, but merely a neutral investigator. This will surely prove to be a fiction, however well-intended and honestly entertained. The point of creating the new Title IX bureaucracy is to identify, investigate, and root out persons who engage in prohibited acts of harassment or discrimination. The mission, and self-conception, of this bureaucracy will inevitably (and quite properly) favor complainants. Its mission is not, except secondarily, to protect the rights of persons accused of this behavior. The Title IX investigator and the Title IX coordinator will certainly strive to be fair, but that will not change their institutional focus. Like prosecutors everywhere, they will not want to convict the innocent, but their true mission is to identify and convict the guilty.

 Defenders of the proposed rule have argued that, whatever the natural sympathies and institutional mission of the Title IX bureaucracy, the investigator will be forced into neutrality because she is barred from expressing a personal opinion or arguing for a particular result. This Board will immediately recognize the fallacy of this suggestion. The essence of successful advocacy lies not in asking the fact-finder to accept your opinion, but in structuring the case so that the verdict you seek is the only reasonable inference from the evidence you present. Once a case goes to panel hearing, the Title IX investigator’s sympathies will in all but rare cases be allied with the victim and her skills will be engaged to present a cogent case against the accused.

 In evaluating the pending rule, consider whether, in a criminal sexual assault case, anyone would seriously advocate silencing defense counsel and requiring the defendant to be his own lawyer because the victim is not separately represented and, after all, we can rely on the prosecutor to be neutral.

 (b) *Rare exceptions*: Defenders of the proposed rules have suggested that, in theory, a case can go all the way to a hearing at the request of a complainant, even where no administrative officer, including the Title IX coordinator, believes the case has merit. And thus, in such a case, the Title IX investigator would not be a de facto advocate for the complainant. That is theoretically true, but practically speaking highly unlikely. And even if such rare cases were to arise, it hardly justifies creating palpable unfairness to the accused in all the other, and far more numerous, cases.

 (c) *Giving victims a voice*: Finally, even if we were to accept the improbable claim that the Title IX office and its investigators will maintain a passive neutrality during the hearing, the proposed rule silences the complainant’s advisor as well as the accused’s. Which means that a complainant, trying to prove a case of sexual harassment or assault or discrimination, must become her own advocate – framing her case, calling and questioning witnesses, and arguing the facts and law to the panel. As difficult as it is for a person accused of sexual misconduct to act as his own advocate, the difficulty is if anything compounded for a *victim* of sexual misconduct.

 In any case, if the concern is the supposed inequity of an accused securing a lawyer in a case when the complainant cannot, this rule does not eliminate that inequity. The rule still allows both complainant and accused to have a lawyer; it merely bars all advisors, lawyers or not, from speaking. Presumably, a party accompanied by a whispering lawyer remains at a relative advantage to a party without one (at least if the lawyer is any good). By muzzling both advisors, the rule forces the distraught complainant into the role of courtroom advocate, and strips her of an opportunity to have *anyone* else speak for her on the dubious premise that forcing the accused into the same untenable position somehow makes the process fairer.

IV. Proposed Amendment

 We are not suggesting that the Board reject the proposed rules in their entirety. Rather, we request that Board remedy the particular problem addressed here by adopting a targeted amendment to CRR 600.040, the text of which is attached to this letter as Appendix A.

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Sexual assault, sexual harassment, and discrimination of all kinds are serious matters with which American higher education is presently much concerned. The energy with which the University of Missouri system has addressed this issue is commendable. Nonetheless, if history teaches anything, it is that haste in addressing even the most genuine and pressing of societal ills often produces perverse and undesirable results. The simple fix proposed here would eliminate one such consequence.

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APPENDIX A

**PROPOSED AMENDMENT TO CRR 600.040(I)**

Section 600.040(I) of the **proposed draft** of the new faculty Title IX rules now contains the following paragraph:

The Advisor may not make a presentation or represent the Complainant or the Accused during any meeting or proceeding. The Parties are expected to ask and respond to questions on their own behalf, without representation by their Advisor. The Advisor may consult with the advisee quietly or in writing, or outside the meeting or proceeding during breaks, but may not speak on behalf of the advisee at any point throughout the process. Advisors who do not follow these guidelines will be warned or dismissed from the meeting or proceeding at the discretion of the Investigator(s) during the investigation, the Provost or Provost Designee during the Administrative Resolution process, or the Chair of the Hearing Panel during the Hearing Panel process.

Delete this paragraph and replace it with the following:

**Role of Advisor**. An Advisor may accompany his or her advisee during meetings which are part of the Investigation, Summary Resolution, Conflict Resolution, or Administrative Resolution processes; during these processes the Advisor may consult quietly with his or her advisee, but may not speak on the advisee’s behalf, make arguments, or question witnesses. Should a case proceed to Hearing Panel Resolution, the Advisor of either the Complainant or the Accused may, if requested by his or her advisee, represent that advisee during the proceedings before the Equity Resolution Hearing Panel by making succinct opening statements and closing arguments, by asking relevant questions of witnesses who appear before the Panel, including his or her own advisee, and by offering relevant evidence to the Panel. Questions by an Advisor directed to the party opposed to his or her advisee must comport with the procedure detailed in CRR 600.040(M)(6). Advisors are cautioned that the Formal Resolution Process is not a court proceeding at which there is an absolute right to legal counsel. Advisors must maintain proper decorum, treat all parties, witnesses, and panel members with respect, inquire into and offer evidence of only relevant matters, avoid the waste of time, and abide by the substantive and procedural rulings of the Equity Resolution Panel Chair. Any Advisor who fails to comply with these conditions may, in the discretion of the Equity Resolution Panel Chair, be dismissed from the hearing.

ALSO, delete the last sentence of CRR 600.040(O)(3)(a)(4): "~~The advisor may not address the hearing panel~~."