

board just for sexual misconduct complaints sends a message about how seriously the college takes sexual violence, and provides a sense of specialized competence with this type of complaint, which is reassuring to complainants, and hopefully to respondents as well.

- **Board Composition**

Many colleges today have hearing boards that are composed of a combination of faculty, staff, administrators, and students. Hearing board composition is one of the main structural impediments to reporting. If an alleged victim seeks a confidential resolution, she (or he) generally will not choose a process where there is a board on which fellow students sit or current or future professors will hear her complaint. Complainants are usually much more comfortable with an administrative panel. Should students and staff be absolutely barred from adjudicating sexual misconduct complaints? If your college is large enough to sustain a pool of adjudicators out of staff and administration only, there is no need to add students and faculty to the pool. If, however, institution is small, and finding adjudicators is more difficult, or if you seek democratic inclusion of campus groups in the process as a matter of principle, simply allow the student-parties involved in the hearing the option of requesting on a case-by-case basis that students and/or faculty do not sit as adjudicators at that hearing.

On a similar theme, it should also be possible for students to challenge the participation of any member of the board for conflict of interest or other good cause. Familiarity alone does not create a bias issue. Only where there is a belief that a board member will not be able to provide an unbiased and impartial decision should an alternate be selected. Furthermore, it is recommended, if possible, that both men and women serve together on the hearing board. The chance for bias could be greater in an all-male or all-female hearing board than it is in a board of mixed gender composition.

- **Hearing Board Size**

Hearing board size is significant in eliminating a structural impediment. Some colleges have a one-person board, or sometimes as many as twelve. With a hearing board of just one person, an alleged victim might fear the omnipotence of the adjudicator, where the opinion of one person will determine the outcome without perspectives from other adjudicators. On the other side of the spectrum, an alleged victim might fear having to tell twelve people about the worst experience of her/his life. It represents too much exposure, a feeling of vulnerability, and especially at small colleges, increases the risk that the rumor mill will leak information, thereby destroying the confidentiality she sought. So, what is a good number? Well, that depends on whether or not unanimous or majority voting is used, as will be discussed below. If a majority vote is required, your hearing board should be odd-numbered, which means three, five seven or nine. Few colleges have a sufficient pool to create a seven or nine-member board, and it is still a cumbersome and possibly intimidating size. Five is good and three works even better. It is my perspective from observing hearings on many different campuses that three member-panels are the most efficient and effective format.

- **Board Training**

Some colleges say they won't train their hearing boards on sexual misconduct issues because it will bias them in favor of the victim. This is like saying that in criminal cases, the judge should not know the rules of evidence, there should be no expert witness testimony to educate the jury, and the judge should not charge the jury with instructions

on the law, because it will bias the outcome. Not training your board will get you sued because your board will not know what it needs to know to make the proper decision, and from that liability is but a misstep away.

NCHERM has established a minimum competence for our clients of 2-days for training conduct decision makers each semester. It is rare to see a board operate truly competently without at least 2 days of training. The hearing board must be familiar with basic rules of evidence regarding relevance, credibility and rape shield rules. It must be thoroughly versed in an analytical approach to determining if a policy was violated. It must be instructed on questioning and deliberation techniques. It should understand Rape Trauma Syndrome and common rape myths. Furthermore, hearing board members need to be sensitized to what the alleged victim is experiencing. He or she may be traumatized by recounting the events of the incident. Providing a box of tissues would be kind.

Hearing board members need to bear in mind that Rape Trauma Syndrome (RTS) is experienced to a different extent by each survivor. Symptoms can include loss of appetite, sleep disturbance, nightmares, extreme phobias, preoccupation with the rape or assault, inability to concentrate on studies or work, anxiety about leaving the dorm or socializing with others, and sexual dysfunction. More importantly, many victims enter a phase of denial or shock that is common to RTS. The effect is that the victim may be able to supply many more facts, and recall much more detail about the incident at the time of the hearing than he or she was able to when the allegation was made. To a hearing officer these "new" facts may appear to be dubious and suspicious. *This is a very common occurrence at rape trials and hearings.* Don't automatically jump to the conclusion that the victim is trying to "improve" his or her story. You need to be aware that the victim is likely to be telling you things of which he or she *was not* aware at the time the affidavit was taken. These seeming inconsistencies alone should not be held to weaken the victim's credibility, but should be subject to more questioning and consideration.

While it is acceptable to train your conduct officers on information about rape trauma syndrome, if it is to be used as evidence in a hearing, care must be taken. If an alleged victim is experiencing symptoms of RTS, and wants to use that as evidence that she was sexually assaulted, that information can be introduced. The fairest way to do so is to give the respondent advance notice that this will come up in the hearing, to introduce information on RTS from an expert or authoritative text, to allow the respondent to introduce evidence refuting the expert or text, and to allow full cross-examination of the expert and the complainant. The expert or text should be a witness of or introduced by the institution, not by either side. The expert or text should not speak to the alleged victim's symptoms and their correlation, but only to the common characteristics of RTS generally.

- **Voting**

Should your board decide responsibility by a majority vote, or unanimously? In practice, a board that must decide unanimously rarely holds a student responsible in a campus hearing. Is that a simple statement of fact or a question of elemental fairness? Regardless, it might provide ammunition to a lawyer in challenging the process. If you use a unanimity requirement, keep the board as small as possible. Two people work well. Larger numbers create fractious inability to reach fair verdicts. Some colleges have adopted a system where the finding of responsibility is by a majority, but a decision to sanction expulsion must be unanimous. Structurally, an odd-numbered board with a majority requirement just resonates with democratic fairness, and invests all involved with a sense of propriety in the process and belief in the outcome. I also tend to see it, experientially, as the approach with the greatest risk management efficacy.

- **Standard of Proof**

Generally, the preponderance of the evidence standard is the better standard. Why then are colleges split evenly in using the two standards? Many colleges feel that where expulsion is possible, they want to apply a higher standard before they are willing to deprive a student of his education. This is a fairness consideration, which is understandable. However, in reality, it is not the best practice. In complaints where alcohol or other drugs, especially date-rape drugs are involved, it is nearly impossible to hold a student responsible under the clear and convincing evidence standard. And, as we know, 70%-90% of all college sexual violence involves the use of alcohol or other drugs by at least one party.¹⁶⁴ How can there be clear and convincing evidence when both students were inebriated, or the victim is fuzzy about the events? If she is passed out, there can never be clear and convincing evidence without DNA testing. Thus, at least for such complaints, a preponderance of the evidence standard is preferable. Again, this goes directly to structural impediments. Why would a victim bring a complaint that is impossible to win?

- **Hearing Venue and Setup**

Hearings should take place in a private place, and should not be open to the public.¹⁶⁵ The structural impediment effects of open hearings should be obvious, given that privacy and confidentiality are key reporting issues for victims. Witnesses should be kept in separate rooms, only entering the hearing to testify, and should not have contact with one another outside the hearing. Make sure the hearing room is big enough, as confining spaces can have an adverse impact on students under pressure. Should the alleged victim desire to testify without having to encounter the alleged perpetrator, what accommodations can you make? Can she testify in a separate room, or by closed circuit television, while still making it possible to question her? This is a best practice. A victim who is too terrified by the presence of the accused to make coherent statements is not a valuable witness, and the hearing will be a waste of time. Make sure that a videotape, audiotape or transcript of the hearing is made. It may be needed by the board during deliberations, on appeal, or for the college's defense, if there is a lawsuit. Make sure to take adequate breaks if the hearing endures for many hours.

- **Evidentiary Issues**

Certain evidence should not be considered in a campus hearing. Irrelevant evidence should not be deliberated upon, and this includes information within the protections of rape shield rules, if it could prejudice the fairness of the process. What color underwear the alleged victim was wearing is not relevant to the issue of whether or not she consented to sex. Who else the alleged victim had sex with is not relevant to whether or not the accused had her consent on the date of the incident in question. Whether the victim has ever consensually slept with the accused before may not even be relevant to whether there was consent on the date of the incident in question. Yet, these types of questions are asked in hearings far too often. Hearing board members are *obligated* to prevent such information from coloring their decisions, and should not consider it in deliberations if it is somehow admitted at a hearing.

There are four different kinds of rape shield laws in effect throughout the country, and they are variously mirrored on campuses:

¹⁶⁴ See e.g., Antonia Abbey, *Acquaintance Rape and Alcohol Consumption on College Campuses: How Are They Linked?*, 39 J. Am. C. Health (1991).

¹⁶⁵ Unless you're a college in Georgia, where hearings must be open under state law.

1. Some laws bar admission of any past sexual experience, even with the accused;
2. Other states allow evidence of past sexual experience with the accused, but nothing else;
3. Some states allow evidence of past sexual experience with the accused to the extent it is relevant;
4. Other states allow general evidence of past sexual experience, but require a very high threshold for determining relevance.

Mirroring your state's rape shield rule is one way to decide on what form the rule should take on your campus, but a campus hearing is not a criminal or civil trial, and you have the freedom to decide what type of protections you will provide. The key to using rape shield rules is to make sure that all participants understand the rule and its application before the hearing. Avoiding the revelation of certain evidence at the hearing is preferable to having to decide on the rule's application to facts that are introduced in front of those who will be making a final determination of the outcome of the complaint. Evidence lacking in credibility should also not be considered by the board. Basic evidentiary training is a must for the hearing board so that they understand these issues well-enough to make on-the-spot determinations. NCHERM publishes a manual called the Rules of Evidence for Campus Conduct Proceedings.

- **Presentation of the Complaint**

At some colleges, the college presents the complaint against the accused, and the alleged victim is merely a witness. At other colleges, the student-parties are charged with the responsibility of making their own cases and arguing them. Other colleges use uninvolved students to present the complaint for the student-parties. A system where the students argue their own complaints/defenses is a good learning experience, but the victim should have the option of having the college or a student-representative present the complaint if she is not up to it. Many victims find it empowering to be more than witnesses at the hearing, and colleges should not take away that important healing opportunity.

- **Victim Advocate/Advisor**

All student-parties in a campus hearing should be allowed to bring advisors to the hearing. Some colleges limit them to one advisor each, while others allow either parents, or other supporters to be present, though in a silent capacity. Many large colleges are also employing victim advocates to help guide victims through the hearing process and helping them to deal with other post-incident issues. Keep in mind that where such services are offered by the college, Title IX may require you to provide the same services to accused students as well, and this is a best practice. We don't prefer confining advisors to members of the college community. This is limiting to the participants, and can often turn into bad publicity down the road, because it makes colleges look like they were trying to keep things quiet. If an assaulted student goes to the local rape crisis center first for help, and develops a rapport with a counselor there, there is no reason to deprive the complainant of this counselor as her hearing advisor

- **Withdrawal by Accused Student**

If an accused student withdraws from the school at the time of the incident, thereby avoiding campus conduct proceedings, he or she may later apply for readmission. It should be a condition of readmission that the student submits to a hearing as he or she would have had if he or she had not left the school. If found responsible, the student must comply with the applicable punishment before being readmitted. If the accusing student is no longer

at the school at the time the accused reapplies, it may be difficult or impossible to hold a hearing. At this point, readmission is a discretionary judgment for the administration. On one hand, the student has been found responsible for no wrongdoing, and may not have violated the policy. On the other hand, readmitting the accused student could place the rest of the student population in jeopardy of another attack. This must be decided on a case-by-case basis because it is highly fact-sensitive. One thing to be wary of is the risk of liability if the student is readmitted and commits another assault. The victimized student may sue on the theory that the school unreasonably placed him or her in jeopardy because it might have been foreseen that readmitting the student could result in additional attacks.

HEARING PROCEDURE

The alleged victim should present his or her allegations first, and be able to call witnesses. There are some situations in which the alleged victim cannot or will not present his or her own complaint. It is not unusual for the conduct administrator to appoint an administrator to present the complaint in the victim's stead. In fact, some colleges insist on presenting the complaint, and only use the victim as a witness. This is not the best practice. If the victim wants to present his or her own complaint, colleges should recognize that so doing may be cathartic and may play a large part in providing a victim with closure or at least a start to the healing process. If the victim *elects* to let the college present the complaint, the victim still has the right to be present throughout the entire proceeding. Another option for the victim is to have a video system set up so that he or she can give testimony in a separate room and thus not have to see the accused. There still should be some way for the accused to cross-examine the alleged victim. After the alleged victim questions the witnesses, the accused student should be able to cross-examine them.

Next, the accused student may present his or her defense followed by questioning from the alleged victim. Then, the accused student can call witnesses. After questioning the witnesses, the alleged victim may question them. With the approval of the hearing board, the alleged victim's witnesses can be recalled to provide rebuttal testimony. The hearing board members are allowed to ask questions at any point throughout the hearing.

Either party has the right to request that portions of the tape (or better, a video recording) be rewound and replayed for the hearing board members or witnesses. The school may also find it necessary to provide time limits for each of these segments of the hearing. Hearings often take place after business hours, and it is necessary to keep them to reasonable time limitations. For example, if a hearing starts at five o'clock, PM, it probably should not go on past ten o'clock, PM, unless all the participants agree to continue. Otherwise, the hearing could exhaust all the participants. The hearing board members should allow and take breaks as necessary. If the hearing is not finished by 10:00pm, it can be re-convened the next morning or evening, or as scheduling permits, but the elapsed time should not be so long as to interfere with the process.

After the alleged victim and the accused student have presented their arguments, each should be allowed to give a closing statement. The accused student should go first, then the alleged victim. The hearing board members should then have a maximum of 48 hours in which to reach a decision. However, if they cannot reach a decision in that time, witnesses may be recalled for further questioning. The members of the hearing board have to decide if the accused student's actions meet the policy definition of sexual misconduct. Usually, the accused will receive a complaint based upon all of the applicable sexual misconduct offenses defined within the institution's policy. That way, the hearing board can decide which violation best describes the accused's conduct as revealed by the hearing process.

If the alleged victim is entitled to submit a victim impact statement to the hearing board, this statement should be used by the board only if they determine that the accused student is in violation of the policy. This statement can help the conduct board members decide what sanction to impose. Some institutions use separate boards for the hearing on the facts and the hearing on the sanction. We find this an unnecessary complication, especially if the college has standardized policies with recommended sanctions for each category of misconduct (in a setting designed to encourage ethical development, fixed or mandatory sanctions do not help to ensure that the “punishment fits the crime.” However, guideline sanctions are helpful, because they still allow for flexibility where appropriate, but also give guidance and encourage consistency where needed).

Once a decision is made, the accused student and the alleged victim should be informed. They should be informed separately and at different times so that they *do not encounter* each other, unless they are both informed at the hearing, in situations where quick decisions are made.

INVESTIGATION/HEARING/POLICY ANALYSIS

This Typology is about ensuring that for each and every complaint, we are asking the right question. If we ask the right question, we’ll have a better chance of getting the right answer. So, how many questions are there? There are three main, overarching questions. Complaints get muddled when the wrong question is applied to a complaint for which it is not appropriate.

The three questions that can be asked are rooted in policy. All colleges should prohibit sexual activity when it occurs under the following circumstances:

- 1) When it is forced; or
- 2) When it is non-consensual; or
- 3) When the victim is incapacitated, and that incapacity is known to or should be known by the accused.

FORCE

The force paradigm is one in which sexual contact is forcible or against the will of the victim. Some policies speak to resistance by the victim, and this too is part of the force paradigm, as resistance is shown in the face of force. In a force-based paradigm, the existence of force can be proved in two ways: 1) evidence of the application of force by the accused; and 2) evidence that the sexual contact was against the will of, or resisted by, the victim. Force includes physical force, threats, intimidation and coercion. All of the other terms that are used are synonyms for one (or more) of these four.

Element of Force	Synonyms
Physical force	Violence, abuse, compulsion
Threats	Harassment
Intimidation	Implied threats, abuse
Coercion	Pressure, duress, cajoling, compulsion, abuse

There is some overlap among the terms. Abuse, for example, can signify physical abuse, sexual abuse, or emotional abuse. Harassment equates to threats, in a force construct. For example, Professor Crudge tells his student, Stephanie, that if she does not sleep with him, he will fail her. While on one level this would be classified as quid pro quo harassment, on another if Stephanie did sleep with Crudge, it would be sexual assault by forcible compulsion. Stephanie was threatened. By use of the threat, Crudge applied a type of force. This should provoke some thought about what is sufficient to constitute a threat, and that will be discussed immediately below, in the ensuing description of the four types of force.

a. Physical Force

Physical force is the classic force construct, equated with violence or the use of a weapon. No matter how slight, any intentional physical impact upon another, use of physical restraint or the presence of a weapon constitute the use of force.

b. Threats

The law defines a threat narrowly, as a direct threat of death or grave bodily injury. “If you don’t have sex with me, I will kill you.” If a threat is used to obtain sex, forcible compulsion is present. I give a much broader interpretation than the law does to what constitutes a threat. Any threat that causes someone to do something they would not have done absent the threat is enough to prove forcible compulsion. While this is not a law-based interpretation, it certainly is useful for college policies. If I threaten you with a negative consequence, and that threat causes you to acquiesce in sexual activity, forcible compulsion is present, and sexual misconduct has occurred.

—If you do not have sex with me, I will harm someone close to you

—If you do not have sex with me, I will tell people you raped me

—If you do not have sex with me, I will spread a rumor you are gay

—If you don’t sleep with me, I will fail you

c. Intimidation

We define intimidation as an implied threat, whereas threats are clear and overt. For example, we have recognized that “If you don’t sleep with me, I will fail you” is a threat. Yet, many of us would agree that it would be just as inappropriate for Professor Crudge to say “If you have sex with me, you’ll get an A in my class.” But, would that be a threat? No. A threat has to have a negative condition attached. This example “threatens” a benefit. I would argue that it is an intimidation, rather than a threat. If Stephanie agrees to have sex, it may be because Crudge is in a position of power and authority over her. What is offered here, the A grade, is overt. What is implied is what Crudge might do to Stephanie if she does not comply with his request. When we talk about intimidation as a type of force, it describes a situation where someone uses their power or authority to influence someone else. In sexual harassment, the offense is met if the victim is intimidated, but for physical sexual misconduct (such as sexual assault or rape), there is a requirement of use of force by the accused against the victim. Otherwise, any woman could argue that a sexual overture by any man larger than she was inherently intimidating. Because most men are bigger than most women, I would certainly hope that is not the case.

d. Coercion

Finally, the fourth element of force is coercion. We define it as a synonym for pressure, duress, cajoling and compulsion. We believe strongly that if any of the four types of force is used, coercion is the type of force most likely to be present in campus sexual misconduct complaints. In a sexual context, we define coercion as an unreasonable amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards,

We define coercion in terms of seduction. Society defines seduction as reasonable, and coercion as unreasonable. Both involve convincing someone to do something you want them to do, so how do they truly differ? The distinction is in whether the person who is the object of the pressure wants or does not want to be convinced. In seduction, the sexual advances are ultimately welcome. You want to do some convincing, and the person who is the object of your sexual attention wants to be convinced. Twist my arm, I'll go along. Two people are playing the same game. Coercion is different because you want to convince someone, but they make it clear that they do not want to be convinced. They do not want to play along. They do not want to have their arm twisted. And the coercion begins not when you make the sexual advance, but when you realize they do not want to be convinced, and you push past that point. Seduction becomes coercion. Yet, coercion is a matter of degree. Some amount of pressure is reasonable and socially acceptable, but too much pressure crosses the line. That line begins when someone makes it clear that pressure is unwelcome, and for some communities, any additional pressure is unacceptable. This is a very intolerant threshold.

What amount of pressure is unreasonable, beyond the indication that pressure is unwelcome. For these communities, determining what is unreasonable should be a function of four things: intensity, frequency, duration and isolation.

Let's say I approached you at a crowded bar, and started to come-on to you. If I pressure you for sex for five minutes, will I get very far? What if I have thirty minutes to pressure you, or three hours? I have a better chance of success if I have a longer duration in which to pressure you. Let's look at frequency. If I have thirty minutes, and I ask you for sex two or three times, would that be less successful than if I asked you thirty times in that thirty-minute timeframe? Frequency can enhance the coercive effect. So can isolation. What if we weren't at a bar? Would my pressure be more or less effective if we were together in my room on campus, with no one else present? My coercion will be more effective if I isolate you. Finally, intensity can impact my coercive effect. We're at the bar, and I'm trying to convince you to have sex with me. I spend a half-hour telling you all the reasons why you should have sex with me. I'm really doing a great sell job, as I know my product better than anyone. I tell you that I'm the best lover you'll ever have. I challenge you to ask any woman in the bar, knowing they will vouch for my prowess. I tell you you owe it to yourself to fly Air Brett. I tell you this is one roller-coaster ride you just don't want to miss. I give you my best Lounge Lizard act. Not buying it? I know why. The problem isn't me. Any reasonable person would jump on the experience I am offering, literally. The problem, I see now, is YOU.

So, I change tactics. "You come into a bar, dressed to kill, flirt with me, and then think you can tease me and say no. You're just a tease. You like to lead men on and then let them dangle. You're probably frigid. You should take a chance, you might just like it. What are you, some sort of religious freak? God won't know if we do it just once. I won't tell him. What are you, the last virgin in captivity? Everyone is doing it. Come on. Virginity is way overrated. Are you afraid your parents are going to find out? I won't tell them, I promise. Loosen up. Relax."

In summary, once you draw a line indicating that you don't want to play my game, and I pressure you beyond that point, seduction will become coercive. What amount of pressure is acceptable is a function of the frequency,

intensity, isolation and duration of my pressure. Once your community standard is exceeded, it is appropriate for you to label my coercion as forcible compulsion.

CONSENT

What is critical to understand here is that consent is a key legal and policy concept that all colleges should embrace, and most have done so. Consent is a modern mechanism when compared to force, which is the classic rape construct, and is obsolete. Force is obsolete because any sexual contact that is by force is by definition without consent. Force became antiquated because of the difficulties in proving its use. Where violence was used, and physical signs were present, force was easily proven. Where physical signs were not present, the courts looked to proof that the sexual contact was against the will of the victim, and that was proved by evidence of resistance. The law, in effect, wound up requiring victims to resist. This had the odd effect of placing a burden on the victim to wound her attacker, have witnesses, or make sure to have his skin under her fingernails. It also placed victims in jeopardy, as resistance could anger an attacker, causing worse harm. And, in the case of the sadistic rapist, her resistance turned him on all the more.

Consent was the way the law updated proof standards. It shifted the burden from the victim to resist, and placed the responsibility for obtaining sexual permission on the aggressor, or initiator of the sexual activity. The core of consent is the right of the victim to be unmolested until she gives clear permission for sexual activity to take place—what I call sexual sovereignty. Silence, in and of itself, cannot function as consent. The following section discusses Consent in detail.

INCAPACITATION

The third construct is incapacity. Incapacity is the most complex of the three, by far. Here are some critical understandings that we should all have about incapacity. First, there are two forms of incapacity, mental and physical. Mental incapacity results from cognitive impairment, such as mental retardation. Physical incapacity results from a physical state or condition, such as sleep, alcohol or other drug consumption. Temporary incapacity can result from conditions such as epilepsy, panic attacks and flashbacks.

Second, alcohol-induced incapacitation is a precise term. Yet, it is often confused with what I call the “i-words” that often are applied to alcohol use. There are five i-words: (under the) influence, impairment, intoxication, inebriation and incapacitation. They are not synonymous, and are more-or-less listed in order of severity of alcohol effect. One becomes under the influence of alcohol as soon as one has anything to drink. Impairment begins as soon as alcohol enters the bloodstream, and increases with consumption. Intoxication and inebriation are synonyms, as is drunkenness, and corresponds to a .08 blood alcohol concentration. Incapacitation is a state beyond drunkenness or intoxication. What is confusing about incapacity is that it has nothing to do with an amount of alcohol or a specific blood alcohol concentration. In fact, some drunk people will be incapacitated, and some will not. Incapacity can be defined with respect to how the alcohol consumed impacts on someone’s decision-making capacity, awareness of consequences, and ability to make fully-informed judgments.

Incapacity Defined

Where someone lacks the ability to make rational, reasonable judgments as a result of alcohol (or other drug) consumption, they are incapacitated. Understanding and distinguishing the i-words is important, because except for

rare religiously-grounded rules at colleges affiliated with various faiths, almost all colleges have policies based on incapacity. Some imprecision with the “i-words” results in lack of clarity, because policies attempt to give i-words that are not synonymous with incapacity the meaning of incapacity. Worse are rules that state that sex is prohibited with someone who “is unable to consent as a result of alcohol or drug consumption.” This language is less than artful, because we are often faced with complaints by students who are able to give consent, but claim they had no idea they were doing so—the so-called Blackout. This will be discussed at length, below. The main thing to understand is the regardless of what careless terminology is used; most colleges use an incapacity standard, which is also the legal standard for all state statutes. The most straight-forward way to compose a policy on incapacity is as follows:

“Having sex with someone whom you know to be, or should know to be, incapacitated (mentally or physically) is a violation of the sexual misconduct policy.”

Common-Sense Definition

While it is precise to define incapacity as an inability to make a rational, reasonable judgment or appreciate the consequences of your decisions, I prefer a more common-sense definition: In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why **and** How with respect to that sexual activity. Any time sexual activity takes place where the alleged victim did not understand any one of these six conditions, incapacity is at issue. An awareness of all six must be present. This is another way of stating the law’s expectation that consent be informed, and any time it is not, consent cannot be effective. To be more precise, an incapacitated person cannot give a valid consent. They could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or knowable to the accused, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT.

Assessing Incapacity

Physical incapacities are sometimes quite overt, and other times more subtle. Incapacitation is a subjective determination that will be made after the incident, in light of all the facts available. Incapacitation is subjective because people reach incapacitation in different ways and as the result of different stimuli. They exhibit incapacity in different ways. Incapacity is dependent on many or all of the following factors:

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- Amount, pace and type of alcohol or other drugs consumed;
- Amount of food intake prior to consumption;
- Voluntariness of consumption;
- Vomiting;
- Propensity for blacking-out (mentally or physically);
- Genetics.

Evidence of incapacity will come from context clues, such as:

- A witness or the accused may know how much the other party has consumed;
- Slurred speech;

- Bloodshot eyes;
- The smell of alcohol on the breath;
- Shaky equilibrium;
- Vomiting;
- Outrageous or unusual behavior;
- Unconsciousness.

None of these facts, except for the last, may constitute--in and of themselves-- incapacitation. But, the process of finding someone responsible for a violation of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof, whether you use a preponderance of the evidence (more likely than not), clear and convincing evidence, or any other evidentiary standard. Some of these standards may be met with some combination of the first seven, or all eight factors. For example, it might be met if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might be met if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity.

Blackouts

The eight context clues listed above will also help you to assess and determine the extent of the respondent's actual and imputed knowledge, given her/his awareness of whether the complainant exhibited any of these "symptoms." Another issue that often deserves attention in these cases is what toxicologists call "blacking out" or "black time." Blacking out or black time feels like unconsciousness to the person who is blacked out. To others, they may appear to be unconscious or conscious. Black time does not affect all drinkers, but some will lose all conscious awareness or memory of their actions, though they may maintain physical ability and control. Thus, they do things that they cannot remember doing. Current research indicates that blackouts are not just amnesia, but an actual inability at the time to form conscious intentions and understand consequences. If someone is experiencing a blackout, they are incapacitated and cannot give consent, if the blackout or black time can be established sufficiently under the evidentiary standard.

Sexual Politics

One of the factors that leads to clouded judgment on the issue of incapacity is the very sexual context of the issue. Each of us has sexual politics, whether we admit it or not. Our sexual politics derive from our morals, religious values, open or close-mindedness, sexual histories, role models, and culture, amongst other factors. They play into our decisions on sexual misconduct, especially with respect to incapacity. "She was asking for it." "She brought him to her room." "She got herself drunk." "Well, he was drinking too. Maybe she raped him." These rape myths have adherents because of sexual politics. The best way for me to address the myths of incapacity is with a story, believe it or not, about a Mercedes. You have to remove incapacity from the sexual context to truly understand it.

"But, I Was Drunk Too, So She Raped Me"

Let's take a look at that last myth I mentioned above--"Well, he was drinking too. Maybe she raped him." Now, both people on either side of the transaction are unable to appreciate Who, What, When, Where, Why and How. Doesn't that just make an already invalid transaction all the more invalid? Sure, it does. Arguing that "he was drunk

too” doesn’t function to excuse the misconduct, especially since it is almost always disingenuous. If he really felt victimized, why didn’t he make a complaint? Let’s be more specific. Most of the time, when someone argues they were drunk too, this is inadmissible evidence. We must remember that almost all colleges have a rule that being drunk does not excuse a policy violation, and even if you don’t have that rule spelled out, being drunk does not excuse the violation of a policy, or the trespass on another human being. What often occurs is a situation where the female student is incapacitated, and the male student is merely drunk.

Jumping to Conclusions

We just jump to the premature conclusion that both students are incapacitated, but the evidence does not show that at all. In nine years, we have NEVER seen a true case of mutual incapacity. I don’t doubt it exists, but it is very rare. We have seen plenty of cases where two people were drunk, but that is not a policy violation at most colleges. How would two genuinely incapacitated people have the physical coordination necessary for sexual intercourse? And if they did, how would they remember it? The courts operate on the presumption that if a man is able to engage in and complete the act of sexual intercourse, he is not incapacitated (Mallory v. Ohio).

Self-Incapacitation

There is another issue with respect to incapacitation. Many conduct panels get hung up on the distinction between complaints where the accused incapacitates the victim, and complaints in which the victim self-incapacitates. For purposes of a conduct hearing, whether the victim self-incapacitates or not should not impact the finding. The question under the policy is whether the victim was incapacitated, not how she became incapacitated. (It also may be worth mentioning that incapacity rules are not gender-specific, so that anyone who has sex with an incapacitated person can be held responsible, regardless of whether the situation is male-on-female, female-on-male, male-on-male or female-on-female.) While self-incapacitation may not impact the finding, it may have an impact on the sanction. It would be perfectly reasonable for a conduct panel to desire to give a harsher sanction to a student accused of deliberately and surreptitiously plying a woman with spiked punch or a rape drug, than it might give to a student accused of having sex with a woman who had self-incapacitated.

Poor Judgment by the Accused Student

An interesting question is because the policy asks not only whether the victim is incapacitated, but also if the accused knew that or should have known it, what happens when the accused is drinking, with respect to what he should have known. The “should have known” part of the policy, what lawyers call constructive knowledge, can be misleading. It is not a subjective question of what the accused should have known. It is an objective question that might be better phrased as “what would a reasonable person, in the position of the accused, have known?” And, of course, a reasonable person does not cloud their judgment with alcohol.

Poor Judgment by the Alleged Victim

At no point is it appropriate to excuse a violation of policy by the accused because of poor judgment or a lack of responsibility by the victim. Two wrongs do not make a right. To blame the victim for irresponsible decisions confuses the difference between responsibility and culpability. The question in a campus hearing is whether the accused is culpable for a violation, not whether the victim was irresponsible (though she may have been). It is also

inappropriate to hold the victim accountable for any policy violation she may have engaged in during the incident underlying the complaint. If at all, that should be done in a separate hearing. Allowing an accused student to file an unfounded counter-complaint against his accuser could amount to retaliatory harassment under Title IX. Where a counter-complaint is valid, it still ought to be addressed in a separate hearing, in most circumstances.

Tying the Three Elements into an Analytic

Now that we have a comprehensive understanding of force, consent and incapacity, we can weave them into a coherent analytic. The analytic is a three-question progression that can be applied to any sexual misconduct complaint. The order in which we ask our questions is important. The first question is:

1) Is there evidence of the use of force, as force is defined under our policy (hopefully as physical force, threats, intimidation, and/or coercion)?

If the answer is yes, you are done. Find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. Do not pay any attention to issues of consent or incapacity that may be present in the complaint. They are irrelevant if force is present. Force, in and of itself, establishes a policy violation. Inquiring about consent is a distraction. For example, I threaten you: “If you don’t have sex with me, I’ll kill you.” You respond “Do whatever you want, just don’t kill me.” You just consented. If we engage in a consent-based inquiry, the answer is yes, there was consent. Again, if you ask the wrong question, you get the wrong answer. If the answer to the question of whether force was used is no, then we have to inquire into incapacity as the second question.

2) Is there evidence that the alleged victim was incapacitated, and that the accused knew that, or that we believe he should have known it?

You will only engage in inquiry on this second question if there is evidence that the alleged victim was developmentally disabled, asleep or using alcohol or other drugs or has any condition that might produce blackouts, loss of consciousness or similar temporary incapacities. We already know that force is not an issue, because you have ruled it out with the first question in the analytic. The critical competency here is to make sure you do not indulge in a consent-based inquiry. Just like with a force-based inquiry, a consent-based inquiry is irrelevant here. Even if the alleged victim verbally consented, or signed a contract, she cannot validly consent if she is incapacitated. **THERE IS NOTHING AN INCAPACITATED PERSON CAN DO OR SAY TO MEANINGFULLY, VALIDLY CONSENT TO SEX.** Too many incapacity inquires become mired in “but she came on to him.” It does not matter. If the evidence shows, by your standard of proof, that the alleged victim was incapacitated, move on to these sub-questions, about the accused’s knowledge. If the evidence does not show incapacity, move on to the third question in this analytic.

- a. Does the evidence show that the accused, knew--as a fact—that the alleged victim was experiencing this incapacity? If so, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. If not, ask the next question.
- b. Should a reasonable person, in the position of the accused, have known of the alleged victim’s incapacity? If so, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. If not, you have determined that this complaint cannot be resolved using an incapacity construct. Move on to the third question in this analytic.

3) What specific words (or actions) by the alleged victim reasonably indicated to the accused that he had consent for each of the specific sexual activities that took place?

If the evidence shows words or actions that are reasonable indications of consent, you are done. There is no violation of policy. But, if the evidence does not show words or actions that are reasonable indications of consent, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. This is the primary inquiry you will need. If the accused argues “I asked her, and she did not respond, so I thought it was okay,” you are done. No consent was communicated. It cannot be assumed.

Conclusion

If you ask these three questions, in this order, it will impose discipline on your decision-making process. We have on many campuses so embraced the concept of consent that we tend to apply it generically to all sexual misconduct complaints. This leads to flawed analyses. Hopefully, the message that has emerged from this Whitepaper is when and how to apply the consent construct, and when other constructs should be used, to the exclusion of consent-based inquiries. Where you find other inquiries seeping in, you will have to challenge whether those inquiries aid in your decision, or confuse the issue you are trying to isolate. While I do not argue that this analytic will work every time, I hope you will find that it is of great aid in the vast majority of complaints you encounter.

**“Sexual Harassment and the First Amendment:
Will Your Policies Hold Up In Court?”**

By: Sandra K. Schuster, Esq., Partner, NCHERM

Introduction

Public colleges and universities strive to create and sustain a learning environment that promotes diversity, maintains civility, and establishes an atmosphere of mutual respect. At the same time, these institutions of higher education proudly acknowledge they represent the “Marketplace of Ideas” and academic freedom where scholarly and divergent opinions are welcomed.

These important and noble goals can create conflict when the expression of an individual’s opinion is articulated in such a way that it offends, embarrasses or degrades another. This challenge is a complex one for public institutions who must uphold the First Amendment rights of students, faculty and staff while maintaining the values of personal dignity and civility to which the institution aspires. It will also challenge private institutions that voluntarily uphold Constitutional rights, and private colleges in California, where Leonard’s Law imposes First Amendment requirements through state statute. Thus, the challenge to institutions of higher education is to find a means to reconcile the often competing values of personal expression and civility. Unfortunately, many institutions choose to maintain their commitment to a civil, respectful community by implementing sexual harassment policies that go far beyond the legal framework created by the legislature and the courts.

Discussion of the Conflict

The conflict of harassment policies with First Amendment freedoms generally stems from two factors. First, institutions frequently apply workplace language related to sexual harassment to their student sexual harassment policies. Restrictions on expression in the workplace are far more expansive and legal than the restrictions on student expression. Second, many institutions do not create clear distinctions about expression versus conduct, thus overreaching through their sexual harassment policies to limit verbal or written interaction among and toward students.

Title VII of the Civil Rights Act of 1964 set forth the standard prohibiting gender discrimination in the workplace. In a 1986 U.S. Supreme Court case, *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 5, the Court stated that sexual harassment was a form of gender discrimination, subject to Title VII regulations. Subsequent cases established the framework for holding an employer liable for sexual harassment in the workplace.

The standard for sexual harassment in the workplace includes a prohibition of “quid pro quo” behavior that involves a power differential, and of a “hostile environment”. The standard for liability for hostile environment-based sexual harassment includes behavior that “alters the conditions of one’s employment and creates an abusive work environment”. The Equal Employment Opportunity Commission (EEOC) is the governmental agency charged with overseeing workplace discrimination issues, including sexual harassment. The EEOC publishes language adopted by institutions to describe sexual harassment.

Many public institutions have adopted the sexual harassment language prescribed by the EEOC as the standard for prohibited conduct by students. Sexual harassment behavior related to students is governed by Title IX. Title IX of the Educational Amendments of 1972 is a Federal law that prohibits gender discrimination in the education context. Like Title VII, Title IX was interpreted by the U. S. Supreme Court to apply gender discrimination to sexual harassment (*Franklin v. Gwinnet Cty. Public Schools*, 503 U.S.60 (1992)). The Court further established the contextual parameters of hostile environment sexual harassment under Title IX in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999). The Court stated that the conduct or expression must be so “severe, pervasive and objectively

offensive such that it undermines the victim's educational experience and denies equal access to an institution's resources and opportunities".

Although Title VII and Title IX are similar, in that they both prohibit discrimination based on gender, they are not identical laws, and the scope and context to which they are applied are distinctly different. Unfortunately, many public institutions begin with publication of their student sexual harassment policy using the broader language of sexual harassment from the employment context, and then they embellish the context to incorporate prohibition of expression that reinforces the institutional mission related to civility and respect.

Freedom of Expression Issues

Certainly civility, respect and support for diversity are important institutional values, and most institutions strive to reinforce these aspirations. However, using institutional policies that incorporate campus conduct and discipline to enforce these values make the institution vulnerable to challenge by prohibiting forms of expression that are protected under the First Amendment.

The U.S. Supreme Court, in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) stated, "a school may not prohibit speech unless the speech will materially and substantially interfere with the requirements of appropriate discipline on the operation of the school, and further, the Court stated *Healy v. James*, 408 U.S. 169 (1972) that, "the vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools". These cases underscore the Court's adherence to the principles of free expression in the educational context.

In order to avoid First Amendment challenges, institutions should also ensure that their student sexual harassment policies contain language that clearly articulates what behavior or expression is prohibited and the context within which this prohibited behavior will rise to the level of sexual harassment. Incorporating words such as "offends", "denigrates", "belittles an individual" in a sexual harassment policy makes the institution vulnerable to challenges of having a policy that is vague (the student must guess at how this would translate to their actions), and overbroad (the language encompasses a substantial amount of protected speech along with prohibited speech).

A successful challenge to the language of a sexual harassment policy could result in a court issuing an injunction against application of the policy or even an outright declaration that the language of the policy is unconstitutional. In extreme cases, it might lead to personal liability under §1983 for administrators who implement unconstitutional policies.

Recent Cases

Saxe v. State College Area School District, 240 F. 3d 200 206 (3rd Cir. 2001). The 3rd Circuit Court of Appeals struck down the school's sexual harassment policy because it was overbroad and encompassed expression the court stated was constitutionally protected. The court stated that the free speech clause of the First Amendment protects a wide variety of speech that listeners may consider deeply offensive".

DeJohn v. Temple University, 537 F. 3d 301 (3d Cir. 2008). The 3rd Circuit Court of Appeals held that Temple's use of broad terms such as "hostile" and "offensive" without qualifying language rendered its sexual harassment policy sufficiently overbroad and subjective that it could conceivably be applied to cover any speech of a gender motivated nature. The court issued a permanent injunction against Temple, from applying its sexual harassment policy as originally written and from re-implementing its originally challenged policy.

Lopez, et al. v. Candaele, et al., U.S. Dist. Ct. Central Dist. of Calif, (2009). In July, a federal district court issued an injunction against the school, prohibiting it from applying parts of its sexual harassment policy. The court, finding the

school's policy was too broad and vague and prohibited a substantial amount of protected speech, held that a school may not prohibit speech unless the speech will "materially and substantially" interfere with the requirements of appropriate discipline in the operation of the school".

Summary

Colleges and universities must carefully review sexual harassment policies to ensure that language specifying prohibited expression is clearly articulated, consistent with the standard established in *Davis*. In addition, institutions must analyze the language of sexual harassment policies to ensure the prohibited language is not unconstitutionally vague, ambiguous or overbroad.

Sanctioning for Sexual Misconduct

By: Brett A. Sokolow, JD

This week, I visited my friends and colleagues at Virginia Tech. After I facilitated a conduct training, an administrator came up to me and expressed that he perceived me to be biased toward suspension and expulsion for sexual misconduct complaints. He agreed with my bias, he said, but wondered how my bias would be perceived by those who did not agree. I agreed with him that I do have a bias, and explained that it is not a personal bias, but a professional one (maybe preference is therefore a better term than bias). It is a bias that has developed over ten years of experience with sexual misconduct complaints, lawsuits and government investigations. It is a bias well-worth explaining, and it is not something I conceal. I am very upfront about my biases, and though I do not use my trainings as a bully pulpit, I do use them as a persuasive pulpit when I believe strongly that a practice will be of benefit to those being trained. Before I explain my bias, I actually need to explain my views on bias, as well.

Does Training Create Bias?

I provided my first conduct training more than fourteen years ago, at Penn State University. I walked into a room of 40 administrators and staff, only to be confronted by an Associate Dean who marched up to me, introduced herself, and demanded to know “what are you here for?” I explained that I was there to do a conduct training on sexual misconduct. Her response was, “You can’t do that.” I replied that Penn State had invited me, and was indeed paying me to do just that. She said, “But if you train us, it will bias us, and that isn’t fair.” I was flabbergasted that anyone would automatically equate training with bias, and protested that I was not there to bias anyone. This scene flashed into my head recently when I read the holding in the Gomes case this summer. In Gomes, two suspended students challenged the fairness of their campus hearing because the hearing Chair was a faculty member who was involved with the local rape crisis center. They asserted that her work with victims made her a biased decision-maker. The judge in Gomes was not persuaded, settling the matter by stating that he knew very few people who were pro-sexual assault, and having a Chair who was anti-sexual assault was not a biasing factor at all.

Yet, despite the fact that a federal judge in Gomes seemed to be on the same page with me, I have changed my view in the last nine years. I have listened to hundreds of administrators debate, deliberate and decide sexual misconduct complaints. I have not found an unbiased one amongst us. We all, I have realized, are biased. We all have value systems, sexual politics, morals, religious beliefs and life experiences that color our thinking and bias us. We humans, I finally must admit, are inherently biased. That Associate Dean at Penn State was right! We cannot expect a process to be bias free. There is no such thing. Conduct trainings, the media, our experiences and our attitudes all bias us. So, I am no longer anti-bias. I accept its inevitability, but disagree with that Associate Dean on one key point. She believed that bias was unfair, and I don’t think that’s true. I think bias that renders us unable to maintain objectivity is unfair. That is an important difference. My goal in trainings is to bias those being trained in a way that overall is balanced. I want to bias you a little in favor of the rights of the accused student.

And, I want to bias you a little in favor of the rights of the alleged victim. And, I want to bias you a little with respect to the witnesses, and the interests of the college or university. I don’t mind that bias is present as long as balance is maintained overall. As long as we are balanced and objective, our results will be fair, notwithstanding slight biases that influence and impact us and our decisions.

Suspension and Expulsion

I have a preference for suspension and expulsion, and I make that clear in trainings. This is one area where my bias favors, perhaps, the alleged victim. But, I train on other biases that enhance the rights of the accused student. Balance results. I very much need to explain my preference for suspension and expulsion. I really don’t have a bias toward those sanctions. I have a desire to ensure that our sanctions are proportionate to the severity of the violation, and believe that in many sexual misconduct situations suspension and expulsion are proportionate, and therefore I favor them.

I qualify this preference. Not all sexual misconduct complaints are of equal severity. My value system makes intercourse a more egregious violation than fondling or other noninvasive sexual contact. Like the law, I agree that the use of weapons, predatory practices, and incapacitating someone are deserving of heightened consequences. Yes, I think there can be a distinction--in terms of sanction severity--between a student who has sex with someone he knows is incapacitated versus having sex with someone whom he caused by his own actions to become incapacitated. The latter is to me a more severe violation than the former.

I would similarly see a group attack or having sex with someone who is asleep or who is known to be mentally deficient to be egregious. Rape drugs are cause for heightened sanctions, as might be knowingly transmitting an STI or HIV to a victim. I would not, however, sanction an accused student more severely because the victim was a virgin. I think the idea of the sanction being proportionate means that we must look at the actions of the accused student as decisive rather than looking to the impact on the victim. Of course, the impact should inform our decision, but to sanction a student more harshly for assaulting a chaste victim than we would for assaulting an unchaste victim is arbitrary, without evidence the accused student somehow knew the victim was a virgin and took advantage of that to leverage sexual access. I once was involved in a complaint where a male student convinced a naïve female student that what they were having was not sex. When she eventually found it that it was, and that they were having lots of it, the male student faced a complaint not only for sexual misconduct, but for misrepresentation and an honor code violation as well.

A client asked me recently what was to be done in a situation where a young woman did not want sexual contact, but at the point of sexual intercourse, she did not protest, and just allowed it to happen. Would that be grounds for mitigating a more serious sanction? I think yes, that it could be. Any defense is by definition a suggestion of mitigating circumstances. A man who has sex with a woman who is not protesting or resisting may believe that he has consent. In fact, he does not, because consent must be actively expressed. Yet, if he genuinely believes that what he did was consensual, he is likely far less malevolent, abusive and dangerous than a man who would have sex with a woman despite her active protests. Of course, both of these men are in violation of our policies, but we do have a right to treat them differently with respect to sanctions, if we choose to. I would add one caveat. If the woman who is passive in the face of sexual aggression is fully capable of resistance and chooses not to, I would agree that it might be reasonable for you to mitigate the sanction. But, where a victim is incapable of resistance, because of fear, flashbacks or other reasons, I would not say that mitigation of the sanction is reasonable. This encourages students to be communicative partners in sex, and I think we should encourage that.

Mitigating and Aggravating Circumstances

Many of us would agree that one instance of fondling or non-invasive sexual contact is not likely to warrant separation from the college or university. But, what about two or three such contacts by the same perpetrator? Sure, that might create aggravating circumstances worthy of enhanced sanctions. Many of us would also agree that threats used to obtain sexual access are unacceptable, but do we sanction all threats equally? Is the threat "if you don't have sex with me, I will break up with you" as severe as "if you don't have sex with me, I will kill you"? Some of us would say that the threat of death is more severe. If so, it could warrant a more severe sanction. Weighing the relative egregiousness of sexual misconduct violations is not easy. Suppose a situation in which consent was obtained by fraud. A male and a female student agreed to have sex, but the female student insisted that he wear a condom. He promised to, but in the dark of their sexual encounter, he decided not to. She found out, and alleged sexual misconduct. Would the sanction for this type of violation be separation from your campus, or something lesser? Would you feel differently if this sexual encounter had been between two males? Is violating a condition of consent of lesser severity than having sex with someone without consent? I would argue no. I think that any clear condition placed upon consent must be respected, and any sexual activity that intentionally violates this condition is non-consensual just as if someone had sex with a protesting partner. If your partner tells you yes, but only if we do it hanging upside-down from the ceiling, then you have consent for that position only, and sex in any other position is not going to be consensual.

Part of my goal with this article is to emphasize that legally, where there is sexual intercourse or penetration, you need to have suspension and/or expulsion on the table for your consideration. If you decide there are mitigating factors which would merit a sanction less than separation, you need to be able to elaborate a compelling justification for that decision. Generally, we look to separation when we need to protect the community, or the perpetrator demonstrates an inability to understand or abide by our community standards. Think of it this way. Murder is not a violation of our codes. Along with violent hazing and drug dealing, sexual misconduct is one of the most serious offenses that can happen on a college campus. If not suspension and expulsion for offenses of this magnitude, then why have suspension and expulsion as sanctions at all? I was on a campus recently where there was no history of using suspension or expulsion for serious sexual misconduct complaints. I questioned this, and received the explanation that small, tuition-driven institutions cannot afford to expel. I then asked what the consequence was for the false pulling of a fire alarm. Expulsion. Why? Because it can place members of the community in grave danger. Oh, and sexual misconduct doesn't? Odd reasoning.

So, what might a compelling justification for mitigation look like? A few years ago, a male student sought out a counselor on his campus, and told the counselor that he felt he had gone too far with his girlfriend, and had gotten carried away. He knew they both wanted to remain virgins, but his hormones got the better of him, and he entered her, slightly. She protested and he pulled out. The girlfriend was very upset, and threatening to go to the Dean. The counselor persuaded this young man that he ought to go to see the Dean first. He did. He expressed to the Dean that he had made a mistake, and had gone too far. He was deeply contrite. He wanted to make it up to his girlfriend, and threw himself on the mercy of the Dean. She sanctioned him to six months of volunteer work with the local rape crisis center, a paper on sexual assault, and a written apology to his girlfriend. Through some restorative justice confrontations, the young man was helped to acknowledge, accept and correct the wrongfulness of his actions and their impact on his girlfriend. The Dean decided that suspension was not necessary. She believed that he "got it." She did not believe that he was a continuing threat to the girlfriend or any other member of the community. Educational sanctions were enough in this situation. Suspension would have provided no additional benefit. The Dean, in explaining this to me, shared her view that this situation was substantially different from men who came in to her office, argued that they had done nothing wrong, insisted that the policy was unfair, and that the administration was out to get them. Education would not help such men to "get it." More serious sanctions were needed for them. This rationale made sense to me.

One of the frequently used sanctions for sexual misconduct is suspension until the victim graduates. I think this sanction is suspect. It protects the victim, true, but does it do anything to protect future victims who might be harmed when the perpetrator returns? I feel about this sanction the same way I feel about no-contact orders where violence is involved. It is dangerous to use them unless you use them carefully and correctly. For any such suspension, I recommend that you set up conditions for readmission, and leave the final decision as a discretionary judgment call of an appropriate administrator. To defend you, your lawyers need some due diligence before the perpetrator returns so that they can say that readmission was a reasonable decision that did not unnecessarily place anyone at risk.

Educatin' and Recidivatin'

Sometimes, we believe that a student is educable on sexual violence issues. James Madison University has had an offender rehabilitation program for years that scares the heck out of me. While I believe that male and female violators could be educated, I need proof that the education has a strong chance of succeeding. Otherwise, separation is 4more appropriate. Many campuses subject offenders to educational projects, but do not have the time, staff or inclination to follow-up to ensure that the education was successful. I think the law insists that we do so. If you attempt to rehabilitate an offender, I'd like some proof that I or your attorneys can walk into court with to show that although we knew this person had caused harm before, we had a reasonable belief that he would not present an ongoing threat. Show me attitude surveys, educational presentations, and psychological assessments that reveal a change of attitude, and it might be tenable to allow a student to stay or return. Without that, we are just guessing, and we don't have the right to play Russian Roulette with vulnerable members of our communities.

Mandatory Reporters: A Policy for Faculty, Trustees and Professional Staff

This document is intended to outline the College's policy regarding mandated reporting of concerning behaviors, discrimination, harassment and crimes by employees. It explains briefly the meaning and purpose of mandatory reporters, outlines the legal context, and articulates a straightforward set of guidelines for all employees to follow.

Mandatory Reporters: What and Why?

There are four federal laws that establish responsibilities for employees of colleges to report certain types of crimes and incidents, especially sexual misconduct---the Clery Act in tandem with the Violence Against Women Reauthorization Act of 2013 (VAWA), Title VII and Title IX. Each of these areas of federal law has a different purpose, but generally the laws are intended to protect members of the campus community, visitors and guests from criminal and discriminatory behavior. The responsibilities established by these laws give rise to the term "mandatory reporter." Reporting of concerning and disruptive behaviors is not legally mandated, but is a policy mandate to assist the BIT in early identification and detection of at-risk situations. Additionally, state law imposes mandates with respect to the reporting of child abuse and sexual abuse as follows...

The Legal Context

The Clery Act in tandem with VAWA creates a duty for institutions to report crimes in 15 different categories and has the broadest scope. It is the College that has the duty to report these crimes and failure to do so can result in substantial fines being imposed on the institution by the Department of Education. Guided by the language of the Clery Act and subsequent amendments, the College is required to define which employees – called Campus Security Authorities – must report crime information they receive.

The language of the Act would allow the College to exclude some faculty some of the time and many professional staff from the obligation to report. Such an approach, however, risks creating confusion for faculty and staff, takes a minimalist approach to the ethical obligation to inform our community about serious crimes, and makes the institution more vulnerable to enforcement action.

Title VII focuses on sexual harassment in the workplace and failure to take appropriate action can lead to financial liability for the College. Under Title VII, the law creates a duty to report for employees who supervise other employees, including students being paid by the College. As with the Clery Act/VAWA, this language means that some faculty and staff would be expected to report while others might be exempted. Once again, however, this selective approach may create confusion and risk; and it fails to ask all of us to share the responsibility to create a work place free of sexual harassment.

Title IX focuses on the adverse consequences faced by victims of gender discrimination and sexual harassment and creates obligations for the College to investigate and to provide a "prompt and effective remedy." Title IX obligates the College to provide a safe environment that does not interfere with the victim's right to pursue an education or employment opportunities, benefits or privileges. The College incurs this obligation when a victim has given notice to a "responsible employee," or when the College, in the exercise of reasonable care, should have known, about the assault or harassment. As with the other laws, the definition of "responsible employee" under Title IX would allow the College to treat only some faculty and staff as mandated reporters but with the same possibility of confusion and risk of institutional exposure.

College Policy

1. Confidentiality and Reporting of Offenses Under This Policy

All College employees (faculty, staff, administrators) are expected to report actual or suspected discrimination or harassment to appropriate officials immediately, though there are some limited exceptions. In order to make informed choices, it is important to be aware of confidentiality and mandatory reporting requirements when consulting campus resources. On campus, some resources may maintain confidentiality – meaning they are not required to report actual or suspected discrimination or harassment to appropriate College officials – thereby offering options and advice without any obligation to inform an outside agency or campus official unless a reporting party has requested information to be shared. Other resources exist for reporting parties to report crimes and policy violations and these resources will take action when an incident is reported to them. The following describes the reporting options at the College:

a. Confidential Reporting

If a reporting party would like the details of an incident to be kept confidential, the reporting party may speak with:

- On-campus licensed professional counselors and staff
- On-campus health service providers and staff
- [On-campus Victim Advocates]
- [On-campus members of the clergy/chaplains working within the scope of their licensure or ordination]
- [Athletic trainers] (if licensed, privileged under state statute and/or working under the supervision of a health professional)
- Off-campus (non-employees):
 - Licensed professional counselors
 - Local rape crisis counselors
 - Domestic violence resources
 - Local or state assistance agencies
 - Clergy/Chaplains

All of the above-listed individuals will maintain confidentiality except in extreme cases of immediacy of threat or danger or abuse of a minor. Campus counselors [and/or the Employee Assistance Program] are available to help free of charge and can be seen on an emergency basis during normal business hours. College employees listed above will submit anonymous statistical information for Clery Act purposes unless they believe it would be harmful to their client, patient or parishioner.

b. Formal Reporting Options

All College employees have a duty to report, unless they fall under the “Confidential Reporting” section above. Reporting parties may want to consider carefully whether they share personally identifiable details with non-confidential employees, as those details must be shared with the Title IX Coordinator. Employees must promptly share all details of the reports they receive. Generally, climate surveys, classroom writing assignments or discussions, human subjects research, or events such as Take Back the Night marches or speak-outs do not provide notice that must be reported to the Coordinator by employees, unless the reporting party clearly indicates that they wish a report to be made. Remedial actions may result from such disclosures without formal College action.

If a reporting party does not wish for their name to be shared, does not wish for an investigation to take place, or does not want a formal resolution to be pursued, the reporting party may make such a request to the Title IX Coordinator, who will evaluate that request in light of the duty to ensure the safety of the campus and comply with federal law. Note that the College’s ability to remedy and respond to a reported incident may be limited if the reporting party does not want the institution to proceed with an investigation and/or the Equity Resolution Process.

In cases indicating pattern, predation, threat, weapons and/or violence, the College will likely be unable to honor a request for confidentiality. In cases where the reporting party requests confidentiality and the circumstances allow the College to honor that request, the College will offer interim supports and remedies to the reporting party and the community, but will not otherwise pursue formal action. A reporting party has the right, and can expect, to have allegations taken seriously by the College when formally reported, and to have those incidents investigated and properly resolved through these procedures.

Formal reporting still affords privacy to the reporter, and only a small group of officials who need to know will be told, including but not limited to: [Office for Institutional Equity, Division of Student Affairs, Integrity and Compliance Office, College Police, and the Threat Assessment Team]. Information will be shared as necessary with investigators, witnesses and the responding party. The circle of people with this knowledge will be kept as tight as possible to preserve a reporting party's rights and privacy. [Additionally, anonymous reports can be made by victims and/or third parties using the online reporting form posted at www.College/ERPAllegationForm, or the reporting hotline at ###-###-####. Note that these anonymous reports may prompt a need for the institution to investigate.]

Failure of a non-confidential employee, as described in this section, to report an incident or incidents of sex/gender harassment or discrimination of which they become aware is a violation of College policy and can be subject to disciplinary action for failure to comply.

2. Federal Timely Warning Obligations

Parties reporting sexual misconduct should be aware that under the Clery Act, College administrators must issue timely warnings for incidents reported to them that pose a substantial threat of bodily harm or danger to members of the campus community. The College will ensure that a victim's name and other identifying information is not disclosed, while still providing enough information for community members to make safety decisions in light of the potential danger.

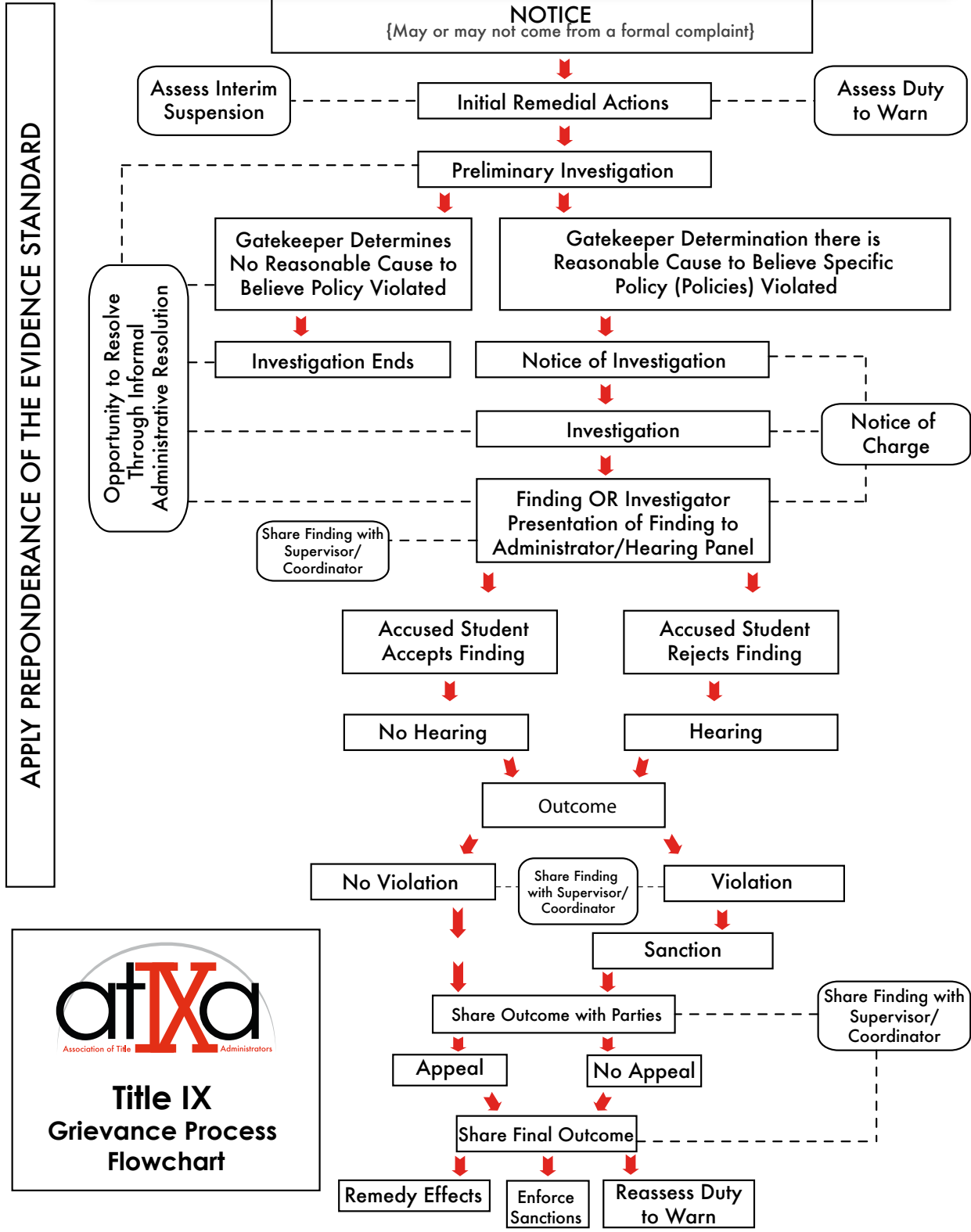
**Mandatory Reporting Under the Clery Act/VAWA, Title VII and Title IX:
Guidelines for Employees of [] College**

1. The College has defined all employees, both faculty and professional staff, as mandatory reporters, except those designated as “confidential”.
2. When an employee becomes aware of an alleged act of sexual harassment, discrimination or assault, the employee must promptly contact the Title IX Coordinator [and/or...]. The employee should use the Sexual Assault Reporting Form, which can be found on the website at []. Alternatively, the employee may call the Title IX Coordinator and then follow-up by filing the form.
3. If the reported conduct also constitutes a possible crime, the Title IX Coordinator will promptly inform the Department of Public Safety about the report, though may withhold identifiable information at their discretion.
4. When an employee thinks that a student may be about to report an act of sexual harassment, discrimination or assault, the employee should, if at all possible, tell the student that the College will maintain the privacy of the information, but the employee cannot maintain complete confidentiality and, is required to report the act and may be required to reveal the names of the parties involved. If the student wishes to proceed, the employee should inform the student of the implications of sharing the names of the parties involved, which puts the College on notice.
 - a. Rather than speaking to the student about confidential information, the employee should offer to refer or accompany the student to Counseling Services or Health Services during the hours that those offices are open: Monday-Friday, 8 a.m. to 5 p.m.
 - b. The student can be referred to the Sexual Assault Response Team/hotline at any time of the day or week, including daily 5 p.m. to 8 a.m. and weekends. ###-###-####
5. The Sexual Assault Response Team is also available to provide guidance on how to handle a situation to faculty and professional staff at any time.
6. Under the Clery Act & VAWA, College employees are mandatory reporters for a broader array of serious crimes, including the following:
 - a. Criminal Homicide
 - i. Murder & Non-Negligent Manslaughter--The willful (non-negligent) killing of one human being by another.
 - ii. Negligent Manslaughter--The killing of another person through gross negligence.
 - b. Sex Offenses: Any sexual act directed against another person without the consent of the victim, including instances where the victim is incapable of giving consent.
 - i. Rape: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim.
 - ii. Fondling: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.
 - iii. Incest: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
 - iv. Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent.
 - c. Domestic Violence: A felony or misdemeanor crime of violence committed:
 - i. By a current or former spouse or intimate partner of the victim;
 - ii. By a person with whom the victim shares a child in common;
 - iii. By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner;
 - iv. By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or

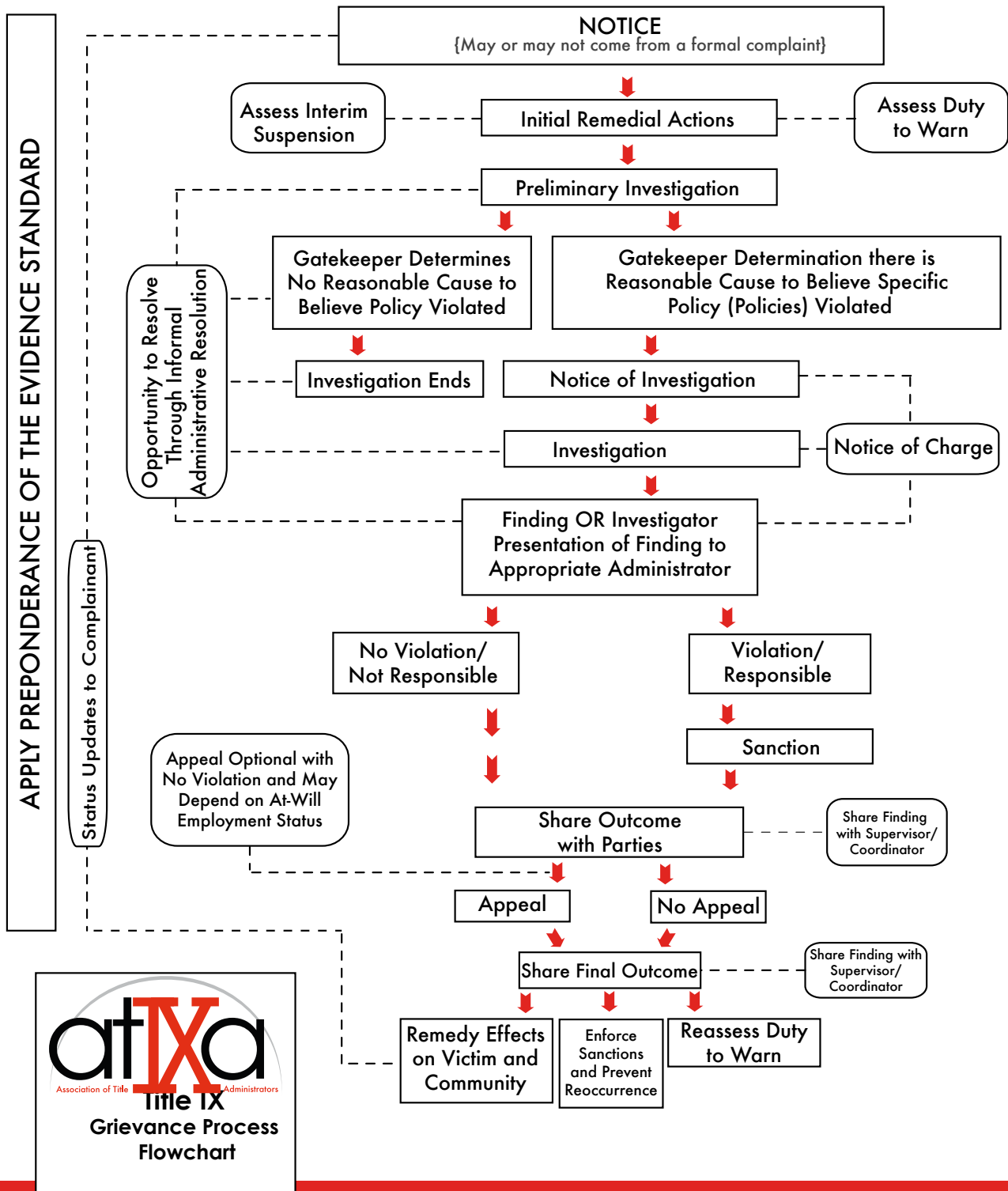
- v. By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.
- d. Dating Violence: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- e. Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - i. Fear for the person's safety or the safety of others; or
 - ii. Suffer substantial emotional distress.
- f. Robbery: The taking or attempting to take anything of value from the care, custody, or control of a person or persons by force or threat of force or violence and/or by putting the victim in fear.
- g. Aggravated Assault: An unlawful attack by one person upon another for the purpose of inflicting severe or aggravated bodily injury. This type of assault usually is accompanied by the use of a weapon or by means likely to produce death or great bodily harm. (It is not necessary that injury result from an aggravated assault when a gun, knife, or other weapon is used which could and probably would result in serious personal injury if the crime were successfully completed.)
- h. Burglary: The unlawful entry of a structure to commit a felony or a theft. For reporting purposes this definition includes: unlawful entry with intent to commit a larceny or felony; breaking and entering with intent to commit a larceny; housebreaking; safecracking; and all attempts to commit any of the aforementioned.
- i. Motor Vehicle Theft: The theft or attempted theft of a motor vehicle. (Classify as motor vehicle theft all cases where automobiles are taken by persons not having lawful access even though the vehicles are later abandoned, including joyriding.)
- j. Arson: Any willful or malicious burning or attempt to burn, with or without intent to defraud, a dwelling house, public building, motor vehicle or aircraft, personal property of another, etc.
- k. Arrests for Weapon Law Violations: The violation of laws or ordinances dealing with weapon offenses, regulatory in nature, such as: manufacture, sale, or possession of deadly weapons; carrying deadly weapons, concealed or openly; furnishing deadly weapons to minors; aliens possessing deadly weapons; and all attempts to commit any of the aforementioned.
- l. Arrests for Drug Abuse Violations: Violations of State and local laws relating to the unlawful possession, sale, use, growing, manufacturing, and making of narcotic drugs. The relevant substances include: opium or cocaine and their derivatives (morphine, heroin, codeine); marijuana; synthetic narcotics (Demerol, methadones); and dangerous nonnarcotic drugs (barbiturates, Benzedrine).
- m. Arrests for Liquor Law Violations: The violation of laws or ordinances prohibiting: the manufacture, sale, transporting, furnishing, possessing of intoxicating liquor; maintaining unlawful drinking places; bootlegging; operating a still; furnishing liquor to a minor or intemperate person; using a vehicle for illegal transportation of liquor; drinking on a train or public conveyance; and all attempts to commit any of the aforementioned. (Drunkenness & driving under the influence are not included in this definition.)
- n. Disciplinary Referrals for Weapon Law Violations
- o. Disciplinary Referrals for Drug Abuse Violations
- p. Disciplinary Referrals for Liquor Law Violations
- q. Hate Crimes: Crimes motivated by the victim's actual or perceived: race, gender, gender identity, religion, sexual orientation, ethnicity, national origin and disability.

INVESTIGATION MATERIALS AND TEMPLATES

TRADITIONAL STUDENT CONDUCT/HEARING PANEL MODEL



CIVIL RIGHTS INVESTIGATION MODEL



ATIXA TITLE IX COMPLIANCE BEST PRACTICES CHECKLIST RELATED TO SEXUAL HARASSMENT/VIOLENCE

Adapted with Permission from the University of the Pacific

Obligation to Respond to Sexual Harassment/ Violence

Procedural requirements pertaining to sexual harassment and sexual violence

A. Publish and disseminate a notice of nondiscrimination

- Includes Title IX coordinator contact information. [y/n]
- Non discrimination policy includes sexual harassment and sexual violence [y/n]
- Designates a Title IX Coordinator as compliance officer to coordinate efforts and comply with and carry out responsibilities under Title IX. [y/n]
- Adopts and publishes grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints. [y/n]
- Procedures may include informal mechanisms and administrative hearings as described in the Dear Colleague Letter. [y/n]
- Provides employee training on reporting of/responding to harassment/violence to appropriate university officials. [y/n]
- Student conduct process includes off campus conduct when reported. [y/n]
- University implements initial remedies for victims of on and off campus sexual misconduct to protect from further sexual harassment or retaliation from the alleged perpetrator or his/her associates. [y/n]
- Reports about harassment/violence are promptly, thoroughly and impartially investigated and action steps determined. [y/n]
- University informs and obtains consent from the complainant (or the complainant parents if the complainant is under 18) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the university takes reasonable steps to investigate and respond (but ability to respond may be limited). [y/n]
- If the complainant continues to ask that his/her name or other identifiable information not be revealed, the university evaluates the request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. The university informs complainant if it cannot ensure confidentiality. [y/n]

B. Provide adequate, reliable and impartial investigation of all complaints

- The complainant will be notified of the right to file a criminal complaint. [y/n]
- University investigates independently of city police. [y/n]
- University takes immediate steps to protect the victim and assure his/her well-being. [y/n]
- In the investigation and resolution, the standard of proof to assess complaints is a preponderance of the evidence standard [y/n]
- Throughout the investigation and conduct process all parties have an equitable opportunity to participate and to present relevant witnesses and other evidence including having similar and timely access to any relevant information. [y/n]
- In conduct proceedings, parties will be offered a separate room or other accommodations to avoid in-person confrontation and may be prevented from direct questioning of each other during the hearing, at the discretion of the Chair. [y/n]
- An appeals process is provided for both the complainant (or alleged victim) and the respondent. [y/n]

- Documentation of all proceedings is made, which may include written findings of fact, transcripts, or audio recordings. [y/n]
- All persons involved in investigating and adjudicating grievance procedures will be comprehensively trained on sexual harassment and sexual violence cases. [y/n]
- All investigation and hearing processes are impartial and devoid of conflicts of interest that would compromise the objectivity of the process. [y/n]
- Due (or fair) process is provided to alleged perpetrators and alleged victims. [y/n]

C. Provide designated and reasonably prompt time frames

- Grievance procedures specify time frames for 1) investigation of complaints (immediately, but full resolution of process within 60 calendar days unless a 10-14 day delay occurs to allow police to gather evidence, or other delay is agreed by all parties), 2) time when both parties will receive the report of the investigation and/or outcome, and 3) time frame for filing an appeal, if applicable. [y/n]
- Parties are updated on the status of the investigation and process by the Coordinator or designee at regular intervals and/or upon request. [y/n]

D. Provide written notice of outcome

- All parties are notified concurrently in writing about the outcome. [y/n]
- University may publicly disclose results of disciplinary proceedings if the student is found to commit a crime of violence or a non-forcible sex offense [y/n]
- University complies with all Clery Act regulations [y/n]

<p>Steps to Prevent Sexual Harassment/ Violence and Correct its Discriminatory Effects on Complainant or Others</p>
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Education and Prevention

- University includes sexual harassment/violence education in 1) orientation programs for new students, faculty, staff, and employees; 2) training for resident assistants; 3) training for student athletes and coaches; 4) campus-wide awareness programs. [y/n]
- Information is included in curriculum; to be implemented in general education courses for all undergraduate students. [y/n]
- In encouraging students to report incidents of sexual misconduct, university will not bring charges against complainants if they were involved with collateral alcohol and/or other non-violent violations of campus policy. [y/n]
- University has specific sexual violence materials for policies, rules, and resources, including employee and student handbooks, protocols, website and brochures. [y/n]
- Materials and implementation of policies and procedures will include information on what constitutes sexual harassment/violence, what to do and how to report, information for resources, how to contact Title IX coordinator, and measures the school will take. [y/n]

Remedies and Enforcement

- University will take immediate action to eliminate hostile environments, prevent reoccurrence and address any effects on the victim and community. [y/n]
- University will take immediate steps to protect complainants even before the final outcome of investigations, including prohibiting the alleged perpetrator from having any contact with the complainant. Steps should minimize the burden on the complainant while respecting (due process) rights of the accused individual unless there is a direct conflict, in which case Title IX protections control. [y/n]
- Remedies for the complainant might include but are not limited to campus escort, ensuring complainant and alleged perpetrator do not attend the same classes if possible, moving either or both parties to a different residence hall, counseling services, advocacy, medical services, academic support services, course withdrawal without penalty, review of disciplinary actions. [y/n]
- Remedies for campus student populations might include counseling services, on-call victim assistance, policy review, educational, awareness and prevention [y/n]

programs, Title IX coordinator training, school law enforcement Title IX training, and other employee Title IX training.

- University will have policies and procedures to protect against retaliatory harassment including how to report any subsequent problems. [y/n]
- Provide notification and assistance in reporting to local law enforcement. [y/n]
- Title IX coordinator reviews all evidence and sexual harassment/violence cases to ensure prompt and equitable remedies. [y/n]
- University will create a committee to identify and implement education strategies. [y/n]
- Issue and review policy statement and all faculty/staff/student grievance procedures to ensure equitable processes and compliance with Title IX. [y/n]
- Investigations and reports are aligned with Title IX guidelines. [y/n]
- Respond immediately to all grievances and allegations [y/n]

ATIXA TIMELINE COMPLIANCE TEMPLATE

	TIMELINE (60 DAYS +/-)	DATE	DATE SATISFIED	DELAY?	REASON FOR DELAY	NOTICE TO PARTIES?
NOTICE OF GRIEVANCE TO COORDINATOR		April 1				
TITLE IX ELIGIBILITY DETERMINED	Within 2 business days	April 3	April 3	N/A	N/A	N/A
ASSIGNMENT TO INVESTIGATION TEAM	Within 4 business days	April 9	April 10	Yes	One Investigator out sick on 9th	Not needed
NOTICE OF INVESTIGATION	Varies		April 11	No		Yes
INVESTIGATION	Typically 10-14 business days	April 11-25	April 22	No		
NOTICE OF CHARGE	Varies		April 11			Yes
NOTICE OF HEARING	Varies		April 12	No		Yes
HEARING	Within 7 business days	April 16-17	April 17	No		Yes
SHARED OUTCOME OF INVESTIGATION	Typically within 1-3 business days	April 20-23	April 22-23	No		Yes
NOTICE OF OUTCOME & INFORMATION ON APPEAL PROCESS	Varies	April 23	April 23	No		Yes
NOTICE OF IMPLEMENTATION OF REMEDIES/SANCTIONS	Varies	April 23	April 23	No		Yes
APPEAL	N/A					
NOTICE OF APPEAL	N/A					
NOTICE OF FINAL DETERMINATION	N/A					
GATEKEEPING	Varies					



YOUR UNIVERSITY
LOGO HERE

SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the **Policy Name(s)** of the University of Knowledge. **Names of Investigators** conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:

(Summarize findings here.)

Procedural History:

Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On **Month XX, 20XX**, **Reporting Party** met with **Name Here** in the Office of Victim Assistance at University of Knowledge along with **Name Other Present Parties**. **Reporting Party** reported that **General Allegations** occurred on **Month XX, 20XX**. **Reporting Party** has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators **Name Here** and **Name Here** on **Month XX, 20XX**. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on **Month XX, 20XX**.

Involved Parties:

Reporting Party is *(e.g., a first-year undergraduate female residing in the residence halls)*.

- Responding Party** is *(e.g., a male graduate student and a residence advisor in the residence halls)*.
- Witness 1** is *(e.g., a freshman female residing in the residence halls and Reporting Party's roommate)*.
- Witness 2** is *(e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party)*.
- Witness 3** is *(e.g., an employee of Nearby Bar; employee is not affiliated with the university)*.

Investigation Timeline/Table of Interviews:

Alleged Violations:

A Notice of Investigation (NOI) was sent to **Responding Party** on **Month XX, 20XX** via campus email. Investigator **Name Here** spoke with **Responding Party** by phone on this date to confirm that he received the NOI. The NOI informed **Responding Party** that an investigation was being conducted pursuant to **Policy**. The NOI contained the following allegations:

- Add details of first allegation here.*
- Add details of second allegation here.*
- Etc.*

The university investigated possible violations of two provisions of the **Policies**. The relevant policy definitions follow. The applicable policies are attached as Appendix B.

1. Sexual Misconduct: Non-Consensual Sexual Intercourse

Non-consensual sexual intercourse is defined by policy as:

- Any sexual intercourse (anal, oral, or vaginal),
- Including sexual intercourse with an object,
- However slight,
- By one person upon another,
- Without consent and/or by force.

2. Sexual Misconduct: Non-Consensual Sexual Contact

Non-consensual sexual contact is defined by policy as:

- Any intentional sexual touching,
- However slight,
- With any object,
- By one person upon another,
- Without consent and/or by force.

3. Consent

Consent is defined by policy as:

- Informed,
- Voluntary,
- Active,
- Clear words or actions
- Indicating permission to engage in mutually agreed upon sexual activity.

Jurisdiction and Status:

Add jurisdictional statement here. The university has jurisdiction over these misconduct allegations pursuant to... Add any necessary details about interim suspension, initial actions, and remedial actions.

Standard of Evidence:

To determine whether an individual has violated the university's **Policy**, the standard of evidence required is a preponderance of evidence (i.e., the evidence demonstrates that it is more likely than not that the conduct occurred). This standard is often referred to as "50 percent plus a feather."

Interview(s) with Reporting Party:

Include the name and title of the interviewer(s); the names and roles of others present; the location and date of the interview(s); and detailed notes of the interview(s).

Additional Information Provided By Reporting Party:

Include information such as written statements, any relevant emails, texts, voice mails, and photographs. Can attach part as Appendix C.

Interview(s) with Responding Party:

Include the name and title of the interviewer(s); the names and roles of others present; the location and date of interview(s); and detailed notes of the interview(s).

Additional Information Provided By Responding Party:

Include information such as written statements, any relevant emails, texts, voice mails, and photographs. Also attach part as Appendix D.

Interview(s) with Witness(es):

Include the name and title of the interviewer(s); the names and roles of others present; the location and date of interview; how witness(es) was/were identified; and detailed notes from those interviews.

Other Information:

1. Attached as Appendix C/D, with proper redaction
2. Relevant Residence Life information, Appendix E
3. Sexual assault nurse exam, Appendix F
4. Campus security or police report, Appendix G
5. Expert reports or information, Appendix H
6. Reviewed video surveillance etc., Appendix I

Credibility Assessment:

Include parties, witnesses, and any relevant information.

Findings of Fact and Analysis for Policy 1:

State your policy and apply the facts as you find them related to the policy, weighing evidence and incorporating credibility assessment as you proceed.

Findings of Fact and Analysis for Policy 2:

State your policy and apply the facts as you find them related to the policy, weighing evidence and incorporating credibility assessment as you proceed.

Conclusion (if applicable):

Based on the totality of the circumstances and the information obtained pursuant to this investigation, and based on a more likely than not standard of evidence, we conclude that **it is/is not** more likely than not that **Responding Party** violated **Policy** for the following reasons...

Sanction Recommendation (if applicable):

Include recommendations here.

Respectfully submitted,

Name, Title of Investigator, University of Knowledge Date signed

Name, Title of Investigator, University of Knowledge Date signed

- Appendix A: Timeline of Investigation
- Appendix B: Applicable Policies
- Appendix C: Witness Interview Transcripts and Other Evidence Collected
- Etc.

SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS II

[UNIVERSITY]

[ADDRESS]

[PHONE]

[NAME OF INVESTIGATOR(S)]

[DATE OF REPORT]

This report addresses alleged violations of the [NAME OF CONDUCT CODE POLICY HANDBOOK] of the [UNIVERSITY], including possible violation of the [POLICY]. [INVESTIGATOR NAME(S)] conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the [STUDENT CONDUCT CODE/POLICY].

Involved Parties:

Reporting Party: [NAME] [RELEVANT INFORMATION]

Responding Party: [NAME] [RELEVANT INFORMATION]

Witness 1: [NAME] [RELEVANT INFORMATION]

Date of Reported Incident: [DATE]

Date Report was made: [DATE]

To whom report was made: [NAME(S)]

History of the Allegation:

[DETAILS]

Alleged Violations:

A Notice of Investigation was (NOI) sent to Responding Party on [DATE].

The NOI informed Responding Party that an investigation was being conducted pursuant to [RELEVANT INFORMATION].

The NOI contained the following allegations: [ALLEGATIONS INFORMATION]

The investigation examined possible violations of the following provisions of the Student Conduct Code/University Policy:

1. [CONDUCT CODE/UNIVERSITY POLICY]
[CONDUCT CODE/UNIVERSITY POLICY DESCRIPTION]
2. [CONDUCT CODE/UNIVERSITY POLICY]
[CONDUCT CODE/UNIVERSITY POLICY DESCRIPTION]

Jurisdiction:

[JURISDICTIONAL STATEMENT]

Standard of Evidence:

In order to determine that a person has violated the [NAME OF CONDUCT CODE POLICY HANDBOOK] of the [UNIVERSITY], the standard of evidence required is a preponderance of evidence (i.e., the evidence demonstrates that it is more likely than not that the conduct occurred). This standard is often referred to as "50 percent plus a feather."

Interview(s) with Reporting Party:

INTERVIEW 1

[DATE], [TIME], [LOCATION]

[PERSONS PRESENT AT INTERVIEW]

[INTERVIEW REPORT]

Additional Information Provided By Reporting Party:

[WRITTEN STATEMENT]

[RELEVANT EMAILS]

[TEXTS]

[VOICEMAILS]

[OTHER]

Interview(s) with Responding Party:

INTERVIEW 1

[DATE], [TIME], [LOCATION]

[PERSONS PRESENT AT INTERVIEW]

[INTERVIEW REPORT]

Additional Information Provided By Responding Party:

[WRITTEN STATEMENT]

[RELEVANT EMAILS]

[TEXTS]

[VOICEMAILS]

[OTHER]

Summary of Information Provided By Witnesses:

[SUMMARY]

Other Information:

[SUMMARY FROM OTHER DEPARTMENT]

[SEXUAL ASSAULT EXAM REPORT]

[CAMPUS SECURITY/POLICE REPORT]

[SUMMARY FROM EXPERTS]

Credibility Assessment:

[ASSESSMENT]

Findings of Fact and Analysis:

[POLICY STATEMENT WITH FACT APPLICATION AS RELATED TO POLICY]

Conclusion:

Based on the totality of the circumstances and the information obtained pursuant to this investigation, and based on a more likely than not standard of proof, I conclude that [IT IS]/[IS NOT] more likely than not that Responding Party violated [POLICY].

[SIGNATURE]

[NAME]

[POSITION]