TABLE OF CONTENTS

SEXUAL MISCONDUCT OFFENSES INCLUDE, BUT ARE NOT LIMITED TO:

1. **Sexual Harassment**
2. **Non-Consensual Sexual Intercourse (or attempts to commit same)**
3. **Non-Consensual Sexual Contact (or attempts to commit same)**
4. **Sexual Exploitation**

1. Sexual Harassment

   Gender-based verbal or physical conduct that unreasonably interferes with or deprives someone of educational access, benefits or opportunities.

Three Types of Sexual Harassment

A. Hostile Environment includes any situation in which there is harassing conduct that is sufficiently severe, pervasive/persistent and patently/objectively offensive that it alters the conditions of education or employment, from both a subjective (the alleged victim's) and an objective (reasonable person's) viewpoint.

The determination of whether an environment is "hostile" must be based on all of the circumstances. These circumstances could include: [There is no reason this paragraph cannot be used elsewhere to address harassment on other protected classes, including race, color, ethnicity, nationality, age, weight, sexual orientation/preference, disability, etc.]

1. The frequency of the conduct;
2. the nature and severity of the conduct;
3. whether the conduct was physically threatening;
4. whether the conduct was humiliating;
5. the effect of the conduct on the alleged victim's mental or emotional state;
6. whether the conduct was directed at more than one person;
7. whether the conduct arose in the context of other discriminatory conduct;
8. whether the conduct unreasonably interfered with the alleged victim's educational or work performance; or

9. whether the statement is a mere utterance of an epithet which engenders offense in an employee or student, or offends by mere discourtesy or rudeness:
10. Whether the speech or conduct deserves the protections of academic freedom.

B. *Quid pro quo* sexual harassment exists when there are:
    1) unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and
    2) Submission to or rejection of such conduct results in adverse educational or employment action.

C. Retaliatory harassment is any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.

Examples of Harassment:

Not all workplace or educational conduct that may be described as "harassment" affects the terms, conditions or privileges of employment or education. For example, a mere utterance of an ethnic, gender-based or racial epithet which creates offensive feelings in an employee or student would not normally affect the terms and conditions of their employment or education.

- A professor insists that a student have sex with him/her in exchange for a good grade. This is harassment regardless of whether the student accedes to the request.
- A student repeatedly sends sexually oriented jokes around on an email list s/he created, even when asked to stop, causing one recipient to avoid the sender on campus and in the residence hall in which they both live.
- Explicit sexual pictures are displayed in a professor's office, on the exterior of a residence hall door or on a computer monitor in a public space.
- Two supervisors frequently 'rate' several employees' bodies and sex appeal, commenting suggestively about their clothing and appearance.
- A professor engages students in discussions in class about their past sexual experiences, yet the conversation is not in any way germane to the subject matter of the class. She

probes for explicit details, and demands that students answer her, though they are clearly uncomfortable and hesitant.

- An ex-girlfriend widely spreads false stories about her sex life with her former boyfriend to the clear discomfort of the boyfriend, turning him into a social pariah on campus
- Male students take to calling a particular brunette student "Monica" because of her resemblance to Monica Lewinsky. Soon, everyone adopts this nickname for her, and she is the target of relentless remarks about cigars, the president, "sexual relations" and Weight Watchers.
- A student grabbed another student by the hair, then grabbed her breast and put his mouth on it.

This sexual harassment policy incorporates language suggested by Tom Trager, Associate Counsel to the University of Colorado, Boulder, and Brett Sokolow, from NCHERM. The Consensual Relationships policy is adapted from Duke University.

2. NON-CONSENSUAL SEXUAL INTERCOURSE:

   Non-Consensual Sexual Intercourse is

   - any sexual intercourse (anal, oral, or vaginal),
   - however slight,
   - with any object,
   - by a person upon a person,
   - Without consent*.

3. NON-CONSENSUAL SEXUAL CONTACT:

   Non-Consensual Sexual Contact is

   - any intentional sexual touching,
   - However slight,
   - With any object,
   - By a person upon a person,
   - Without consent*.

*CONSENT DEFINED

Consent is informed, knowing and voluntary. Consent is active, not passive. Silence, in and of itself, cannot be interpreted as consent. Consent can be given by words or actions, as long as those words or actions create mutually understandable permission regarding the conditions of sexual activity.

Consent to one form of sexual activity cannot imply consent to other forms of sexual activity.

Previous relationships or consent cannot imply consent to future sexual acts.

Consent cannot be procured by use of physical force, compelling threats, intimidating behavior, or coercion. Coercion is unreasonable pressure for sexual activity. Coercive behavior differs from seductive behavior based on the type of pressure someone uses to get consent from another. When someone makes clear to you that they do not want sex, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

In order to give effective consent, one must be of legal age.

If you have sexual activity with someone you know to be--or should know to be—mentally or physically incapacitated (by alcohol or other drug use, unconsciousness or blackout), you are in violation of this policy. Incapacitation is a state where one cannot make a rational, reasonable decision because they lack the ability to understand the who, what, when, where, why or how of their sexual interaction.

- This policy also covers someone whose incapacity results from mental disability, sleep, involuntary physical restraint, or from the taking of a so-called “date-rape” drug. Possession, use and/or distribution of any of these substances, including Rohypnol, Ketomine, GHB, Burundanga, etc. is prohibited, and administering one of these drugs to another student for the purpose of inducing incapacity is a violation of this policy. More information on these drugs can be found at http://www.911rape.org/

- Use of alcohol or other drugs will never function to excuse behavior that violates this policy.

Sexual activity includes:

- Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; any intentional bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice.
- Intercourse however slight, meaning vaginal penetration by a penis, object, tongue or finger, anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact or genital to mouth contact).

4. SEXUAL EXPLOITATION

   Occurs when a student takes non-consensual or abusive sexual advantage of another for his/her own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses. Examples of sexual exploitation include, but are not limited to:

   - prostituting another student;
   - non-consensual video or audio-taping of sexual activity;
   - going beyond the boundaries of consent (such as letting your friends hide in the closet to watch you having consensual sex);
   - engaging in Peeping Tommery;
   - knowingly transmitting an STI or HIV to another student.

   The requirements of this policy are blind to the sexual orientation or preference of individuals engaging in sexual activity.

SANCTION STATEMENT

- Any student found responsible for violating the policy on Non-Consensual Sexual Contact (where no intercourse has occurred) will likely receive a sanction ranging from

warning to expulsion, depending on the severity of the incident, and taking into account any previous campus conduct code violations.*

- Any student found responsible for violating the policy on Non-Consensual Sexual Intercourse will likely face a recommended sanction of suspension or expulsion.*
- Any student found responsible for violating the policy on sexual exploitation or sexual harassment will likely receive a recommended sanction ranging from warning to expulsion, depending on the severity of the incident, and taking into account any previous campus conduct code violations.*

*The conduct body reserves the right to broaden or lessen any range of recommended sanctions in the complaint of serious mitigating circumstances or egregiously offensive behavior. Neither the initial hearing officers nor any appeals body or officer will deviate from the range of recommended sanctions unless compelling justification exists to do so.

THE CONSENT CONSTRUCT

The most significant change to the reality of sexual violence has been a reformulation of the definitions we use to proscribe sexually violative behaviors in our society. More accurately, this decade has brought us a retreat from the legislative baggage that has been tacked onto statutory definitions of rape and sexual assault over many decades, in deference to a re-emergence and modernization of the common law definitions of these crimes. Before states enacted voluminous criminal codes, our law was taken from a basic set of rules that were borrowed from England and known as the common law. At common law, most crimes could not be consented to, though most intentional torts and a select few crimes were exceptions to the rule. For example, when two boxers brutalize each other on Pay-Per-View, the common law would have considered those boxers to have committed criminal battery as well as the tort of battery upon each other. Yet, the boxers' consent to the prize fight effectively abrogates any illegality that might otherwise have existed. Like battery, common law rape, the carnal knowledge of a woman by a man, not her husband, was a crime unless it was effectively consented to.

Over time, as these common law rules became codified by states, they collected moral, religious and evidentiary baggage that transformed this consent construct into a definition requiring the

use of force, a showing of resistance, or other physical harm in addition to that caused by the act of forced intercourse. Force was often defined very narrowly, as physical force. Under these codes, only women could be raped, and rape was limited to vaginal penetration exclusively. Degrees upon degrees of sexual misconduct, sexual battery, sexual assault, forcible intercourse, and involuntary intercourse became part of the legal lexicon.

To a great extent, we are still today saddled with statutory definitions of multivariate complexity, but states are beginning to reclaim the consent concept of the common law. At least for some degrees of sexual assault, a majority of states now have adopted consent-based definitions. Force may be an aggravating factor, or may serve as additional proof, but it is increasingly being abandoned as the *sine qua non* of rape. Where codes previously provided that sex against one's will constituted rape, modern revision now holds that rape is sexual intercourse without one's consent.

This shift represents a subtle yet all-important change. The onus of giving consent is taken away from the object of the sexual initiator, instead requiring that the initiator gain that consent from the object of the sexual attention before any permissible sexual activity may take place. This re-emergence of consent-based doctrine recognizes and ratifies a simple principle of the common law--our personal sovereignty. We have the right not to be acted upon by someone else unless we wish to be acted upon, and communicate that wish to the actor. Our silence is not our permission. You may not take my wallet simply because I have not said you cannot have it. Moreover, this restoration of the common law principles of consent aids in the uniform application of the laws. A murder victim never was required to resist an attacker in order to prove it was murder. A mugging victim need not resist a thief in order for the theft to occur. So, this reformulation restores a sense of symmetry to sex crime codes where anomaly has heretofore reigned.

EVERYTHING YOU NEED TO KNOW ABOUT CONSENT

- At the heart of the idea of consent is the idea that every person, man or woman, has a right--to personal sovereignty--not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so.

- With this idea comes the concomitant notion that consent can be broad or narrow, and can be limited, such as in cases where someone is willing to engage in some forms of sexual activity, but not in others.
- Consent to one form of sexual activity does not automatically imply consent to other forms of sexual activity.
- Consent may be given verbally or nonverbally, based on an active, informed, freely decided choice.
- Consent means you can't make assumptions about what your partner does or does not want. Absence of clear signals means you can't touch someone else, not that you can.
- Consent means two people (or more) deciding together to do the same thing, at the same time, in the same way, with each other.
- The idea of consent completely rules out any need to show the use of force, or any type of resistance.
- Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.
- Passively allowing someone to touch you in a sexual manner cannot be assumed to indicate consent.
- There is no duty for an alleged victim to fight off or act in any way to stop a sexual aggressor. But, there is a responsibility to communicate as clearly as possible.
- There are circumstances, as well, where even when consent is given, it is not valid. Consent would be invalid when forced, threatened, intimidated, coerced, when given by a mentally or physically incapacitated person, or when given by a minor.
- We can't play the game of "If she doesn't want it, she'll stop me." That's based on antiquated resistance requirements. It's not her job to resist, but yours to respect her boundaries, and to find out what they are if they are unclear.
- No means no, but nothing also means no. Silence and passivity do not equal permission.

- Men are not entitled to engage in or heighten levels of sexual activity like they are running through the bases. The idea that kissing always leads to fondling, which always leads to petting/fingering, which leads to some sort of intercourse is a notion that is based

on male sexual patterns and beliefs, only. Mutual exchanges must involve the expectations and desires of each person involved.

- To be valid, consent must be given prior to or contemporaneously with the sexual activity. You can't put it in first and see if she likes it later.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.
- Men often ignore the subtle signals sent by women that what is happening is not okay with them.
- Where you see assumptions being made by someone in a sexual context, this is an alarm. Look at those assumptions and see if they are reasonable. Unreasonable assumptions are usually policy violations.
- When you get to a point where someone says no, it's time to back off completely, or have a conversation about where the interaction is going.
- If you get a "No" and keep right on pressuring and continuing to interact sexually, you run the risk that your behaviors are a coercive influence on the other party.
- Respect for another member of the community is an expectation that all members are expected to uphold at all times, including in the context of sexual interaction. Respect means paying heed to verbal and non-verbal cues, desires, boundaries, and behaviors of others.
- Just because someone wants to be alone with you doesn't mean that you have a sexual license.
- Just because someone kisses you doesn't mean it's automatically going any farther.
- Making someone touch you is as bad as touching someone else, where no consent is given.

If someone won't touch you, and you have to physically manipulate them to get them to touch you sexually, you automatically have a consent problem. Unless they freely give consent, you can't take it.

DUE PROCESS AND FUNDAMENTAL FAIRNESS

It is incumbent on public colleges to provide participants in judicial hearings with rudimentary rights of due process, as guaranteed by the United States Constitution and the myriad cases interpreting the 14th Amendment, from which the due process rights derive. Often, many of the rights conveyed to students under the Constitution at public colleges are guaranteed to students at private colleges by contract, state constitutions and state and federal legislation. The Constitution mandates that private college judicial proceedings be fundamentally fair.

But if fundamental fairness and due process are guiding precepts for the campus judicial process, we must realize that these concepts are fluid, loosely defined, situational, and in some cases, jurisdictionally malleable. Some courts create rights where others see no rights. So, what is required in the campus judicial context? Does it make a difference between public and private institutions? Here are some basic rules common to all colleges and universities:

- A campus judicial decision must be based on a fundamentally fair rule or policy;
- The decision must made in good faith (without malice, ill-will, or bias);
- It must have a rational relationship (be substantially based upon, and a reasonable conclusion from) to the evidence introduced in the hearing;
- It therefore cannot be arbitrary or capricious;
- Sanctions must be reasonable and constitutionally permissible.[1]

Several assumptions are implicit in these rules. One is that even though private institutions are not required to provide hearings, it is a best practice to do so, and most do. Thus, we can add to this list that the following hearing-related rights attach:

- Respondents are entitled to written notice of the charges against them, including details of which rules are alleged to have been violated, basic facts of the alleged incident including time, date, place, identity of witnesses (or role of witnesses, if identity of a witness needs to

[1] Wood, N.L., & Wood, R.A., *Due Process in Student Discipline: A Primer*, J. of Coll. & Univ. Stud. Housing, Vol. 26, No. 1, 11-12, ACUHO-I, 1997, citing Wasson v. Trowbridge, 382 F.2d 807 (2nd Cir. 1967), and Winnick v. Manning, *supra.*

be protected, and is not essential to the determination of the case[2]), and a general description of the alleged violative behavior of the respondent[3];

- Respondents are entitled to notice of the time, date, and place of the hearing, which should be given sufficiently in advance for the respondent to adequately prepare a defense (2 to 10 days is sufficient unless the case is of unusual complexity)[4];
- Respondents are entitled to advance notice of the type and character of the evidence to be presented against them, in the form of a fact summary of expected evidence and witness testimony, or by direct inspection of statements, records, investigatory materials, and any other evidence that will be presented at the hearing[5];
- Respondents are entitled to notice of the range of possible sanctions if found responsible for a violation;[6]
- Accused students have the right not be suspended or expelled without a hearing unless it can be shown that respondent poses a substantial threat to life or property (and then they can be temporarily suspended for no more than two weeks, pending the outcome of a hearing);[7]
- The respondent has the right to have college judicial procedures followed without material deviations (those that interfere with fundamental fairness), where public and private colleges have established such procedures;[8]
- The respondent has a right to a fundamentally fair hearing on the charges. A fundamentally fair hearing has more elements to it than are immediately obvious:
    - ◊ For example, while colleges are not required to furnish students with stenographic transcripts of hearings, because of the cost, when a significant loss of liberty or property is threatened, students should be permitted to access the college's

[2] Where such information is essential, and a respondent insists on knowing the identity of witnesses, that information must be given, if the witness agrees to the release of his/her identity. If the witness refuses permission, they are not permitted to testify, and the hearing must take place in their absence. Where the witness is the key to the resolution of the case, it may not be possible to proceed with charges.
[3] Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961), *cert. denied,* 368 U.S. 930 (1961); Winnick v. Manning, 460 F.2d 545 (2nd Cir. 1972).
[4] Kaplin, W.A., & Lee, B.A *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decisionmaking, 3rd Ed*., San Francisco, Jossey-Bass, Inc., 1995.
[5] Where names of witnesses will be given in written form, obtain FERPA waivers from the witnesses for this release.
[6] Wood, N.L., & Wood, R.A., *Due Process in Student Discipline: A Primer*, J. of Coll. & Univ. Stud. Housing, Vol. 26, No. 1, ACUHO-I, 1997.
[7] Goss v. Lopez, 419 U.S. 565 (1975); Picozzi v. Sandalow, 623 F.Supp. 1571 (D.C. Mich. 1986).
[8] Turof v. Kibbee, 527 F.Supp. 880 (1981).

transcript/recording; or to make their own recording or transcripts of the hearing; or the college should provide a recording or transcript at the student's expense, if students are not permitted to make their own.[9]

- ◊ A fundamentally fair hearing should provide the respondent and complainant with similar rights. For example, a college need not afford the participants the right to compel the attendance of witnesses at the hearing, but if that right is afforded to one party, it must be afforded to both.
- ◊ Fundamental fairness is not affected by whether the hearing is open or closed to the public, unless the opening of the hearing allows outside influences that somehow bias or materially disrupt the proceedings and affect the outcome. Open hearings should not be held without the express written permission of the complainant and respondent[10], unless hearings are routinely open under state law, as in Georgia.
- ◊ Fundamental fairness also requires impartiality on the part of judicial decisionmakers.[11]
- ◊ Fundamental fairness includes ensuring the right of the respondent to present evidence and confront evidence against her/him.[12] Courts have yet to recognized the right of a respondent to question witnesses adverse to him/her, but such a right could be recognized as an element of fundamental fairness, where an inability to question key
- ◊ witness causes less than full revelation of relevant facts and results in a hearing that is lacking in fundamental fairness.

Many private colleges even go further, assuring their students the same due process rights as adhere to public college students. These include:

- The right to consult with and obtain the advice of an attorney (but not be represented by one) in a hearing in which the college charges are presented by an attorney (or perhaps, if the college presides through an attorney), or during which there are also criminal charges pending against the respondent arising out of the same incident, or where complex policies

[9] Esteban v. Central Missouri State College, 415 F.2d 1077 (1969); Gorman v. University of Rhode Island, 646 F.Supp. 799 (D.R.I. 1986).
[10] A FERPA mandate.
[11] Henderson State Univ. v. Spadoni, 848 S.W.2d 951 (Ark. App. Ct. 1993).
[12] Goldberg v. Regents of the Univ. of Cal., 248 Cal.App. 2d 867, 57 Cal. Rptr. 463 (1967).

and procedures and sophisticated rules of evidence are in place. No court has ever found a need to permit attorneys to actively represent clients in judicial proceedings. However, it is conceivable that in the most complex of cases, where expulsion is threatened, criminal prosecution has been commenced, and the college proceeds through its attorney, full adversarial representation might be appropriate;[13]

- If a right to remain silent is voluntarily granted, due process requires that no negative inferences be drawn from an invocation of that right by a witness or respondent.

Note: Due process does not include, as some mistakenly believe, any right to be considered innocent until proven guilty. Yet, presuming guilt would violate fundamental fairness, so perhaps no presumptions ought to be made at all.

RIGHT TO REMAIN SILENT/BURDEN OF PROOF

The burden of proof is not a particularly useful concept for hearing bodies. Burdens of proof are used in the civil and criminal legal systems, and can fall on different parties in different cases. In criminal law, the burden of proof is used to enforce the concept that a defendant is innocent until proven guilty. However, no such presumption of innocence exists in civil proceedings, and it need not exist in a campus hearing. This does not mean that guilt is presumed, only that a determination should be made on the basis of all the evidence presented, taking into account the totality of the circumstances. This is a distinctly different operation from a criminal trial. In a criminal trial, the prosecutor puts on his or her entire case. If, after that presentation, there is insufficient evidence that the prosecution has proved the facts to be as alleged beyond a reasonable doubt, the defendant goes free. The defendant does not need to present any evidence of his or her own. The presumption of innocence is a device used to ensure that a defendant's constitutional right to remain silent cannot be used against him or her. But, there is no right to remain silent in a campus hearing (unless you promise it). In a case where the presumption of innocence has not been overcome by the evidence and the defendant has not incriminated himself, the trial ends. Because no presumption of innocence operates in a campus hearing (unless you promise it), the process has a different goal. Instead of protecting the respondent, the

[13] Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); Richmond, D.R., *A Student's Right to Counsel in University Disciplinary Proceedings,* J. Coll. & Univ. L., 15(3), 289-297, 1989.

dynamic of the campus hearing is to discover the truth, and the best way of doing so is to hear all of the relevant evidence, and decide the case on that basis. To decide the charges solely on the basis on the testimony of the complainant would negate the "He Said/She Said" nature of sexual misconduct, and the need to see the full picture. There is one final reason that burdens of proof are not useful. For most judicial bodies that say they use the concept of a burden of proof in theory, it is not applied in reality when deliberations are made. This is because it really does not matter which party presented the evidence. Only the persuasive value of the evidence is considered.

BIAS

Some people equate judicial training with bias, especially in the sexual misconduct context. Such a belief shows a fundamental misunderstanding of the purpose and results of training, or perhaps bad experiences with poorly done training in the past. Done correctly, training equips judicial decision makers with the information and skills necessary to do their jobs competently, an essential element of risk management. To those who equate bias with training, consider this analogy: Imagine a rape trial in a criminal court where the prosecutor and defense counsel never went to law school, and have never tried a rape case before. The judge never went to law school either, never sat on the bench before, and has never tried a rape case. The jury was randomly selected from people who passed by the courthouse that day, and were given no instructions on the law or the facts by the judge. Will the defendant in this case get a fair trial? Will the alleging victim? No, it is impossible for justice to be done under these circumstances.

In a campus judicial hearing, the judicial decision makers operate as an amalgam of lawyer, judge and jury. It is an absolutely unique system, differing even from administrative law procedures. So, perhaps the analogy to criminal law is inapposite? But, if you were the defendant in the case just described, would you want your life and freedom to be determined in that courtroom, by those people, under those circumstances? Similarly, you would not want your case tried on a college campus under such ignorant circumstances either. This does not mean that lawyers need to be present, or that a judge need preside. What it means is that all who are involved in the process must be properly equipped to deal with the issues they will confront. To do the job competently in a sexual misconduct case, judicial decision makers must be well versed

in procedural rules, evidentiary rules, logic skill-building, case analysis, deliberation, consensus building, application of precedent and other key skills[14]. Information on these topics will not bias a judicial body. It will enable it.

THE STANDARD OF PROOF

Unlike the burden of proof, the standard of proof has central weight and importance to competent judicial decision making. The standard of proof is the measure of evidence needed to convince a body that the policy has been violated. The two main standards of proof in use, with rare exception, are the "preponderance of the evidence" and "clear and convincing evidence."

a. PREPONDERANCE OF THE EVIDENCE

The preponderance standard is the most often used in campus judicial hearings. It is simply defined as that amount of evidence that makes it more likely than not that the facts demonstrate a violation of college policy. "More likely than not" is variously defined at "50.01%" or "51%." It means that there is slightly more evidence favoring one side than the other. A common-sense approach may be more useful than numeric formulae. Ask yourself, are you *persuaded* by the all of the relevant evidence that a violation occurred. If you are, that is a preponderance.

b. CLEAR AND CONVINCING EVIDENCE

Clear and convincing evidence is often explained at length. It need not be. Clear and convincing is a higher standard than the preponderance. The test is this: If you find that the evidence is clear, and convinces you that a policy violation has occurred, this standard has been met. Where a preponderance requires only that you be *persuaded*, this higher standard requires that you be *convinced.* Rather than a 51% bare majority, there must be a high probability that the facts are indicative of a violation. There is no way to assign a numerical significance, it is always better to use common sense. Perhaps the following exercise will assist

[14] Precedent is only of value if your judicial body is involved in the sanctioning process, as many are.

you. There are no right and wrong answers, because each of these standards is a subjective opinion, not an objective concrete fact.

THE TYPOLOGY OF CAMPUS SEXUAL MISCONDUCT COMPLAINTS

The 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. **THE MOST IMPORTANT MESSAGE OF THIS WHITEPAPER IS THAT OF THE THREE QUESTIONS THAT CAN BE ASKED, THE SKILL IS TO CHOOSE WHICH ONE OF THE THREE APPLIES, AND TO ONLY ASK IT, TO THE EXCLUSION OF THE OTHER TWO**. 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

Let us start with force. Force is the classic paradigm for stranger rape, though it may be applicable to any assault, regardless of whether the offender is known to the victim. 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. Two things that complicate the force construct are the law's recognition of "forcible compulsion" and the Feminist revision of the meaning of "force."

We all have an intuitive understanding of what "force" means. If I hit you, hold you down, or act upon you violently, I use force. Feminist theory advocates that the act of penetration itself is enough to constitute force, but the logic of that theory would then make every act of intercourse forcible. This Feminist revision is really a necessary endrun around the classic understanding of force as violence, and is used to encourage expansive prosecution in states that cling to antiquated and obsolete force requirements and do not use modern, consent-based statutes. By essentially re-defining force as the absence of consent, more liberal prosecution is possible. However, arguing that "lack of consent=use of force" conflates force and consent in a way that is ultimately imprecise and confusing, and does not serve to help make the analytical distinction at the heart of this Whitepaper. Let me be very clear that I am not critiquing Feminist theory. I only feel a need to explain this artifice because of confusion it may create. That it is a useful and necessary artifice I do not debate.

The term "forcible compulsion" also adds to the confusion. If force is equated with violence, what then is forcible compulsion? It is recognition in the law that force can be applied without violence; that classic notions of force are too limiting as a construct. Many terms are used within policies and statutes to connote this more expansive view of force, including: threats, implied threats, intimidation, abuse, pressure, cajoling, coercion, harassment, duress and compulsion. This multiplicity is confusing, too. Any list of force elements can be distilled to four distinct, key descriptors. To me, 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. I will explain each in turn, but first let me show how my four terms interact with the synonyms given above.

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

In my assignment of some terms to my four force elements, there is some overlap. Abuse, for example, can signify physical abuse, sexual abuse, or emotional abuse. Harassment, in my terms, 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 I would classify this as quid pro quo harassment, on another I would argue that 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 of 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. For me, 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

I did a workshop on the West Coast recently, and the assembled administrators and I puzzled over whether threats and intimidation are different from one another, if at all.

This is a difficult question to answer, and for colleges whose policies prohibit both, they are often interpreted as synonyms. I do not believe they are entirely synonymous. I define intimidation as an implied threat, whereas I see threats as 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. I do not mean to suggest that just having power or authority over someone is inherently intimidating. When I talk about intimidation as a type of force, it describes a situation when someone uses their power or authority to influence someone else. For example, a female student once told me that she "was intimidated by her date because he was bigger than she was." I asked if he menaced her, or used his size to make her feel that she was in jeopardy. She said no. I think she may have felt intimidated, but that does not mean that he intimidated her. If he had pinned her into a corner, and had used his size to menace her, I would say that he used forcible compulsion. 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.

As an aside, I am frequently asked how sexual harassment and physical sexual misconduct converge and diverge on the college campus. This distinction, identified above, is one good example. In sexual harassment, we ask whether the alleged harasser's actions (or failures to act) had the intent or effect of changing the terms of the alleged victim's employment or educational setting. When we look at physical

sexual misconduct, we look at whether the accused engaged in certain deliberate behavior. After all, it would be nearly impossible for a man to have sexual intercourse without intending to do so. Certain non-invasive sexual contacts might not be intentional, and where they are not, college policy should be flexible enough to accept reasonable explanations. For example, if I brushed past a woman in a crowded bar, and space was so tight that my arm touched her buttocks as I passed, this is a touch for which there is a socially acceptable explanation. But, if in passing, I reached out to intentionally touch her buttocks, this would be sexual misconduct.

D. Coercion

Finally, the fourth element of force is coercion. I define it as a synonym for pressure, duress, cajoling and compulsion. I 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, I define coercion as an unreasonable amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards, I think. I can give you a sense of what I think is reasonable, but that is only my personal sensibility. I like to define coercion in terms of seduction (if we could only get our students to understand this distinction). 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. Other communities ask 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 this is one rollercoaster 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."

Do you see the intensity difference? I can talk myself up to you until I am blue in the face, and I have a First Amendment right to tell you how great I am in the sack. It's not coercive, it's obnoxious. But, if I turn on you, and start to attack you, rather than sell myself, there is a qualitative difference. If I assail your core values, your morals, your religion, I am crossing the line on intensity.

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

Consent is the second of the three constructs discussed in this Whitepaper. I have written previously on consent. I will not rehash that article here, but commend it to you, if you are interested. It is posted online at http://www.ncherm.org/pdfs/elimforce.pdf. 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 see if there was evidence 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. With all due respect to Johnny Cochran, and his famous "If it doesn't fit, you must acquit," defense in the O.J. Simpson case, I have my own pithy version for sex: "If there's no consent, you must relent."

While there is much that can be and has been said about consent, a summary will suffice here. As you may know, I have done student programs on sexual assault on over 900 campuses. I have developed a handout, called *Sokolow's Rule of Consent* that I give out at these programs, that tries to encapsulate the essence of consent in one paragraph.

Sokolow's Rule of Consent

In order for individuals to engage in sexual activity of any type with each other, there must be clear consent. Consent is shared sexual permission. Consent can be given by word or action, but non-verbal consent is less clear than talking about what you want and what you don't. Consent to some form of sexual activity cannot be automatically taken as consent to any other sexual activity. Silence--without actions demonstrating clear permission--cannot be assumed to show consent. There is a difference between seduction and coercion. Coercing someone into sexual activity is a violation just as much as physically forcing someone into sex. Coercion happens when someone unreasonably pressures someone else for sex. When alcohol or other drugs are being used, someone will be considered unable to give valid consent if they cannot appreciate the Who, What, When, Where, Why, or How of a sexual interaction. Individuals who consent to sex must be able to understand what they are doing. You will do well to keep in mind that because of this, "No" always means "No," but "Yes" may not always mean "Yes."

Campuses differ in how they define consent. Most campuses permit consent to be conveyed through word or action, though a small number do require verbal consent. No state's law requires consent to be verbal. While there are a number of questions that any campus conduct panel should ask with respect to consent, the more important question is "What specific words

(and/or actions) by the alleged victim gave you a clear indication that she wanted to engage in the specific sexual actions in which you engaged?"

Incapacitation

The third construct discussed in this Whitepaper 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 or 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 commonsense 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.

Can a Mercedes be a Sexual Metaphor?

I like Mercedes-Benzes. I have always wanted one. You know the one I mean, right? The red one. The convertible. The $100,000 one. Alas, I have chosen higher education, so the closest I get to that Mercedes is on Saturday mornings. I pick up a Krispy Kreme and a coffee, and I take my lawn chair down to the local dealership. I set it up outside the plate glass window, and just stare at that car for hours, as it goes round and round the turntable in the showroom. Pathetic,

huh? So, one night I go out drinking with my buddies from law school. We down a few beers, and they begin to brag about their success. They all went into corporate law. Big houses. Beach houses. Boats. Hometheaters. Three cars. Each. Three wives. Each (not all at once). Several of them own red Mercedes convertibles. They ask if I have one. Nope. Doing well, but not that well. Higher education law is very gratifying, I say, but the rewards are more intangible. Don't you want one, they ask? Heck yes, but I have a family to provide for, college to save for. Maybe when I retire. Maybe.

Then we have another few rounds. They ask, don't you feel you missed out, not going with the big firm and the big bucks? They're talking about exotic vacations, fancy clothes. You know, Brett, you deserve that Mercedes, they say. You work hard. I know I do, but I can't afford it. Have some more to drink. Finally, but the end of the night, I'm in my cups. They're egging me on now. Just lease it. You don't have to have $100k now. Pay later. I'm sufficiently drunk that I start to believe them. I work hard. I travel all the time. I deserve that car. I stumble out of the bar, and march right down to my local all-night, drive-thru Mercedes dealership. I pull up to the window, and the salesman greets me with "Hey, aren't you the lawn chair guy?" Why, yes, and I want that red convertible. Sure, he says, noting that I'm obviously drunk to the point of incapacity. Just sign right here. He even manages to tack on extra for the floor mats and undercoating. No one pays for undercoating. But, I sign, and drive off in my dream car. The next morning, I wake up next to my wife. Honey, I had the best dream last night. I dreamt I bought that Mercedes I've always wanted. She looks out the window and points. I don't think it was a dream. Whoops. I look out. There it is, in the driveway. The signed lease, too. $1,500 a month. Not a mortgage, a lease. My wife takes one look, and in the way only a wife can, tells me to take it back. I can't, I say. I signed a lease. She doesn't care. We can't afford it. Take…it…back.

I drive back to the dealership, and there is the guy from last night. I tell him he needs to take the car back. He laughs. I tell him I was drunk. I didn't know what I was doing. Yes, you sure were, he agrees. But, once you buy a prize, it's yours to keep. I insist. He refuses. I sue him (after all, I am a lawyer).

So, what is the judge going to do? Will I win? Does the dealer have to take the car back and cancel the lease? It may surprise you to know that the answer is yes. We formed an agreement, but in order for a contract to be legally valid, there must be a meeting of the minds. All parties to the contract must have a full understanding of all the terms of the agreement, and must accept them. Simply, we must understand Who, What, When, Where, Why and How. If any term of the agreement is missing, there is no contract. The agreement is invalid. The court will require the dealer to take the car back and cancel the lease if I was incapacitated, did not know what I was doing, and that was known to the dealer, or he should have known.

Why do you care about a Mercedes? You care because an agreement to have sex is a contract. Just like buying a car, buying a house, getting married, and any number of personal transactions. This story helps to cut the through the mythology. I wanted the car (sex). I came to your dealership (room). I signed the deal (consented). But, I did not understand all the terms and conditions, so no sale (sexual misconduct). I think we would all agree that the dealer took advantage of a drunken customer, regardless of whether I made it easier for him to do so. The law protects us from being taken advantage of, by unscrupulous dealers and opportunistic sexual aggressors. Incapacity is a broad legal concept. Applying it to sex is just one narrow window of its applicability. (For the record, I neither own nor lease a red, $100,000 Mercedes convertible).

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." How does that hold up to the Mercedes analogy? The salesman at the drive-in window is incapacitated too. 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, I have NEVER seen a true case of mutual incapacity. I don't doubt it exists, but it is very rare. I have seen plenty of cases where two people where 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). I have heard stories of students using Cialis to counteract what they call "beer dick," and if you have that factual situation, you'll have to piece through whether that evidence indicates intentional predation, or whether the mutual incapacity makes it impossible, from an evidentiary perspective to determine who did what to whom. Sometimes, students feel badly about a sexual experience, but the evidence is insufficient to support a finding of sexual misconduct.

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 complains 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. This Whitepaper just uses the pronouns of the usual suspects, for convenience). 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

An interesting question I am often asked 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 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 is 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.

   c. 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.

d. 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.

In rare complaints, you may need a few other consent-based inquiries. For example, you may need to ask whether the alleged victim was of legal age. Or, if the alleged victim agrees that she did consent, you may need to ask whether she withdrew that consent. If she did, and she communicated that withdrawal clearly to the accused, if he did not stop, that is sexual misconduct. One of the benefits of this analytic is that it will help you to more effectively control inflammatory evidence, such as evidence about the sexual character of the alleged victim. When you are asking only these three questions, it becomes more difficult to see how any information about sexual history or character can help to answer any of these questions. Sexual character is usually only of interest to us when those sexual politics enter into our inquiry again.

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.

DELIBERATION

Commonly, colleges have established a defensive posture as policy with regard to records of hearings and deliberations. It is becoming clear that this defensive posture is backfiring. It is standard procedure at a majority of colleges and universities, as a matter of policy, not to keep a verbatim record of campus hearings. It is a nearly uniform practice among colleges not to keep verbatim records of campus judicial deliberations. This has enabled the defensive posture. For example, suppose a student sues his or her institution, alleging that the campus hearing in which they were charged was highly irregular and in violation of the fundamental fairness owed them. As a legal matter, the complaining student has the burden to prove to the court that the hearing proceedings were irregular and fundamentally unfair. Without access to a compete record of the transactions of the hearing, it will be very difficult for the complaining student to prove that the college did wrong, and that the hearing was in some way flawed.

In recent years, a large number of college administrators have come to understand that this defensive posture has worked against them in cases where they could have vindicated their actions if they had a complete transcript or tape recording of the hearing. Therefore, many colleges have adopted a policy of allowing verbatim notes or recordings to be made of the hearing, but almost all colleges have not permitted the record to continue to be made during deliberations, again so that records of any errors made by adjudicators could never be used against the college in later legal proceedings.

Suppose a hypothetical sexual misconduct case wherein the plaintiff (who was the respondent) student alleged that during the hearing, evidence was admitted against him that prejudiced the fairness of the process. He alleges that two statements were prejudicial. One witness, a police

officer, testified that when the complainant came to the police station to file a report, she "looked like a rape victim." The statement was unsupported by any foundational testimony from the police officer. It was opinion testimony, lacking in credibility. The plaintiff also complained that the complainant's best friend was called as a witness, and stated, "He is a rotten SOB who is well known on this campus for mistreating women." The respondent objected to this evidence at the hearing, but the student chair of the judicial panel decided to allow its admissibility, and questioned the best friend as to how she knew this, and if she had ever had any dealings with the respondent, which she had not.

After the close of all the evidence, the judicial panel met in closed session to deliberate. No record was kept. During the deliberations, the panel made a decision to ignore the testimony of the police officer, because it was of questionable foundation. Then, the chair of the judicial panel instructed the panelists to disregard the testimony of the best friend, that the respondent was an SOB known for mistreating women, because this was testimony from a witness who proved her bias by her statements, and could not factually support the hearsay/opinion she presented. The panel then deliberated on all the other evidence, and found the respondent in violation. Reasons for the decision were not given.

When the plaintiff sued, he challenged the fairness of a judicial process that allowed evidence that was inflammatory conjecture without credibility and relevance, and should not have been admitted. The college defended its actions by arguing that it probably wrong to admit the evidence, but harmless error because the evidence did not in fact prejudice the proceeding because this evidence was not used as part of the deliberations.

Yet, the only record of the case shows that this testimony was admitted. The college now has to show that when the case was decided in closed session, those inflammatory facts and opinions were disregarded by the adjudicators, and were in no way part of the foundation of their decision against him. This college is going to have a tough time proving that its deliberations were fundamentally fair without some record of the deliberative session.

Colleges and universities need to adopt updated recording and retention policies to counter cases like this one. Rather than tape record full deliberations, I recommend developing a deliberation report, summarizing the evidence presented, clarifying any evidence discounted in deliberations and why, and demonstrating the detailed basis for the conclusion reached. This report should then be given to the parties at the end of the proceedings.

IMPACT STATEMENTS

Many colleges offer the participants in a sexual assault judicial hearing the chance to provide impact statements. An impact statement is an opportunity for the participants to give the judicial decision makers some insight into how the incident in question has effected their lives. Much of the evidence at the hearing will concern the event at issue, rather than giving a more global account of how the participants have been changed by the incident. Making an impact statement allows the participants to address these issues, which might not otherwise be strictly relevant. Impact statements are not evidence per se, but can serve to weigh on the judicial decision maker's determination of the credibility of the testimony, and can weigh heavily on the sanctioning process. Many colleges only allow the complainant to make an impact statement. A more evenhanded approach would allow both the complainant and the respondent to make impact statements. They should be informed in advance if they will be able to make impact statements, so that they can prepare their thoughts or a written statement. Much of a victim's impact statement may reiterate testimony already given regarding rape trauma syndrome. However, the impact statement may in some cases afford the judicial body its first opportunity to assess the complainant's testimony and credibility in the sociological and psychological context offered by the body of knowledge that comprises rape trauma syndrome, and to assess its evidentiary value to the case.

It may be advantageous to limit the impact statements to a reasonable amount of time, or to a written statement. If given orally, they should not be read until a conclusion is reached, but before a sanction is determined. Before the hearing commences, select who will give their impact statement first by a coin toss or other neutral method, and so inform the participants. Do not allow participants to bring prejudicially inadmissible evidence to the attention of the judicial

body through the vehicle of the impact statement. You may need to warn a student or cut off a statement in order to prevent the abuse of this privilege. While you may expand the rule of relevance to allow the participants to address how this incident has impacted their lives, that expansion should not be at the expense of any of the other evidentiary rules governing the hearing.

Sanctioning for Sexual Misconduct

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 nine 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 or 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 more 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.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader. Brett A. Sokolow, JD, is President of the National Center for Higher Education Risk Management (NCHERM) in Malvern, Pennsylvania. Mr. Sokolow serves ten colleges asoutside counsel, and has served as a consultant to over 650 colleges and universities. Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the American College Personnel Association (ACPA), where he is Vice President for Education of the Commission for Student Conduct and Legal Issues. He is a member of the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees. He is Editor Emeritus of the Report on Campus Safety and Student Development. Mr. Sokolow has authored ten books and dozens of articles on campus security, Clery Act compliance, student conduct, risk management, problem drinking, and sexual misconduct. www.ncherm.org

Sokolow, B. (2005). Whitepaper: The typology of campus sexual misconduct complaints. Retrieved at www.ncherm.org.

Sokolow, B. & Schuster, S. (2004). The 2004 NCHERM campus sexual misconduct judicial training webinar. Retrieved at www.ncherm.org.

Sokolow, B. (n.d.) Sanctioning for sexual misconduct. Retrieved at http://www.ncherm.org/pdfs/SANCTIONING_SEXUAL_MISCONDUCT.pdf.