

**THE NATIONAL CENTER FOR
HIGHER EDUCATION RISK
MANAGEMENT (NCHERM)**

**COMPREHENSIVE
SEXUAL MISCONDUCT
JUDICIAL PROCEDURES**

BY: BRETT A. SOKOLOW, JD

This Manual is intended to provide assistance in writing campus conduct codes, but is not given and should not be taken as legal advice. Before acting on any of the ideas, opinions or suggestions in this Manual, readers should always check first with a licensed attorney in their own jurisdiction.

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COMPREHENSIVE SEXUAL MISCONDUCT JUDICIAL PROCEDURES

THE SEXUAL ASSAULT RISK MANAGEMENT APPROACH

Risk management is a multidisciplinary field, crossing such diverse areas as law, insurance, management, law enforcement, and many others. Higher education risk management involves faculty, staff, administration and students within the campus environment, and many of the support organizations, groups and resources of the surrounding community. Risk management is exactly what it sounds like, the field or science associated with the management of risk. The management part extends to proactive efforts to prevent risk-causing events, and reactive efforts to address risk-related incidents as they occur. The risk part refers to events, acts, behaviors and attitudes that can lead to institutional liability/vulnerability, injury to a member(s) of the community, poor public relations and/or media coverage and other negative consequences. Risk management is a body of knowledge that identifies high-risk issues, and enables institutions to develop cohesive approaches to avoiding negative incidents and their negative consequences.

Today, higher education risk management is itself a hot topic, focusing on current hot button issues like binge drinking, fraternity/sorority relations, and campus diversity. These issues are often in the news, and colleges are endeavouring to find new and creative ways to address these volatile challenges. Among the top challenges colleges face is the issue of sexual assault. A cohesive sexual assault risk management strategy is essential in today's campus environment.

Envision a sexual assault risk management strategy as a large protective tent or canopy, supported by five pillars. Without each pillar, the tent will not stand. With a pillar at each corner, and a fifth at the center, the tent girds powerfully against all manner of wind, rain, snow, and other wrathful natural elements that seek to penetrate the protective zone under the canopy and pull it down. With the right five pillars, a college can create a protective canopy that enables it to effectively manage all the possible risks that sexual assault presents.

Metaphors aside, proactive risk management really is a win-win situation when approached properly.

THE GOALS OF THIS PROCEDURAL GUIDE

Effective sexual assault risk management practices will decrease the likelihood of sexual assault on college campuses, thereby protecting students and helping to insulate colleges from a potential source of litigation. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by perpetrators, because college adjudications will be less likely to violate their rights. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by survivors of sexual violence, because the college will be less likely to violate their rights. Effective risk management practices will increase the likelihood that colleges will win lawsuits if they arise out of incidents of sexual assault. Effective sexual assault risk management practices will decrease the likelihood of lawsuits between survivors and perpetrators. Effective sexual assault risk management practices will help colleges to maintain a reputation for safety, and for dealing appropriately with campus crime when it occurs. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by campus and local media seeking access to campus crime information. Effective sexual assault risk management practices will increase the likelihood that survivors and perpetrators receive vital services at a time of crisis. How will it do all this? By erecting these five pillars:

- **A Proactive Campus Sexual Misconduct Policy;**
- **Comprehensive Sexual Misconduct Judicial Procedures and Training For Judicial Officers;**
- **Creation of a Trained, Campus-Wide Sexual Assault Response Protocol/Network;**
- **Risk Reduction Through Education, Safety and Awareness;**
- **Compliance With Federal and State Tort and Sexual Assault-related Laws.**

It is important to understanding the supportive structure of the canopy as a team effort. Take one of the five pillars away, and the canopy will totter, perhaps fall. It will expose the protected underside to the elements. Take away two pillars, and the canopy is sure to collapse. For example, translating this metaphor into reality, even if a college has excellent educational programs, fair and comprehensive judicial procedures, and a campus-wide sexual assault response network at the ready, these elements cannot be brought into effective interrelation if the policy discourages victims from coming forward. Putting the five pillars into place creates a unified, cohesive system that will support a far sturdier canopy than the pillars could support individually.

This guide is designed to help you construct one of the pillars of a holistic approach; comprehensive sexual misconduct judicial procedures. Other NCHERM publications address the other four pillars.

OVERARCHING THEMES OF THE RISK MANAGEMENT APPROACH

Campus sexual assault victims rarely make formal reports of their assaults. It is the legal and moral responsibility of the campus community to change that reality. Victims are reticent to report for many reasons, such as a lack of awareness that an incident constitutes campus sexual assault or rape, fear that friends and/or family will not support or believe them, fear that they will be blamed by authorities, or fear that they will be put on trial, opening their past and present behavior to public scrutiny. This last reason, fear of secondary victimization at the hands of those to whom reports are made, is the strongest "structural impediment" victims cite for not coming forward.

A structural impediment is a systemic factor that makes some aspect(s) of a college's sexual assault policies, procedures or protocol non user-friendly (simplicity and user-friendliness are hallmarks of the risk management ethic). Structural impediments discourage students from reporting incidents and accessing the college's response system. Structural

impediments can be minor and major. For example, take a look at the index of your college's student handbook. Look under "R." Is there an entry for "Rape"? A victim in a panic, trying to find out what she should do, looking for your policy in the handbook, will look under "R" if she thinks she was raped. In her distress, she may not think to look under "S" for sexual assault or sexual misconduct. Even if there is no policy using the word "Rape," specifically, creating an index entry that reads, "Rape—see sexual assault" will eliminate a minor structural impediment. An example of a major structural impediment would be a college that limits its jurisdiction over incidents by imposing a short period of limitations in which reports must be made.

Structural impediments, considered in their totality, have a strong influence on the perception of how a college addresses campus sexual violence. 7 out of 10¹ students on college campuses, asked for their opinions on how their administration handles sexual assault complaints, say that they do not have confidence in the process or those who administer it. This staggering and often undeserved vote of "no confidence" is typical of students on college campuses, whether based on rumor, implication, evidence, or assumption.² Moreover, students don't just see bias as the problem, but a perceived incompetence coupled with a desire to sweep rape under the carpet.³ Most victims feel that the costs of reporting clearly outweigh the benefits. Students and victims perceive the manner in which their campus approaches sexual assault negatively because of all the structural impediments they encounter, although their concerns are usually couched in less technical terms. While it is true that some small number of colleges create and maintain structural impediments intentionally, most others simply are not sensitized to their presence and operation, but student opinion does not recognize this nuance, and often, neither does the media. A negative perception is hard to overcome.

¹NCHERM, Ltd., internal survey instrument data. 1997-8. Unpublished.

²*Id.*

³*Id.*

The topics in this guide evolve the judicial procedures risk management pillar with an eye toward identifying and eliminating structural impediments to the proper functioning of an effective sexual assault risk management strategy. Though most colleges do not intentionally create systems that discourage students from coming forward about sexual violence, there is much that colleges can and must do in order to create a fair, just, competent and truly user-friendly environment, for both victims and the students they accuse.

SHOULD COLLEGES ADJUDICATE SEXUAL MISCONDUCT?

Hotly debated on campuses and at student affairs conferences, college administrators are still divided over the issue of hearing sexual misconduct complaints. Some feel they have a right or a duty to hear allegations that arise out of incidents between students on campus. Still others feel hearing such complaints may open Pandora's box. Hearing sexual misconduct complaints requires trained adjudicators, sophisticated knowledge of the law and rules of evidence, and proceedings that are increasingly coming to resemble adversarial courtroom battles, not to mention the fact that colleges are increasingly being sued by students whether campus adjudications are conducted properly or not.

Those who oppose hearing the policy equivalent felonies on campus cite three primary reasons for their opposition:

- 1) There is nothing that requires colleges to adjudicate violations that are tantamount to felonies, and there is therefore no reason that they should open themselves to potential legal liability for doing so;
- 2) These complaints can and should be heard by the criminal courts, which are better suited and prepared to deal with felony trials; and
- 3) College adjudicators lack, and should not be required to attain, the legal training needed to handle these complex complaints, and therefore can commit mistakes unknowingly

which only serve to agitate rather than resolve the situation, and often make a mockery of “campus justice.”

These commonly offered reasons interweave to reveal a basic misunderstanding of the issue, and a lack of appreciation of the necessity for colleges to adjudicate sexual misconduct complaints. First, let us look at the issue from the legal perspective. Criminal courts are not the ideal venue the dissenters think they are. While it is true that the criminal justice system’s approach to sex crimes has improved dramatically in the last decade, it is erroneous to equate improvement with achievement of the goal. The advent of rape shield laws and victim advocates represents progress in the right direction, and pockets of enlightenment--where police, prosecutors, judges and juries take this issue seriously--exist throughout the country.

Yet, those places are still very much the exception. More common is the grilling by police officers to which victims are subject before they ever file a complaint. Most prosecutions operate to put the victim on trial in public, and juries are all too willing to believe that date rape is just a type of seduction. Only one in one thousand date rapists is ever convicted. Couple those grim facts with defense lawyers who use every trick in the book to cast doubt on a victim’s credibility and abuse the sequestration rules to keep key support people out of the courtroom during trial, and what emerges is a system that is more likely to revictimize those it presumes to help. For all those proponents of “taking these cases to the criminal courts where they belong,” you need to understand the harsh reality to which you are consigning victims. It is certain that victims understand it. Known offender rape is the most underreported of all violent crimes, and it is in no small part the systemic flaws of the criminal justice system which dissuade victims from reporting and seeking prosecution.

A second legal consideration is tied to the criminal prosecution issue and creates an untenable choice for colleges that refuse to handle these types of complaints. In most rural areas of this country, the backlog for a criminal rape prosecution is three to six months from

the time an indictment is handed down until the time of trial. In metropolitan areas, it is not uncommon to have delays as long as one year, and in some places, two years in typical. Public colleges may temporarily suspend students accused of violent acts without a hearing, but only for short periods of time, given due process considerations. Private colleges often have contractual and bail issues that yield the same problematic result.

To illustrate the problem this causes, imagine the following scenario. Mark, a sophomore at the State College of Knowledge, is accused of raping Kelly, a freshman at the college and Mark's date at a fraternity party. Kelly reports the assault to the Dean, who tells her that her college does not handle sexual assault complaints, and that she ought to go to the police. She presses charges, and Mark is arrested, arraigned, and soon after, indicted. This is his first offense, and he is released on bail shortly after arraignment, as are almost all college students charged with sex crimes. Where does he go when he gets out? Back to campus, to live in his dorm room and attend classes until his trial, which may be up to two years away. He will probably graduate before he has his day in court.

Mark is now back on campus, free to move as he will. Free to rape again (as a reminder, rape has the highest recidivism rate of all crimes, in the 74% range). The Dean believes that Mark is a "known danger," and a "foreseeable risk," and understands that if Mark does it again, the College will be vulnerable to a negligence suit by his next victim. The Dean decides that she wants to suspend Mark until the trial, just to be safe. She tells Mark to be out by Friday. On Thursday, the Dean is slapped with a preliminary injunction which bars her from suspending Mark, pending the outcome of Mark's suit in federal court against the College for depriving him of his property interest in his education without the required procedural due process of law, in violation of his rights under the 14th Amendment of the United States Constitution. You see, Mark is entitled to be notified of the allegations against him, to have a hearing during which he may confront the witnesses against him, and to be found in violation only if substantial evidence is produced against him. Only then may he be separated from the College for that length of time. This analysis also applies to those colleges

that make it their policy to await criminal resolution of the charges before hearing the dispute on campus, and those colleges which do not hear “off-campus” incidents.

Or, suppose this is the private College of Knowledge. Federal due process concerns do not apply. Mark sues instead on the basis on his contractual relationship with the College, which he contends the College has breached without proof of any wrongdoing on his part. Just for good measure, he throws in a state due process claim, because this is one of the many states where state action is not required for due process protections to attach. Win or lose, the College is courting a costly lawsuit and negative publicity. Is the College caught in a conundrum? If it leaves Mark on campus, it may endanger students and leave itself open for tort liability. If it kicks Mark out without a hearing, it also risks a lawsuit. Should it, therefore, hold a campus hearing? Must it?

The third and most compelling legal reason for colleges to hear campus sexual assault complaints is that federal law requires it. Lively debate in legal circles has surrounded this issue, but it is now clear that Title IX requires an adequate and prompt resolution of sexual harassment complaints, usually meaning suspension or expulsion for severe sexual misconduct incidents (for more background on the Title IX requirements, please visit <http://www.nchem.org/nchem/whitepaper1.cfm>). There are only two ways to suspend or expel a student; by their consent or as a consequence of a policy violation.

From the risk management perspective, a campus hearing is infinitely preferable to the scenario with Mark and Kelly, described above, which is a sure-lose situation. Certainly, there are no guarantees that the college will not be sued as a result of the way it conducts the campus hearing, but that is why effective risk management is the answer, rather than deciding not to hear sexual misconduct complaints on campus. Effective risk management will put the college in a position to be able to defend its policies, hearing board procedures, and its decision, should they be challenged in court. A well-trained judicial board does not need to be an assemblage of legal scholars, though lawyers should no doubt be involved in

crafting the process and training the board. The best defense a college can have is that the students had notice of the policies, and that the adjudicators made their decision in light of the evidence, and in accordance with those policies via consistently and fairly applied procedures incorporating basic due process protections and victim's rights.

A common reaction to an onslaught of litigation is to run from whatever practice is giving rise to the potential liability. Running from the adjudication of sexual violence on college campuses is neither an adequate nor viable response to such litigation. In fact, the relevant legal and risk management principles involved suggest that colleges must hear these complaints in order to avoid even greater potential liability, and that the proactive risk management techniques elaborated below can help to minimize the risk that colleges face when they hear these complaints.

THE PURPOSE OF HEARING SEXUAL ASSAULT COMPLAINTS

It is popular on college campuses today to choose to view the college judicial system as a vehicle and opportunity for educational resolutions to policy violations. This is a healthy approach to the extent that it means differentiation of the college judicial system from the criminal justice system. College hearings are not criminal trials. No one can be put in jail as a result of a college hearing. Differences include the levels of proof required, the format, who adjudicates, and the involvement of attorneys, to name but a few. College hearings are not entirely civil either, since loss of liberty and property rights are at stake. Civil proof standards are used in campus hearings, but evidentiary rules and certain constitutional rights are drawn from both the civil and criminal legal fields. Thus, college hearings are very much a hybrid entity of the two systems, while also incorporating other aspects, which make college hearings unique within the administrative law field.

Differentiation exists in the use of hybrid and unique jargon, as well. Very few colleges refer to their judicial processes as "trials." They are called "hearings." "Charges" are not

filed against students. "Complaints" are made. Alleged perpetrators are called respondents, and alleged victims are complainants. Complaints against respondents do not allege "offenses" or "breaking the law," but rather allege "violations" or "infractions." "Findings" are preferred to "Verdicts." "Punishments" are not meted out to violators, they receive "Sanctions." Those who receive sanctions are not "guilty," but found "responsible." Though linguistic distinctions are important for setting a tone, some colleges take their educational mission too far, giving greater emphasis to rehabilitative efforts than to outcomes appropriate for remedying the misconduct.

Hearing a complaint of rape or sexual assault, though it may be called something else on campus, is a serious matter. These offenses are equivalent to felony-level crimes in most states. Yet, when a respondent is found to be responsible for violation of an institution's policy on non-consensual sexual intercourse, this be viewed purely as an educational opportunity. Remedial action is required by Title IX, and while educational sanctions may work in some situations, college administrators must also be willing to discipline, when necessary. Too many colleges, in an effort to retain an educational judicial focus, are reticent to suspend or expel student violators. Colleges must acknowledge and accept that their role at times demands a separation from the institution in order to remedy a Title IX discrimination and protect members of the community. In the absence of serious mitigating factors, colleges have to be prepared to mete out separation-based sanctions, not just educational sanctions, for severe sexual misconduct. To fail to deal swiftly and assertively with sexual violence is a failure of institutional duties under negligence law, and quite possibly Title IX.

It is also an untenable morally relativistic position to give only educational sanctions where the same complaint tried in criminal court could result in imprisonment. Suspension and expulsion need to be the default sanctions for severe violations of your sexual misconduct policy, or you are courting a risk management nightmare. Serious sanctions are also necessary if your policy is to have any deterrent effect. Otherwise, students who are

aware that you fail to deal meaningfully with sexual violence will feel as if they have an unfettered ability to commit conduct violations.

STRUCTURAL/NON-CONSTITUTIONAL PROCEDURAL HEARING BOARD ISSUES

- *Charging a Student and Probable Cause Determinations*

It is possible for an alleged victim to make a first report to a number of different contact points throughout the college community. If, after meeting with any of these contact points, the alleged victim determines that he or she would like to pursue a college disciplinary hearing, the contact point should direct the student to meet with the judicial administrator or whichever administrator on your campus is responsible for code of conduct matters.

Once a meeting is arranged, the judicial administrator should outline the options available to the student, and should indicate how a judicial proceeding will work, along with its possible outcomes. If the victim decides to make a complaint, the judicial administrator should take a written and preferably recorded statement of the alleged victim's account of the incident. Or, the alleged victim may give such a statement directly to the campus police or security force, depending on how your complaint/investigation process is structured. The alleged victim and the judicial administrator should review the school's sexual misconduct policy together and decide what policies the alleged perpetrator should be accused of violating.

After meeting with the judicial administrator, the student should meet with campus police or security personnel to file a crime report. The police (or other appropriate department) should conduct a full investigation and report the results to both the judicial administrator and the student making the complaint. If your school does not have a campus police or security force, the judicial administrator should direct the student to the local police with jurisdiction.

The next step involves a matter of choice for colleges. Some institutions proceed directly to notifying the accused, scheduling a hearing, and convening the hearing board. However, other schools utilize an intermediate step to establish whether there is “probable cause” to take the matter before the hearing board. These schools call the accused student before the judicial administrator, so that his or her version of the incident may be recorded in written and preferably recorded form. Then the judicial administrator, based on the results of the investigation and the statements from the students involved, makes a determination as to whether the incident should be put before the hearing board for adjudication. There is a procedural fairness issue to be considered here, and that is whether the judicial administrator will allow every allegation to go to a hearing, or whether it is unfair to an accused student to be subject to a hearing based on an unsupported or bare accusation. There is some support in the Title IX Sexual Harassment guidance for the proposition that conducting a hearing without any evidentiary support for the complaint would be unfair to the respondent. But, if there is any evidence to support the complaint, no matter how thin or circumstantial, it is best to allow the hearing to proceed.

While this intermediate step may be more laborious, it may also be crucial for another reason. Often, the statements by the accused and the alleged victim made at this time are fresh, having been given soon after the incident. They help to outline the conflict concretely before the parties have the opportunity to spend a week preparing to argue and defend the allegations. Thus, if there are conflicts in testimony at the hearing, the hearing board members may be able to use the written statements to clear up any discrepancies.

Many colleges also use this initial meeting, or a subsequent one, as an opportunity for informal resolution, and that is a best practice. If, after an explanation of the evidence, the results of the investigation, and the possible repercussions, the accused student wants to admit the infraction and accept a sanction without a hearing, that is an efficient way to address incidents.

Note: If the campus or local police have already taken a written or recorded statement from the victim and/or the accused, the judicial administrator may use these statements in lieu of the statement mentioned above.

Nota Bene: If a complaint is made against the student, it is important to inform him or her of the full range of possible policy violations, not just the most severe, most general, or most likely violation.

- *Sexual Misconduct Hearing Board*

The first issue is whether or not to create a discrete hearing board specifically for sexual misconduct complaints. Many colleges have adopted separate boards, but this is not the only way to do it. As long as the board is well-trained to hear sexual misconduct complaints, whether it is a separate body or a board that hears general college misconduct complaints is really only a matter of institutional preference. If your college possesses the resources and is so inclined, creating a separate board just for sexual misconduct complaints can have the benefit of helping to reduce another structural impediment to reporting. Seeing that the college has established and trained a hearing board just for sexual misconduct complaints sends a message about how seriously the college takes sexual violence, and provides a sense of specialized competence with this type of complaint, which is reassuring to complainants, and hopefully to respondents as well.

- *Board Composition*

Many colleges today have hearing boards that are composed of a combination of faculty, staff, administrators, and students. Hearing board composition is one of the main structural impediments to reporting. If an alleged victim seeks a confidential resolution, she (or he) generally will not choose a process where there is a board on which fellow

students sit or current or future professors will hear her complaint. Complainants are usually much more comfortable with an administrative panel. Should students and staff be absolutely barred from adjudicating sexual misconduct complaints? If your college is large enough to sustain a pool of adjudicators out of staff and administration only, there is no need to add students and faculty to the pool. If, however, institution is small, and finding adjudicators is more difficult, or if you seek democratic inclusion of campus groups in the process as a matter of principle, simply allow the student-parties involved in the hearing the option of requesting on a case-by-case basis that students and/or faculty do not sit as adjudicators at that hearing. Where the student-participants differ on their preferences, ask them to submit a one-page paper arguing for their preferred board format, and decide accordingly on the basis of the strengths of the arguments presented.

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

- *Hearing Board Size*

- Hearing board size is significant in eliminating a structural impediment. Some colleges have a one-person board, or sometimes as many as twelve. With a hearing board of just one person, an alleged victim might fear the omnipotence of the adjudicator, where the opinion of one person will determine the outcome without perspectives from other adjudicators. On the other side of the spectrum, an alleged victim might fear having to tell twelve people about the worst experience of her life. It represents too much exposure, a feeling of vulnerability, and especially at

small colleges, increases the risk that the rumor mill will leak information, thereby destroying the confidentiality she sought. So, what is a good number? Well, that depends on whether or not unanimous or majority voting is used, as will be discussed below. If a majority vote is required, your hearing board should be odd-numbered, which means three, five seven or nine. Few colleges have a sufficient pool to create a seven or nine-member board, and it is still a cumbersome and possibly intimidating size. Five is good and three works even better. It is my perspective from observing hearings on many different campuses that three member-panels are the most efficient and effective format.

- *Board Training*

Some colleges say they won't train their hearing boards on sexual misconduct issues because it will bias them in favor of the victim. This is like saying that in criminal cases, the judge should not know the rules of evidence, there should be no expert witness testimony to educate the jury, and the judge should not charge the jury with instructions on the law, because it will bias the outcome. Not training your board will get you sued because your board will not know what it needs to know to make the proper decision, and from that liability is but a misstep away.

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

traumatized by recounting the events of the incident. Providing a box of tissues would be kind.

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

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

- *Voting*

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

- *Burden of Proof*

Who has the burden of proof in a sexual misconduct complaint? The alleged victim/complainant does on many campuses. It is she who must persuade the board by the sufficiency of the evidence she offers that what she alleges did in fact happen and constitutes a violation of policy. The burden of proof is different from the standard of proof. In practice, very few hearing boards are actually able to understand and apply this concept. It is, in reality, not relevant to what hearing boards actually do. They hear all of the evidence on both sides, and make a determination based on the totality of that evidence, regardless of which party that evidence comes from. I suggest that you not get overly hung up on burdens of proof. In fact, the best practice is to get rid of them entirely, and base your decision on all the evidence presented, no matter who presents it. This idea is tied to whether you allow accused students the right to refuse to answer questions. You are not required to provide this right, and we do not suggest that you do. But, if you do, and you are a public college, you should not draw a negative presumption from the

refusal to answer. Thus, it is simplest to avoid burdens and the idea of innocence until proven guilty. This is not a courtroom, students must answer your questions, or they always have the opportunity to refuse to participate (with negative consequences), or withdraw pending resolution of criminal charges. (For a broader discussion of this issue, please visit <http://www.nchem.org/nchem/burdenofproof.cfm>).

- *Standard of Proof*

The standard of proof is the evidentiary standard by which a complaint is decided. Most colleges use the preponderance of the evidence standard or the clear and convincing evidence standard. Four colleges use the proof beyond a reasonable doubt standard, but they are truly anomalous. A preponderance of the evidence means that it is more likely than not that a policy violation has occurred. The clear and convincing evidence standard is a higher standard where the truth of the facts as asserted by the victim must be shown to be highly probable--they must clearly and convincingly establish a policy violation.

Generally, the preponderance of the evidence standard is the better standard. Why then are colleges split evenly in using the two standards? Many colleges feel that where expulsion is possible, they want to apply a higher standard before they are willing to deprive a student of his education. This is a fairness consideration, which is understandable. However, in reality, it is not the best practice. In complaints where alcohol or other drugs, especially date-rape drugs are involved, it is nearly impossible to hold a student responsible under the clear and convincing evidence standard. And, as we know, 70%-90% of all college sexual violence involves the use of alcohol or other drugs by at least one party.⁴ How can there be clear and convincing evidence when both students were inebriated, or the victim is fuzzy about the events? If she is passed out, there can never be clear and convincing evidence without DNA testing. Thus, at least for such

⁴ See e.g., Antonia Abbey, *Acquaintance Rape and Alcohol Consumption on College Campuses: How Are They Linked?*, 39 J. Am. C. Health (1991).

complaints, a preponderance of the evidence standard is preferable. Again, this goes directly to structural impediments. Why would a victim bring a complaint that is impossible to win? I dislike the clear and convincing evidence standard from a risk management perspective simply because it is a difficult standard to define, to train on, and to explain later to a judge, in terms of how the evidence met that standard. It is also a standard that judicial boards tend to ignore, misunderstand or nullify more often in practice. My preference is for elegant simplicity in judicial procedures, and the clear and convincing evidence standard represents an unnecessary complication to me.

There is also a trend developing with colleges, to depart from the preponderance of the evidence standard. These colleges are adopting a lower standard, called substantial evidence, which means that the decision will be a reasonable conclusion based on the evidence presented at the hearing. This is the legal standard colleges are required to uphold by courts, and by state administrative procedures rules. Colleges are adopting this as a risk management posture. They don't want to increase their level of risk by assuring a higher standard than they are required to by law. This is a good practice, these colleges reason, because their judicial bodies often are reaching a reasonable conclusion, even though they say they are basing it on a preponderance. This helps them to better uphold their contractual and due process guarantees to students.

- *Hearing Venue and Setup*

Hearings should take place in a private place, and should not be open to the public.⁵ The structural impediment effects of open hearings should be obvious, given that privacy and confidentiality are key reporting issues for victims. Witnesses should be kept in separate rooms, only entering the hearing to testify, and should not have contact with one another outside the hearing. Make sure the hearing room is big enough, as confining spaces can have an adverse impact on students under pressure. Should the alleged victim

desire to testify without having to encounter the alleged perpetrator, what accommodations can you make? Can she testify in a separate room, or by closed circuit television, while still making it possible to question her? This is a best practice. A victim who is too terrified by the presence of the accused to make coherent statements is not a valuable witness, and the hearing will be a waste of time. Make sure that a videotape, audiotape or transcript of the hearing is made. It may be needed by the board during deliberations, on appeal, or for the college's defense, if there is a lawsuit. Make sure to take adequate breaks if the hearing endures for many hours.

- *Evidentiary Issues*

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

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

1. Some laws bar admission of any past sexual experience, even with the accused;
2. Other states allow evidence of past sexual experience with the accused, but nothing else;

⁵Unless you're a college in Georgia, where hearings must be open under state law.

3. Some states allow evidence of past sexual experience with the accused to the extent it is relevant;
4. Other states allow general evidence of past sexual experience, but require a very high threshold for determining relevance.

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

- *Presentation of the Complaint*

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

- *Infractions by Victim*

A major structural impediment to reporting is fear of reprisal by the college against the victim for her own policy infractions if she reports a sexual misconduct policy violation. The most common example is a woman who is drinking underage when she is raped. If she fears punishment for the alcohol infraction, she may not be willing to report the incident. It should be conveyed to students that the institution takes sexual violence much more seriously than alcohol policy violations, and that accommodations will be made so that the student is not penalized for reporting violent policy infractions.

- *Victim Advocate/Advisor*

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

- *Withdrawal by Accused Student*

If an accused student withdraws from the school at the time of the incident, thereby avoiding campus judicial proceedings, he or she may later apply for readmission. It should be a condition of readmission that the student submits to a hearing as he or she would have had to had he or she not left the school. If found responsible, the student must comply with the applicable punishment before being readmitted. If the accusing student is no longer at the school at the time the accused reapplies, it may be difficult or impossible to hold a hearing. At this point, readmission is a discretionary judgment for the administration. On one hand, the student has been found responsible for no wrongdoing, and may not have violated the policy. On the other hand, readmitting the accused student could place the rest of the student population in jeopardy of another attack. This must be decided on a case-by-case basis because it is highly fact-sensitive. One thing to be wary of is the risk of liability if the student is readmitted and commits another assault. The victimized student may sue on the theory that the school unreasonably placed him or her in jeopardy because it might have been foreseen that readmitting the student could result in additional attacks.

HEARING PROCEDURE

The alleged victim should present his or her allegations first, and be able to call witnesses. There are some situations in which the alleged victim cannot or will not present his or her own complaint. It is not unusual for the judicial administrator to appoint an administrator to present the complaint in the victim's stead. In fact, some colleges insist on presenting the complaint, and only use the victim as a witness. This is not the best practice. If the victim wants to present his or her own complaint, colleges should recognize that so doing may be cathartic and may play a large part in providing a victim with closure or at least a start to the healing process. If the victim *elects* to let the college present the complaint, the victim still has the right to be present throughout the entire

proceeding. Another option for the victim is to have a video system set up so that he or she can give testimony in a separate room and thus not have to see the accused. There still should be some way for the accused to cross-examine the alleged victim. After the alleged victim questions the witnesses, the accused student should be able to cross-examine them.

NCHERM has a distinct preference for confrontational hearings. There are a number of colleges that use a format in which separate meetings are held between the judicial board and the complainant and the judicial board and the respondent. This approach coddles victims, thereby unbalancing the fairness of the process, and is unnecessary when a closed-circuit system can be used. Non-confrontation hearings are more likely to be ineffective because many sexual misconduct complaints are "he said" "she said" situations in which it is impossible to discover the truth if the two people involved in the incident are not allowed to question each other. The respondents answers and affect in response to questions by a judicial board member may be very different than the answers and affect in response to the very same question, asked by the victim. Again, the preference is for simplicity in the process, rather than stilted and artificial formats in which the answers of the parties get filtered through a third party before they are responded to.

Next, the accused student may present his or her defense followed by cross-examination from the alleged victim. Then, the accused can call witnesses. After questioning the witnesses, the alleged victim may cross-examine them. With the approval of the hearing board, the alleged victim's witnesses can be recalled to provide rebuttal testimony. The hearing board members are allowed to ask questions at any point throughout the hearing. Either party has the right to request that portions of the tape (or better, a videorecording) be rewound and replayed for the hearing board members or witnesses. The school may also find it necessary to provide time limits for each of these segments of the hearing. Hearings often take place after business hours, and it is necessary to keep them to reasonable time limitations. For example, if a hearing starts at five o'clock, PM, it probably should not go on past ten o'clock, PM, unless all the

participants agree to continue. Otherwise, the hearing could exhaust all the participants. The hearing board members should allow and take breaks as necessary. If the hearing is not finished by 10:00pm, it can be re-convened the next morning or evening, or as scheduling permits, but the elapsed time should not be so long as to interfere with the process.

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

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

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

DUE PROCESS AND STUDENT RIGHTS

A competent and comprehensive college sexual misconduct adjudication process strikes a balance between the need of the institution to resolve the incident, the due process rights of the students involved, and minimum student rights that must exist for the process to function properly to minimize risk.

- *Notice*

Accused students are entitled to notice (which should be in writing) of the substance of the complaints filed against them. They are entitled to know the nature of the complaint, who is making the it, and the possible sanctions. All lesser included and related offenses being alleged which the judicial officers may consider should also be noticed. Accused students should be informed if they are expected to respond to the complaint and how. They should be informed of a hearing date if one has been set. They should be given at least five business days notice before a hearing. Inform the alleged victim of the date and time that the accused will receive the notice. Acts of violence upon victims by the accused upon the accused's receipt of the complaint are not infrequent.

- *Hearing*

The accused is entitled to a hearing at public colleges, though almost all privates guarantee this right as well. This may be a formal adjudicatory proceeding, but it need not be. Mediation of physical sexual assault complaints is not a best practice, and is

prohibited by federal regulation. It creates too much institutional liability risk. Informal resolution can be achieved if the accused admits responsibility for the violation, and the appropriate administrator may impose the sanction without a formal finding, based on the admission. The key difference between mediation and informal resolution is the ability of the victim to accept the outcome. In mediation, the parties agree on a resolution, and no formal finding of responsibility is made. The application of the college's policy takes a back seat to the will of the victim. For example, in a mediated case where the accused student admits to sexual misconduct, the victim could accept an apology as the only outcome. In an informal resolution, the goal is for the college to apply its policy efficiently. If this can be accomplished by an admission, without a hearing, this is the most efficient means. But, the college still administers the appropriate sanction by consent of the accused. What the victim wants is not the foremost concern.

- *Timing*

The hearing should typically be held within 5-10 business days of the complaint being filed. It need not take longer unless exigencies or the investigation require delay. The longer you have a potentially dangerous student at-large on campus, the greater your institutional vulnerability if another student is assaulted. A finding should be reached by the board within 48 hours (2 business days) of the conclusion of the hearing. Again, the victim should be made aware of when the accused is informed of the outcome and the sanction, because of the possibility of retaliation.

- *Witnesses*

The student-parties should be given a list, two to three days in advance of the hearing, of the witnesses who will be called by the opposing party at the hearing. The student-parties should be entitled to confront the witnesses against them at the hearing, and to question them and challenge their credibility. Please note that there may be a FERPA

issue here, based on a recent ruling from the Department of Education's Family Policy Compliance Office. Though the ruling is puzzling, colleges should understand that the Department considers the notification of a student's decision to be a witness at a hearing to be part of that student's educational records. FERPA requires that the testifying students first grant a FERPA waiver before their names are given in writing to the accused. Although witness lists should generally be provided, there may be times when it is necessary to withhold the name of a witness to protect them. This is possible, but must be handled delicately with input from the college's legal advisors.

- *Attorneys*

Generally, attorney involvement in campus hearings is not encouraged, but students can be allowed to bring attorneys to hearings where suspension or expulsion is possible, where the college is acting through its attorneys, or where criminal charges may be filed against the accused, or are already pending. Attorneys should never be allowed to act as advocates for their clients, they are advisors only in this process. If the accused student intends to have an attorney present, the alleged victim must be informed in advance and reminded that he or she also has the right to have an attorney present. If either side will be accompanied by an attorney, the college should have its own counsel present during the hearing to advise the adjudicators and referee possible disputes between the student's attorneys. NCHERM publishes a monograph called "The Right To Counsel In College Disciplinary Hearings: How Much Process Is Due?" which addresses this issue in detail.

- *Criminal Prosecution*

Most colleges do not delay campus hearings if a criminal prosecution is also being conducted, even if the prosecutor requests it, unless the accused student agrees to

voluntarily leave college pending the outcome of the prosecution. A few colleges will delay, but this leaves a potentially dangerous person on campus, with a high probability of a repeat victimization. Please see the discussion at the beginning of this Manual on whether colleges should adjudicate sexual misconduct complaints for all the arguments regarding why colleges should not delay campus hearings until after criminal trials. The reasoning is the same.

- *Appeals*

Any student-party should have the right to appeal the decision of the hearing board. This is a simple risk management strategy. If the complainant has viable grounds for an appeal, we would much rather have those grounds addressed in the appeals process than as the basis for a civil suit against the college. How many levels of appeal you provide, and to whom, is a matter of institutional structure and preference. The appealing student(s) should have access to a transcript or copy of the tape of the hearing for use in crafting their appeals.

The grounds under which an appeal should be granted are:

- 1) The finding is against the substantial weight of the evidence;
- 2) New evidence that could change the outcome;
- 3) Errors by the hearing board procedurally or in admitting or excluding evidence that could have impacted the outcome;
- 4) Bias of adjudicator;
- 5) Finding of not-guilty in a criminal trial (optional) for the same offense, if avenues of appeal have not been already exhausted.

A special note is required here. Within the past three years, there has been a particular uproar on college campuses related to the appeals process. Invariably, the tumult has been

caused by high-level reversals of decisions, the Brown University case being the most notable example. In nearly all of these instances, judicial bodies, and often the first appellate level, found students to have violated college policy, and sanctions were imposed. Upon final appeal, often to a provost, vice president or college president, the finding was reversed, or the sanction was changed, often being reduced. For the most part, these appellate decisionmakers had only transcripts of the hearings, and were not present at the initial presentation of the evidence. In all of these situations, enraged students, faculty and the public responded to the appearance of impropriety, heavy-handedness, or a perception of institutional cover-up. Through these examples, it has become clear that the appellate power needs to be wielded with greater discretion and prudence. Some principles to guide appellate power:

- Decisions of the judicial officers should be given great deference. They are trained. Appellate officers are often not, but must make scrupulous efforts to adhere to published college rules and standards.
- Only in situations of clear error should a decision be overturned, and better yet, consider adopting appeals court-style procedures. Instead of reversing the decision of the judicial body, direct that an error occurred, and where possible remand the decision back to the initial decisionmakers to reverse the error, change the procedures, consider the new evidence, substitute new adjudicators, or otherwise repair the grounds that gave rise to appellate jurisdiction in the first place.
- Where a decision has already survived a layer of appeal (or more), it is due even greater deference.
- Retain the power to reduce or increase a sanction, and steadfastly adhere to the standard that it takes a compelling justification to modify a sanction.
- Insulate appellate decisionmaking from the appearance of impropriety. Many colleges are utilizing appeals committees to guard against the appearance of placing too much discretion in the hands of one high-ranking administrator. Allowing committee appeals

has the appearance of being more Democratic, even if it is necessary to create committees at several different appellate levels.

- Involve the college's legal advisors, and even the risk manager, but remember that doing the right thing is not always the same as doing what will most reduce the college's exposure to liability. This is the risk management conundrum. Decisions are sometimes taken based not on the evidence, but upon the greater cost to the institution. The experience of many other colleges should make it clear that this type of risk management is very likely to backfire. The loss of public prestige and alumni support following a "blow-up" case is usually far worse than the liability the college was seeking to avoid.
- Appellate officers should take the time to internalize the reasoning of the judicial officers. They should not simply impose what they think is right. The initial judicial officers did what they thought was right. Appellate officers should find out why, and why their conclusion might be different.
- Remember that it was easier for the judicial officers to assess the value and credibility of evidence presented live than it is for appellate officers to make the same judgments based on a sterile transcript.
- Appellate bodies should issue written reports for every decision, explaining the full basis for that decision, whether the decision is about the existence of grounds for an appeal, or the deciding of the merits of a granted appeal.