

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

**THE 2001 JUDICIAL  
TRAINING VIDEOSEMINAR  
TRAINING MANUAL**

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

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## Establishing a Baseline of Policy Familiarity and Knowledge --BAS

Prior to initiating your campus judicial training regimen, distribute copies of all relevant policies and procedures to those who will be adjudicators of student conduct code complaints. Instructions to your future trainees should be to read all policies fully, and to familiarize themselves with procedures. As a tool of both accountability and interactivity, each trainee should be given instructions to go through the policies and procedures, and circle any word or phrase the meaning of which is not inherently obvious to them, or any word or concept they would desire to have explained or clarified. First, you will be surprised with how much they circle.

This exercise is more than passive. Take the time in the training to fill in and explain where necessary. Go over all the circled items. Often, what I call non-policy or practice standards will emerge from these discussions. These are tools that are not memorialized in written policy (or at least not for general campus consumption), but that every college has in place formally or informally to ensure the smooth and consistent operation of the campus judicial process.

Before engaging in this policy and procedural clarification and definition exercise, I find it very helpful to launch training with a role-definition exercise. Very often, I find that those chosen or who volunteer for campus judicial duty acutely misperceive their appropriate role. If you don't define this from the outset, you leave open the potential for adjudicators to step outside the boundaries of their role, to detrimental result. You can test role-definition by asking your trainees to engage in the following exercise: Write down, in just a minute or two, words or sentences that describe what they believe to be the ultimate purpose of their service on a hearing board. Very few will give the right answer, and there is one. Take the test yourself. This role-defining process may be effectively begun during the recruitment and selection phase. Invite applicants to discuss their perceived roles during interest meetings or interviews. Not only will you jump-start training, you will help students make more informed decisions about whether they want to participate in your program.

How many of your adjudicators will answer, "To discover the Truth," or "To do Justice," or "To be Educational," or "To provide Fairness," and other lofty propositions? They misperceive how narrow their task actually is. Their ultimate purpose is to uphold the institution's policies. All other objectives must be

secondary. Let me explain why. If all is done as it should be, those who have crafted your institution's policies and procedures have designed them to discover the truth, to do justice, to be educational, and to be fundamentally fair. Thus, in upholding those policies and procedures, your adjudicators will do justice, find truth, be educational and provide fairness. But a failure to materially uphold policies and procedures can lead to liability for the institution. Fortunately, campus codes are NOT usually saddled with the specificity or rigid "sentencing requirements" of criminal statutes. Hearing boards usually enjoy moderate to significant latitude in interpreting and applying policy and in recommending sanctions. Board members don't simply "uphold" policy, they creatively apply it and interpret it, where appropriate and necessary. Therefore, board members must be coached in the fine art of applying general principles to individual cases, so that they know when the exercise of discretion is desirable, and when their discretion is bounded by policy.

As agents of the institution, adjudicators cannot subject their institutions to the potential of liability. Adjudicators are not the guarantors of fairness. The administrators of the policies and procedures are. If it ever manifests that a policy is fundamentally unfair, it is not the duty of the adjudicators to do other than uphold it. If a decision is to be made to ignore a campus policy, that decision needs to be made at the highest level of the institution's administration. Jury nullification occurs in courtrooms, and receives limited tolerance. But, jury nullification cannot take place on a college campus. Jury can't be sued for ignoring the rules. Colleges can. I always think the Dr. Kevorkian jury is a great example of understanding this duty. A majority of that jury likely was accepting of assisted suicide, and yet they convicted Dr. Kevorkian for performing assisted suicide. They upheld a law, even though they disagreed with it, because that was their job.

### **Getting Comfortable --BAS**

The judicial body must make sure that it is comfortable with the subject matter of its purview. Some complaints will involve incredibly difficult situations. Though you may strive for a sense of detachment, this may not always be possible. For an adjudicator, a hearing can be an emotional and traumatic experience. Prepare yourselves for hearing difficult things. Judicial decisionmakers must realize that your own emotional boundaries and limits may be tested. There may be times when you need to excuse yourselves from the hearing, or take a short break. It may also be valuable to have someone who can help you debrief

from the experience afterward. If you need to vent regarding the hearing itself, it may be best to seek out another judicial body member with whom you have a rapport, or a counselor who will maintain the confidentiality of the proceedings. Another aspect of gaining comfort with adjudicating is accepting that judicial bodies will occasionally be called to hear cases that involve racial, ethnic, religious, gender-based and sexual orientation issues. Allowing any of these factors to improperly influence a decision works a denial of fundamental fairness.

### Confidentiality --LPR

On most campuses, a hearing is a confidential process that becomes part of the accused student's confidential educational record. The maintenance and distribution of students' educational records and information about the outcomes of campus hearings are constrained by the provisions of the Family Education Right to Privacy Act (FERPA), the Campus Security Act and related legislation. State statutes and differing institutional policies also shape how and when and with whom information about judicial cases is shared. Rules and laws governing confidentiality of student judicial records are complex and subject to change. The following information in student records is considered "directory" information and is therefore not confidential unless a student specifically requests that it be made so:

#### Directory Information: Not Confidential\*

- Name
- Address
- Telephone Listing
- Email Address
- Photograph
- Date and Place of Birth
- Major Field of Study
- Dates of Attendance
- Enrollment Status
- Participation in Officially Recognized Activities
- Degrees, Honors, and Awards
- Most Recent Educational Institution Attended

- Athletes: Weight and Height

*\*Directory Information must be made confidential at the student's request \**

Confidential educational records subject to federal legal protections and exceptions:

- Grades
- Test Scores
- I.D. Numbers or Social Security Numbers
- Financial Records
- Disciplinary Records
- Class Schedule

Disclosure of information from confidential educational records is limited to the eligible student or to others:

- Who have a "Legitimate Educational Interest";
- To whom the eligible student releases the records;
- Who are entitled or permitted to know the content of the records by virtue of one or more FERPA "exceptions."

At most schools around the country, the details and outcomes of student judicial cases are considered confidential information to be shared only with those who have a legitimate "need to know." At most institutions, persons with a legitimate educational interest include other institutional staff members involved with the student in ways that impact or are impacted by the student's judicial status. Sharing of judicial information with people outside the judicial process "chain of command" is limited to that which must be shared for adequate completion of the terms and conditions of a sanction. Administrative assistants who type the reports will obviously read them but won't discuss them with anyone except their supervisors. Desk or security staff or RAs may need to know that a student's visitation has been restricted, but are not necessarily told why or given details of the exact sanction. A community service agency may be told that a student is being referred from the judicial affairs office, but might not be told what rule the student violated.

Victims of violence and sexual assault are entitled to information about the outcome of judicial proceedings brought against their attackers. Institutions may also make public the results of judicial proceedings in cases of violence against persons. Parents may be notified of drug or alcohol violations committed by students under the age of 21. If your institution chooses to notify parents, it has probably developed a protocol or set of guidelines for doing so.

Student record-keeping is rarely a responsibility of judicial board members. Judicial board members are rarely the designated spokespeople for their institutions. This means, in effect, that judicial board members should not discuss information about judicial cases with parties other than those involved in the hearing *at the time of the hearing or at times and places defined by the administrator in charge of the judicial process.*

Key Competencies for Judicial Officers:

- 1) Understand confidentiality guidelines on your campus;
- 2) Do not leak information;
- 3) Have a protocol for handling documents and notes;
- 4) Refer information requests to the judicial administrator.

Confidentiality is a sacred trust and judicial board members must take care not to “leak” information about judicial complaints to others. They should never discuss complaints with other students, faculty, staff or community members or with each other where their conversations could be overheard; or when not necessary in connection with deciding a complaint. It also means that board members should have a protocol for destroying or returning all complaint-related documents and notes when the complaint has concluded. Student privacy regulations declare that associating any “personally identifiable information” with protected information can be unauthorized disclosure. Thus, it could be a breach of confidentiality to say “We heard a complaint about the student who lives in room 124 Allen Hall” because someone could easily figure out who that student is.

**Student A's name or personally identifiable information may not be placed in Student B's records without Student A's permission.** As board members you should be prepared to give permission for your names to be included in student records. Moreover, complainants and witnesses should also be asked to approve inclusion of their names in the record of the hearing that goes in the respondent's records.

Board members should expect to receive clearly defined guidelines governing confidentiality on their campuses. They should refer any requests for information – whether from other students, attorneys, the press, or parents – to the judicial administrator.

### **Public Versus Private Universities --MLA**

Both public and private institutions have the right to create rules and to enforce those rules, however, the law imposes different procedural requirement on public institutions than it does on private institutions.

If you are serving on the judicial board of a private college or university, you need to understand that the materials published by your institution -- in handbooks, catalogues and brochures--can be considered part of a contractual relationship. These publications may describe residency policies, academic policies and graduation requirements, or even judicial policies and procedures. Therefore, the basis of your judicial power lies in your published policies and procedures. These policies and procedures have formed a contract between your college or university and your students. Generally, every institution is not required to provide all of the same procedural safeguards as all other institutions, and your rules may reflect the values and purpose of your institution. However, if your publications tell your students that they will be provided "due process of law," you may be subject to the same procedural requirements that we will be covering in the public university segment of this presentation.

As a member of a judicial board at a private college or university, it is very important that you read and understand all of the written policies and procedures that govern your work. And should your university offer due process protections, you must understand what those protections mean so that you are not accused of acting outside of your policies or acting "arbitrarily or capriciously."

If you are a member of a judicial board at a public college or university, you should understand that your institution also is held accountable for what it publishes. In addition, it must follow state and federal laws and guidelines, including laws that are created by the courts when they make final decisions (case law). It is especially important that you realize that as a person delegated power by a state college, you are bound by the 14<sup>th</sup> Amendment of the U.S. Constitution which states, “nor shall any State deprive any person of life, liberty or property without due process of law.”

You should know that courts in the United States have ruled that there is *no constitutional* right to a higher education [Phelps v. Washburn Univ. of Topeka, 634 F Supp 556 (D Kan 1986).]; however, they also have stated that once a student is admitted to a college, that student has a constitutional interest in continuing their education. Although courts have differed on whether this is a property interest or a liberty interest, they agree that it is an interest. So, although courts clearly have stated that public institutions of higher education have the right to discipline their students, they also have stated that the students being disciplined have a right to due process. Specifically, they have ruled that before a public institution can interrupt or terminate a student’s education, that institution must give the student *adequate* due process protections. [Memorandum on Judicial Standards of Procedure and Substance in review of Student Discipline in Tax Supported Institutions of Higher Education, 45 FDR 133 (1989).] However, the amount of due process due to each student varies with the severity of the discipline. The greatest amount is required when suspension or expulsion is a possible outcome of the judicial proceeding. [Picozzi v. Sandalow, 623 F. Supp 1571 (ED Mich 1986). *aff’d* 827 F2d 770 (6<sup>th</sup> Cir 1987). *Cert denied*. 484 US 1044.]

When the judicial proceeding in which you are involved may lead to the expulsion (dismissal) of a student, courts have required that the institution provide that student with:

- Notice of the charges. The notice should provide enough specificity that the student will understand that she or he could be suspended or expelled if the charges are upheld.
- A hearing with a board or administrator(s) where both the student and the university may be present information in detail. (A full hearing with the right to cross-examine witnesses is not necessary. If the student does not have the right to questions witnesses, she or he must be provided with the names of the persons who give information about the situation and an oral or written summary of the information they present.)

- The opportunity to give his or her side of the situation either in person or in writing to the board or administrator.
- The results or outcome of the hearing.

[Dixon v. Alabama State Board of Education, 294 F2d 150 (5<sup>th</sup> Cir 1961)].

When the judicial proceeding may lead to suspension, the courts require less due process:

- Oral or written notice of the charges
- Explanation of the evidence that the college or university possesses
- The chance to present her or his side of the situation

[Goss v. Lopez, 419 US 565 (1975)].

Because the federal courts are divided into eleven circuits, and because a decision made in one circuit is not binding on any other circuit, although it does have some persuasive authority, establishing firm guidelines by reviewing court cases is very difficult. At times circuit courts render contradictory decisions. When that happens, those decisions form the law for that circuit only, unless these conflicts are resolved by the United States Supreme Court.

Never-the-less, many of the decisions rendered in the circuits are educationally sound, and should be considered when colleges and universities, public or private, are considering policies and procedures. We recommend that:

- There should be a *clear statement of the conduct regulated*, on or off-campus, and the conduct regulated should be related to the "lawful mission, process or function" of the university. [Esteban v. Central Missouri State College, 415 F2d, 1077 (8<sup>th</sup> Cir 1969)].
- The student should be given an *opportunity to be heard* in person unless there is good reason to make an exception (in the hospital, in the armed services and stationed overseas). [Hart v. Ferris State College, 557 F. Supp. 1379 (WD Mich 1983); Kusnir v. Leach, 439 A2d 223, 226, (Pa, 1982); Wallace v. Florida A & M. Univ. 433 So 2d 600 (Fla App1 Dist 1983)].
- The *standards of conduct must be clear and understandable*. Standards that are vaguely written or that cover too wide a range of behavior violate the First Amendment. [Picozzi v. Sandalow, 623 F. Supp 1571 (ED Mich 1986). aff'd 827 F2d 770 (6<sup>th</sup> Cir 1987). Cert denied. 484 US 1044.]

What may be more important for you to realize is that there are some rights the courts have **not** imposed on the campus disciplinary procedure, although many persons believe that they have and may try to impose them during your hearing. Unless your college or university or your state's laws specifically provides for these rights, they do not exist.

- There is no right to an open hearing, although state law may provide this;
- There is no right to a transcript of a hearing. [*Jaska v. Regents of the Univ of Michigan*, 597 F. Supp 1245 (ED Mich 1984). *aff'd* 757 F2d 59 (6<sup>th</sup> Cir 1986).], But some courts have required some kind of a record and one has allowed either party to record the proceeding. [*Esteban v. Central Missouri State College*, 415 F2d 1077 (8<sup>th</sup> Cir 1969). *Cert denied*. 398 US 965 (1970).]
- There is no right to confront and cross-examine witnesses although a couple of courts have ruled that in cases involving suspension and expulsion, that it would have been a good idea. [*Esteban v. Central Missouri State College*, 415 F2d 1077 (8<sup>th</sup> Cir 1969). *Cert denied*. 398 US 965 (1970)]. Cross-examination is a term of art in law and suggests questioning by the opposing attorney in an adversarial form of proceeding. In an inquisitorial form of proceeding, the parties would have the right to ask questions of each other, but they may be required to do so indirectly through a third party or by presenting the questions in writing to a neutral party.
- There is no right to be represented by an attorney, although when there are concurrent criminal charges, some courts have ruled that there is a right to be *advised* by an attorney [*Hall v. Medical College of Ohio at Toledo*, 742 F 2<sup>nd</sup> 299 (6<sup>th</sup> Cir 1984). *Cert. Denied*, 469 US 1113 (1985).] An advisor does not participate directly in the hearing.
- There is no protection against self-incrimination because a university process is not a criminal matter. A student may not respond to questions, but that silence may be used against him or her (unless your institution specifically allows a student to refuse to answer questions, in which case several courts have noted that no negative inference can be drawn from such silence).
- There is no right or requirement o delay a university proceeding until the concurrent criminal process is concluded. [*Wimmer v. Lehman*, 705 F2d 1402 (4<sup>th</sup> Cir 1983). *Cert denied*, 464 US 992.]
- There is no right to a written statement of the facts found or the conclusions reached. [*Herman v. Univ of South Carolina*. 341 F Supp (D SC 1971). *Aff'd* 457 F2d 902 (4<sup>th</sup> Cir 1972)]
- There is no double jeopardy when a college or university takes disciplinary action. Double jeopardy only bars subsequent criminal penalties for the same actions. College and university

disciplinary actions protect the safety of the campus and promote the mission of the university. They are not intended to enforce state or federal law or to impose criminal penalties.

One more piece of good news for you is that courts do not require that college and universities follow the letter of their procedures rigidly. Courts will look for substantial compliance with your rules and procedures and a fundamentally fair process.

### The Role of Attorneys in the Judicial Process --MLA

As judicial board members it is important that you consider the impact of having an attorney present during a hearing, because it is likely that an attorney will accompany a client into one of your judicial hearings.

Your written rules and policies will tell you whether an attorney may be present or not during a university hearing. Some policies speak directly to attorney presence. Most do not. Even though your policies may not directly address the presence of attorneys, they may address the presence of advisors or support persons. If your university allows an advisor or support person to be present for either the accused student or the victim/complaining witness or any other witness and does not specifically exclude attorneys, an attorney may attend the hearing as an advisor.

Your policies and procedures also govern the role an attorney may play during your proceeding. Some universities allow attorneys to *represent* a client during a hearing. Some allow the attorney to be present but strictly limit the attorney's ability to act during the hearing. Some universities do not allow an attorney even to be present during a hearing. Even if your policy strictly forbids the presence of attorneys, you may have to make an exception if the accused student is facing concurrent criminal charges. In other words, if the student is facing charges in a court of law for the same behaviors that led to his case being heard by your judicial board, the law says that you must allow the student to be *advised* by an attorney during your judicial procedures. This is especially true if you are a public university. Although there is no Supreme Court case that speaks to this point, Gabrilowitz v. Newman, heard by the federal court in the second circuit, advises us that the university must allow an attorney to be present to *advise*, but not necessarily *represent*, a student who is facing concurrent criminal charges, when the university hearing precedes the criminal trial.

But what is the difference between advising and representing?

The term represent is a word of art in the legal profession. When an attorney represents a client, the attorney controls, to a large extent, the flow of the information from the client to the panel. The attorney will ask the questions on behalf of her client and may even control the responses of the client.

When an attorney advises, s/he functions during the hearing as any other lay advisor would function. Her/His most important function is to be present to support the student. If there are concurrent criminal charges pending, the attorney may help the student frame responses to questions so that the student's answers cannot be used against that student in criminal court. S/He may advise the student not to answer a question, if your procedures allow a witness to remain silent. If your procedures do not allow a student to remain silent, procedures should spell out the ramifications for not speaking. In other words, if the student does not speak, may the panel make any assumptions about his/her silence?

An attorney may ask to speak privately to the judicial advisor or the hearing chair if s/he feels that there is a fundamental error in the proceedings. If your process allows for such consultations, the chair or the advisor may honor the request. It is important, however, that attorneys do not disrupt the hearing by making frequent requests to meet privately. Attorneys serving as advisors also should not be allowed to make other interruptions, question the witnesses or panel members, or inject opinions into the proceedings either verbally or non-verbally.

As you evaluate the role of an attorney advisor in your hearings, keep in mind the purpose behind the legal requirement that an attorney be allowed to advise a student during a school judicial hearing when there is a pending criminal proceeding against the student. The primary concern of the courts is based on the criminal court concern about self-incrimination. The courts do not want a student to make an admission during a judicial process that can be used against her/him in the criminal court. But how could that happen? If a student, during a judicial hearing, admits to a violation of state law, the victim may tell their attorney who may use the information against the student during the subsequent court proceedings. An attorney also may subpoena the records of the hearing or the hearing tapes. On the other hand, it is important to remember that the rules that govern the criminal justice system are so different from the rules that govern

most of our judicial procedures, that it is very unlikely that any information revealed in a school proceeding will be useful in the criminal process. Do not be overly concerned about information that an attorney may be learning during the hearing.

While it is important at some institutions to safeguard against self-incrimination, you must keep your goals in mind when evaluating the role of an attorney in a hearing. You must primarily be concerned about the student and her/his understanding of and adherence to the rules of your college or university. Your job is to determine whether or not the student violated the policies of your institution and, if s/he did, to assign appropriate sanctions. Should you allow the attorney to dominate the proceedings, you will only learn what the attorney knows about the violation being heard, not what the client student knows and understands. In a setting where the panelists ask the questions, they need to ask questions to the parties in order to discover the information they need to make a decision. You need the student's perspective, not the attorney's perspective on the student's answer.

Most of you will be participating in an inquisitional hearing system rather than an adversarial system. In an adversarial system, there is a person who presides over a trial or hearing at which the parties present their case in the best possible light through the prosecutor and the defense attorney. In an inquisitorial system, there may or may not be a prosecutor or defense attorney, but the judge and/or jury ask questions directly of the parties and witnesses who respond directly to them. Although very few law schools teach about the inquisitorial system, it was used in many state criminal and civil court systems until the mid-1800s.

Your university may accept the presence of attorneys in your hearings as routine or may require that another attorney be present to advise the university and, if necessary, manage the behavior of the outside attorney. No matter how many attorneys are present during a hearing it is important that you follow your hearing procedures precisely and not vary them to accommodate any attorney. You can be confident that your school's attorney has reviewed your Code and your judicial procedures. As you will hear repeatedly during this presentation, one of the most important things that you need to do is follow your written procedures.

Presence of Attorneys --LPR

It happens from time to time that students bring attorneys with them to hearings. Your campus will most likely have articulated rules for the presence of attorneys at hearings, and in most instances those rules will allow attorneys in advisory capacities only. In other words, attorneys will not be allowed to participate in the hearing, or to represent people in the hearing. But, whether or not attorneys speak or participate, the job of the judicial board remains the same: to follow campus procedures and to make decisions in accordance with campus policies.

Attorneys may be experts on certain parts of the law, but not necessarily on higher education law or campus policies. Sometimes, unfortunately, the participation of attorneys (unless as the judicial administrator, of course!) can be very intimidating to judicial board members. Board members who are trained and knowledgeable have no need to feel intimidated and should be confident that they are as "expert" when it comes to campus proceedings as anyone with a law degree. As a general rule, board members and student advisors or advocates should not communicate with attorneys who represent the complainant, the respondent, or any of the witnesses, and should discourage and immediately report any communication from any party's legal counsel.

### **Bias --BAS**

In the mock hearing portion of your training, ask your adjudicators to raise their right hands, and swear that they will be unbiased in performing their duties. Then, once they swear (they always do), tell them how glad you are that they agree not to allow any preconceptions, personal beliefs, values, morals, outside knowledge, or any other potentially biasing influence to enter into their decision making. I'm getting a little facetious with you here. We have this bizarre adhesion in judicial affairs to creating hearings that are without bias. That's impossible. People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to. A certain amount of bias is inevitable and unavoidable. What we do have concern for is bias that serves as the basis for the outcome of the hearing. Hearings must be based on evidence, not on personal beliefs about a complaint. Too much bias will jeopardize fairness. Rather than create an unbiased process, our goal should be to create a balanced process. A little bit of bias toward one party. A modicum of bias toward the other. As long as there is minor bias toward all and major bias toward none, the judicial process is secure.

### **BIAS EXERCISE**

Professor Snape was a member of a three-person hearing panel. During the hearing of a sexual misconduct complaint, members of the panel questioned the complainant and respondent. At one point, the complainant was testifying. Professor Snape asked her the following question. "Do you honestly expect this panel to believe that you were sexually assaulted? From your testimony, it is quite clear that on the night in question you were dressed provocatively, went to a bar known as a pick-up joint, flirted with a bunch of drunken guys, and drank too much yourself. Don't you think you were asking for whatever you got?" Do we have a bias issue with respect to Snape? If so, what steps would you consider appropriate to restore the fairness of the process:

- 1) The complainant should be directed not to answer Snape's question.
- 2) Snape should be directed not to ask such inflammatory and conclusory questions.
- 3) Snape should be immediately removed from the hearing panel.
- 4) The hearing should be reconvened with a new panel, because all three panelists were tainted by Snape's remarks.

### **Right To Remain Silent --LPR**

The right to remain silent in a hearing is an important corollary of the requirement that no negative inference be drawn from failure to appear for the hearing, a right that is conferred by most, if not all public institutions.

The right of the accused to remain silent in a judicial hearing is an important corollary of the widely granted "right" of an accused student not to appear at a judicial hearing without fear that a negative inference will be drawn from his or her absence. Lacking the means to physically compel students to appear at hearings, campuses need to be able to process charges against students who refuse to appear. Otherwise, we end up with open cases and "pending charges" in our files for years.

Courts have typically granted institutions the freedom to hear a complaint in a student's absence – provided that the school has made reasonable attempts to notify the student of the hearing. Courts have typically frowned on the practice of "automatically" assuming that a student who fails to appear is in

violation of policy. Therefore, judicial boards at public institutions should not “add in” the student’s absence when calculating the weight of the evidence against the student, but should decide the complaint based on the evidence that is presented.

If no negative inference is drawn from failure to appear, it seems hypocritical to demand the student who does appear to speak. If we don’t allow students the right to remain silent, we push them to not appear, thereby voiding all possible learning opportunities in the hearing process.

### *Why Would a Student Remain Silent?*

- **To Avoid Self-Incrimination.** This is only one reason. Certainly the student might be hiding something, but there may be other reasons;
- **Poor Speaking Skills.** The student may be particularly shy or uncomfortable in front of a group and may simply be too intimidated to speak.
- **Fear, Confusion or Nervousness.** Some students are so intimidated by the process – especially when there are no advocates or advisors to help them – that they just can’t talk, even to defend themselves. A student who intends to speak may become so confused that s/he reacts in the hearing like a deer in the headlights.
- **Lack of Faith in the System.** I have known of cases in which, sadly, students had no faith in the system and believed that no matter what they said or did, the deck was stacked against them.
- **Advice From Others.** Students who are advised by attorneys, particularly when there are concurrent criminal charges, may be told not to speak in a campus hearing for fear that the hearing transcript could be used against them. Such students should not be penalized for exercising their perceived interests in the face of criminal prosecution.

Finally, a student who is assured s/he doesn't HAVE to speak may be more likely to appear and may, in fact, decide during the hearing that it would be in his/her best interest to say something. Therefore, judicial boards should at several points in a hearing ask an accused student who has refused to speak if s/he has changed his/her mind. Moreover, we should remember that the silent student is usually *listening* and, we hope, *learning* while present during the hearing.

### **Innocent Until Proven Responsible --LPR**

Campus discipline is an educational process. We do not prosecute crimes, but adjudicate our codes and provide education and remediation for the students who violate them. It is often argued, and rightly so, that this perspective frees us from the convoluted structure and "legalese" of the criminal justice system – where procedures sometimes seem to trample over justice. However, arguing educational purpose is not synonymous with abandonment of procedure. Students have constitutional rights in public institutions and contractual rights in private ones and are entitled to orderly and educational due process before being deprived of or limited in their pursuit of higher education.

The idea of such orderly processes rests in fundamental American values. The concept that an accused party is innocent until proven otherwise is just such a fundamental value. I daresay that it is a value most students will recognize and understand and rightly expect to see upheld on their campuses. Because part of the function of our process should be to teach all students who are involved in or who observe it about fairness, order, and civility, it makes sense to mirror those concepts that form the bedrock of American justice. We fulfill an educational purpose when we uphold our cherished ideal that a person must be innocent until proven in violation.

Before deciding upon or changing policies with regard to presumption of innocence, schools should check state statutes. Even though Federal law may not require such a presumption in administrative due process, state regulations might.

It is understandable that a school would not want to construct its process so that a complainant or victim has the burden of proving that a violation occurred. If there is to be a burden of proof, it should rest with the institution, thus enabling a person trained by the institution to gather the information and "argue the

complaint.” The victims, complainants, or authors of the reports upon which complaints are based serve as witnesses on behalf of the institution. In most settings, however, the board must merely find that the “totality” of the evidence – regardless of who provides it -- proves that the respondent violated policy. What a school should never do is demand that respondents *prove* that they are *not* responsible for violations. Thus you as a judicial board go into a hearing either assuming nothing at all about the complaint, or assuming that the accused did not do anything – until you hear evidence that makes you believe otherwise.

### **Burden of Proof --BAS**

Let me state my conclusions about this issue unequivocally from the outset, before I make my argument, so that they are not misconstrued or mischaracterized. I have three:

- 1) If you are a public institution required by state law, regulation or state system rule to rest the burden of proof upon the complainant, do so, and adhere materially to the legal underpinnings of that burden and its concomitant right against self-incrimination and right to be presumed innocent;
- 2) If you are a public institution that places the burden of proof upon the complainant by choice, clarify whether your campus comprehends this legal term of art the way a member of the legal profession would, or with the lay interpretation in use on many campuses of the burden of proof as the burden of production;
- 3) If you are a private institution or one whose procedures are simply silent on this issue, clarify within your procedures whether the concept of a burden of proof, and its attendant rights against self-incrimination and to be presumed innocent are valid and desirable elements of a college conduct proceeding.

To be clear, we are not talking here about the standard of proof, which is the amount of evidence needed to find a policy violation. A standard of proof is a necessary element of conducting a hearing. Most colleges use a "more likely than not" standard of proof, though clear and convincing evidence is used by a fair number of colleges and universities, whose judicial processes tend to be more legalistic and rights-focused. Those at the far right of the continuum use a proof beyond a reasonable doubt standard, and those whose systems can be placed toward the left end of the continuum have adopted the reasonable conclusion/substantial evidence standard. To differentiate the burden of proof think of it simply as the

placing on one party or the other the entire obligation to provide the evidence and persuasion that will meet the standard of proof.

On campus, this obligation is placed on the complainant, whether the complainant is a victim, or the institution itself. As a legal matter, the burden of proof is the holistic joining of two burdens, the burden of production and the burden of persuasion. The burden of production is the obligation to produce evidence adequate to move the legal process through various motions designed to end the trial before it is finished. If the burden of production is met, the trial proceeds to conclusion. If it is not, the trial ends, in favor of the person on whom the burden was not. The burden of persuasion is the obligation to sway the judge or jury, to convince them that the standard of proof has been met.

To be made meaningful, the burden of proof is usually accompanied by two concomitant rights, the right to remain silent, and the right to be presumed innocent until proven guilty. Here's how it often works in the criminal legal context. Mr. Hugh Felonist is charged with a burglary. The only way to link Felonist to the crime is through the testimony of Ms. Renta Dweller, the occupant of the apartment Felonist allegedly burgled. Ms. Dweller was in the apartment at the time of the break-in, and observed Felonist in the act. She later picked him out of a police line-up. No other evidence connects Felonist to the crime. Once indicted, Felonist will stand trial. At the trial, he will be presumed innocent until he is proven guilty by the prosecution. Felonist will refuse to take the witness stand in his own defense, and will refuse to answer any of the prosecution's questions on the basis of his 5th amendment right to avoid self-incrimination. Please be clear that these are rights that attach only in the criminal legal context. There is no right to remain silent in a civil proceeding. There is also no presumption of innocence. In fact, in certain circumstances, liability (civil guilt) can be presumed, as was the complaint in an IRS audit until last year. The burden was on the taxpayer to prove they had not cheated on their taxes.

Taken together, Felonist's rights to remain silent and to be presumed innocent create the burden of proof that the prosecution must bear. In order for Felonist to be convicted, the prosecution must meet the burden of production and the burden of persuasion. This means that the prosecution must produce the inculpatory evidence. Felonist can remain silent, and need not prove any exculpatory evidence. The prosecution must call Ms. Dweller as a witness. And, Ms. Dweller's testimony, alone, must convince the jury beyond a reasonable doubt that Felonist committed the burglary. If the prosecution cannot do so, Felonist goes free.

To apply this construct to the college context, one thing should be clear now, at a minimum. Those colleges that place the burden of proof on the complainant should also provide a right to remain silent, from which silence no negative presumption will be drawn. And, such colleges should presume the respondent innocent until proven guilty. If you are going to go the legalistic route, at least make it cohesive.

But, as many of you know, we don't prove "guilt" in a campus hearing. We prove responsibility. We don't have to offer the rights due a criminal defendant. Just as we can argue that we owe no right to representation by an attorney (with very limited exceptions), we can also argue that at most colleges the concept of the burden of proof is not germane to campus proceedings, and the complaint law is fully supportive. These three rights are not requirements within the panoply that constitute campus due process.

Most colleges do not have to allow a right to remain silent. Nor should they. Developmentalism and ethical decisionmaking are not served by allowing a student to refuse to participate in the process, or to subvert it with selective answering of questions. The criminal implications of compelling information are quite simply not your worry. And, you do not need to provide a right to be presumed innocent until proven guilty. Not that you should presume guilt, but recognize that no presumption is actually necessary, when the other two rights are not given either.

It is entirely permissible and desirable for you to decide complaints on the basis of the totality of the evidence presented, regardless of who presents it. There is also a practical reason for this contention. Campus conduct boards do not tend to heed a burden of proof requirement, even when the code contains one, because we naturally tend to consider the totality of the evidence presented to us. Using a burden of proof requirement can actually expose us to greater liability, because when we ignore it, we open ourselves to a charge of violating the procedural rights of the respondent.

In fact, it is arguable that in certain circumstances, the operation of a burden of proof is actually anathema to the goals and philosophy of the campus judicial system. Imagine a complaint for which your procedures state that the complainant has the burden of proof. Innocence is presumed, and you have a "more likely than not" standard of proof. The respondent has a right to remain silent, from which silence no negative inference may be drawn. During the course of the hearing, the complainant victim convinces you of the responsibility of the respondent only by a 40% certainty. The respondent refuses to testify personally, but calls an alibi witness, who proves to be a very weak alibi. This witness' testimony, when coupled with the complainant's, convinces you of respondent's violation by 51%. Do you find the respondent responsible

or not responsible? You're convinced by the totality of the evidence that the respondent violated the policy. But, your policy requires the complainant to meet the burden of proof. Has he? Does the concept of a burden of proof help you here, or hurt you? Why do you need it? Aren't we really asking the basic question: Is it more likely than not that the respondent violated our policy? We're not asking: Did the complainant prove it more likely than not that the respondent violated our policy?

Imagine instead that the university is the complainant, and has the burden. Does this change the situation? Yes, but it overcomplicated the process. Think about it. The university presents the victim's testimony as a witness, and calls the alibi witness. The hearing panel is 51% convinced. The standard of proof is met. The burden issue makes no difference. It adds nothing but another right the respondent can allege was violated when s/he sues you.

### **The Standard of Proof --BAS**

The standard of proof has central weight and importance to competent judicial decisionmaking. The standard of proof is the measure of evidence needed to convince a judicial body that the policy has been violated. The two main standards of proof in use, with rare exception<sup>1</sup>, 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.

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<sup>1</sup> On occasion, you will encounter a college, such as Stanford University, that uses the criminal "proof beyond any reasonable doubt" standard. Such schools are rare exceptions. A very small group of colleges use the minimum standard required by the administrative law field, that their decision be a reasonable conclusion based on substantial evidence presented. This is generally viewed in law as a standard somewhat lower than 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 you. There are no right and wrong answers, because each of these standards is a subjective opinion, not an objective concrete fact.

## EVIDENCE EXERCISE

Each of the lines below represents the progression of introduction of facts at a hearing. Indicate at what level you are *persuaded* to find a violation, and at what level you are *convinced* of a violation. Assume that you know that the end result is that Todd and Amy have had sexual intercourse. Amy alleges that it was nonconsensual, and therefore in violation of your campus policy.

	<u>51%</u>	<u>C&amp;C</u>
1. Todd and Amy meet at a bar. Todd asks Amy to sleep with him. She refuses, but agrees to go back to his room.		
2. Todd is charming and persuasive, but Amy barely knows him. She is attracted to him and fools around with him, but draws a line.		
3. Todd at first heeds her “No,” to intercourse but she continues to fool around with him and induces him into a frenzy of arousal. He thinks she is a tease.		
4. Todd realizes that she doesn’t want to have intercourse, but he’s had a few beers, and he says he is unable to control his lust. She lets him go further, but not to the point of intercourse		
5. Amy had nine beers over three hours at the bar, and it has been 2 hours since they left the bar.		
6. Todd testifies that he noticed that Amy stopped saying “No” and started crying during the intercourse, so he hurried up to finish.		
7. Instead of the testimony in #6, Todd testifies that he thinks Amy passed out for a short time during the intercourse...		

### Evidence and Decision-Making --LPR

You will assess multiple types of information and consider multiple factors in reaching your decision. In the hearing process, **EVIDENCE IS ANY KIND OF INFORMATION PRESENTED WITH THE INTENT TO PROVE WHAT ACTUALLY TOOK PLACE.** Although the words are often used interchangeably, “evidence” and “proof” are not the same. **PROOF IS SIMPLY THE EFFECT OF EVIDENCE.** Evidence can prove something or nothing at all. There are no hard and fast rules governing

evidence in a campus judicial hearing. Be fair, and use good judgment. Remember, responsibility does not have to be established “beyond any reasonable doubt.”

## TYPES AND VALUE OF EVIDENCE

**Direct or Testimonial Evidence:** based on personal observation or experience and relayed in the hearing through eyewitness testimony or sworn statements. You either believe the person saw or did it, or you don't. This is the most common and, usually, the most valuable form of evidence.

**Circumstantial Evidence:** information which, although it does not include an eyewitness to an actual event, does include enough information to lead a reasonable person to the conclusion that the student did what he/she is alleged to have done. Circumstantial evidence can be very powerful. For instance, if you are in a hallway and see a water balloon being thrown out of the room into the hallway (but didn't see who threw it), and you immediately walk into that room, no one leaves the room as you approach it, and when you get to the room there is only one student in that room (and no one under the beds or in the closets or hanging out the window), it may be reasonable to conclude that the student threw the balloon.

**Documentary Evidence:** any supportive writings or documents including statements, reports, etc., that support or deny a fact at issue. The panel should take reasonable steps to ensure that documents presented are accurate and authentic. Witnesses may be asked to testify to the accuracy of documents.

**Real and Demonstrative Evidence:** Real evidence is any physical object such as a weapon, fire extinguisher, piece of clothing, etc. Demonstrative evidence substitutes for real evidence that may be difficult to produce at a hearing (e.g. a bruise that has faded; a damaged street sign; the room in which the incident took place). Demonstrative evidence includes photographs, maps, charts, diagrams, etc., which substitute for real or documentary evidence.

**Hearsay Evidence:** any statement made “outside the hearing” and offered as evidence to *prove* the truth of some fact asserted in the statement. If Jennifer testifies that Derek told her that he saw Justin break the ceiling tiles, Jennifer is testifying about a statement made “outside the hearing.” Hearsay carries little weight and cannot itself be used as a basis for findings of fact. However, hearsay can lead to other

lines of questioning or to the production of documents that corroborate the testimony. For instance, Jennifer's statement might be used to call Derek as a witness; Derek's testimony that he saw Justin break the ceiling tiles would be persuasive direct evidence.

**Character Evidence:** Evidence pertaining to the character or academic record of the respondent (or accuser or witnesses) is seldom acceptable because responsibility is not determined by whether the respondent is a good person or a good student. "Bad" people sometimes act well, and "good" people sometimes behave badly. If the accused student brings his/her character into the hearing, the complainant may rebut the student's arguments with evidence (if any) to show that the character is not what has been claimed.

**Past Record:** The past record of the accused student should not be brought into the hearing except before sanctioning and in cases where the institution is trying to show responsibility for multiple or repeated violations. However, in some cases evidence of past behaviors may be admitted in order to show intent or knowledge or to rebut a student's claim of incident-free history. For instance, if Marcia argues that she did not know that alcohol was prohibited on campus, the institution may present evidence that she was previously found in violation of the alcohol policy.

## Relevance --BAS

Judicial decisionmakers should only deliberate upon evidence that is relevant to the issue being tried in the hearing. Otherwise, the hearing could degenerate into a confusing barrage of unrelated facts and character assassination. Controlling evidence can occur, potentially, at three separate stages: Excluding testimony and evidence before the hearing; declaring testimony inadmissible at the hearing; and limiting or excluding evidence admitted at the hearing in the later deliberation stage.

Relevance must be controlled by the presiding judicial decisionmakers or the chair of the judicial body. Unlike a trial, though, judicial decisionmakers should not wait for objections to be raised by participants. It is the duty of the judicial body to inform those testifying that the information they are providing is irrelevant and inadmissible, if there is a need to make that clear in the hearing to avoid prejudicing the process. Often, it is possible to anticipate such testimony, and cut it off so that it is not revealed at the hearing.

Sometimes, judicial decisionmakers will not recognize that testimony is irrelevant until after it is given. When this happens, the judicial body must strive to disregard the testimony in its deliberations, and refuse to allow it to color its decision. Although this is difficult, it is a foundation for fairness in the hearing that all judicial bodies should endeavor to accord to the participants.

Relevance is a discipline that is not controlled tightly enough in most judicial hearings, mostly because of a lack of familiarity with the concept, and how to apply it. So, how do you recognize irrelevance when you hear it? Testing for relevance is actually not complex; we intuitively understand the idea of relevance when it is used as a synonym for germane. But, as an operative concept, it is broader than that. To test for relevance, ask yourself: Is the fact or information that is being offered likely to prove/disprove an issue in the hearing? If it is likely to lead to proof/disproof, even indirectly (indirectly does not mean tenuously), it is relevant. If it is not likely to do so, it should be inadmissible (inadmissible not in the legal sense that it cannot be testified to, be inadmissible in the sense that it cannot form any part of the basis for the finding). Test your familiarity with this concept on the following examples. In each complaint, ask yourself, what is the matter in issue that this fact speaks to? Then ask whether considering that fact would tend to prove or disprove the issue. If it would, it is relevant. If it would not, it is not.

## RELEVANCE EXERCISES

1. Is the fact that a boyfriend failed to heed a campus no-contact order relevant in a later hearing in which he is charged by his girlfriend (who requested the order) with a violent attack? *Yes. It tends to prove that he had potentially violent inclinations toward her.* Would it be relevant in a hearing in which the boyfriend accused of an attack on an unrelated third person? *Probably not. What would make it relevant? If we knew the basis for the no-contact order, and it helped to establish violent tendencies generally (that this is an individual who likes to solve his problems with his fists) as a fact in issue in the complaint, we could then generalize about his behavior from the no-contact order, rather than seeing it as reflecting his behavior only toward a specific target. This might require the issuer of the no-contact order (depending on FERPA), or the person who sought the order to testify at the hearing. Without that basis, for a judicial body to consider that evidence as relevant could prejudice the fairness of the process.*

2. A male respondent was accused of sexually assaulting a female student. He testified at the hearing about the incident. At one point, he testified that he was having sex with the complainant, and he looked over at his desk, which was just next to the bed. Upon the desk was his fishbowl, in which he kept his pet fish (this is a true story). He then testified that while he was having sex, he was quite certain the fish was watching him. The fish was not called as a witness. Is this testimony relevant? *No, but it is harmlessly irrelevant. To allow it to be testified to is not problematic, just frivolous and useless.*

## **CREDIBILITY --LPR**

Judicial Board members may hear a great deal of information in a hearing. The sheer quantity of evidence presented is less important than that the *quality* or credibility of that evidence. All findings of fact and recommendations must be based solely on the *evidence* in the complaint as a whole. This information can be conflicting or unclear. In order to effectively “weigh” the evidence before them, board members must make “credibility” decisions about witnesses and their testimony.

My office copy of Webster’s Dictionary defines credibility as the “state or quality of being credible.” *Credible* is defined as “worthy of credit, with *Credit* meaning “reliance on testimony.” In short, **TO ASSESS CREDIBILITY IS TO ASSESS THE EXTENT TO WHICH YOU CAN RELY ON A WITNESS’S TESTIMONY TO BE ACCURATE AND HELPFUL IN YOUR UNDERSTANDING OF THE CASE.**

Credible is not necessarily synonymous with “truthful.” Although some witnesses may deliberately lie or distort the truth, others may be sincerely in error. Witnesses should provide reasonably detailed accounts of the events in question. You may use multiple factors – to the extent that you can determine them – such as the witnesses’ relationships to other parties (are they impartial, are they friends?) and their motives and attitudes with respect to the respondent -- to judge credibility. Eyewitness testimony will vary from person to person and no two people remember an incident in exactly the same way. Memory errors do not necessarily destroy a witness’s credibility. Jermaine may incorrectly recall that Matt was wearing a red ball cap when Matt was actually wearing a blue beret. This does not mean that Jermaine did not see Matt light the firecrackers. Do not focus on *irrelevant* inaccuracies and inconsistencies.

Moreover, do not be drawn in to irrelevant examinations of the actions of witnesses, victims or complainants, unless they bear *directly* upon the determination of whether or not the respondent violated the Code. Remember that the hearing is about the actions of the respondent. Those who testify, whether complainants, respondents, or witnesses usually know something about the incident or about matters directly related to the incident. You are asking them to share information to help you build an understanding of what happened. Paying attention to the following five factors: **DEMEANOR, LOGIC, CORROBORATING EVIDENCE, CIRCUMSTANTIAL EVIDENCE, AND EXPERTISE** will help you assess the credibility of a witness's statement.

## DEMEANOR

You will of course look closely at the witness's nonverbal language, remembering that people behave nervously or avoid eye contact for a number of reasons. Diversity in cultural expectations about how to act in the presence of "authority", fear, nervousness, or unfamiliarity with the situation may cause people to avoid eye contact. Demeanor issues should be your cue to ask more questions. But demeanor alone is never reason enough to either discount testimony or completely rely upon it. I think it can be OK – but check with your advisor about this -- to objectively point out to a witness what you observe about his or her demeanor and ask for an explanation. Watch out for these problematic patterns in witness demeanor:

***Non-cooperation.*** Non-cooperation frequently manifests itself in abrupt, short answers or refusal to answer questions. This could result from the witness's fear of retaliation, anger or frustration with "the system", or a desire to hide something. A question you might ask is, "You seem reluctant to answer these questions. Could you tell us what makes you reluctant?"

***Loves the limelight.*** This witness may seem TOO cooperative; may appear to enjoy testifying, being center of attention. The witness who loves the limelight seems confident and may embellish or go beyond the scope of the questions, in order to remain on center stage. There is no particular need to question or admonish this person, but it may be necessary to say: "Because this is such a complicated complaint, could you please limit your statements to answering our specific questions, or describing the incident in question."

***Axe to Grind.*** This person may have a “hidden agenda” with respect to the particular person or about the situation. For example, a RA who is frustrated with a student and has finally “caught” that student in a violation might try to use the time to talk about all the other problems the student is believed to have caused. I recall a complaint in which a witness testified that her roommate’s boyfriend hit her. It was eventually revealed that the “hit” was accidental, but that the witness was angry about the respondent’s previous mistreatment of her roommate and saw this as an opportunity to “nail” him. A witness with an axe to grind should be politely cautioned to stay focused on the event in question. I might say to such a witness, “you seem to have concerns that go beyond the scope of this hearing; perhaps you can discuss those with the Dean of Students at a later time.”

***Tries to Please.*** This witness wants to please the hearing panel, or administrators – or perhaps even the complainant or the accused -- and will try to give the “right” answer. The pleaser might tip you off by such remarks as, “well, I’m not sure what you want me to say,” or by looking for approval to the person(s) he or she is trying to please. Because this witness can be easily led, it is very important to ask open-ended questions: “Please describe the lighting outside Jones Hall that evening.” Not, “It was very dark outside Jones Hall, wasn’t it?”

## LOGIC/CONSISTENCY

You must assess the internal logic or consistency of the testimony you hear. In short, does the testimony make sense? If the witness says that she heard her next-door neighbor unlock her door at midnight but later says music in the hallway was too loud to hear voices, you might wonder how she could hear the key sounds. Your questions will be directed at clarifying any areas that don’t make sense to you or any perceived inconsistencies in the testimony.

## CORROBORATING EVIDENCE

Quite simply, does the testimony of others, or other documentation, corroborate, or “back up” what the witness is saying? Naturally you will assign more credibility to testimony that is backed up by others’

testimony and other evidence. This will be particularly helpful in areas where the witness seems unsure. If Brad remembers that he was in class at the time of the incident and can produce a copy of his class schedule and an instructor who marked him "present" in the grade book, his memory is corroborated.

### CIRCUMSTANTIAL EVIDENCE

Circumstantial evidence can be very powerful, even though it does not include direct information about the event. If the accused student establishes that he was taking a shower on the fourth floor at 9:14 p.m., the circumstances suggest that it is very unlikely that he pulled the fire alarm on the twelfth floor at 9:18 p.m. (unless the floor around the alarm was covered with water!).

### EXPERTISE

Establishing the expertise of the witness can be extremely helpful in assessing the witness's credibility. For instance, the expertise of a police officer who has been trained to assess intoxication, and who has encountered hundreds of drunken people in her career, renders her testimony that "John seemed intoxicated" quite credible. Conflicting testimony by another party guest who asserts that "John seemed sober" will be deemed less credible because the other party guest admits that he was himself extremely drunk at the time. Expertise need not be professional or "trained" expertise, merely a familiarity with the subject of the testimony. We could expect Mary to be more of an "expert" on her best friend Jill's drinking habits than Roy, who had just met Jill, would be.

### CREDIBILITY EXERCISE

In this exercise you are asked to come up with questions and/or additional information you need to help you assess the credibility of the testimony:

1. Jan says that she saw Jeff throw a rock from his residence hall window. Jeff says he accidentally knocked a plastic cup from the window ledge.
2. Officer Smith says that when he interviewed Marie, the complainant, she "looked like a rape victim." The respondent says that Marie willingly had sex with him.

3. Rick, the Resident Advisor, says that he smelled the distinct odor of marijuana emanating from Lou's room. Lou claims that the odor was caused by her attempts to make venison jerky in her microwave oven. No physical evidence of marijuana or the jerky was produced.

### Prejudice & Limiting Evidence --WSL

Reduced to its simplest component, what does "prejudice" mean?

To "Pre-judge."

There are two ways that "Prejudice" enters our proceedings. The first is in our own minds.

*What do we prejudge based upon?* A variety of factors cause us to pre-judge. We discussed most of them when we discussed bias, and the preconceived notions that we have developed over our lives. We know that these are almost impossible to overcome, and what we are trying to do is to be aware of them, and their potential affect on our ability to hear a complaint.

The second way that "Prejudice" enters a hearing is through evidence and testimony. In short, when things are said, shown, read, distributed, acted out, or played (e.g., audio or video tapes), they have the potential to impact the proceeding. Much like relevance and credibility, it is your job to determine whether or not what was said, shown, read, distributed, acted out, or played will have an effect on the fundamental fairness of the hearing's outcome; and, if so, what kind of effect it will have. But here is the tricky part – you often have to decide this before it is said, shown, read, distributed, acted out, or played. Sometimes this is easier, because it can be addressed it before the hearing.

### BEFORE THE HEARING

You (or your advisor, a hearing officer, the University's Counsel, etc. - *someone*) should go over with all parties (charging, accused, witnesses, etc.) what the purpose of the hearing is, and what can and cannot be discussed or entered into evidence. A good idea is to make all materials from all sides due to the coordinating office 2-3 days prior to the hearing. This will also allow you to: a) determine what materials may be unable to be admitted, and b) disseminate the materials to the panel prior to the hearing, to give

them more time to review. *But won't they form opinions?* Perhaps, but this is a decision that you (as an institution) must weigh.

## DURING THE HEARING

Handling testimony and evidence during a hearing is a lot tougher, as parties may blurt out information without thinking (or sometimes intentionally). The panel (usually the Chair) has the dubious honor of not only having to listen to what is being asked and answered AND maintain decorum, but also to guess what is about to happen or be said to make sure it does not "cross the line". (*Fun, huh?*)

## WHERE IS THE LINE?

This is one of those instances where we, as Judicial Councils/Boards, can take a lesson from the actual criminal and civil courts. A good rule to go by is one that is similar to the Courts: "If the probative (truth establishing) value of the evidence outweighs the potential harmful effect," it should generally be allowed.

Sound a little vague? Good. It is more than a little vague, and wide open to interpretation – that is your job – to determine which way the scales tip.

## PREJUDICE EXERCISE #1

In a sexual assault hearing, a University Police Officer who interviewed the victim/survivor one time for one hour four days after the incident is asked: "What did the victim look like?" She answers, "She sure looked like someone who was raped to me."

- 1) Is that statement prejudicial?
- 2) Why or Why not?
- 3) If so, how much?
- 4) What should the Hearing Chair do? Cancel the Hearing? Go on as if it had not been stated?
- 5) What other options are available?

- 6) How could the question have been better phrased?

#### PREJUDICE EXERCISE #2

A victim of an assault wants to show the Hearing Panel photos he took of his cuts and bruises five days after the alleged assault.

- 1) What should the Hearing Chair do? Allow them to be shown? Not allow them?
- 2) What could happen if the Chair does or does not allow them?

#### PREJUDICE EXERCISE #3

During a sexual assault hearing, a witness for the victim, when asked how she knows the accused, says, "I used to date him, and I know he treats women like dirt and probably raped her."

- 1) Is that statement prejudicial?
- 2) Why or Why not?
- 3) If so, how much?
- 4) What should the Chair do? Cancel the Hearing? Go on as if it had not been stated?
- 5) What other options are available?
- 6) How could the question have been better phrased?

#### PREJUDICE EXERCISE #4

During a sexual assault hearing, a witness for the accused, when asked for his name, says, "I am the guy who had sex with her (pointing at the victim) along with everyone else I know. Everybody knows she is easy and she is just doing this because she is mad at him."

- 1) Is that statement prejudicial?
- 2) Why or Why not?
- 3) If so, how much?

- 4) What should the Hearing Chair do? Cancel the Hearing? Go on as if it had not been stated?
- 5) What other options are available?

### Reading Witnesses (Gestics) – The Art of People Watching --WSL

In a hearing, it is important for you to remember this – no one is comfortable. It is an inherently uncomfortable situation. You are uncomfortable hearing the things you are hearing. You are uncomfortable asking the personal questions that you sometimes have to ask. You are uncomfortable with the notion that you may have to make a decision that could potentially dramatically impact someone's future. That is just **your** discomfort. Imagine theirs.

#### THE ACCUSED

S/he has to come into a room and discuss with 3-10 complete strangers an event in his/her life that s/he would probably rather forget. Then, after giving a statement, s/he has to *answer questions about it!* Try this: next time you go with a friend to meet their family, start by saying, "Hello, I am (insert name here), did I ever tell you about the time I got arrested?" You probably would not want to do it. Neither do they. Hopefully, they have prepared for this as best they can – it will make your job easier. Probably – they have not.

#### THE VICTIM

S/he has it as bad (or perhaps even worse) than the Accused. Not only do they have to tell this awful, sometimes embarrassing, sometimes horrific story again, but also they get to share it with 3-10 complete strangers. To add to their stress, they may even get to hear the Accused (with his/her testimony), as well as any of his/her witnesses, in essence, call them a liar – repeatedly. Take, for example, a sexual assault complaint. To attempt put you in her<sup>2</sup> shoes for a moment, imagine telling a group of perfect strangers – in vivid details – about your last sexual/intimate encounter. And be prepared to answer questions about it. Chances are, your last encounter was consensual – so now try to imagine how difficult it is for her.

## THE WITNESSES

Given the option, some of these folks would prefer to not even be at the hearing. In fact, if your institution cannot compel them, they may not show up. Others cannot wait to testify on behalf of or against someone. Both instances have strengths and weaknesses.

## THE GOOD NEWS

Is that “people are people,” and we all have a lot of similar tendencies. BUT...keep in mind as you read the following: there is no one physical response that automatically indicates whether or not a person is lying, exaggerating, telling the truth, etc! You have to look at the total package – what they are saying, how they are saying it, and why they might be saying it. That being said, here are a few pointers:

*What you (the Hearing Panelist) should be doing:*

- Establish a baseline – get them as relaxed as possible
- Maintain solid eye contact (no glaring or staring)
- Listen to their answer (do not write, if you can help it)
- Listen to their answer (do not think of your next question while you are not paying attention to their last answer)
- Nod affirmatively to keep them talking
- Use your hands to encourage them (e.g., “The Preacher Clasp”)
- DO NOT fidget (hands or feet)
- DO NOT shake your head “no”
- DO NOT look shocked, stunned, or accusingly at what they just said – they will shut down

*What to look for in their testimony:*

- ***Their baseline*** – How relaxed are they? Remember – baselines can adjust throughout testimony!

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<sup>2</sup> I understand the use of “her” may be gender biased, but I am merely going with statistical probabilities.

- ***What are they doing with their eyes?*** A lack of eye contact may mean a lack of comfort, and possible dishonest testimony. This is especially true if their baseline established solid eye contact. Eyes that dart back and forth indicate nervousness as well. You are looking for eye contact that matches baseline.
- ***What are they doing with their arms/hands?*** Fidgety, shifty hands indicate discomfort. Also, hands to the mouth indicate a desire not to be heard clearly –potential exaggeration or dishonest testimony. Crossed arms may mean that the witness is closing off to you – ask yourself why and reestablish a new baseline/change lines of questioning.
- ***What are they doing with their head?*** There is a phenomenon known as the “Liar’s Lean” – this is where a person will lean towards the closest exit when lying or in extreme discomfort. Look for an exaggerated head tilt, or perhaps an entire torso lean towards the door or away from the panel. Also, are they “flushing” or “blushing” – there is a difference. “Flushing” (from the neck up) is a stronger indicator of discomfort or nervousness, where “blushing” (from the cheeks down), is a stronger indicator of embarrassment.
- ***What are they doing with their legs and feet?*** Crossed legs can be an indicator of an attempt to “build a barrier” between them and you (some gender bias here, as more women tend to sit cross-legged than men). For example, in men, look for a definitive crossing of legs, tied with other attributes; in women, look for a definitive switching of legs. With feet, look for fidgeting, nervous tapping, etc. As with all other physical attributes, you are looking for movement away from the baseline.
- ***What words are they using?*** To often, we overlook the importance of the words we choose. Conversely, we do the same to others. For example, when does the witness/accused/victim change from “I” to “we” to “him” or “her” during testimony? This change may indicate a desire to distance from the other’s conduct or potential ramifications of the conduct.

*Remember:*

- 1) Different words have different meanings. Think "accident" versus "collision," "cut" versus "slice" or "stab" or "incision" or "sever." (Which would you rather be? "Cut" or "sliced?")
- 2) People rarely choose words accidentally; the "Freudian slip" is alive and well! Pay attention and LISTEN!

## CONCLUSION

When people are uncomfortable, it does not necessarily mean that they are lying – it may just mean that they are uncomfortable. What are YOU doing to make them more comfortable, and thus, more likely to tell the truth (or at least talk to you)?

## Advisors and Advocates --LPR

I am strongly in favor of including within the judicial process students or staff who are trained to serve as advisors to complainants and respondents. The roles of these advisors, or advocates may include:

### PROVIDE EMOTIONAL SUPPORT

For victims, complainants, and accused students, involvement with a judicial hearing can be intimidating and emotionally draining. Having a confidential support person who is perceived as totally "on your side" -- a role few judicial officers can assume because the judicial officer usually represents the institution -- helps the student weather the emotional strain of the process and concentrate on working within it. Outside of the hearing process, advisors and advocates can perform a mentoring function and can be helpful to the student in making many difficult choices associated with the complaint.

### PROVIDE PROCESS GUIDANCE

An advisor or advocate helps the student understand the process. Although the concepts are simple, the procedures can be complex. A trusted advisor (more trusted than an administrator who may be seen not to represent the student) can be of enormous help to students who, while in a difficult life situation, also have to learn and negotiate an unfamiliar process. It is the role of the advisor to know the process and to explain and interpret it to the student, and to be realistic with the student about what to expect.

#### PROVIDE INTERPRETIVE ASSISTANCE

If permitted by the campus system, advisors may be able to speak on behalf of students in the hearing, thereby helping students interpret their experiences and feelings in the format and terminology appropriate for a campus judicial hearing. Advisors should strive to be or should educate students to be civil, non-legalistic, and rational in their presentations.

#### KEY POINTS FOR ADVISORS AND ADVOCATES

Respect the *Student's Perspective*. Help Present Evidence. It is extremely important that advocates and advisors respect and represent the student's point of view, not their own (no axe-grinding). The advisor must respect the student's autonomy and must maintain confidentiality. An advisor or advocate's job is to help the panel get all the information they need to make a fair and accurate decision --- not to "win" or impress them with the advocate's skill. Therefore, advisors and advocates do not testify as witnesses.

#### BE KNOWLEDGEABLE ABOUT THE PROCESS

This suggests that advisors and advocates should have some training and be vetted by the Judicial Affairs office. **Do Not be "Substitute" Attorneys.** Advisors and Advocates should never try to emulate or fulfill the attorney role. Nor, if an attorney is involved in the complaint, should they be dictated to by the attorney.

Impact Statements --LPR

## MAY OR MAY NOT BE EVIDENTIARY

The impact of a student's behavior on others may or may not be a factor in determining whether or not a violation occurred. Whether or not an action is considered harassment or sexual abuse, for instance, depends in part on how the action was experienced by the recipient: on its effect or impact. If, for some bizarre reason, John *enjoys* the fact that Jane calls him every fifteen minutes between 11 p.m. and 2 a.m., Jane's behavior is not likely to be considered harassment. If John feels annoyed or frightened by Jane's actions, her calls may well be considered harassment. In other cases, the impact of the violator's behavior may have little or no bearing on the determination of responsibility. For instance, at most schools, throwing water balloons out of a residence hall window will be considered a violation regardless of whether those on the sidewalk below delight in or detest the behavior. It is essential that hearing panels understand the role the effect of an action plays in determining whether or not the action is a violation. Judicial board advisors should be prepared to help board members study their Codes and sort out whether or not the impact is a form of evidence.

## SHOULD BE CONSIDERED WHEN RECOMMENDING SANCTIONS

Understanding the impact of the incident on the affected persons should *always* be an element in the development of sanctions for persons found responsible for violation. Campus judicial sanctions serve to promote the safe and appropriate educational environment and provide education and remediation for the violators. Part of this educational purpose includes helping the student violator understand the negative impact of his or her actions. Such sanction requirements as restitution, restriction from contact with particular persons, certain areas, or events, and the writing of reflective papers or participation in service activities will be built on the board's sensitivity to the impact of the student's behavior on the campus community.

## MAY BE HEARD BEFORE OR AFTER FINDINGS OF FACT

Impact information can be gathered during witness testimony. The witness can be invited to tell about, say, the costs and workers' time associated with replacing the window broken by the accused; or to tell about changes in her life and behavior as a result of victimization by the accused. The advantage of the in-testimony approach is that witnesses and complainants do not have to return to give their statements after

sanctioning has occurred. However, on some campuses, there may be concern that including impact statements in testimony will unduly prejudice the panel against the accused. Although I believe that most panels can easily sort out the differences, when this is a concern, schools may choose to wait until after the student has been found responsible to introduce impact information.

SHOULD BE PERMITTED, NOT REQUIRED

The most powerful impact information is of course delivered in person by the ones who were affected. Understanding that giving such a statement in person, in the presence of the responsible student, may be embarrassing at best and emotionally devastating at worst for a victim or complainant, impact statements can also be introduced by advisors, can be submitted as written statements, or, depending upon your system, can be incorporated into "statements before sanctioning."

--- EVEN FROM THE RESPONDENT

To maintain fairness and support our educational missions, I recommend that students found responsible also be allowed – not required -- to make "statements before sanctioning" and to talk about the impact of their actions.

### **Disruptions--Postponing/Rescheduling the Hearing --BAS**

A judicial hearing that runs flawlessly is a thing of myth. Most cases, especially sexual misconduct cases, have their complications. Be ready to address these twists and turns as they come. Hearings can deteriorate into shouting matches, dissolve into tearful incoherence, be undermined by parental interference, perjury, or the reversing of testimony, dissipate by fear and intimidation into silence, collapse by reconciliation, or be disrespected by lawyers. The judicial body must maintain its control in the face of these and other possibilities, to the extent that it can. When it is clear that the judicial body cannot maintain the requisite level of control, alternatives must be considered. The judicial body should consider its ability to eject disruptive participants. It should also consider a break in the proceedings, to regain calm, if necessary.

Ultimately, a postponement of the hearing may be called for. Clearly, if a participant is too emotional to continue, a postponement is appropriate. Other situations must be considered on a complaint-by-complaint basis. It is natural to be reluctant to make a postponement, and a decision to delay a hearing should not be made lightly. There will be times when participants insist on a postponement, even if the judicial body does not grant it. When participants walk out of a hearing, it is prudent to postpone and reschedule, unless an unwillingness to participate further in the process is manifest by the participants prior to their withdrawal. In that complaint, you may need to see the process through to a resolution, despite full participation of the key parties. When a hearing is postponed, it should be rescheduled as quickly as possible. Every attempt should be made to avoid repetition of the circumstances that caused the disruption of the previous hearing.

### The Policy Analytic --BAS

I find it helpful to train adjudicators to break a policy into its constituent parts or elements to determine if it was violated. Often, a policy can be transformed into a flowchart to make it easier to assess if it has been violated. Look at following example of a sample sexual misconduct policy, with its attendant elements.

Sexual Misconduct is any sexual contact that takes place:

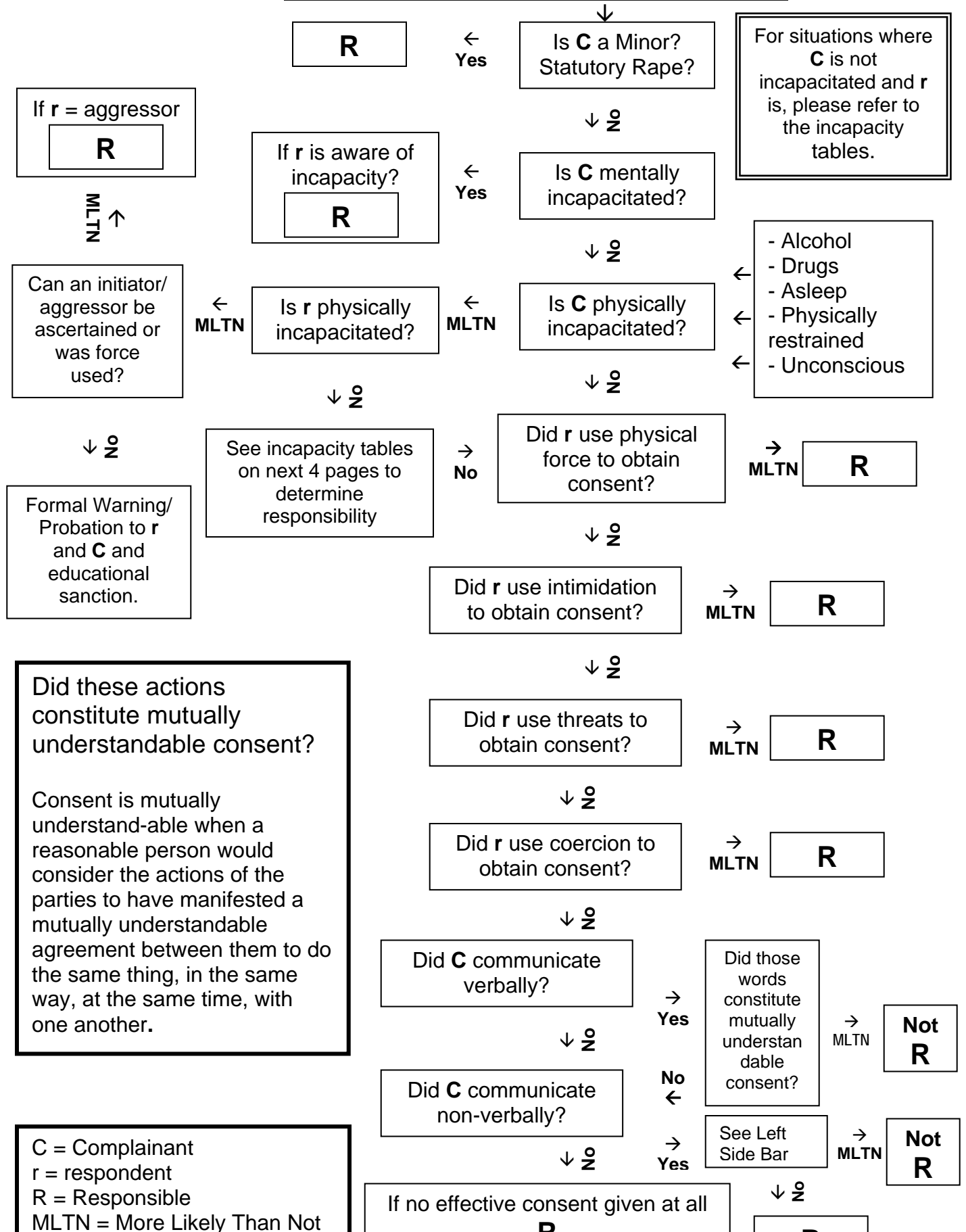
- Between a minor and an adult;
- With a mentally incapacitated person;
- Or without the effective consent of all parties.

Effective consent is:

- Informed--consent is not informed when given by one who is known to be or should reasonably be known to be physically incapacitated.
- freely and actively given--consent is not freely given when produced as a result of physical force, threats, intimidation or coercion.
- mutually understandable words or actions;
- which indicate a willingness to engage in mutually agreed upon sexual activity.

Now, take a look at the same policy flowcharted as an analytic for hearing purposes:

# Allegation of Sexual Misconduct



## Deliberations with Case Scenarios

### FACT PATTERN #1

1. Rhonda Resident calls the campus police department to report that her credit card had been used to purchase things over the web without her knowledge. A police officer responds to take her complaint. Rhonda tells the officer that she noticed a bill from Porn-is-U's on her credit card bill. She is adamant that she has never ordered anything from a company with a name anything like that. She adds that since she has learned in her Women's Studies class about how pornographers exploit their models, she decided that she would never purchase anything that would support pornographers and would discourage others from doing the same.

When asked who might have access to her personal information, the only person she can think of is her roommate, Sally Thang. She tells the officer that she, Rhonda, frequently goes home on weekends and that Sally stays weekends on campus. Rhonda suspects that her roommate allows her boyfriend, Johnny Jump-Up, to sleep over while Rhonda is away, but Rhonda cannot prove that. Rhonda has allowed Sally to use her computer to check her e-mail and do campus assignments. She did note that one Sunday evening, Sally and Johnny were using her computer when she arrived in their room and they appeared nervous about something. She did not ask them about it, because Johnny left almost immediately.

The officer talks to Sally, who admits looking at pornography on the web while Rhonda is not in the room. Sally says that she and Johnny were looking at a porn site a couple of weeks ago when Sally walked in and that they hurriedly signed off because Sally knows how Rhonda feels about pornography. Sally denies ordering anything from Porn-is-U's and charging it to Rhonda.

The officer contacts Porn-is-U's and asks for information about the order. Porn-is-U's initially is reluctant to provide information, but eventually tells the police that the charge is not for an item that was ordered, but is a subscription fee for accessing the site. They also provide the IP address of the computer from which the order was sent. The IP address is Rhonda's. The officer meets with Rhonda and Sally together. Sally starts to cry and admits that Johnny didn't tell her that there was a subscription fee. She denies providing Rhonda's credit card number, but admits to leaving Johnny in the room alone while she went to take a

shower and suspects he may have taken Rhonda's card from her desk drawer and used it. Rhonda also admits telling Johnny where Rhonda keeps her card, because she was making fun of Rhonda for leaving a credit card in such an unprotected place.

*Your campus policy explicitly prohibits the unauthorized use, taking or misappropriation of the property of another. Based only on the information given here, has your campus' standard of proof been met sufficiently to prove a violation? By whom? Of what? What are the issues you must address?*

## FACT PATTERN #2

2. Sherie and Vanna have been dating for several months. They met through the campus Gay, Lesbian, Bisexual, Transgender organization. Sherie is an "out" lesbian and quite forthright about her sexual preference. While Vanna is quite taken with Sherie, this is her first relationship with another woman, and she is not comfortable being seen with Sherie in public, and being identified as a lesbian. This upsets Sherie, who feels that Vanna is ashamed of her and their relationship. Sherie is often pushing Vanna to be more militant and overt. Sherie is into terrorizing "breeders" (heterosexuals). Her idea of fun is to take her date to a bar full of guys and make out in front of everyone. Sherie and Vanna have had some tense exchanges at the GLBT organization meetings over how homosexuals are perceived on campus.

In fact, their arguments have become more and more personal at recent meetings. Sherie and Vanna are close with a few other students in the group, including two women named Micki and Darlene. Micki is a lesbian who is quite interested in Sherie, and is jealous of her relationship with Vanna, though she has always kept those feelings hidden from Vanna. Darlene suspects how Micki feels about Sherie. One night, all four women had plans to go out to a gay bar together. Vanna was fairly reluctant to go, but Sherie persuaded her. The scene at the gay bar was pretty dull, so Sherie and Micki decided they wanted to go to a breeder bar and stir up trouble. Vanna was adamant about not being a part of the plan, until Sherie grabbed her by the hair and pulled her out of the bar and into the next one. About a month later, Sherie and Vanna broke up, after Vanna wound up in the hospital. She wouldn't tell the police what happened, but Vanna made a complaint against Sherie under the college's relationship violence policy. The policy stated: The College of Knowledge does not tolerate abusive, hostile or violent behavior between people who are

engaged in intimate relationships with each other. During the hearing, Sherie wants Micki to testify as a witness on her behalf.

- 1) It is clear that Micki plans to testify about typical characteristics of butch lesbians. She will support Sherie by arguing that being a little rough is part of the butch/femme lesbian relationship, and that Sherie did nothing more to Vanna than any butch lesbian would have done, and that such toughness and mildly rough behavior should be accepted by Vanna as the submissive partner in the relationship. *Any concerns with admission of this testimony?*
- 2) Darlene was called as a rebuttal witness by Vanna. She is to testify that Micki's support of Sherie is unreliable because Micki has a crush on Sherie and would say anything to curry favor with her. *Any concerns with this testimony?*
- 3) Vanna is questioning Micki, and asks her to testify to the arguments she heard between Vanna and Sherie at the GLBT meetings. Micki asks the chairperson if she should not answer, because what took place at the meeting is not relevant, and should not be revealed to those who are not GLBT members. *What would you advise her?*

### FACT PATTERN #3

3. Tanya, an African-American female student and Rosa, an Hispanic female student, first came to the attention of judicial affairs in early September of their freshman year (about two weeks after the first day of classes). Tanya complained that Rosa had been stalking her and "talking trash" about her to other students. Rosa, in turn, insisted that she was not stalking Tanya but that Tanya made threatening remarks and gave her threatening looks while on campus. The judicial director talked with both women separately. In the course of these conversations, both Tanya and Rosa stated that they had been best friends through grade school and that their animosity originated in an incident that had occurred when both were in the ninth grade. Both women described incidents of stalking, threats and harassment that allegedly occurred on and off over the years, at various locations in their hometown, up to the weeks preceding their matriculation at the University. Both indicated that the conflict had grown to include other family members, resulting in a restraining order being placed upon Rosa's father after Tanya's family complained about him.

Meanwhile, the Dean of Student Affairs received angry calls from the respective mothers of the two women, each claiming that her daughter was being victimized and demanding that the University “do something” about the situation. After both the Dean and the Judicial Director engaged in additional conversations (separately) with the women, Tanya and Rosa decided to drop their respective complaints and agreed to stay away from one another. Each stated that all she wanted was “not to have to deal with” the other.

No more was heard from or about Tanya and Rosa until the following March, when a Security Guard reported that the two were engaged in a loud verbal altercation in a residence hall lobby. The Guard called the campus police, who separated the women and then referred the matter to the judicial office. Each woman was reported by the guard to have said, among other things, “I’m going to kick your ass.” Again, the women met separately with the judicial director. The judicial director learned that the altercation began when Rosa angrily confronted Tanya to complain that Tanya’s cousin Derek (also a University student) had been telling “talking trash.” Allegedly, Derek told Rosa’s boyfriend, in the presence of several other students, that Rosa was a slut and that he should stay away from Rosa because she had a sexually transmitted disease and was two-timing him. The two women agreed to participate in alternative dispute resolution (mediation) to try to resolve their conflict. At the close of a three-hour mediation session, Rosa and Tanya developed and signed an agreement promising to (a) avoid each other on campus, (b) not talk about each to other students, and (c) seek out the assistance of a professional staff member at the first hint of any problems or concerns.

Again, nothing was heard from the two women until late October of the NEXT fall (the beginning of their sophomore year).

**ROSA’S STORY:** Rosa appeared in the Judicial Director’s office at 9:00 a.m. saying that she had been attacked by Tanya the night before. She had a scratch along the side of her face. Rosa said that she had already reported the matter to the city police. According to Rosa, both women were in the library computer lab at about 9:00 p.m. Rosa said that when she realized Tanya was sitting a few feet from her she (Rosa) became worried that Tanya “might try to start something.” Part of

Rosa's concern stemmed from the fact that Tanya had allegedly stalked Rosa at Rosa's house and place of work during the summer. Tanya left the lab and was talking on a cell phone. Rosa feared that Tanya was preparing to "ambush" her. Rosa left the lab at about 9:15 p.m. and started walking toward the perimeter of campus, in the direction of her apartment. She saw Tanya about 20 feet ahead of her and "wondered what Tanya was up to" because she knew that Tanya lived in a residence hall on the other side of campus. Tanya disappeared behind the arch that marks the campus entrance. Rosa said she assumed that Tanya was crossing the street and continued to walk in Tanya's direction. When Rosa reached the arch Tanya was still standing there. According to Rosa, Tanya turned, called Rosa a "bitch" and lunged toward Rosa with her fists clenched. Rosa struck out to defend herself and Tanya pushed her down and began hitting her and scratching her. About that time Rosa heard a passerby yell, "Stop! What's going on here?" This distracted Tanya and Rosa was able to extricate herself, whereupon she got up, ran to a pay phone, and called the city police. The city police took her statement but said they would have to refer the complaint to the campus police.

**TANYA'S STORY:** Immediately following this incident, Tanya ran across the street to her cousin Derek's apartment and, with Derek, drove to the campus police station to make a report. In Tanya's report to the campus police (taken at 11:20 p.m.) she stated that both women were in the library computer lab at about 9:00 p.m. Tanya said that when she realized Rosa was sitting a few feet from her she (Tanya) became worried that Rosa "might try to attack me" because during the summer Rosa had made "unfounded" complaints that Tanya was stalking her. Therefore, Tanya said, she immediately got up and left. She decided to go to Derek's apartment because he had a book that she needed. According to Tanya, she was standing next to the campus entry arch, waiting for the streetlight to change, when Rosa came up behind her, called her a "bitch," knocked her down and began pounding her with her fists. Tanya, trying to defend herself, managed to roll Rosa over and scratched Rosa's face in the process. When a passerby calling "stop" distracted Tanya, she ran to Derek's and had him drive her to the police station.

**The PASSERBY'S Story:** At approximately 9:45 p.m. on the evening of the incident Ms. Martha Jackson presented herself at the campus police station to report an altercation she had witnessed on campus property. In a written statement, Ms. Jackson said that she was in her vehicle, waiting at

a stoplight near campus. To her right, across two street lanes, she observed a dark-complected, dark-haired woman standing and "peeking" around the campus arch in the direction of campus. A smaller dark-haired woman approached the arch. Ms. Jackson glanced at the stoplight and when she looked back, the taller woman (the one who had been peeking) was on top of the other, pounding her with fists. To Ms. Jackson, the taller woman appeared to have "ambushed" the smaller – i.e., appeared to be the aggressor. Ms. Jackson rolled down her window and yelled to a young white man who was near the women, "hey, stop them! Get some help." The young man seemed to ignore her and ran off, out of sight. The two women jumped up and ran in opposite directions, also out of sight. Ms. Jackson drove directly to the campus police station and made a report of the incident. Ms. Jackson identified herself as a private investigator who teaches part time in the University's legal assisting program. She is white. She did not know either of the women, but her description of the tall woman matched Tanya's description, and her description of the shorter woman fit Rosa's.

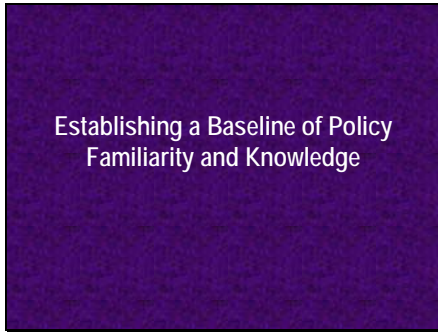
## ISSUES and QUESTIONS:

1. The judicial officer wants to charge both women in this incident. Would you hold separate hearings for each? The women have asked to have both cases heard at once. How would you structure it to ensure a fair hearing for each?
2. Each woman argues that the fact that she reported the incident almost immediately to the police is "proof" that she was not the aggressor? Is this relevant?
3. Each woman claims that she cannot get a fair hearing unless there is someone from her ethnic background on the panel? How would you address this – especially if you do not have the "personnel" to construct such a panel.
4. The University is claiming that the women violated their mediation agreement. Tanya wants the mediator to testify at the hearing. Rosa claims that the content of the mediation session was and should remain confidential. How do you handle violations of mediation agreements?
5. Both women want to call in friends, family and documents to show the history of their dispute – in hopes of proving the other's history and predilection to "aggression." Is such testimony useful, relevant, allowable? It will be very time-consuming.
6. Rosa has filed a criminal complaint against Tanya and the county will not allow Tanya to file a "counter complaint" until Tanya's complaint is settled downtown. Rosa wants to use this fact as "evidence" that Tanya is guiltier. Should the criminal complaint be brought into the hearing?
7. Tanya has been criminally charged, and wants to bring an attorney to the hearing(s). Issues?
8. How useful is Ms. Jackson's testimony in establishing responsibility? What would you do to assess her credibility?

9. Is it possible for both women to be responsible for a violation? Or must there be an aggressor and a victim?

THE FOLLOWING POWER POINT SLIDES ACCOMPANY SEGMENTS PRESENTED BY BRETT SOKOLOW

Slide 1



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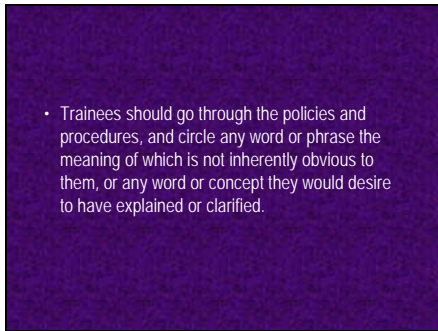
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Slide 2



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Slide 3

- Take the time in the training to fill in and explain where necessary.
- Go over all the circled items.
- Often, what I call non-policy or practice standards will emerge, helping to ensure the smooth and consistent operation of the campus judicial process.

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Slide 4

**Role-definition Exercise.**

- Write down words or sentences that describe what you believe to be the ultimate purpose of service on a hearing board.

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Slide 5

**Role-definition Exercise.**

- Your ultimate purpose is to uphold the institution's policies.
- All other objectives must be secondary.

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Slide 6

**Role-definition Exercise.**

- I always think the Dr. Kevorkian jury is a great example of understanding this duty.
- A majority of that jury likely was accepting of assisted suicide, and yet they convicted Dr. Kevorkian for performing assisted suicide.
- They upheld a law, even though they disagreed with it, because that was their job.

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Slide 7

**Getting Comfortable**

- The judicial body must make sure that it is comfortable with the subject matter of its purview.

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Slide 8

**Getting Comfortable**

- Prepare yourselves for hearing difficult things.
- Judicial decision-makers must realize that your own emotional boundaries and limits may be tested.

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Slide 9

**Getting Comfortable**

- Another aspect of gaining comfort with adjudicating is accepting that judicial bodies will occasionally be called to hear cases that involve
  - racial,
  - ethnic,
  - religious,
  - gender-based and sexual orientation issues.

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Slide 10

**Bias**

- Raise your right hands, and swear that you will be unbiased in performing your judicial duties.

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Slide 11

**Bias**

- We have this bizarre adhesion in judicial affairs to creating hearings that are without bias.
- That's impossible.
- People do not shed their values, beliefs and life experiences at the hearing room door.
- Nor should we expect them to.

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Slide 12

**Bias**

- A certain amount of bias is inevitable and unavoidable.
- What we do have concern for is bias that serves as the basis for the outcome of the hearing.
- Our goal should be to create a balanced process.

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Slide 13

**Bias Exercise**

- Professor Snape was a member of a three-person hearing panel. At one point, the complainant in this sexual misconduct hearing was testifying. Professor Snape asked her the following question. "Do you honestly expect this panel to believe that you were sexually assaulted?"

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Slide 14

**Bias Exercise**

- From your testimony, it is quite clear that on the night in question you were dressed provocatively, went to a bar known as a pick-up joint, flirted with a bunch of drunk guys, and drank too much yourself. Don't you think you were asking for whatever you got? Do we have a bias issue with respect to Snape?"

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Slide 15

**Bias Exercise**

- If so, what steps would you consider appropriate to restore the fairness of the process:
  - 1) The complainant should be directed not to answer Snape's question.
  - 2) Snape should be directed not to ask such inflammatory and conclusory questions.
  - 3) Snape should be immediately removed from the hearing panel.
  - 4) The hearing should be reconvened with a new panel, because all three panelists were tainted by Snape's remarks.

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Slide 16

**The Burden of Proof**

- Think of it simply as the placing on one party or the other the entire obligation to provide the evidence and persuasion that will meet the standard of proof.

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Slide 17

**Relevance**

- Judicial decision-makers should only deliberate upon evidence that is relevant to the issue being tried in the hearing.

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Slide 18

**Relevance**

- When irrelevant evidence is admitted at a hearing, the judicial body must strive to disregard the testimony in its deliberations, and refuse to allow it to color its decision.
- This is a foundation for fairness in the hearing that all judicial bodies should endeavor to accord to the participants.

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Slide 19

**Relevance**

To test for relevance, ask yourself:

- Is the fact or information that is being offered likely to prove/disprove an issue in the hearing?
- If it is likely to lead to proof/disproof, even indirectly (indirectly does not mean tenuously), it is relevant.

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Slide 20

**Relevance**

- Test your familiarity with this concept on the following examples.
- In each case, ask yourself, what is the matter in issue that this fact speaks to?
- Then ask whether considering that fact would tend to prove or disprove the issue.
- If it would, it is relevant.
- If it would not, it is not.

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Slide 21

**Relevance Exercise 1**

- Is the fact that a boyfriend failed to heed a campus no-contact order relevant in a later hearing in which he is charged by his girlfriend (who requested the order) with a violent attack?
- *Yes. It tends to prove that he had potentially violent inclinations toward her.*

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Slide 22

**Relevance Exercise 1**

- Would it be relevant in a hearing in which the boyfriend accused of an attack on an unrelated third person?
- *Probably not. What would make it relevant? If we knew the basis for the no-contact order, and it helped to establish violent tendencies generally (that this is an individual who likes to solve his problems with his fists) as a fact in issue in the complaint, we could then generalize about his behavior from the no-contact order, rather than seeing it as reflecting his behavior only toward a specific target.*

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Slide 23

**Relevance Exercise 2**

- A male respondent was accused of sexually assaulting a female student. He testified at the hearing about the incident. At one point, he testified that he was having sex with the complainant, and he looked over at his desk, which was just next to the bed. Upon the desk was his fishbowl, in which he kept his pet fish (this is a true story).

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Slide 24

**Relevance Exercise 2**

- He then testified that while he was having sex, he was quite certain the fish was watching him. The fish was not called as a witness. Is this testimony relevant?
- *No, but it is harmlessly irrelevant. To allow it to be testified to is not problematic, just frivolous and useless.*

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Slide 25

**Disruptions--  
Postponing/Rescheduling the  
Hearing**

Hearings can deteriorate into shouting matches, dissolve into tearful incoherence, be undermined by parental interference, perjury, or the reversing of testimony, dissipate by fear and intimidation into silence, collapse by

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Slide 26

**The Policy Analytic:**

- I find it helpful to train adjudicators to break a policy into its constituent parts or elements to determine if it was violated.

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Slide 27

### The Policy Analytic:

- Often, a policy can be transformed into a flowchart to make it easier to assess if it has been violated.

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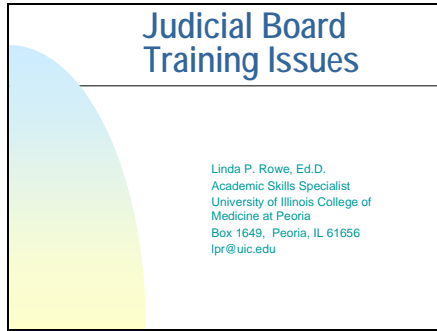
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THE FOLLOWING POWER POINT SLIDES ACCOMPANY SEGMENTS PRESENTED BY LINDA ROWE

Slide 1



**Judicial Board  
Training Issues**

Linda P. Rowe, Ed.D.  
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University of Illinois College of  
Medicine at Peoria  
Box 1649, Peoria, IL 61656  
lpr@uic.edu

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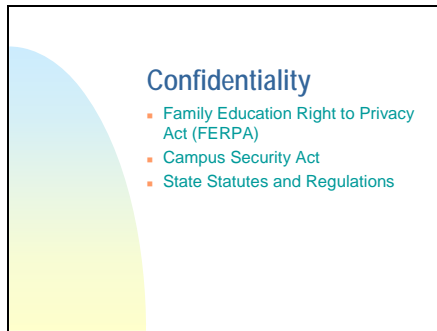
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Slide 2



**Confidentiality**

- Family Education Right to Privacy Act (FERPA)
- Campus Security Act
- State Statutes and Regulations

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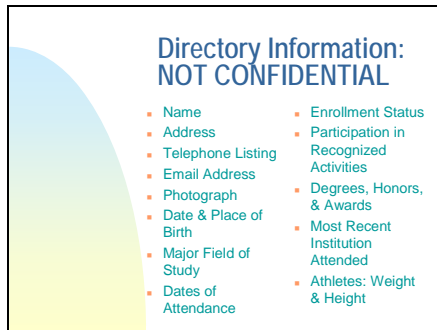
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Slide 3



**Directory Information:  
NOT CONFIDENTIAL**

- Name
- Address
- Telephone Listing
- Email Address
- Photograph
- Date & Place of Birth
- Major Field of Study
- Dates of Attendance
- Enrollment Status
- Participation in Recognized Activities
- Degrees, Honors, & Awards
- Most Recent Institution Attended
- Athletes: Weight & Height

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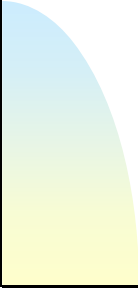
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Slide 4



**Confidential Records Include:**

- Grades
- Test Scores
- Disciplinary Records
- Financial Records
- Class Schedule

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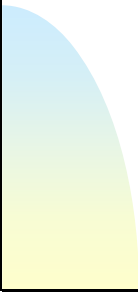
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Slide 5



**Disclosure of Confidential Information**

- Limited to "Eligible Student" Or
  - ◆ Persons who have a "Legitimate Educational Interest"
  - ◆ Others to whom the Student Releases the Records
  - ◆ Others who are entitled or permitted access by virtue of one or more FERPA "exceptions"

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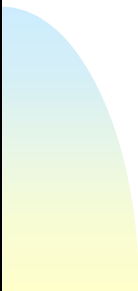
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Slide 6



**Understand Confidentiality Rules on *Your* Campus**

- Restrict Discussion to the Hearing Process
- Do not "Leak" Information
- Follow Protocols for Handling Documents and Notes
- Refer Requests for Information to a Professional Staff Member

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Slide 7

Student A's name and personally identifiable information may not be included in Student B's confidential records without Student A's permission.

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Slide 8

The right to remain silent in a hearing is a corollary of the requirement that no negative inference be drawn from failure to appear for the hearing.

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Slide 9

**Why Would a Student Remain Silent?**

- To Avoid Self-Incrimination
- Lack of Speaking Skills
- Fear, Confusion or Nervousness
- Lack of Faith in the System
- Advice from Others

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Slide 10

Campus judicial systems fulfill an educational purpose when they uphold the cherished American idea that a person must be considered innocent until proven guilty.

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Slide 11

Evidence is any kind of information presented with the intent to prove what actually took place.

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Slide 12

PROOF is Simply the Effect of Evidence

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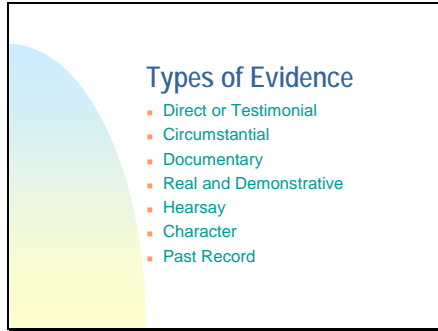
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Slide 13



**Types of Evidence**

- Direct or Testimonial
- Circumstantial
- Documentary
- Real and Demonstrative
- Hearsay
- Character
- Past Record

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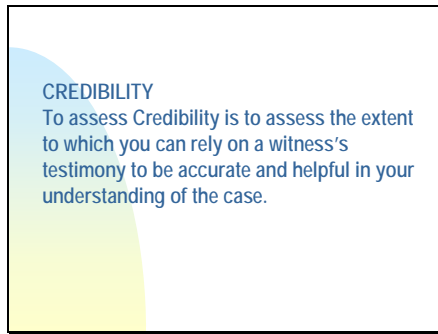
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Slide 14



**CREDIBILITY**  
To assess Credibility is to assess the extent to which you can rely on a witness's testimony to be accurate and helpful in your understanding of the case.

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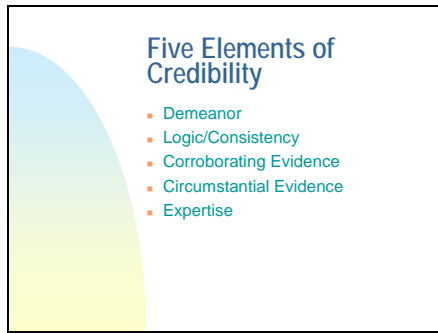
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Slide 15



**Five Elements of Credibility**

- Demeanor
- Logic/Consistency
- Corroborating Evidence
- Circumstantial Evidence
- Expertise

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Slide 16

**1. Demeanor**

- ◆ Watch Out For A Witness Who
  - Is Not Cooperative
  - Loves the Limelight
  - Has an Axe to Grind
  - Tries to Please

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Slide 17

**2. Logic/Consistency**

- Does the Testimony Make Sense?

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Slide 18

**3. Corroborating Evidence**

- Where's the back-up?

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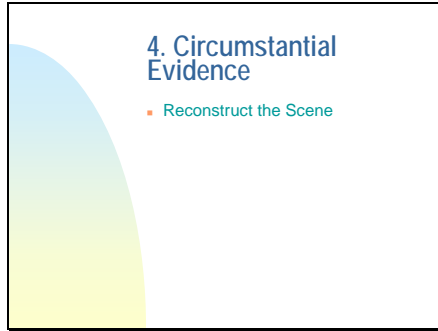
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Slide 19



4. Circumstantial Evidence

- Reconstruct the Scene

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Slide 20



5. Expertise

- Check the Qualifications

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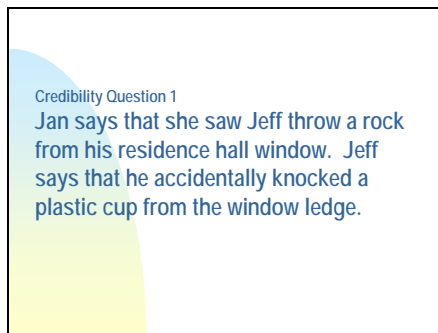
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Slide 21



Credibility Question 1

Jan says that she saw Jeff throw a rock from his residence hall window. Jeff says that he accidentally knocked a plastic cup from the window ledge.

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Slide 22

Credibility Question 2  
Officer Smith says that when he interviewed Marie, the complainant, "she looked like a rape victim." The respondent has disputed Marie's claim of rape, saying that the sex was consensual.

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Slide 23

Credibility Question 3  
Rick, the Resident Advisor, says that he smelled the distinct odor of marijuana emanating from Lou's room. Lou claims that the odor was caused by her attempts to make venison jerky in the microwave. No physical evidence of marijuana *or* jerky was produced.

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Slide 24

**Advisors and Advocates**

- Provide Emotional Support
- Provide Process Guidance
- Provide Interpretive Assistance
- Respect the Student's Perspective
- Help Present Evidence -- But are not witnesses
- Are Knowledgeable About the Process
- Resist becoming "Substitute" Attorneys

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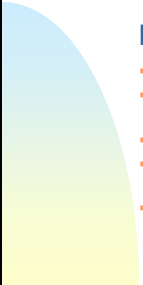
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### Impact Statements

- May or May Not be Evidentiary
- Should be Considered When Recommending Sanctions
- Have Educational Value
- May be Heard Before or After Findings of Fact
- Should be Permitted
  - ◆ Even from the Respondent
  - ◆ Should Not be Required

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THE FOLLOWING POWER POINT SLIDES ACCOMPANY SEGMENTS PRESENTED BY SCOTT LEWIS

Slide 1

**Prejudice & Limiting Evidence:**

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Slide 2

What does “prejudice” mean?  
  
To “Pre-Judge”

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Slide 3

2 ways that “Prejudice” enters our proceedings

- In our own minds
  - *What do we prejudge based on?*
    - A variety of factors
    - Discussed in “Bias”
- Through evidence and testimony

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Slide 4

**What is my role?**

- to determine whether or not what was:
- said,
- shown,
- read,
- distributed,
- acted out, or
- played (e.g., audio or video tape)

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Slide 5

**...will have an effect on:**

- the fundamental fairness of the hearing's outcome;
- and, if so, what kind of effect it will have?

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Slide 6

**When should I make this determination?**

- **Before the Hearing:**
  - Review with ALL parties:
    - The purpose of the hearing
    - What testimony may/may not be allowed
    - Have a documentary evidence due 2-3 days prior to the hearing
- **During the Hearing:**
  - This is a LOT more difficult, and generally falls to the Hearing Panel Chair, who must:
    - Listen to the testimony
    - evaluate it for hearing purposes
    - Maintain decorum; AND
    - guess what is about to happen or be said to make sure it does not "cross the line"

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Slide 7

**WHERE IS “THE LINE?”**

“If the probative value of the evidence outweighs the potential harmful effect”

It should *generally* be allowed

Sound vague?

In need of interpretation?

Good!

That is why you signed on!

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Slide 8

**PREJUDICE EXERCISE #1**

In a sexual assault hearing, a University Police Officer who interviewed the victim/survivor one time for one hour four days after the incident is asked:

“What did the victim look like?”

She answers, “She sure looked like someone who was raped to me.”

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Slide 9

**QUESTIONS**

- Is that statement prejudicial? Why or Why not? If so, how much?
- What should the Hearing Chair do? Cancel the Hearing? Go on as if it had not been stated?
- What other options are available?
- How could the question have been better phrased?

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Slide 10

**PREJUDICE EXERCISE #2**

- A victim of an assault wants to show the Hearing Panel photos he took of his cuts and bruises five days after the alleged assault.
- **What should the Hearing Chair do?**
- **Allow them to be shown? Not allow them?**
- **What could happen if s/he does or does not allow them?**

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Slide 11

**PREJUDICE EXERCISE #3**

During a sexual assault hearing, a witness for the victim, when asked how she knows the accused, says,  
“I used to date him, and I know he treats women like dirt and probably raped her.”

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Slide 12

**QUESTIONS**

- **Is that statement prejudicial?**
- **Why or Why not? If so, how much?**
- **What should the Hearing Chair do?**
- **Cancel the Hearing? Go on as if it had not been stated?**
- **What other options are available?**
- **How could the question have been better phrased?**

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Slide 13

**PREJUDICE EXERCISE #4**

During a sexual assault hearing, a witness for the accused, when asked for his name, says, "I am the guy who had sex with her (pointing at the victim) along with everyone else I know. Everybody knows she is easy and she is just doing this because she is mad at him."

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Slide 14

**QUESTIONS**

- Is that statement prejudicial?
- Why or Why not? If so, how much?
- What should the Hearing Chair do?
- Cancel the Hearing? Go on as if it had not been stated?
- What other options are available?

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Slide 15

Any other questions or comments?

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Slide 1

**READING WITNESSES**

The Art of People Watching

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Slide 2

In a Hearing, NO ONE is comfortable:

- Not you
- The Accused
- The Victim (if applicable)
- The Witnesses

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Slide 3

**The Hearing Panelists**

- Uncomfortable with what you are hearing
- Uncomfortable with what you have to ask
- Uncomfortable with the thought of the potential negative impact you may have on your fellow student (victim or accused)
- This is YOUR discomfort - imagine theirs

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Slide 4

**The Accused**

- Gets to discuss an uncomfortable or embarrassing moment with 3-10 complete strangers!
- Gets to answer questions about it!
- Gets to be judged on what they did for 5 minutes to a couple of hours of their entire life!

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Slide 5

**The Victim - An Exercise**

- Take out a piece of paper. Describe, in vivid detail, your last sexual or most intimate encounter.
- At the first meeting of your next class, begin the class by reading it aloud to them.
- Afterward, ask if they have any questions or would like any clarification.

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Slide 6

**The Victim - Continued**

- Chances are, your last encounter was consensual - imagine having to share the details of the most horrific experience of your life!
- Now, try to imagine having to listen to people tell you you are lying about it!

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Slide 7

**The Witnesses**

- There are 2 kinds:
  - The ones who do not want to be there at all
  - The ones who can not wait to testify
  
- Both are potentially difficult to read, but for different reasons, but.....

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Slide 8

**The Good News**

- "People are people" - and have similar tendencies in similar situations!
- You can use gestic (also called kinesics, body language, people reading, etc. -- this is NOT "profiling"! ) to get a "read" on the information you are receiving!  
    **BUT REMEMBER...!!!**

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Slide 9

- There is no **one** physical response that automatically indicates whether or not a person is lying, exaggerating, telling the truth, etc!
- You have to look at the **total package** –
  - what they are saying,
  - how they are saying it, and
  - why they might be saying it.

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Slide 10

**What you (the Hearing Panelist) should be doing:**

- Establish a baseline – get them as relaxed as possible
- Maintain solid eye contact (no glaring or staring)
- Listen to their answer (do not write, if you can help it)
- Listen to their answer (do not think of your next question while you are not paying attention to their last answer)

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Slide 11

**What you (the Hearing Panelist) should be doing: (cont.)**

- Use your hands to encourage them (e.g., “The Preacher Clasp”)
- DO NOT fidget (hands or feet)
- Nod Affirmatively - keeps them talking
- DO NOT shake your head “no”
- DO NOT look shocked, stunned, or accusingly at what they just said – they will shut down

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Slide 12

**In the testimony of others:**

- Remember - it is UNCOMFORTABLE!!!
- So, make them as comfortable as possible!
- This is called “Establishing a baseline”
- These can adjust as the testimony goes on (and on and on...)
- Look for “tells”

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Slide 13

**Their Eyes**

- Look for lack of eye contact
  - May indicate discomfort or dishonesty
  - Is it constant? Appropriate?
- “Darting eyes” -
  - What/who are they looking at? (brown bag test)
  - May indicate nervousness or guilty feelings
- Cultural Considerations - Look to baseline!

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Slide 14

**Their Arms and Hands**

- The Hands:
  - Are they fidgeting with items?
  - Sweaty? White Knuckled? Clenched fists?
  - Rubbing constantly together?
  - Sitting on them?
  - Up to their mouth?
- Arms Crossed? Open? Wildly gesturing?

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Slide 15

**Head and Torso**

- The head and face
  - “Flushing” vs. “Blushing”
  - Tilting toward or away/up or down (fight or flight)
- The Torso
  - The “Liar’s Lean”

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Slide 16

**Legs and Feet**

- Legs
  - Crossed? Gender differences. Look to the baseline.
  - Stretched out?
- Feet
  - Twitching? Constant or not?
  - Sitting on them?
  - Crossed?

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Slide 17

**Word Choice**

- Overlooked in you and them!
- Rarely chosen by accident - the "Freudian Slip"
- Very important!
- Would you rather be:
  - "Cut?" or
  - "Sliced"

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Slide 18

**Word Choice**

- Look for pronoun uses
  - "I" vs. "we"
    - indicates distancing
- Look for time inconsistencies
  - "A little while" vs.
  - "seven minutes"
- ALWAYS REFER TO YOUR BASELINE!

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**REMEMBER**

- When people are uncomfortable, it does not necessarily mean that they are lying – it may just mean that they are uncomfortable.
- What are **YOU** doing to make them more comfortable, and thus, more likely to tell the truth (or at least talk to you)?

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POWER POINT SLIDES FOR SEGMENTS PRESENTED BY MARY LOU ANTIEAU

Slide 1

Legal constraints on the hearing procedures of public and private institutions of higher education

*Both can create rules.  
Both can enforce the rules they create.*

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Slide 2

The big difference

- Public schools are bound by the same rules as governments - they are held to the 14th Amendment of the Constitution.
- Private schools are held to the same rules as private individuals - they are held to the written and implied contracts they create.

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Slide 3

What makes a contract?

Almost anything the school publishes:

- Brochures
- Admissions publication
- Policy manuals
- Housing rules and regulations
- *Codes of conduct and related procedures*

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Slide 4

Some of the words your institution uses may hold you to a higher standard.

If you guarantee that students will be provided due process, you may have to provide the same level of due process as a public college or university must provide.

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Slide 5

Why should you care?

As judicial board members, you must know what is written in your policies and procedures to act consistently with them.

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Slide 6

What is Due Process

- The amount of process due to a student before, during and after a disciplinary hearing.

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Slide 7

**Two ways to get into legal trouble**

- Not follow the printed rules and policies of your college or university.
- Act arbitrarily or capriciously

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Slide 8

**Public school have more constraints**

- Also must act in accordance with published materials:
- Code of conduct
- Procedures manuals
- Also must provide due process as defined by law and "case law."

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Slide 9

Surprise: the courts in the United States have repeatedly ruled that no person has a *right* to a college education.

But once admitted, the student has a right to remain in college unless they do something that violates the rules.

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Slide 10

**Important thought**

For the most part, due process requirements only apply if the student's education is going to be interrupted:  
if the student is going to be *suspended* for any length of time or *expelled*.

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Slide 11

**Due process is not a static concept**

- The amount of due process that you must provide varies according to the severity of the sanction, with the highest amount required when a student is suspended or expelled.

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Slide 12

If it is reasonable to believe that the charges brought against a student may lead to expulsion, you must provide a student with these due process rights:

- Notice of charges
- Some kind of a hearing - with a board or one administrator
- The opportunity to tell his or her side of the situation
- The results or outcome of the hearing.

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Slide 13

If it is reasonable to believe that the charges brought against a student may lead to suspension, you must provide a student with these due process rights:

- Oral or written notice of the charges
- explanation of the information you have against them
- the chance to present her or his side

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Slide 14

So why do we give so much due process?

- We are educators: when you sanction a student you are contributing the the educational development of that student
- The circuit courts do not always agree about what we have to do.
- (Why be the first to lose a law suit?)

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Slide 15

Providing an educationally sound process requires providing

- A clear statement of the conduct that is regulated on and/or off your campus.
- **The regulated conduct should be closely related to the educational mission and goals, the process or the functioning of your university.**

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Slide 16

Providing an educationally sound process requires providing

- The student the *opportunity to be heard*
- in person if possible.
  - Even if the student is in jail or the hospital or has quit school and moved back home to the other side of the state or country, the student should be given the opportunity to tell his or her side, even if it is writing or on the telephone.

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Slide 17

Providing an educationally sound process requires providing

- Written conduct standards that be easy to understand.
- If the words used are too vague or legalistic or the prohibited behavior described too broadly, the standards may be unconstitutional.

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Slide 18

Common myths or  
**What you  
do *not*  
have to do**

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Slide 19

- Unless
- your state's laws or your written policies
- Require it

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Slide 20

- Unless your state law or school policies require it
- **There is no federal right to an open hearing** - a hearing open to the general public.

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Slide 21

- Unless your state law or school policies require it
- **There is no federal right to obtain a transcript of a hearing.**
  - Some courts requires some kind of a record. One circuit s allows either party to make a recording.

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Slide 22

Unless your state law or school policies require it

- **There is no right to confront and cross-examine witnesses.**
- A couple of courts have suggested it would be a good idea in suspension/expulsion cases.

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Slide 23

Unless your state law or school policies require it

- **There is no right to be represented by an attorney.**
- Some courts say that there is a right to be advised by an attorney when there are concurrent criminal charges pending.
- Note: an advisor does not actively participate in the proceedings

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Slide 24

Unless your state law or school policies require it

- **There is no protection against self-in crimination.**
- *Incrimination* relates to the *criminal* process.
- Your procedures *may* require a student to respond and, if he does not, hold the silence against him.

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Slide 25

Unless your state law or school policies require it

- There is no right to delay your hearing until pending criminal charges are concluded..

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Slide 26

Unless your state law or school policies require it

- There is no right to a written statement of the facts found or the conclusions reached by the hearing officer/panel.

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Slide 27

Unless your state law or school policies require it

- There is no double jeopardy when both a college or university and a court of law take action on the same set of facts.
- Double jeopardy bars two criminal proceedings based on the same set of facts.

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Slide 28

**Don't sweat the small stuff!**

While it is important that you conduct your hearings in a way that reflects your rules and procedures,

*you do not have to be rigid.*

- Courts will look for
  - *substantial compliance* and a
  - *fundamentally fair process.*

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Slide 29

**Protect yourself: follow your college or university's rules and written procedures.**

- **If your evidentiary standard is *preponderance of the evidence*, don't use *without a shadow of a doubt*.**
- **If your process gives students 72 hours to prepare for a hearing, don't give him 24.**
- **If your process allows an unlimited number of witnesses, don't limit the number of witnesses.**

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Slide 1

Role of Attorneys  
in the  
College or University  
Judicial Process

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Slide 2

Plan on it

- If you are a public college or university
- Even if your rules say that attorneys are not welcome in your hearings, an attorney may find her way into your hearing room.

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Slide 3

***WHY?***

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Slide 4

Your published procedures permit it.

If you allow advisors to be present but do not specifically bar attorneys, an attorney may serve as an advisor.

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Slide 5

Federal Courts require you to in some situations

The university must allow an attorney to advise a student when there are concurrent criminal proceedings.

- 2nd Circuit. No Supreme Court ruling.
  - Not binding on the rest of us,
  - but persuasive

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Slide 6

An attorney presents your institution's case

If the person presenting the university's case is an attorney, allowing the accused to have an attorney present is a good idea.

- 5th Circuit. No Supreme Court ruling.
  - Not binding on the rest of us,
  - but persuasive

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Slide 7

**Advising or Representing?**

- **Representing**
  - A legal word of art.
  - The attorney does most of the speaking, even controls, to a large extent, the questions that are asked of the client.
  - The client may not have to provide information directly.

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Slide 8

**Advising or Representing?**

**Advising**

The attorney is present to support the student and to advise the student against making statements that might incriminate him in a subsequent criminal proceeding.

- The Attorney may not speak directly to the members of the panel, the other party or witnesses.

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Slide 9

**Advising or Representing?**

**Advising**

- The attorney may confer with the student and
  - Suggest responses to the questions asked of the student.
  - Suggest questions that the student may ask.

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Slide 10

**Advising or Representing?**

**Advising**

- The attorney may request a private conference with the judicial advisor, the hearing chair and/or the person presenting the case or advising the student
  - if the procedures allow for such a conference
  - if the requests do not constitute a disruption to the process.

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Slide 11

**Your job**

- Discover whether or not the student violated the rule. Discover whether or not the student understands the rule.
  
- NOT to discover whether or not the attorney understands the rule.

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Slide 12

**More than one attorney may be present.**

- Your college or university may require that a college or university attorney be present whenever an outside attorney attends a hearing.
- Other attorneys may be present to advise the victim and/or witnesses.

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Remember: it's your hearing!

- Do not change your process or procedures to accommodate an attorney who is present to advise a student client unless you are advised to do so by your advisor or by the university attorney.

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## MEET THE SEMINAR PRESENTERS

[Brett A. Sokolow, JD.](#) A higher education attorney and the President of NCHERM, Mr. Sokolow is the author of *Sexual Misconduct on Campus* and seven other books on the campus judicial process, sexual misconduct, and campus security. A member of NASPA, URMIA and CLHE, Mr. Sokolow is the Editor of the *Report on Campus Safety and Student Development*, and the Vice President for Campus Security of the Council on Law in Higher Education. He trains dozens of judicial boards each year.

[Mary Louise Antieau, JD.](#) Mary Louise Antieau has worked in student life for over 20 years, the last 8 in judicial affairs. She was the Assistant to the Vice President for Student Affairs and Director of the Office of Student Conflict Resolution at the University of Michigan until 1998. She currently is the Director of the Office of Student Conflict Resolution and Executive Assistant to the Vice Chancellor for Student Success at East Carolina University. Ms. Antieau holds a BA in English and Communications and an MA in Education Administration from the University of Michigan and a JD from the University of Toledo (Ohio). She is a certified mediator trained at the Center for Dispute Resolution in Boulder, Colorado and a mediation trainer for ASJA. She is a member of the Association of Student Judicial Affairs, the National Association of Student Personnel Administrators, and the Michigan Bar (retired).

[W. Scott Lewis, JD.](#) Mr. Lewis has served as the Director of Judicial Affairs at the University of South Carolina since 1997, and has worked in student affairs since 1991. He holds a B.S. in Psychology and an M.A. in Higher Education Administration from Texas A&M University, as well as a JD from the University of Houston Law Center. He is a member of NASPA, ACPA, ASJA, and the ABA. He also serves as a consultant and faculty member for the Daniel Management Center's Executive Education program, and presents on a variety of topics related to student affairs and judicial affairs.

[Linda P. Rowe, Ed.D.](#) Dr. Linda P. Rowe has served as Marshall University's Director of Judicial Programs and advisor to its student judiciary and advocate society since 1994. She began her student affairs career in residence life in the 1970's and has also worked as an advocate for the developmentally disabled, a lobbyist in the WV legislature, and as an officer of the League of Women Voters. She is currently the secretary for the Association for Student Judicial Affairs and a member of the Executive Committee of Phi Eta Sigma National Honor Society. She has written and presented about residence halls, student cultures, and other student affairs issues on numerous occasions; has taught undergraduate and graduate classes

in peer leadership and student personnel administration, and is a frequent contributor to the COMXV-L listserv. Linda earned her BA and M.Ed. degrees at the University of Florida and earned her Doctorate in Educational Leadership at West Virginia University.