

Sanctioning for Sexual Misconduct

By: Brett A. Sokolow, JD

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

Does Training Create Bias?

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

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

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

Suspension and Expulsion

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

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

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

A client asked me recently what was to be done in a situation where a young woman did not want sexual contact, but at the point of sexual intercourse, she did not protest, and just allowed it to happen. Would that be grounds for mitigating a more serious sanction? I think yes, that it could be. Any defense is by definition a suggestion of mitigating

circumstances. A man who has sex with a woman who is not protesting or resisting may believe that he has consent. In fact, he does not, because consent must be actively expressed. Yet, if he genuinely believes that what he did was consensual, he is likely far less malevolent, abusive and dangerous than a man who would have sex with a woman despite her active protests. Of course, both of these men are in violation of our policies, but we do have a right to treat them differently with respect to sanctions, if we choose to. I would add one caveat. If the woman who is passive in the face of sexual aggression is fully capable of resistance and chooses not to, I would agree that it might be reasonable for you to mitigate the sanction. But, where a victim is incapable of resistance, because of fear, flashbacks or other reasons, I would not say that mitigation of the sanction is reasonable. This encourages students to be communicative partners in sex, and I think we should encourage that.

Mitigating and Aggravating Circumstances

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

Part of my goal with this article is to emphasize that legally, where there is sexual intercourse or penetration, you need to have suspension and/or expulsion on the table for your consideration. If you decide there are mitigating factors which would merit a sanction less than separation, you need to be able to elaborate a compelling justification for that decision. Generally, we look to separation when we need to protect the community, or the perpetrator demonstrates an inability to understand or abide by our community standards. Think of it this way. Murder is not a violation of our codes. Along with violent hazing and drug dealing, sexual misconduct is one of the most serious offenses that can happen on a college campus. If not suspension and expulsion for

offenses of this magnitude, then why have suspension and expulsion as sanctions at all? I was on a campus recently where there was no history of using suspension or expulsion for serious sexual misconduct complaints. I questioned this, and received the explanation that small, tuition-driven institutions cannot afford to expel. I then asked what the consequence was for the false pulling of a fire alarm. Expulsion. Why? Because it can place members of the community in grave danger. Oh, and sexual misconduct doesn't? Odd reasoning.

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

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

Educatin' and Recidivatin'

Sometimes, we believe that a student is educable on sexual violence issues. James Madison University has had an offender rehabilitation program for years that scares the heck out of me. While I believe that male and female violators could be educated, I need proof that the education has a strong chance of succeeding. Otherwise, separation is

more appropriate. Many campuses subject offenders to educational projects, but do not have the time, staff or inclination to follow-up to ensure that the education was successful. I think the law insists that we do so. If you attempt to rehabilitate an offender, I'd like some proof that I or your attorneys can walk into court with to show that although we knew this person had caused harm before, we had a reasonable belief that he would not present an ongoing threat. Show me attitude surveys, educational presentations, and psychological assessments that reveal a change of attitude, and it might be tenable to allow a student to stay or return. Without that, we are just guessing, and we don't have the right to play Russian Roulette with vulnerable members of our communities.

All information offered in this publication is the opinion of the author, and is not given as legal advice. Reliance on this information is at the sole risk of the reader.

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