

## **Training Campus Conduct Boards for Sexual Misconduct Hearings**

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### **A Changed Approach**

Having trained over 250 campus conduct boards at last count, I am in a position to have a pretty clear vantage point on the training practices within the judicial affairs field. I am also in a position to have a pretty clear vantage point on my own involvement in these trainings and my own evolution during the last six years. Sometimes I get it right, and sometimes I do not. The subject of this article represents a clear change in my thinking on how to train campus conduct boards for sexual misconduct, and is therefore an admission that I disagree with some of what I did before, and am modifying what I do in future trainings.

In part, I think the time has come for a change in my practices because I am seeing a trend in taking sexual misconduct judicial training way too far. In an effort to embrace this issue, and seem proactive on it, some colleges are ripping fairness to shreds. My books and trainings make me partly responsible for this, so now that I am making a change, I feel an obligation to let those in the field know that I have changed my mind, and why. My basic thesis is simple. Decisions in our campus hearings **MUST** be based solely on evidence and information introduced during the course of the hearing. This is a hallmark of a fundamentally fair hearing. To consider information gained outside the hearing as the basis for a decision flies in the face of good and legal practice.

### **Taking Information from Outside the Hearing as Gospel**

Let me share an example that illuminates my point. A conduct board is faced with a "He Said, She Said" complaint of sexual misconduct. Evidence points to the conclusion that something happened, but exactly what happened is murky. However, at a critical juncture in the hearing, the alleged victim gives information that ever since the night of the incident in question, she has had trouble sleeping. In fact, she can't sleep in her room, because doing so causes flashbacks to the incident. Her nocturnal disturbances include nightmares, and frequent crying out in her sleep.

At the hearing, this testimony by the alleged victim goes unquestioned by either the respondent or members of the conduct board. After the hearing ends, the conduct board begins its deliberation. One of the board members makes the argument that when she first heard the testimony at the hearing, and reviewed the investigation report, she was convinced that this was a situation in which there was even evidence on both sides. There was nothing sufficient to prove a sexual misconduct by the campus standard of proof, "more likely than not." She then went on to conclude that after hearing from the alleged victim, her perspective tilted just enough so that she was convinced that the respondent was

in violation of campus policy. Her conclusion was not reached because of anything the respondent did, or any additional proof of what took place between the complainant and the respondent. Instead, she leaned toward a finding of responsibility because of the information that the complainant was suffering from nightmares and sleep disturbances.

This member of the conduct board recalled that in judicial training that fall, representatives from the local rape crisis center had supplied the conduct board members with details of Rape Trauma Syndrome (RTS). Further, she recalled that sleep disturbances were characteristic of the second stage of RTS. To her, it made sense that if the alleged victim had experienced no such disturbances prior to the incident in question, and then began to experience them only subsequent to the incident, it made it more likely that the incident had in fact transpired. Because she was experiencing the trauma of sexual violation, it was more likely that she was in fact sexually violated. This information was persuasive to the other conduct board members, who all voted to find the respondent in violation of college policy.

### **A Refresher on Fundamental Fairness**

That this sort of reasoning can and does lead to a finding of responsibility in campus hearings has me worried. I'm not saying the campus conduct board member was wrong. What I do believe, though, is that this conduct board violated the rights of the respondent to a fundamentally fair hearing. They did so by hinging the sole basis for their finding on information that they received outside the hearing. While it is normal and appropriate to draw on common sense and common information in a campus hearing, and to apply the lessons we have learned throughout our lives, information about RTS was not introduced at the hearing. It was never mentioned. The alleged victim knew nothing about it when she gave information about the nightmares. The conduct board drew its conclusion based solely on outside information. And that outside information came from a source who it is hard to credit with a unbiased perspective on victimology.

Four years ago, information on RTS, past sexual history, false accusations and similar victimological information was included as part of the trainings I did on college campuses. I even included it in a chapter in my book, *The NCHERM Sexual Misconduct Judicial Training Manual*. But, when I did so, I did it with a lot more neutrality and detachment that I am seeing as part of many of the trainings being done on campuses today. I don't work for a rape crisis center. I'm not a victim's advocate. And, the nature of sexual misconduct complaints and how we process them is changing. I'm not making excuses for my past practices. I've already stated that I'm changing them. I doubt they would hold up to current legal scrutiny, and are no longer within the panoply of best practices, if they ever were. But, do not misunderstand what I am stating. I am not arguing that this type of information has no place in a campus hearing. In fact, I think that we are

being called on to rely more and more heavily on expertise and sophisticated bodies of knowledge to decide our hearings.

### **Critical Expertise**

Expert information and testimony is becoming critical to decisions on the complex fact-patterns that students are sending our way. It is because of this that I think a change in practice is due. Just recently, I watched as a Dean argued to the other members of a conduct board that alcohol clears one's system at a rate of drink per hour, and therefore the complainant could not have been as drunk as she claimed. The Dean adopted this information as unquestioned gospel, though it was never introduced in the hearing. It became the Dean's sole weapon for leading a charge toward a not-responsible finding, and the others members of the conduct board followed his lead.

Yet, the Dean was wrong. Or at least hopelessly under-informed, and applying general rules to specific contexts. That board needed expert information on alcohol clearance rates. They consulted neither an alcohol expert nor a medical text. They pulled expertise out of thin air, because they thought they knew. They did not. And they made a very bad decision in that hearing. They never even realized how limited their knowledge was. We owe students in these tough situations a lot more than our limited understandings of complex psychological and physiological phenomena. So, I am arguing for increased information of an expert nature. But, I am not arguing for it as part of our annual training regimens.

### **The Crux of my Argument**

Students accused of conduct code violations have a legal right to respond to or confront the evidence against them. When victimological information, or other expertise, is used as the basis for a conduct decision, the best practice is to air it in the course of the hearing, and have it subjected to the scrutiny and defense of the student who has been accused.

When the respondent was held responsible by the conduct board I described above, he had never even heard of RTS. He never knew the conduct board was deliberating upon it, or that it formed the foundation of their decision. He was the victim of an arbitrary and capricious decision because he never had the chance to provide his perspective, or challenge the certitude of the conclusion that just because the complainant had nightmares, it follows logically that she must be the victim of sexual misconduct. He never got to ask what the nightmares were about. He was not able to question whether RTS was sound science, or pseudo-science. He should have been able to raise the argument that alternate explanations existed. He should have had the opportunity to cite studies that supported his position, or called into question the training given by the rape crisis center. But, he wasn't there during the judicial training at the beginning of the semester. He wasn't there when the information used to find him in violation was

introduced, not as a mere line of inquiry and exploration for a conduct board, but as a phenomenon the existence of which was surefire proof of the trauma of rape. He should have been able to question whether the alleged victim was having nightmares, or was telling that conduct board exactly what it wanted to hear. He could neither question the credibility of the science, nor the person who obliquely brought it into issue in the hearing.

### **Neutral Expertise**

My preference is to have all expertise introduced during the hearing, so that it can be challenged and questioned by the parties and conduct board. But, this has the potential to turn hearings into quasi-legal "battles of experts." We should make sure that this does not happen. Expertise can take a number of forms. A textbook, medical treatise, or authoritative article can provide us with critical information. A doctor, toxicologist, psychologist or other knowledgeable professional can be called as a witness, or can submit a written statement. But, I believe that this information or this witness ought to be brought into the hearing as neutral information, not by any party, but by the conduct board, as a way to educate it on the issues. This expertise can be subject to questioning, or to confrontation, such as when a respondent might produce a text showing that the conclusions of the text the conduct board is using may not be definitive. This is a very different model from the courts, where a psychologist might come forward with testimony about RTS, and then make a conclusion that based on an examination of the alleged victim, it is the expert's conclusion that the victim is suffering from RTS, and was therefore likely to have been raped. Rather, experts in campus hearings could tell us what RTS is, but it is then the job of the conduct board to determine whether the testimony of the complainant establishes the possibility of RTS symptomology, and then to decide whether to draw any causal connection therefrom.

### **The 2% Solution**

It was recently argued to me that because only 2% of complaints of sexual assault are shown to be false, according to the FBI, admission of this statistic into a campus hearing could help to prove that an alleged victim is telling the truth, and it is thus more likely than not that she was assaulted. That's one heck of a logical leap. First, this could be one of the 2% of cases, rather than one of the 98%. Second, who says that 2% of reports are false? Show the conduct board the studies. Let them determine if this is credible. Don't assume statistical truth when studies may conflict, or may have employed limited or suspect methodology. Some statistics, such as the one-in-four, become so commonplace and widely quoted that we forget they represent one sampled population. The population on your campus may be similar, or different. One study's results do not create truth for more than that limited subjects of that study. We need to be careful how we use tangential facts and statistics as part of the quantum of proof in our campus conduct hearings.

## **What Should a Fair and Comprehensive Sexual Misconduct Judicial Training Include?**

If you accept my thesis that admitting expertise at the time of the hearing is the best practice, what then should be the subject matter of a quality judicial training generally, or specifically on sexual misconduct? Your training should focus on, for example, your process, fairness, questioning skills, gestics, relevance, credibility, how to address past sexual history, understand the policy, how consent works, how incapacity works and what it means. Sticking to these key skills will ensure your conduct board is well-prepared, unbiased, and ready to hear the complaint before they decide it.