

NCHERM NEWSLETTER WINTER 2005

Hello friends and colleagues. Welcome to the Winter 2005 Newsletter. Here's a quick overview of what you will find inside this issue:

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If you would prefer not to receive our quarterly newsletter, please e-mail NCHERM@aol.com and ask to be removed from the subscription list. We'll take care of it right away.

1) Updates on NCHERM news and activities

Alan Berkowitz and Brett Sokolow just presented a two-day seminar on alcohol and sexual assault culture change at Catawba College in NC. We had almost 50 participants each day, and a very engaging dialogue. Thanks, Catawba, for hosting.

Brett, Cori and Gabrielle Sokolow attended the ASJA conference in Clearwater, FL. Brett was jealous that Gabrielle got all the attention! NCHERM was a sponsor at the conference this year, and gave away one free conference registration and gave a \$500 grant to reimburse someone who came to the conference at their own expense. The winner was Dr. Barbara Fienman, from Suffolk University. Congrats, Barbara. Brett also dropped in quickly at the Stetson Conference on Law in Higher Education. It was nice to see so many of you at these two excellent events.

Brett will be at both NASPA and ACPA and looks forward to seeing you at those conferences, if you are planning to go. If you want to schedule a time to sit down and have a drink or a meal, please contact him to plan a time in advance. (610) 993-0229 or basokolow@aol.com.

2) NCHERM Launches a New Weekly Publication

On February 18th, 2005, NCHERM published the first issue of *The Chronicle of Campus Conduct*. This is a weekly, quick-reading, practical publication, dedicated solely to the topic of the administration of campus conduct. For the first two months, it will be uploaded on Fridays to the ASJA members' listserv, and will thereafter be archived at www.ncherm.org for access by those of you who are not ASJA members. Starting April 15th, CCC will become subscription-based. An institutional subscription is \$200.00, and you will be entitled to add as many e-mail addresses to our distribution list from your institution as you want. CCC's staff of a dozen contributing editors promises challenging and engaging topics for you each week. To order, please fill out this form, and fax it to NCHERM at (610) 993-0228

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3) Upcoming NCHERM Seminars and Presentations

On Friday, March 4th, 2005, NCHERM will be presenting an Intensive Institute at Kenyon College in Gambier, OH. The topic is Crafting a Code of Conduct for the 21st Century College.

This is a full-day intensive institute on writing and revising codes of conduct, including both policies and procedures. Most codes are not educational, developmental tools. This workshop will guide participants in a process to re-envision conduct codes as tools of prevention that are connected to the institutional mission and values. Most policies are dense, and are not written for ease of understanding or application. This workshop teaches participants how to make a paradigm shift in how we craft policies and procedures, taking them from reactive rules to proactive guidance.

Participants will be involved in:

- ▶ Learning techniques for assessing policies and procedures
- ▶ Learning the difference between a rule and a policy
- ▶ Determining whether policies have an educational emphasis and impact
- ▶ Determining whether policies have a developmental emphasis and impact
- ▶ Drafting policies for ease of understanding and application
- ▶ Drafting procedures that allow for maximum flexibility and risk management
- ▶ Learning how examples can enhance conduct codes
- ▶ Determining how to connect codes to institutional and community values
- ▶ Acquire a four-step process for drafting policies

We invite you to visit www.ncher.org for more information on this Institute, and a registration form.

4) Exciting!!! -- New NCHERM Video & DVD Available

On September 23rd, 2004, NCHERM held its videoseminar, Best Practices for Campus Sexual Misconduct Judicial Training at the University of Dayton. The seminar was a great success, with more than one hundred participants at campuses across the country.

One of our desires, in organizing this event, was to be able replace the tape of the 2002 judicial training event that NCHERM has been marketing. While the content was good, the video quality and sound were not up to our demanding standards. The 2004 version was taped digitally, and I am very pleased with the way it turned out. You will be too. It is a four hour tape (also available as a DVD), featuring facilitation by Brett Sokolow and Saunie Schuster (the Senior Assistant Attorney General for the State of Ohio in the Higher Education Section, representing public colleges and universities), and interaction with a live judicial board and judicial boards participating by remote from around the

country. This seminar sets the standard for sexual misconduct judicial training, even if we do say so ourselves.

This comprehensive training seminar focused on the best practices for adjudicating sexual misconduct through campus judicial hearings. The training was broadcast live, using judicial officers from the University of Dayton as the on-site training group. Registrants had the opportunity from off-site to train their boards via this televised format, and off-site participants had the opportunity to fax and e-mail questions to the presenters and on-site judicial officers. Now, the full tape of this valuable seminar is available. Please visit www.ncherm.org for details.

5) A Few Open Dates Still Available for Spring 2005

Please contact us if you would like to arrange a visit from Brett Sokolow and/or Alan Berkowitz this spring. There are still a few open dates available, when Brett will be visiting North Carolina, Colorado, California, Georgia, Ohio, Florida, Pennsylvania, Tennessee, Michigan, Washington, Oregon, Wisconsin and Minnesota. Catch him when he is nearby and save on travel costs. A list of the student programs and consulting services offered by Brett and Alan is available at www.ncherm.org.

Additionally, please keep in mind that booking Brett Sokolow through Campus Outreach Services is no longer possible—you should call NCHERM directly.

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6) Free Article

As with every issue, we try to provide you with a thought-provoking article. Below, please find the NCHERM 2005 Whitepaper, just published this month.

The National Center for Higher Education Risk Management

A not-for-profit corporation

2005 Whitepaper

***The Typology of Campus
Sexual Misconduct Complaints***

By: Brett A. Sokolow, JD

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Introduction

Every year since the National Center was founded, we have published an annual Whitepaper on a topic of special relevance to student affairs professionals, risk managers, and higher education attorneys.

The Whitepaper is distributed via the NCHERM e-mail subscriber list, posted on the NCHERM website, and distributed at conferences.

- In 2001, NCHERM published *Sexual Assault, Sexual Harassment and Title IX: Managing the Risk on Campus*.
- In 2002, NCHERM published *Complying With the Clery Act: The Advanced Course*.
- In 2003, the Whitepaper was titled *It's Not That We Don't Know How to Think—It's That We Lack Dialectical Skills*, on campus judicial decision-making.
- For 2004, the Whitepaper focused on *Crafting a Code of Conduct for the 21st Century College*.

Why this topic?

For 2005, we return once again to the topic of our first Whitepaper, campus sexual violence. Each year, the Whitepaper topic focuses on an issue of special currency. Why is sexual misconduct especially current? Surely, colleges have experienced sexual violence for as long as college students have been sexually active. The currency exists because the historical reluctance of victims to report sexual violence is changing. Many of the campuses I serve have experienced significant increases in reporting. There is no evidence that this increase is the result of increased frequency of perpetration of sexual violence. National reports continue to show an overall decrease in violent crime and sex offenses. Thus, the increase in reporting is likely a result of more reporting, not more violence. If this is true, why is there more reporting now? Given the cruel way the legal system chewed up and spat out the female college student who accused Kobe Bryant of rape, we could expect the Kobe Bryant case to have chastened victims from making formal reports to authorities. But reports have increased and are continuing that trend. Can we give ourselves credit? Have years of our efforts to encourage reporting finally paid off? Maybe to a limited extent, but that is not the primary reason for the increased reporting. Campuses that have made no effort to court victims have seen dramatic increases.

Talkin' 'Bout This Generation

While I have no definitive explanation, a theory I have shared with colleagues seems to resonate with many. Our counseling centers are inundated with students seeking help and looking to talk. The years of under-utilized counseling centers are over. There is a stigma associated with psychological help. What stigma? Millennial generation students have been raised to talk about their problems. They are good at it. Sometimes, they are so good that we can't get them to stop. If our counseling centers are bursting with students who need to talk about their problems, why not our campus judicial offices too?

My theory is that we are seeing more reporting because Millennial generation students want and need to bring their problems to light. What else would explain a trend impacting colleges across the board, without respect to geography, socio-economics, religious affiliation or any other differentiating factors that separate colleges from one another? Regardless of whether my theory holds any credence for you, the reality cannot be denied. Sexual misconduct hearings are no longer rare occurrences on many campuses, because of the increased reporting. If the increase in reporting is challenging enough, the changing nature and egregiousness of student-on-student sexual violence add additional levels of complexity. We face accusations of rape-drug usage, sexual predation via e-mail, video-taped assaults and other complicating circumstances.

The increase in reporting, coupled with more abusive sexual violations, challenges campus judicial officers and hearing panels to raise our game. If we don't, the courts, the Department of Education, and campus watchdog organizations are willing to substitute their judgment for ours. Litigation in the last few years has increasingly focused on the competency of campus conduct proceedings. It is against this backdrop that this year's topic was chosen.

Terminology

This Whitepaper addresses "The Typology of Campus Sexual Misconduct Complaints." I mean something precise by my decision to use this title, and want to explain my choice. A Typology is a classification. This Whitepaper will categorize sexual misconduct complaints into a cohesive framework, classifying them by types that can be readily identified. Once the types of complaints are categorized, a series of questions will help conduct panel members to develop a structured analytic for the processing of all sexual misconduct complaints. When I use the term "sexual misconduct," I mean what many colleges refer to as physical sexual assault, and I am using the term narrowly. I have stated previously that I believe the term "sexual misconduct" is broad enough to encompass sexual abuse, sexual harassment, and sexually exploitative behavior, and as policy terminology, it provides great flexibility. Here, I use it solely as a substitute for "rape" and "sexual assault" because I do not believe that colleges and universities have the legal authority to determine whether statutory crimes have occurred, and "rape" and "sexual assault" have very specific legal meanings. When discussing college policy violations as distinct from crimes, I use the term "sexual misconduct." This Whitepaper assumes, to some degree, commonality of college policies. Policies may use different words, but most colleges prohibit the same set of behaviors, regardless of what they are called. Any sexual intercourse or contact that occurs by force, without consent or with an incapacitated victim will run afoul of most college conduct codes. Much amplification of these terms will follow. Finally, this Whitepaper refers to sexual misconduct "complaints." By "complaints," I mean formal accusations by one student against another for violation of the college's code of conduct. Some colleges would call these "sexual misconduct cases." My terminology is synonymous, but I choose again to employ terminology that differentiates college proceedings from legal ones.

Asking the Right Question

I have observed hundreds of campus judicial trainings and hearings on sexual misconduct complaints. It is clear that analyzing these complaints is frequently vexing for the students, faculty, staff and administrators who are called upon to do so. These complaints can be heart

wrenching, preying on our emotional reasoning, our sexual politics, our gender-role expectations and stereotypes, our basic sense of fair play, and our innate notions of right and wrong. Administrators report to me that these complaints are brutal for them to resolve, because of the “gray areas” present in these situations, and the “He Said—She Said” nature of many complaints. They see both sides, and empathize with both parties. This gives rise to a prevalent mythology that all parties to a complaint have some responsibility, in a context where right and wrong are compromised by an alcohol-fueled “hook-up” environment. Yet, despite the complexity we attribute to sexual misconduct complaints, deciding a complaint is a fairly straightforward process. If the decision is less than clear, it is because of interference from emotional reasoning, sexual politics, gender-role expectations and stereotypes, our basic sense of fair play, and our innate notions of right and wrong. Because of the interplay of these factors, what emerges all too often is a muddled result. This Whitepaper seeks to provide judicial decision-makers with a tool for consistent analysis and clear decision-making. These complaints are never easy. But, this Typology will make analyzing them easier for those called upon to do so.

The Typology of Campus Sexual Misconduct Complaints

The Typology is about ensuring that for each and every complaint, we are asking the right question. If we ask the right question, we’ll have a better chance of getting the right answer. So, how many questions are there? There are three main, overarching questions. **THE MOST IMPORTANT MESSAGE OF THIS WHITEPAPER IS THAT OF THE THREE QUESTIONS THAT CAN BE ASKED, THE SKILL IS TO CHOOSE WHICH ONE OF THE THREE APPLIES, AND TO ONLY ASK IT, TO THE EXCLUSION OF THE OTHER TWO.** Complaints get muddled when the wrong question is applied to a complaint for which it is not appropriate.

The three questions that can be asked are rooted in policy. All colleges should prohibit sexual activity when it occurs under the following circumstances:

- 1) When it is forced; or
- 2) When it is non-consensual; or
- 3) When the victim is incapacitated, and that incapacity is known to or should be known by the accused.

Force

Let us start with force. Force is the classic paradigm for stranger rape, though it may be applicable to any assault, regardless of whether the offender is known to the victim. The force paradigm is one in which sexual contact is forcible or against the will of the victim. Some policies speak to resistance by the victim, and this too is part of the force paradigm, as resistance is shown in the face of force. In a force-based paradigm, the existence of force can be proved in two ways: 1) evidence of the application of force by the accused; and 2) evidence that the sexual contact was against the will of, or resisted by, the victim. Two things that complicate the force construct are the law’s recognition of “forcible compulsion” and the Feminist revision of the meaning of “force.”

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

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

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

In my assignment of some terms to my four force elements, there is some overlap. Abuse, for example, can signify physical abuse, sexual abuse, or emotional abuse. Harassment, in my terms, equates to threats, in a force construct. For example, Professor Crudge tells his student, Stephanie, that if she does not sleep with him, he will fail her. While on one level I would classify this as quid pro quo harassment, on another I would argue that if Stephanie did sleep with Crudge, it would be sexual assault by forcible compulsion. Stephanie was threatened. By use of the threat, Crudge applied a type of force. This should provoke some thought about what is sufficient to constitute a threat, and that will be discussed immediately below, in the ensuing description of the four types of force.

a. Physical Force

Physical force is the classic force construct, equated with violence or the use of a weapon. No matter how slight, any intentional physical impact upon another, use of physical restraint or the presence of a weapon constitute the use of force.

b. Threats

The law defines a threat narrowly, as a direct threat of death or grave bodily injury. “If you don’t have sex with me, I will kill you.” If a threat is used to obtain sex, forcible compulsion is present. I give a much broader interpretation than the law does to what constitutes a threat. For me, any threat that causes someone to do something they would not have done absent the threat is enough to prove forcible compulsion. While this is not a law-based interpretation, it certainly is useful for college policies. If I threaten you with a negative consequence, and that threat causes you to acquiesce in sexual activity, forcible compulsion is present, and sexual misconduct has occurred.

—If you do not have sex with me, I will harm someone close to you

—If you do not have sex with me, I will tell people you raped me

—If you do not have sex with me, I will spread a rumor you are gay

—If you don’t sleep with me, I will fail you

c. Intimidation

I did a workshop on the West Coast recently, and the assembled administrators and I puzzled over whether threats and intimidation are different from one another, if at all. This is a difficult question to answer, and for colleges whose policies prohibit both, they are often interpreted as synonyms. I do not believe they are entirely synonymous. I define intimidation as an implied threat, whereas I see threats as clear and overt. For example, we have recognized that “If you don’t sleep with me, I will fail you” is a threat. Yet, many of us would agree that it would be just as inappropriate for Professor Crudge to say “If you have sex with me, you’ll get an A in my class.” But, would that be a threat? No. A threat has to have a negative condition attached. This example “threatens” a benefit. I would argue that it is an intimidation, rather than a threat. If Stephanie agrees to have sex, it may be because Crudge is in a position of power and authority over her. What is offered here, the A grade, is overt. What is implied is what Crudge might do to Stephanie if she does not comply with his request. I do not mean to suggest that just having power or authority over someone is inherently intimidating. When I talk about intimidation as a type of force, it describes a situation when someone uses their power or authority to influence someone else. For example, a female student once told me that she “was intimidated by her date because he was bigger than she was.” I asked if he menaced her, or used his size to make her feel that she was in jeopardy. She said no. I think she may have felt intimidated, but that does not mean that he intimidated her. If he had pinned her into a corner, and had used his size to menace her, I would say that he used forcible compulsion. In sexual harassment, the offense is met if the victim is intimidated, but for physical sexual misconduct (such as sexual assault or rape), there is a requirement of use of force by the accused against the victim. Otherwise, any woman could argue that a sexual overture by any man larger than she was inherently intimidating. Because most men are bigger than most women, I would certainly hope that is not the case.

As an aside, I am frequently asked how sexual harassment and physical sexual misconduct converge and diverge on the college campus. This distinction, identified above, is one good example. In sexual harassment, we ask whether the alleged harasser’s actions (or failures to

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

d. Coercion

Finally, the fourth element of force is coercion. I define it as a synonym for pressure, duress, cajoling and compulsion. I believe strongly that if any of the four types of force is used, coercion is the type of force most likely to be present in campus sexual misconduct complaints. In a sexual context, I define coercion as an unreasonable amount of pressure to engage in sexual activity. What is unreasonable is a matter of community standards, I think. I can give you a sense of what I think is reasonable, but that is only my personal sensibility. I like to define coercion in terms of seduction (if we could only get our students to understand this distinction). Society defines seduction as reasonable, and coercion as unreasonable. Both involve convincing someone to do something you want them to do, so how do they truly differ? The distinction is in whether the person who is the object of the pressure wants or does not want to be convinced. In seduction, the sexual advances are ultimately welcome. You want to do some convincing, and the person who is the object of your sexual attention wants to be convinced. Twist my arm, I'll go along. Two people are playing the same game. Coercion is different because you want to convince someone, but they make it clear that they do not want to be convinced. They do not want to play along. They do not want to have their arm twisted. And the coercion begins not when you make the sexual advance, but when you realize they do not want to be convinced, and you push past that point. Seduction becomes coercion. Yet, coercion is a matter of degree. Some amount of pressure is reasonable and socially acceptable, but too much pressure crosses the line. That line begins when someone makes it clear that pressure is unwelcome, and for some communities, any additional pressure is unacceptable. This is a very intolerant threshold. Other communities ask what amount of pressure is unreasonable, beyond the indication that pressure is unwelcome. For these communities, determining what is unreasonable should be a function of four things: intensity, frequency, duration and isolation.

Let's say I approached you at a crowded bar, and started to come-on to you. If I pressure you for sex for five minutes, will I get very far? What if I have thirty minutes to pressure you, or three hours? I have a better chance of success if I have a longer duration in which to pressure you. Let's look at frequency. If I have thirty minutes, and I ask you for sex two or three times, would that be less successful than if I asked you thirty times in that thirty-minute timeframe? Frequency can enhance the coercive effect. So can isolation. What if we weren't at a bar. Would my pressure be more or less effective if we were together in my room on campus, with no one else present. My coercion will be more effective if I isolate you. Finally, intensity can impact my coercive effect. We're at the bar, and I'm trying to

convince you to have sex with me. I spend a half-hour telling you all the reasons why you should have sex with me. I'm really doing a great sell job, as I know my product better than anyone. I tell you that I'm the best lover you'll ever have. I challenge you to ask any woman in the bar, knowing they will vouch for my prowess. I tell you this is one roller-coaster ride you just don't want to miss. I give you my best Lounge Lizard act. Not buying it? I know why. The problem isn't me. Any reasonable person would jump on the experience I am offering, literally. The problem, I see now, is YOU.

So, I change tactics. "You come into a bar, dressed to kill, flirt with me, and then think you can tease me and say no. You're just a tease. You like to lead men on and then let them dangle. You're probably frigid. You should take a chance, you might just like it. What are you, some sort of religious freak? God won't know if we do it just once. I won't tell him. What are you, the last virgin in captivity? Everyone is doing it. Come on. Virginity is way overrated. Are you afraid your parents are going to find out? I won't tell them, I promise. Loosen up. Relax."

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

In summary, once you draw a line indicating that you don't want to play my game, and I pressure you beyond that point, seduction will become coercive. What amount of pressure is acceptable is a function of the frequency, intensity, isolation and duration of my pressure. Once your community standard is exceeded, it is appropriate for you to label my coercion as forcible compulsion.

Consent

Consent is the second of the three constructs discussed in this Whitepaper. I have written previously on consent. I will not rehash that article here, but commend it to you, if you are interested. It is posted online at <http://www.nchem.org/pdfs/elimforce.pdf>. What is critical to understand here is that consent is a key legal and policy concept that all colleges should embrace, and most have done so. Consent is a modern mechanism when compared to force, which is the classic rape construct, and is obsolete. Force is obsolete because any sexual contact that is by force is by definition without consent. Force became antiquated because of the difficulties in proving its use. Where violence was used, and physical signs were present, force was easily proven. Where physical signs were not present, the courts looked to see if there was evidence that the sexual contact was against the will of the victim, and that was proved by evidence of resistance. The law, in effect, wound up requiring victims to resist. This had the odd effect of placing a burden on the victim to wound her attacker, have witnesses, or make sure to have his skin under her fingernails. It also placed victims in jeopardy, as resistance could anger an attacker, causing worse harm. And, in the case of the sadistic rapist, her resistance turned him on all the more.

Consent was the way the law updated proof standards. It shifted the burden from the victim to resist, and placed the responsibility for obtaining sexual permission on the aggressor, or initiator of the sexual activity. The core of consent is the right of the victim to be unmolested until she gives clear permission for sexual activity to take place—what I call sexual sovereignty. Silence, in and of itself, cannot function as consent. With all due respect to Johnny Cochran, and his famous “If it doesn’t fit, you must acquit,” defense in the O.J. Simpson case, I have my own pithy version for sex: “If there’s no consent, you must relent.”

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

Sokolow’s Rule of Consent

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

Campuses differ in how they define consent. Most campuses permit consent to be conveyed through word or action, though a small number do require verbal consent. No state’s law requires consent to be verbal. While there are a number of questions that any campus conduct panel should ask with respect to consent, the more important question is “What specific words (and/or actions) by the alleged victim gave you a clear indication that she wanted to engage in the specific sexual actions in which you engaged?”

Incapacitation

The third construct discussed in this Whitepaper is incapacity. Incapacity is the most complex of the three, by far. Here are some critical understandings that we should all have about incapacity. First, there are two forms of incapacity, mental and physical. Mental incapacity results from cognitive impairment, such as mental retardation. Physical incapacity results from a physical state or condition, such as sleep, alcohol or other drug consumption. Temporary incapacity can result from conditions such as epilepsy, panic attacks and flashbacks.

Second, alcohol-induced incapacitation is a precise term. Yet, it is often confused with what I call the “i-words” that often are applied to alcohol use. There are five i-words: (under the)

influence, impairment, intoxication, inebriation and incapacitation. They are not synonymous, and are more-or-less listed in order of severity of alcohol effect. One becomes under the influence of alcohol as soon as one has anything to drink. Impairment begins as soon as alcohol enters the bloodstream, and increases with consumption. Intoxication and inebriation are synonyms, as is drunkenness, and corresponds to a .08 blood alcohol concentration. Incapacitation is a state beyond drunkenness or intoxication. What is confusing about incapacity is that it has nothing to do with an amount of alcohol or a specific blood alcohol concentration. In fact, some drunk people will be incapacitated, and some will not. Incapacity can be defined with respect to how the alcohol consumed impacts on someone's decision-making capacity, awareness of consequences, and ability to make fully-informed judgments.

Incapacity Defined

Where someone lacks the ability to make rational, reasonable judgments as a result of alcohol (or other drug) consumption, they are incapacitated. Understanding and distinguishing the i-words is important, because except for rare religiously-grounded rules at colleges affiliated with various faiths, almost all colleges have policies based on incapacity. Some imprecision with the i-words results in lack of clarity, because policies attempt to give i-words that are not synonymous with incapacity the meaning of incapacity. Worse are rules that state that sex is prohibited with someone who "is unable to consent as a result of alcohol or drug consumption." This language is less than artful, because we are often faced with complaints by students who are able to give consent, but claim they had no idea they were doing so—the so-called Blackout. This will be discussed at length, below. The main thing to understand is the regardless of what careless terminology is used, most colleges use an incapacity standard, which is also the legal standard for all state statutes. The most straight-forward way to compose a policy on incapacity is as follows:

"Having sex with someone whom you know to be, or should know to be, incapacitated (mentally or physically) is a violation of the sexual misconduct policy."

Common-Sense Definition

While it is precise to define incapacity as an inability to make a rational, reasonable judgment or appreciate the consequences of your decisions, I prefer a more common-sense definition: In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why **and** How with respect to that sexual activity. Any time sexual activity takes place where the alleged victim did not understand any one of these six conditions, incapacity is at issue. An awareness of all six must be present. This is another way of stating the law's expectation that consent be informed, and any time it is not, consent cannot be effective. To be more precise, an incapacitated person cannot give a valid consent. They could be stark naked, demanding sex, but if they are incapacitated at the time, and that is known or knowable to the accused, any sexual activity that takes place is misconduct, and any factual consent that may have been expressed is IRRELEVANT.

Assessing Incapacity

Physical incapacities are sometimes quite overt, and other times more subtle. Incapacitation is a subjective determination that will be made after the incident, in light of all the facts available. Incapacitation is subjective because people reach incapacitation in different ways and as the result of different stimuli. They exhibit incapacity in different ways. Incapacity is dependent on many or all of the following factors:

- Body weight, height and size;
- Tolerance for alcohol and other drugs;
- **Amount, pace and type of alcohol or other drugs consumed;**
- Amount of food intake prior to consumption;
- Voluntariness of consumption;
- Vomiting;
- Propensity for blacking-out (mentally or physically);
- Genetics.

Evidence of incapacity will come from context clues, such as:

- A witness or the accused may know how much the other party has consumed;
- slurred speech;
- bloodshot eyes;
- the smell of alcohol on the breath;
- shaky equilibrium;
- vomiting;
- outrageous or unusual behavior
- unconsciousness.

None of these facts, except for the last, may constitute--in and of themselves-- incapacitation. But, the process of finding someone responsible for a violation of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof, whether you use a preponderance of the evidence (more likely than not), clear and convincing evidence, or any other evidentiary standard. Some of these standards may be met with some combination of the first seven, or all eight factors. For example, it might be met if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might be met if someone is vomiting so violently and so often that they are simply in such bad shape that they cannot be said to have capacity.

Blackouts

The eight context clues listed above will also help you to assess and determine the extent of the respondent's actual and imputed knowledge, given her/his awareness of whether the complainant exhibited any of these "symptoms." Another issue that often deserves attention in these cases is what toxicologists call "blacking out" or "black time." Blacking out or black time feels like unconsciousness to the person who is blacked out. To others, they may appear to be unconscious or conscious. Black time does not affect all drinkers, but some will lose all conscious awareness or memory of their actions, though they may maintain physical ability and control. Thus, they

do things that they cannot remember doing. Current research indicates that blackouts are not just amnesia, but an actual inability at the time to form conscious intentions and understand consequences. If someone is experiencing a blackout, they are incapacitated and cannot give consent, if the blackout or black time can be established sufficiently under the evidentiary standard.

Sexual Politics

One of the factors that leads to clouded judgment on the issue of incapacity is the very sexual context of the issue. Each of us has sexual politics, whether we admit it or not. Our sexual politics derive from our morals, religious values, open or close-mindedness, sexual histories, role models, and culture, amongst other factors. They play into our decisions on sexual misconduct, especially with respect to incapacity. “She was asking for it.” “She brought him to her room.” “She got herself drunk.” “Well, he was drinking too. Maybe she raped him.” These rape myths have adherents because of sexual politics. The best way for me to address the myths of incapacity is with a story, believe it or not, about a Mercedes. You have to remove incapacity from the sexual context to truly understand it.

Can a Mercedes be a Sexual Metaphor?

I like Mercedes-Benzes. I have always wanted one. You know the one I mean, right? The red one. The convertible. The \$100,000 one. Alas, I have chosen higher education, so the closest I get to that Mercedes is on Saturday mornings. I pick up a Krispy Kreme and a coffee, and I take my lawn chair down to the local dealership. I set it up outside the plate glass window, and just stare at that car for hours, as it goes round and round the turntable in the showroom. Pathetic, huh? So, one night I go out drinking with my buddies from law school. We down a few beers, and they begin to brag about their success. They all went into corporate law. Big houses. Beach houses. Boats. Home theaters. Three cars. Each. Three wives. Each (not all at once). Several of them own red Mercedes convertibles. They ask if I have one. Nope. Doing well, but not *that* well. Higher education law is very gratifying, I say, but the rewards are more intangible. Don't you want one, they ask? Heck yes, but I have a family to provide for, college to save for. Maybe when I retire. Maybe.

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

was a dream. Whoops. I look out. There it is, in the driveway. The signed lease, too. \$1,500 a month. Not a mortgage, a lease. My wife takes one look, and in the way only a wife can, tells me to take it back. I can't, I say. I signed a lease. She doesn't care. We can't afford it. Take...it...back.

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

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

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

But, I Was Drunk Too, So She Raped Me

Let's take a look at that last myth I mentioned above--"Well, he was drinking too. Maybe she raped him." How does that hold up to the Mercedes analogy? The salesman at the drive-in window is incapacitated too. Now, both people on either side of the transaction are unable to appreciate Who, What, When, Where, Why and How. Doesn't that just make an already invalid transaction all the more invalid? Sure, it does. Arguing that "he was drunk too" doesn't function to excuse the misconduct, especially since it is almost always disingenuous. If he really felt victimized, why didn't he make a complaint? Let's be more specific. Most of the time, when someone argues they were drunk too, this is inadmissible evidence. We must remember that almost all colleges have a rule that being drunk does not excuse a policy violation, and even if you don't have that rule spelled out, being drunk does not excuse the violation of a policy, or the trespass on another human being. What often occurs is a situation where the female student is incapacitated, and the male student is merely drunk.

Jumping to Conclusions

We just jump to the premature conclusion that both students are incapacitated, but the evidence does not show that at all. In nine years, I have NEVER seen a true case of mutual incapacity. I don't doubt it exists, but it is very rare. I have seen plenty of cases where two people were drunk, but that is not a policy violation at most colleges. How would two genuinely incapacitated people have the physical coordination necessary for sexual intercourse? And if they did, how would they remember it? The courts operate on the presumption that if a man is able to engage in and complete the act of sexual intercourse, he is not incapacitated (Mallory v. Ohio). I have heard stories of students using Cialis to counteract what they call "beer dick," and if you have that factual situation, you'll have to piece through whether that evidence indicates intentional predation, or whether the mutual incapacity makes it impossible, from an evidentiary perspective to determine who did what to whom. Sometimes, students feel badly about a sexual experience, but the evidence is insufficient to support a finding of sexual misconduct.

Self-Incapacitation

There is another issue with respect to incapacitation. Many conduct panels get hung up on the distinction between complaints where the accused incapacitates the victim, and complaints in which the victim self-incapacitates. For purposes of a conduct hearing, whether the victim self-incapacitates or not should not impact the finding. The question under the policy is whether the victim was incapacitated, not how she became incapacitated. (It also may be worth mentioning that incapacity rules are not gender-specific, so that anyone who has sex with an incapacitated person can be held responsible, regardless of whether the situation is male-on-female, female-on-male, male-on-male or female-on-female. This Whitepaper just uses the pronouns of the usual suspects, for convenience). While self-incapacitation may not impact the finding, it may have an impact on the sanction. It would be perfectly reasonable for a conduct panel to desire to give a harsher sanction to a student accused of deliberately and surreptitiously plying a woman with spiked punch or a rape drug, than it might give to a student accused of having sex with a woman who had self-incapacitated.

Poor Judgment by the Accused

An interesting question I am often asked is because the policy asks not only whether the victim is incapacitated, but also if the accused knew that or should have known it, what happens when the accused is drinking, with respect to what he should have known. The "should have known" part of the policy, what lawyers call constructive knowledge, can be misleading. It is not a subjective question of what the accused should have known. It is an objective question that might be better phrased as "what would a reasonable person, in the position of the accused, have known?" And, of course, a reasonable person does not cloud their judgment with alcohol.

Poor Judgment by the Victim

At no point is it appropriate to excuse a violation of policy by the accused because of poor judgment or a lack of responsibility by the victim. Two wrongs do not make a right. To blame the victim for irresponsible decisions confuses the difference between responsibility and culpability. The question is a campus hearing is whether the accused is culpable for a violation, not whether the victim was irresponsible (though she may have been). It is also inappropriate to

hold the victim accountable for any policy violation she may have engaged in during the incident underlying the complaint. If at all, that should be done in a separate hearing. Allowing an accused student to file an unfounded counter-complaint against his accuser could amount to retaliatory harassment under Title IX. Where a counter-complaint is valid, it still ought to be addressed in a separate hearing, in most circumstances.

Tying the Three Elements into an Analytic

Now that we have a comprehensive understanding of force, consent and incapacity, we can weave them into a coherent analytic. The analytic is a three-question progression that can be applied to any sexual misconduct complaint. The order in which we ask our questions is important. The first question is:

1) Is there evidence of the use of force, as force is defined under our policy (hopefully as physical force, threats, intimidation, and/or coercion)?

If the answer is yes, you are done. Find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. Do not pay any attention to issues of consent or incapacity that may be present in the complaint. They are irrelevant if force is present. Force, in and of itself, establishes a policy violation. Inquiring about consent is a distraction. For example, I threaten you: “If you don’t have sex with me, I’ll kill you.” You respond “Do whatever you want, just don’t kill me.” You just consented. If we engage in a consent-based inquiry, the answer is yes, there was consent. Again, if you ask the wrong question, you get the wrong answer. If the answer to the question of whether force was used is no, then we have to inquire into incapacity as the second question.

2) Is there evidence that the alleged victim was incapacitated, and that the accused knew that, or that we believe he should have known it?

You will only engage in inquiry on this second question if there is evidence that the alleged victim was developmentally disabled, asleep or using alcohol or other drugs or has any condition that might produce blackouts, loss of consciousness or similar temporary incapacities. We already know that force is not an issue, because you have ruled it out with the first question in the analytic. The critical competency here is to make sure you do not indulge in a consent-based inquiry. Just like with a force-based inquiry, a consent-based inquiry is irrelevant here. Even if the alleged victim verbally consented, or signed a contract, she cannot validly consent if she is incapacitated. **THERE IS NOTHING AN INCAPACITATED PERSON CAN DO OR SAY TO MEANINGFULLY, VALIDLY CONSENT TO SEX.** Too many incapacity inquiries become mired in “but she came on to him.” It does not matter. If the evidence shows, by your standard of proof, that the alleged victim was incapacitated, move on to these sub-questions, about the accused’s knowledge. If the evidence does not show incapacity, move on to the third question in this analytic.

- a. Does the evidence show that the accused, knew--as a fact—that the alleged victim was experiencing this incapacity? If so, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. If not, ask the next question.
- b. Should a reasonable person, in the position of the accused, have known of the alleged victim’s incapacity? If so, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. If not, you have determined that this complaint cannot be resolved using an incapacity construct. Move on to the third question in this analytic.

3) *What specific words (or actions) by the alleged victim reasonably indicated to the accused that he had consent for each of the specific sexual activities that took place?*

If the evidence shows words or actions that are reasonable indications of consent, you are done. There is no violation of policy. But, if the evidence does not show words or actions that are reasonable indications of consent, find the accused in violation of your policy, and sanction him proportionally to the severity of his violation. This is the primary inquiry you will need. If the accused argues “I asked her, and she did not respond, so I thought it was okay,” you are done. No consent was communicated. It cannot be assumed.

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

Conclusion

If you ask these three questions, in this order, it will impose discipline on your decision-making process. We have on many campuses so embraced the concept of consent that we tend to apply it generically to all sexual misconduct complaints. This leads to flawed analyses. Hopefully, the message that has emerged from this Whitepaper is when and how to apply the consent construct, and when other constructs should be used, to the exclusion of consent-based inquiries. Where you find other inquiries seeping in, you will have to challenge whether those inquiries aid in your decision, or confuse the issue you are trying to isolate. While I do not argue that this analytic will work every time, I hope you will find that it is of great aid in the vast majority of complaints you encounter.

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