

SEXUAL MISCONDUCT COMPLAINTS:

17 TIPS FOR STUDENT DISCIPLINE ADJUDICATORS

Background. On April 4, 2011, the higher education community received a “Dear Colleague” letter on sexual assault issued by the Office for Civil Rights in the U.S. Department of Education. The letter requires institutions to provide training on sexual assault to various campus groups. It states:

All persons involved in implementing [an institution’s] grievance procedures (e.g., Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, and in the [institution’s] grievance procedures. The training should include applicable confidentiality requirements. In sexual violence cases, the fact-finder and decision-maker should also have adequate training or knowledge regarding sexual violence.

In partial response, the University of Pennsylvania developed the following guide for members of its student discipline panels. The three people primarily responsible for the guide were: Wendy White, Senior Vice President and General Counsel, University of Pennsylvania; Susan Herron, Esq., Director, Office of Student Conduct, University of Pennsylvania; and Ann Franke, President, Wise Results, LLC. They appreciated assistance from other colleagues, notably including Dr. Felicity Paxton, Director, Penn Women’s Center.

How to Adapt This Guide. The University of Pennsylvania offers the guide as a template for other *nonprofit* colleges and universities. Here are ideas for adapting the guide:

- Look for text enclosed in brackets and in uppercase letters. [LOOK FOR THIS TYPE OF TEXT.] At these points, consider inserting language specific to your institution.
- Adjust any other contents that would make the guide more suitable to your institution.
- Check footnote 11, which requires adaptation or deletion.
- Delete this explanatory page.
- The pages and endnotes will renumber automatically.
- After completing your revisions, update the table of contents using the Word table of contents feature. (Right-click anywhere in the table, select Update Field, then select Update Entire Table.)
- Please leave the first footnote intact. It credits the work of the University of Pennsylvania and the National Judicial Education Program.

Should you need further assistance, you may wish to contact Ann Franke at annfranke@verizon.net.

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Updated Fall 2012

Sexual Misconduct Complaints

17 Tips for Student Discipline Adjudicators

[NAME OF INSTITUTION]

[NAME OF STUDENT DISCIPLINE OFFICE]

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Introduction

This guide presents common issues and attributes of student sexual misconduct matters. It is designed as a resource to help members of student disciplinary hearing panels in resolving complaints of sexual misconduct.¹

The [INSTITUTION’S] student disciplinary system promotes the [INSTITUTION’S] educational mission. It provides a fair and effective way to resolve disputes involving students and students’ alleged violations of institutional rules, regulations, and policies. Your service on a student discipline hearing panel makes an important contribution to the well-being of the student body and of [INSTITUTION] as a whole.

Student disciplinary hearings are not civil or criminal cases. Through the hearing process the institution enforces its internal policies, not state or federal law. The hearing process is designed to conform to Title IX of the Education Amendments of 1972, which requires gender equity in educational institutions that receive federal funds.

[INSERT NAME OF POLICY ON STUDENT DISCIPLINE PROCEDURE] controls the hearing process, and each panel member must decide each case based on the evidence and arguments presented in the case. It describes the responsibilities of panel members and how panels conduct their hearings. You must consider witness statements, testimony, and other evidence in a neutral, fair manner. If you believe you cannot make an objective judgment in a case, or if your objectivity might reasonably appear to be impaired, you should disqualify yourself from service.

Other policies having a central role in sexual misconduct are: [INSERT NAMES]. [INSERT A FEW SENTENCES ABOUT THE OTHER POLICIES.]

The hearing panel will presume a student not responsible for misconduct unless proven responsible by a preponderance of the evidence. Preponderance of the evidence weighs the balance of probabilities. The standard is met if you believe it is more likely than not that the alleged misconduct occurred. In effect, 51% of the evidence satisfies this standard. The relevant policies appear as appendices below.

¹ This guide is modeled after a document prepared by the University of Pennsylvania in 2012. That work drew extensively from several sources. In 2010 the National Judicial Education Program released a report titled “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case.” With kind permission of the report’s authors, this guide draws heavily from the report. Among other borrowings, most of the guide’s major headings are modeled after sections of the report. Another major source for this guide is a 2000 report from the United States Department of Justice: “The Sexual Victimization of College Women.” It provides statistical snapshots of the frequency of campus sexual assault, the relationships between a complainant and alleged assailant, and other matters. For information on accessing these and other publications, please see the Resources in Appendix D.

Adjudicating Complaints of Sexual Misconduct

Should you feel that anything in this guide departs from the policies or from evidence or arguments in a particular case, please disregard this guide. It is a resource designed merely as background information that may be helpful to you.

Several comments on terminology are in order. The text uses gender-neutral vocabulary unless the context requires otherwise. It refers in various places to a *complainant* or a *victim*. These are slightly different, because a victim may not choose to pursue a complaint. The word victim should not be interpreted as carrying a conclusive presumption that any misconduct occurred. The text also uses the terms *respondent* or *assailant*, again without any presumption of responsibility. You will also see the phrases “sexual assault” and “sexual misconduct.” Sexual assault is any non-consensual, or unwelcome, sexual contact. The term covers touching (including through clothing), child molestation, attempted penetration, sodomy (oral or anal), rape, and incest. Sexual misconduct is a violation of institutional policy. Words italicized and shaded in *gray* at their first appearance in the text are defined in the Glossary (Appendix B).

[INSERT NAME OF STUDENT CONDUCT OFFICE] hopes you find this guide helpful and stands ready to support you in your important role.

1. Sexual assault, including intimate partner assault, is more common than many people realize.

Through the work of various researchers, a composite picture of the prevalence of sexual assault has emerged. We offer data from several sources. The United States Department of Education received nearly 3,300 reports of forcible sexual offenses on college and university campuses in 2009. The Department of Education has observed¹:

A report prepared for the National Institute of Justice found that about 1 in 5 women are victims of completed or attempted sexual assault while in college. The report also found that approximately 6.1 percent of males were victims of completed or attempted sexual assault during college.

In the spring of 2011, 105,781 college students responded to a health survey that included questions on their experience of violence, sexual assault, and abusive relationships.² They reported the following experiences, covering just the prior year:

<i>Percent (%)</i>	Male	Female
Sexual touching without their consent	3.1	7.4
Sexual penetration attempt without their consent	0.8	3.2
Sexual penetration without their consent	0.6	1.9
Stalking	3.8	7.0
An emotionally abusive intimate relationship	7.3	11.0
A physically abusive intimate relationship	2.3	2.2
A sexually abusive intimate relationship	0.9	1.9
A physical fight	10.9	3.7
A physical assault (not sexual assault)	5.1	3.4
A verbal threat	25.4	15.9

In an earlier study, the U.S. Department of Justice found that sexual assault against female college students is more common than sexual assault among women in the same age range who are not in college.³ One expert has estimated that in 2006, women over 18 were subjected to 800,000 *forcible* rapes, 300,000 *drug-facilitated* rapes, and 300,000 *incapacitated* rapes, in which the victim was unable to consent after voluntarily ingesting drugs or alcohol. A study on male victims calculated that 2.8 million (3%) men in the United States have been forcibly raped at some point in their lives. Another reported that in 2003, one of every ten rape victims was male.⁴

2. Numerous myths and stereotypes surround sexual assault.

A New York judge articulated many of the false stereotypes commonly applied to sexual assault.⁵ He catalogued these misplaced beliefs:

- A true victim of sexual assault will complain immediately to family, friends, or police.
- Sexual assault usually occurs outdoors, at night, between strangers. The perpetrator has a weapon and leaves the victim physically injured.
- Sexual assault is an expression of (misplaced) sexual desire.
- Women commonly make false reports of rape against men.
- If someone previously consented to intercourse with a partner, the partner can fairly assume consent on later occasions.
- Through attire, behavior, drug or alcohol use, or being in the wrong place at the wrong time, a victim invites sexual assault or deserves it.

The last point is sometimes termed *victim blaming*. Appendix C offers advice to [DISCIPLINARY PANEL MEMBERS] on formulating questions to avoid an implication of blaming a complainant.

Other myths and stereotypes exist. For example, some people believe that only women are victims of sexual assault and only men are perpetrators. Some believe that sexual assailants are “crazy” or “psycho.” Another myth is that once a person consents to some sexual activity, such as fondling, he or she is also consenting to intercourse. Yet another is the belief that sexual activity cannot be stopped midway. Myths deny the reality that sexual assault is about power and control.

3. Most campus sexual assaults are committed by someone the victim knows.

In about 9 out of 10 sexual assaults against female college students, the complainant knows the assailant. The assailant may be a classmate, friend, intimate partner, ex-partner, or acquaintance. The complainant often trusted the assailant before the assault. Students assaulted by someone they know may engage in significant self-blame and are often reluctant to report the matter. No typical assailant profile exists. Assailants may be popular or not, outgoing or quiet, great athletes or klutzes, top students or slackers. They belie the myth that assailants are all “crazy” or “psycho.”

The Department of Justice has provided the following data on assailants of female college-student victims:⁶



4. Prior dating violence may be associated with sexual assault.

An abusive relationship may involve emotional abuse, physical abuse, or both. Physical abuse can be a predictor of sexual assault. In simple terms, a person who is hit or kicked by a partner, or subjected to other violence, faces a heightened risk of sexual assault. A study by the American College Health Association found a correlation between a woman’s experience of dating violence in a year and her experience of sexual assault during the same year.⁷

Abuse in a relationship may begin with tension over factors such as stress, jealousy, or alcohol or drug use. Verbal or physical abuse may follow, and the abuser may then seek forgiveness. The pattern of violence may be regular or unpredictable. Victims face significant obstacles to leaving an abusive relationship. Factors can include, among others: confusion, embarrassment, low self-esteem, self-blame, depression, fear of further violence, minimization of the situation, and loyalty to the assailant.

5. Most sexual assaults are never reported to campus authorities or law enforcement.

Sexual assault is commonly believed to be the most-underreported form of violence. The U.S. Department of Justice found that fewer than 5% of female college students who are sexually assaulted report the matter to school authorities or law enforcement.⁸ Surveys show various reasons for the low reporting rate. Some complainants do not want family members or others to know. Some do not report

because they feel they lack proof that the incident occurred. Others fear hostile treatment by the authorities. Some victims do not report due to concern about retaliation from the alleged assailant or his or her friends.

Fear of blame is another factor. Some victims fear they will be blamed for the assault, a fear linked to social preconceptions. One scholar has described how victim blaming has evolved from overt to subtler forms:

Blatant forms of victim blaming have become socially unacceptable.... For example, [a 2008] study found that college students knew that forced sex was rape and that the victim should not be blamed, however, they were less clear about how accountable the perpetrator should be. This was further illustrated by a study conducted with college student-athletes, where [a 2007 study] found that respondents would not directly blame the victims for their assault, but expressed the belief that women put themselves in bad situations by dressing a certain way, drinking alcohol, or demonstrating other behaviors such as flirting.⁹

Social blame can influence a victim's feelings of self-blame. He or she may have drunk too much, worn revealing clothing, or flashed intimate body parts. Absent consent, however, such conduct does not justify sexual touching.

Foggy memory about the assault may deter someone from reporting. A victim's memory may have been impaired by alcohol or drugs, whether ingested knowingly or unknowingly.

At some universities, complainants may be reluctant to report because they may have violated campus policies on alcohol or drugs.¹⁰ [INSERT SENTENCE OR TWO HERE ABOUT HOW YOUR INSTITUTION HANDLES THIS PROBLEM, E.G., THROUGH A "MEDICAL AMNESTY" POLICY. QUOTE THE POLICY IN THE FOOTNOTE].¹¹

Other factors suppressing reporting can include denial about the experience or uncertainty about whether it was an assault. Some victims may prefer to put the experience in the past rather than to relive it by making a complaint. Others want to avoid the social stigma often associated with having been a sexual assault victim. Still others may minimize the assailant's responsibility.

Women report sexual assaults committed by strangers more often than assaults committed by someone they know. As discussed above, most campus sexual assaults occur between people who know one another.

6. Alcohol does not cause someone to commit sexual assault.

Regardless of whether the victim was intoxicated, the assailant may have consumed alcohol or drugs. While typically lowering inhibition, drinking or drug use does not cause someone to commit sexual assault.

7. A sexual assault may not leave serious, observable physical injuries.

A sexual assault, including rape, may not leave obvious physical injuries. During any assault a victim is not required to take physically protective actions. Only about 20% of college women who experience attempted or completed rape report suffering an injury. The most common injuries are bruises, black eyes, cuts, scratches, swelling, or chipped teeth.¹²

In a forcible assault, the victim is capable of giving consent and does not do so. Serious, observable physical injuries occur in some, but not all, forcible assaults.

In incapacitated assaults, the victim is not capable of giving consent. The victim may be asleep, under the influence of alcohol or drugs, or intellectually disabled. Serious, observable physical injuries are less likely in incapacitated assaults. In *drug-facilitated sexual assault*, the assailant gives drugs to the victim, often without his or her knowledge. *Rape-facilitating drugs* include, among others, Ketamine, Rohypnol, and GHB. Incapacitated assaults remain, nonetheless, assaults and they make up the majority of campus sexual misconduct complaints.¹³

8. Sexual assault victims often sustain profound, long-lasting psychological injury.

The loss of control during a sexual assault is profoundly stressful and traumatic for victims.¹⁴ Common symptoms include fears, flashbacks, nightmares, withdrawal, difficulty concentrating, anger, and changes in appetite and sleep. Post-traumatic stress disorder and depression may persist for long periods, and victims may develop substance abuse problems. As one woman explained:

"I haven't slept for days. As soon as I fall asleep I have a nightmare of someone trying to sexual[ly] assault me. Every time I look at food I get nauseous and can't eat. I can't concentrate and don't see how I'm going to return to school." *Emily, college sophomore, sexually assaulted by classmate at fraternity party*¹⁵

Victims of drug- or alcohol-facilitated assault may have no memory of the incident. This factor can complicate their recovery. Drugging creates a unique form of trauma that can exacerbate the victim's feelings of powerlessness.¹⁶ One should not assume that memory loss is a benefit to the complainant.

Sexual assault before or during college elevates a student's risk of suicide.¹⁷

In general, while victims may experience certain common responses, there is no "typical" or "expected" universal pattern.

9. Assault by a prior intimate partner may increase the psychological injury.

One stereotype is that victims of *intimate partner sexual assault* are less harmed by the experience, because they had previously engaged in consensual intercourse with the person. This is not correct. Intimate partner sexual assault can be more damaging, due to breach of the trust established over the course of the relationship.¹⁸

In a 2010 survey, the Centers for Disease Control documented the impact of intimate partner sexual assault and stalking. It found:¹⁹

81% of women who experienced rape, stalking or physical violence by an intimate partner reported significant short or long term impacts related to the violence experienced in this relationship such as Post-Traumatic Stress Disorder (PTSD) symptoms and injury while 35% of men report such impacts of their experiences.

The survey also showed that 72% of female victims were fearful and 63% had symptoms of post-traumatic stress disorder. Health effects can be lifelong. CDC researchers suggest the long-term impacts may be due to chronic stress or unhealthy coping habits such as smoking or inappropriate alcohol or drug use.²⁰

10. Victim behaviors during and after a sexual assault may appear counterintuitive to those unfamiliar with sexual assault.

People react in various ways during and after the extreme stress of a sexual assault.

During a sexual assault, the complainant may experience *frozen fright*. Also known as *tonic immobility*, frozen fright leaves the victim physically paralyzed and unable to respond. This is a type of surrender in self-defense, sometimes seen in animals when they are attacked.

Another reaction during an assault is *dissociation*. With this response, the victim may report feeling like a bystander witnessing the attack or like someone experiencing a terrible nightmare. One complainant described the phenomenon:

I left my body at that point. I was over next to the bed, watching this happen. . . . I [disassociated] from the helplessness. I was standing next to me and there was just this shell on the bed. . . . There was just a feeling of flatness. I was just there. When I repicture the room, I don't picture it from the bed. I picture it from the side of the bed. That's where I was watching from.²¹

In states of both frozen fright and dissociation, the complainant will not physically resist the attacker. Other complainants may make a strategic decision not to resist physically, out of fear of harm or even

death. Acquiescence from fear is not consent.²² [SEE THE DISCUSSION OF CONSENT IN THE INSTITUTIONAL POLICY, REPRINTED AS APPENDIX A BELOW.]

Many complainants try to avoid the assailant afterwards, although some may initiate contact. While this may seem counterintuitive, the complainant may be seeking to understand what happened. “How could someone I thought was a friend turn on me?”²³

Recovery from sexual assault can be a long and difficult process. Stages of recovery may include:²⁴

1. Initial Shock. Physical and emotional reactions ranging from withdrawal to highly expressive emotions such as crying, screaming, or shaking. An individual may not feel comfortable communicating these feelings to others.
2. Denial. Also called pseudo-adjustment. Wanting to forget about the assault, attempting to continue normal routine. Denial or rationalization is an attempt to quiet inner turmoil.
3. Reactivation. Prompted by memories, recurring feelings from Stage 1. May include flashbacks, nightmares, a sense of vulnerability, mistrust, and physical complaints. Depression, anxiety, and shame may increase.
4. Anger. Feelings of anger toward self, friends, society, the legal system, all people of assailant’s gender, or other groups. Anger may be redirected toward the assailant.
5. Integration. Thoughts and feelings about the assault become integrated into life experience and an individual begins to feel “back on track.” Strength can come from support, education, and passage of time.

Stages may come in different orders for different people and may be repeated over time.

11. The brain stores and retrieves traumatic and non-traumatic memories differently.

Some complainants may have excellent recall of the details of a sexual assault while others may not. Stress affects how the brain establishes, stores, and retrieves memories. Elevated levels of hormones involved in the “fight or flight” phenomenon, such as cortisol, may influence an individual’s ability to recall events. Major trauma may lead to fragmented recall.²⁵ The impact of stress, including extreme stress, on memory is a subject of ongoing research.²⁶ The fact that a complainant recounts a sexual assault somewhat differently from one retelling to the next may reflect memory processes rather than inattentiveness or deceit.²⁷ The vital role of sleep in processing memory may also contribute to differences over time, and sleep disruptions are very common after sexual assault.²⁸

12. A sexual assault complainant may display a flat affect while testifying.

When appearing before a disciplinary hearing panel or a jury, complainants may suppress their emotions. They may have told their story many times before, or they may want to hide their emotions from the respondent, panel members, or others. A **flat affect** does not, by itself, show that no assault occurred.

Complainants behave differently at a hearing depending on factors including their personality, stage of recovery, and life circumstances.²⁹ Some may be openly expressive, sobbing or showing anger, while others may appear controlled and practically emotionless.

13. A victim may experience physiological arousal during a sexual assault. This does not prove desire or mutuality.

A victim may experience a reaction of physiological arousal during a sexual assault. This is an autonomic response in which genitals respond automatically to friction. This physiological response does not indicate consent or enjoyment. The presence of physiological arousal may contribute to a victim's feelings of self blame.

14. False allegations of rape are not common.

One myth is that, out of revenge or other motives, women make numerous false allegations of sexual assault. Recent research at a major northeastern university suggests that, over a ten-year period, 5.9% of its cases involved false allegations.³⁰ Other reputable research places the rate in the general population between 2% and 10%.

15. The typical assailant is neither a brutal stranger nor a “good guy” who had a bit too much to drink one night. Rather he knows his victims, pre-meditates, and uses little overt violence.

The two most common stereotypes about the “typical” man who commits sexual assault are both false. He is neither a brutal stranger wearing a ski mask nor a good guy who drank too much.

Most sexual assaults occur between people who know one another, at least slightly. One leading researcher has concluded that a small number of assailants commit the great majority of assaults. They may not regard themselves as rapists. They share common characteristics, namely that they:

- Are extremely adept at identifying “likely” victims and testing the prospective victims' boundaries

- Plan and premeditate their attacks, using sophisticated strategies to groom their victims for attack and to isolate them physically
- Use instrumental rather than gratuitous violence; use only as much violence as is needed to terrify and coerce their victims into submission; exhibit strong impulse control
- Use psychological weapons – power, control, manipulation, and threats – backed up by physical force; almost never resort to weapons such as knives or guns
- Use alcohol deliberately to render victims more vulnerable to attack or completely unconscious
- Are as likely to be serial and multi-faceted offenders as are incarcerated rapists.³¹

The typical rapist operates within ordinary social conventions to identify and groom victims. His or her patterns of operation, such as strategically isolating potential victims, can show the premeditation involved in the attacks.

A respondent in a sexual misconduct complaint may have many apparent positive attributes such as talent, charm, and maturity. A respondent may display, for example, a deep commitment to community service and excellent career potential. Such attributes, while commendable, are generally irrelevant to whether the respondent engaged in nonconsensual sexual activity with the complainant.

16. Potential disciplinary hearing panel members who have had personal experience with sexual assault, involving themselves or a loved one, may disqualify themselves from service.

Hearing panel members may decline to hear a complaint under two circumstances: (i) if they feel they may not evaluate the matter fairly or (ii) if others might reasonably question their objectivity. [CHECK WHETHER THIS STATEMENT FITS YOUR INSTITUTION.]

In a sexual assault case, a panel member might decline to participate on grounds such as:

- He or she has experienced an attempted or completed sexual assault
- He or she has been accused of sexual assault
- A close family member or friend has experienced an attempted or completed sexual assault
- A close family member or friend has been accused of sexual assault

These grounds are potentially disqualifying even if the assault was never reported. Prospective panel members who disqualify themselves from a case **will not** be asked to explain their reasons. [CHECK WHETHER THIS IS TRUE AT YOUR INSTITUTION.]

17. Evidence provides the basis for credibility determinations.

In sexual assault cases, as in other cases, the complainant and respondent deserve an equal opportunity to present their positions. A sexual assault case may involve a situation with no witnesses other than the

complainant and the respondent. Each may offer a radically different version of what happened. Each may suggest a plausible reason why the other is lying. Often the cases boil down to the issue of consent. [THE INSTITUTIONAL POLICY, APPENDIX A, MAY DEFINE CONSENT. IF SO, NOTE THAT FACT.]

Alcohol or drugs may have been involved. If the complainant was impaired by alcohol or drugs, then the panel evaluates whether the respondent knew or should have known the complainant was incapable of giving consent.

Panel members will need to weigh the credibility of any conflicting accounts. Factors discussed previously in this guide, including common reactions to assault and elements affecting traumatic memory, may be helpful in evaluating credibility. Here are some additional questions to consider in weighing the relative credibility of conflicting accounts:

- ✓ Which account makes most sense?
- ✓ Could the individuals have seen or heard what they claimed?
- ✓ Should the individuals have seen or heard more than they claimed?
- ✓ Does one account offer reasoned explanations for the major inconsistencies between the versions?
- ✓ How general or detailed were the statements and testimony?
- ✓ What reasons might either party have to lie or exaggerate?
- ✓ Has either party offered a plausible explanation of why the other might be lying?
- ✓ Does any individual have special loyalty to, or special grudge against, the complainant or respondent?
- ✓ What corroboration exists?

None of these factors is conclusive. Use these questions and others in weighing credibility.

Two types of potential evidence merit special comment. First, in most sexual assault complaints the complainant's past sexual history is irrelevant. Past history does not bear on whether a complainant consented to sexual activity on a particular occasion. Shielding the complainant from inquiry about past history provides protection against privacy invasion and unnecessary harassment. **Rape Shield Laws** exclude a complainant's past sexual activity from most court cases.

Second, a question may arise about whether to allow evidence of a complainant's or respondent's past bad conduct. This is sometimes termed evidence of **prior bad acts**. If an individual has engaged in the same or a similar conduct previously, does that bear on the likelihood that he or she has violated institutional rules on this occasion? As one expert has explained, a campus party at which a woman drinks too much and winds up in bed with someone may seem like an ordinary occurrence.

But when the investigation reveals that each week the defendant joins [other students] in scouting the campus for naïve young women to invite to their weekend parties, and that at these parties the men get these women drunk as fast as possible with sweet-tasting punch and

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then take them to designated rooms stripped of all identifiable furnishings, the intent, motive and/or common scheme and plan emerge.³²

Past conduct may be most relevant if it is recent in time and similar to the conduct alleged in the complaint. Disciplinary hearings may probe relevant past conduct. [CHECK WHETHER THIS IS TRUE AT YOUR INSTITUTION.]

The standard for evaluating responsibility in sexual assault complaints is preponderance of the evidence. Preponderance of the evidence weighs the balance of probabilities. The standard is met if the panel believes it is more likely than not that the alleged misconduct occurred. In effect, 51% of the evidence satisfies this standard.

Finally, panel members are encouraged to contact the [RELEVANT CAMPUS OFFICE] with any questions about these tips or any other aspects of a student disciplinary matter involving sexual misconduct.

Spring 2012

APPENDICES

A: [YOUR INSTITUTION'S POLICY ON SEXUAL ASSAULT, IF ANY]

TO BE ADDED

B: GLOSSARY

Acquaintance rape. A term sometimes applied to sexual assault committed by an assailant known to the complainant. Term is now often considered trivializing, along with the term date rape.

Date rape. A term sometimes applied to sexual assault committed by an assailant known to the complainant. Term is now often considered trivializing, along with the term acquaintance rape.

Dissociation. The psychological state of feeling outside of the body or in a dream during an experience.

Disqualify. Not participating in a disciplinary matter because the panel member may not make an objective judgment or his or her objectivity might reasonably appear to be impaired. A panel member who disqualifies himself or herself from a case will not be asked for reasons.

Drug-facilitated sexual assault. An assault in which the assailant gives the victim drugs or another intoxicant, eliminating the individual's capacity to consent.

Frozen fright. A temporary form of paralysis experienced by some victims during a sexual assault. Also called tonic immobility.

Flat affect. Appearing emotionless, a demeanor that some sexual assault complainants may display during the hearing process.

Forcible sexual assault. In forcible sexual assault, the victim has the capacity to consent and does not do so. The assailant may use force or threats.

Incapacitated sexual assault. An assault against a victim who is unable to give consent. The victim may have diminished mental capacity, may be asleep, or may be under the influence of alcohol or drugs. The victim may have ingested the alcohol or drugs (or both) knowingly or unknowingly. The common element is that the victim cannot, and does not, consent.

Intimate partner sexual assault. An assault committed by someone with whom the complainant previously had consensual sexual activity.

Prior bad acts. Evidence of a party's past history offered to show intent, motive, or a common scheme and plan.

Rape. Sexual intercourse with someone who did not give consent or someone incapable of giving consent.

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Rape-facilitating drugs. Drugs that may be used to incapacitate a sexual assault victim. They include, among others, Ketamine, Rohypnol (flunitrazepam) from the class of benzodiazepines, and GHB.

Rape Shield Law. A law limiting the circumstances under which an alleged victim's past sexual history may be introduced in a legal proceeding involving sexual assault.

Self-inflicted incapacity. The condition in which a complainant has voluntarily consumed alcohol, drugs, or other intoxicants that prevent him or her from giving consent to sexual activity.

Sexual assault. Any non-consensual, or unwelcome, sexual contact.

Sexual misconduct. A type of University policy violation subject to disciplinary proceedings.

Sexual violence. Physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent.

Tonic immobility. See frozen fright.

Victim blaming. Holding the belief or expressing an opinion that a person who is alleging sexual assault was in some way responsible, whether wholly or in part, for what happened. Victim blaming can be a form of re-traumatization.

C: ADVICE ON FORMULATING QUESTIONS AND AVOIDING VICTIM BLAMING

Developed by Columbia University, slightly adapted, and used with permission.²

What is victim blaming?

Victim blaming can be defined as holding the belief or expressing the opinion that a person who is alleging he or she was sexually harassed, sexually assaulted, or victimized in an intimate relationship was in some way responsible.

Victim blaming can be obvious or subtle. Obvious victim-blaming would include expressing the opinion that a woman would not have been sexually harassed or assaulted had she not been wearing certain clothes or drinking alcohol. Subtle victim-blaming can arise from the way questions are asked of a person who has been sexually harassed, sexually assaulted, or victimized.

Why does victim blaming exist?

Victim blaming is often tied to myths people hold about sexual harassment, sexual assault, gender-based harassment, stalking, and intimate partner violence. Some people may hold misconceptions about victims, offenders, and the nature of violent acts. For example, some people may believe that in order for an individual to have been a victim of sexual assault, some sort of struggle must have occurred during the incident. Being aware of the myths associated with misconduct, particularly gender-based harassment and violence, is an important step in understanding whether a question raises an implication of victim blaming.

In addition, some victims receive more sympathy in society than others. For example, men or women who are victims of random acts of violence by unknown offenders are often accorded more sympathy than victims who knew their offenders.

Victim blaming may be a way for people to defend their own feelings of invulnerability. Friends and family members of crime victims may blame the person in order to reassure themselves. Examples of these types of statements are:

² Sources for this material include: The Canadian Resource Centre for Victims of Crime. (2009). "Victim Blaming." www.crcvc.ca/docs/victim_blaming.pdf; Mahr, L. & Ramirez, M. (2007). "Representing farmworker women who have been sexually harassed. A best practices manual." Southern Poverty Law Center. Full text available at http://uchastings.edu/faculty-administration/faculty/adjuncts/class-websites/reisch/Ch.6_Esperanza_Manual-Interviewing_witnesses.pdf

“She/he was beaten because she stayed in such a destructive relationship. I would never stay in that type of relationship.”

“That person was raped because they drank too much. I would never drink as much as she/he did so it will never happen to me.”

“I don’t wear revealing clothing like he/she does, so my boss would never touch me inappropriately.”

Sexual misconduct cases can be challenging and potentially disturbing, and each one presents a unique set of facts. It is important for panel members to consider how the facts of a given case may impact their own perceptions of safety or how the world operates.

What are examples of victim blaming questions?

Examples of victim-blaming questions include:

- *Why didn’t you tell him directly to stop commenting on your body?*
- *Why did you wait so long to report this?*
- *If you were sexually assaulted, why didn’t you go to the hospital right away?*
- *You had the chance to report this incident to the police, why didn’t you choose to do that?*
- *How did the respondent get your clothes off without a struggle?*
- *Did he/she say “no” like she/he meant it?*
- *Was the complainant flirting with the respondent that evening?*
- *What was the complainant wearing that evening?*
- *If you don’t remember everything that happened that night, how are we supposed to know what happened?*

How can hearing panel members avoid victim-blaming questions?

The goal of the hearing panel is to determine if a violation of policy occurred. Therefore, panelists should ask themselves the following underlying questions as they frame their lines of questioning:

- Will the answer to this particular question help me to understand if a violation of policy occurred?
- How will the answer to this question illuminate whether or not a person’s behavior meets the definition of a violation?

- Does the information I am attempting to elicit serve my curiosity about the person or the incident? Or, does it help the panel make a decision?

Curiosity is part of human nature especially in situations that people may find confusing. Student disciplinary proceedings are not, however, an appropriate vehicle for merely satisfying curiosity.

It is important that each question a panel member poses contributes to establishing whether a policy violation occurred. As panel members plan their questions for the hearing, they can review the definitions and examples in the campus policies. This can help reduce the risk of victim-blaming questions. If a sexual assault case involved alcohol, for example, panel members may want to explore whether the respondent caused the complainant's intoxication or the respondent took advantage of the complainant's inability to consent due to alcohol intoxication. Questions useful in making that determination could include:

It says in the investigative report that you felt drunk and were wobbly. Can you elaborate on that?

The investigative report indicates that the respondent kept buying you shots. Is that right?

What if I'm concerned that a question will seem to blame the complainant?

Panel members may want to ask certain questions seeking information that might be perceived as victim-blaming. Framing the questions well, whether they are posed to the complainant or the respondent, supports the fairness of the disciplinary procedure. Before asking the question, the panel member can tell the person why the answer to the question may be helpful.

We understand you told the [STUDENT CONDUCT OFFICER] that you had a lot to drink that night. We think it may be helpful for us to get a clearer picture of how much you drank and how you felt it affected you. Can you tell us about that?

We want to understand the dynamic between you and your partner better.

You mentioned that your friend said you could stay with her after your partner hit you. The report says that you decided to go home with your partner. We are hoping you could tell us more about that decision.

As a panelist, your body language, tone, and mannerisms are important. Panelists can provide a supportive environment to each student involved in the hearing. This will help the students be as comfortable as possible with the process.

If you are concerned that you may pose a question that could be perceived as victim blaming, ask that the panel take a short break. Use the break to consult with your co-panelists.

D: RESOURCES

Publications

“The Campus Sexual Assault (CSA) Study,” by Christopher Krebs, Christine Lindquist, Tara Warner, Bonnie Fisher, and Sandra Martin (2007). Full text available at www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (last visited 3/26/2012).

“Changing Perceptions of Sexual Violence Over Time,” by Sarah McMahon, Applied Research Paper, National Online Resource Center on Violence Against Women” (October, 2011). Full text available at www.vawnet.org/Assoc_Files_VAWnet/AR_ChangingPerceptions.pdf (last visited 12/2/2011).

“Dear Colleague” letter by Russlyn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education (April 4, 2011). Full text available at www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html (last visited 3/13/2012).

“Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study,” by Dean Kilpatrick, Heidi Resnick, Kenneth Ruggiero, Lauren Conoscenti, and Jenna McCauley (2007). Full text available at www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf (last visited 3/26/2012).

“Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey,” by P. Tjaden and N. Thoennes, Washington, DC: National Institute of Justice and Centers for Disease Control and Prevention, 2000, NCJ 181867, full text available at www.ncjrs.org/pdffiles1/nij/181867.pdf (last visited 12/5/2011).

National College Health Assessment, “Reference Group Executive Summary: Spring 2011,” p. 5, from the American College Health Association. Full text available at www.achacha.org/docs/ACHA-NCHA-II_ReferenceGroup_ExecutiveSummary_Spring2011.pdf (last visited 12/2/2011)

National Judicial Education Program, “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case” (2010). Full text available at www.legalmomentum.org/our-work/vaw/njep-reports-and-resources/judges-tell.pdf (last visited 3/26/2012).

“Sexual Assault on Campus: What Colleges and Universities Are Doing About It” by Heather Carjane, Bonnie Fisher, and Francis Cullen. National Institute of Justice (2005). Full text available at www.ncjrs.gov/pdffiles1/nij/205521.pdf (last visited 3/26/2012).

“The Sexual Victimization of College Women,” by Bonnie Fisher, Francis Cullen, and Michael Turner. U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2000). Full text available at www.ncjrs.gov/pdffiles1/nij/182369.pdf (last visited 12/5/2011).

Organizations

California Coalition Against Sexual Assault

www.calcasa.org

The Higher Education Center for Alcohol, Other Drug Abuse, and Violence Prevention

www.higheredcenter.org

National Online Resource Center on Violence Against Women

www.vawnet.org

National Sexual Violence Resource Center

www.nsvrc.org

E: ENDNOTES

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- ¹ “Dear Colleague” letter, April 4, 2011, by Russlyn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Department of Education. Full text available at www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html (last visited 3/13/2012).
- ² About two-thirds of the respondents were female. American College Health Association, National College Health Assessment, “Reference Group Executive Summary: Spring 2011,” p. 5. Full text available at www.achacha.org/docs/ACHA-NCHA-II_ReferenceGroup_ExecutiveSummary_Spring2011.pdf (last visited 12/2/2011)
- ³ Bonnie Fisher, Francis Cullen, and Michael Turner, “The Sexual Victimization of College Women,” U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2000), pp. 10, 33. Full text available at www.ncjrs.gov/pdffiles1/nij/182369.pdf.
- ⁴ Data in this paragraph come from National Judicial Education Program, “Judges Tell: What I Wish I Had Known Before I Presided in an Adult Victim Sexual Assault Case,” pp. 3-4 (2010). Full text available at www.legalmomentum.org/our-work/vaw/njep-reports-and-resources/judges-tell.pdf (last visited 3/26/2012).
- ⁵ Judge Richard T. Andrias, “Myths About Rape: A Persistent Problem in Defining and Prosecuting Rape,” *Criminal Justice*, magazine of the Criminal Law Section of the American Bar Association, summer 1992, vol. 7 #2, page 3.
- ⁶ Bonnie Fisher et al., supra note 3, at p. 19.
- ⁷ “National College Health Assessment: Reference Group Executive Summary Spring 2004.” Baltimore, MD: American College Health Association (2004). Cited in “The Campus Sexual Assault Study,” by Christopher Krebs, Christine Lindquist, Tara D. Warner, Bonnie S. Fisher, and Sandra L. Martin (2007) pp. 2-8. Full text available at www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (last visited 12/2/2011).
- ⁸ “Sexual Assault on Campus: What Colleges and Universities Are Doing About It” by Heather Carjane, Bonnie Fisher, and Francis Cullen. National Institute of Justice (2005), p.3. Full text available at www.ncjrs.gov/pdffiles1/nij/205521.pdf (last visited 3/26/2012).
- ⁹ Sarah McMahon, “Changing Perceptions of Sexual Violence Over Time,” Applied Research Paper, National Online Resource Center on Violence Against Women” (October, 2011) pp. 6-7 (internal citations omitted). Full text available at www.vawnet.org/Assoc_Files_VAWnet/AR_ChangingPerceptions.pdf (last visited 12/2/2011).
- ¹⁰ “Sexual Assault on Campus,” supra note 8, at p. 8.
- ¹¹ [QUOTE YOUR MEDICAL AMNESTY OR SIMILAR POLICY HERE].
- ¹² “The Sexual Victimization of College Women,” supra note 3, at p. 22.
- ¹³ “The Campus Sexual Assault Study,” supra note 7, pp. 6-3.
- ¹⁴ “Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study,” by Dean G. Kilpatrick, Heidi S. Resnick, Kenneth J. Ruggiero, Lauren M. Conoscenti, and Jenna McCauley (2007), at p. 12. Full text available at www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf (last visited 3/26/2012).
- ¹⁵ “Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement” by the National Center for Women and Policing (2001) at p. 5. Full text available at www.mincava.umn.edu/documents/acquaintsa/participant/victimimpact.html (last visited 3/26/2012).
- ¹⁶ “Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study,” supra note 14, at p. 12.
- ¹⁷ “[R]ape victims are 13 times more likely to attempt suicide than noncrime victims and six times more likely than victims of other crimes.” “The Campus Sexual Assault Study,” supra note 7, at p. viii.
- ¹⁸ “Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National Violence Against Women Survey,” by P. Tjaden and N. Thoennes. Washington, DC: National Institute of Justice and Centers for Disease Control and Prevention (2000). NCJ 181867, available at www.ncjrs.org/pdffiles1/nij/181867.pdf (last visited 12/5/2011).

¹⁹ “National Intimate Partner and Sexual Violence Survey: Highlights of 2010 Findings,” Centers for Disease Control, p. 2. Full text available at www.cdc.gov/ViolencePrevention/pdf/NISVS_FactSheet-a.pdf. (Last visited December 30, 2011).

²⁰ “The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report” by M.C. Black, K.C. Basile, M.J. Breiding, S.G. Smith, M.L. Walters, M.T. Merrick, J. Chen, & M.R. Stevens (2011) at p. 61. (Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. Full text available at www.cdc.gov/violenceprevention/nisvs/ (last visited 3/26/2012).

²¹ “Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement,” supra note 15, p. 4.

²² “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case,” supra note 4, p.

²³ *Ibid.*, p. 8.

²⁴ “Silence Hurts: Alcohol Abuse and Violence Against Women. Module 5 – Alcohol, Sexual Assault, and Rape,” p. 12. U.S. Department of Health and Human Services, Center for Substance Abuse Prevention. Full text available at <http://pathwayscourses.samhsa.gov/> (last visited December 5, 2011).

²⁵ “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases,” David Lisak, L. Gardiner, et al., p. 12 (2010). Full text available at www.idaho.gov/crimevictim/conference/handouts/False-Allegations.pdf (last visited December 5, 2011).

²⁶ “Stress and Cognition: A Cognitive Psychological Perspective,” Lyle Bourne and Rita Yaroush, National Aeronautics and Space Administration (Feb. 1, 2003), p. 51. Full text available at http://humansystems.arc.nasa.gov/eas/download/non_EAS/Stress_and_Cognition.pdf (last visited 3/26/2012).

²⁷ “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case,” supra note 4, p. 9.

²⁸ “The Memory Function of Sleep,” Susanne Diekelmann and Jan Born, *Nature Reviews Neuroscience* v. 11, pp. 114-126 (February 2010); “Sleep-Dependent Memory Consolidation,” Robert Stickgold, *Nature*, v. 437, pp. 1272 – 1278, 1278 (October 27, 2005)(“The past ten years have shown an explosive growth in our knowledge of the relationship between sleep and memory, providing consistent and strong support for the existence of sleep-dependent memory consolidation.”).

²⁹ “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case,” supra note 4, p. 9.

³⁰ “False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases,” supra note 25.

³¹ List taken directly from “Judges Tell: What I Wish I Had Known *Before* Presiding in an Adult Victim Sexual Assault Case,” supra note 4, p. 11.

³² “Judges Tell,” “Judges Tell: What I Wish I Had Known *Before* I Presided in an Adult Victim Sexual Assault Case,” supra note 4, p. 18.