

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

# **CREATING A PROACTIVE CAMPUS SEXUAL MISCONDUCT POLICY**

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

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**CREATING A PROACTIVE CAMPUS SEXUAL MISCONDUCT POLICY**

A. THE SCOPE OF THE PROBLEM.....2

B. THE SEXUAL ASSAULT RISK MANAGEMENT APPROACH.....8

C. OVERARCHING THEMES OF THE RISK MANAGEMENT APPROACH.....9

D. ELEMENTS OF A MODEL CAMPUS SEXUAL MISCONDUCT POLICY .....12

E. STATEMENT OF INTENT .....16

F. STATEMENT OF LIMITATIONS OF CONFIDENTIALITY .....17

G. OPTIONS FOR VICTIMS .....21

H. JURISDICTION .....25

    a) PHYSICAL/PERSONAL JURISDICTION .....25

    b) GEOGRAPHICAL JURISDICTION .....26

    c) TEMPORAL JURISDICTION .....27

I. PERIOD OF LIMITATION .....29

J. EXTENDING TITLE IX PROTECTIONS TO THE ACCUSED .....30

K. STATEMENT OF VICTIM'S RIGHTS .....30

L. STATEMENT OF THE ACCUSED RIGHTS .....34

M. PROSCRIBED BEHAVIORS .....37

N. DEFINITIONS OF TERMS .....38

O. SEXUAL MISCONDUCT .....39

P. TERMINOLOGY .....42

Q. ADDITIONAL CLARIFYING RULES .....49

R. ILLUSTRATIVE EXAMPLES .....53

S. POSSIBLE SANCTIONS .....60

T. ASSESSMENT AND IMPROVEMENT .....61

U. DISSEMINATION .....62

V. GROUP INFRACTIONS .....62

W. LIMITED IMMUNITY FOR VICTIMS .....63

X. GOOD SAMARITAN .....63

## THE SCOPE OF THE PROBLEM

- The highest risk a college-bound woman faces for sexual assault in her lifetime is from the first day of her first semester of college, until her first break.<sup>1</sup>
- In 1996, 18% of women said they experienced a completed or attempted rape at some time in their life.<sup>2</sup>
- In 1992, approximately 25% of men and women surveyed had experienced at least one incident of unwanted sex in the last year as a result of alcohol use.<sup>3</sup>
- In 1990, there were 1.3 rapes each minute; 78 each hour; 1,871 each day; 56,916 each month; and 683,000 that year .<sup>4</sup>
- In 1988, 44% of college women reported giving in to sexual contact (non-intercourse) because they were overwhelmed by pressure from a man. 25% had sexual intercourse as a result of giving in to pressure<sup>5</sup>
- 1996, a study of rape victims showed that 22% were under age 12, 32% were from 12-17, and 29% were 18-24, and 16% were older than 24 at the time of the rape.<sup>6</sup>
- In 1994, 91% of rape victims were female.<sup>7</sup>
- In 1994, 99% of single-victim incidents involved male perpetrators.<sup>8</sup>
- In 1993, sexual assault was the most rapidly growing violent crime in America.<sup>9</sup>

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<sup>1</sup>Marta Aizenman & Georgette Kelley, *The Incidence of Violence and Acquaintance Rape in Dating Relationships Among College Men and Women*, 29 J.C. Student Dev. at 305 (1988).

<sup>2</sup> United States. Department of Justice. Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey. Washington, D.C.: National Institute of Justice, with the Centers of Disease Control and Prevention, Nov. 1998. 2.

<sup>3</sup> Perkins, H.W. "Gender Patterns in Consequences of Collegiate Alcohol Abuse: A Ten Year Study of Trends in an Undergraduate Population." *Journal of Studies on Alcohol* 53. (1992) 458-462.

<sup>4</sup> National Center for Victims of Crime & Crime Victims Research and Treatment Center. Rape in America: A Report to the Nation. Arlington, VA: National Center for Victims of Crime, 1992.

<sup>5</sup> Koss, Mary, Christine A. Gidycz, and Nadine Wisniewski. "The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students." *Journal of Consulting and Clinical Psychology* 55. (1988) 162-70.

<sup>6</sup> United States. Department of Justice. Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey. Washington, D.C.: National Institute of Justice, with the Centers of Disease Control and Prevention, Nov. 1988. 6.

<sup>7</sup> United States. Bureau of the Census and the Department of Justice. National Crime Victimization Survey. Washington, D.C.: Bureau of Justice Statistics, National Institute of Justice, 1994.

<sup>8</sup> United States. Bureau of the Census and the Department of Justice. National Crime Victimization Survey. Washington, D.C.: Bureau of Justice Statistics, National Institute of Justice, 1994.

<sup>9</sup> Dupre, A.R., et. al. "Sexual Assault." Obstetrical and Gynecological Survey 48. (1993) 640-648.

- In 1993, two-thirds of rapes occurred between 6 PM and 6 AM.<sup>10</sup>
- In 1993, nearly 60% of assaults took place in the home of the victim or the home of a friend, relative, or neighbor. Over 50% occurred within one mile of the victim's residence.<sup>11</sup>
- In 1993, 91% percent of rapes involved single offenders.<sup>12</sup>
- In 1991, there was a greater incidence of sexual assault among college fraternity members than among non-fraternity members.<sup>13</sup>
- In 1988, 1 in 12 male students had committed acts that met the legal definitions of rape or attempted rape.<sup>14</sup>
- In 1988, the risk of rape for women ages 16-24 was four times higher than for any other age group.<sup>15</sup>
- In 1988, the average age for women and men (as victims and perpetrators) when a rape incident occurred was 18.5 years.<sup>16</sup>

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<sup>10</sup> United States. Bureau of the Census and the Department of Justice. National Crime Victimization Survey. Washington, D.C.: Bureau of Justice Statistics, National Institute of Justice, 1993.

<sup>11</sup> United States. Bureau of the Census and the Department of Justice. National Crime Victimization Survey. Washington, D.C.: Bureau of Justice Statistics, National Institute of Justice, 1993.

<sup>12</sup> United States. Bureau of the Census and the Department of Justice. National Crime Victimization Survey. Washington, D.C.: Bureau of Justice Statistics, National Institute of Justice, 1993.

<sup>13</sup> Boeringer, S.B., C.L. Shehan, C.L., and R.L. Akers. "Social Contexts and Social Learning in Sexual Coercion and Aggression: Assessing the Contribution of Fraternity Membership." *Family Relations* 40. (1991) 58-64.

<sup>14</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. (citing Mary Koss, "The Ms. Magazine Campus Project On Sexual Assault.") 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. "The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students." *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education." In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988. 3-25.

<sup>15</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 24. (citing Mary Koss, "The Ms. Magazine Campus Project On Sexual Assault.") 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. "The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students." *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. "Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education." In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>16</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 24. (citing Mary Koss, "The Ms. Magazine Campus Project On Sexual Assault.") 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. "The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students." *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. "Hidden Rape: Sexual Aggression and Victimization in a National

- In 1988, 27% of college women whose sexual experiences met the legal definition of rape thought of themselves as rape victims.<sup>17</sup>
- In 1988, about 75% of men and 55% of women involved in acquaintance rapes had been drinking or taking drugs just before the assault.<sup>18</sup>
- In 1988, 15% of college women reported an attempted rape by threat of force.<sup>19</sup>
- In 1988, 9% of college women reported having had sexual intercourse that was the result of physical force or the threats of physical force. 6% experienced oral or anal penetration under the same circumstances.<sup>20</sup>
- In 1988, 84% of college victims knew their attackers.<sup>21</sup> 57% were on dates.<sup>22</sup>

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Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>17</sup> Warshaw, Robin. *I Never Called it Rape*. New York: Harper and Row, 1988. 26. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>18</sup> Warshaw, Robin. *I Never Called it Rape*. New York: Harper and Row, 1988. 44. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>19</sup> Warshaw, Robin. *I Never Called it Rape*. New York: Harper and Row, 1988. 44. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>20</sup> Warshaw, Robin. *I Never Called it Rape*. New York: Harper and Row, 1988. 44. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>21</sup> Warshaw, Robin. *I Never Called it Rape*. New York: Harper and Row, 1988. 11. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National

- In 1988, 15.3% of college women were victims under the legal definition of rape, 11.8 were victims of attempted rape, and an additional 14.5 had been touched sexually against their will.<sup>23</sup>
- In 1988, 41% of rape victims were virgins at time of the assault.<sup>24</sup>
- In 1988, 42% of college student rape victims told no one about their assaults.<sup>25</sup>
- In 1988, 5% of college student rape victims reported their rapes to the police.<sup>26</sup>
- In 1988, 42% of college women rape victims had sex again with the men who assaulted them. The women who were raped averaged slightly higher than 2 rapes per victim.<sup>27</sup>

Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>22</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 11. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>23</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 49. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>24</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 49. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>25</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 50. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>26</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 50. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>27</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 63. (citing Mary Koss, “The Ms.

- In 1988, 30% of college female rape victims contemplated suicide after the incident. 31% had some form of counseling. 22% took self defense courses.<sup>28</sup>
- In 1988, 84% of college men identified as having committed rape said what they did was definitely not rape.<sup>29</sup>
- In 1988, 26% of rapists and attempted rapists took part in gang attacks.<sup>30</sup>
- In 1988, a study of 114 college men showed that 91.3% liked to dominate women, 86.1% enjoyed the conquest aspect of sex, 83.5% believed some women just looked like they were asking to be raped, 63.5% got excited when a woman struggled during sex, and 61.7% thought it would be exciting to use force to subdue a woman sexually.<sup>31</sup>
- In 1988, two-thirds of college men reported having unwanted sexual intercourse, either out of male peer pressure or a desire to be popular.<sup>32</sup>

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Magazine Campus Project On Sexual Assault.)” 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>28</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 66. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>29</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 90. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>30</sup> Warshaw, Robin. I Never Called it Rape. New York: Harper and Row, 1988. 101. (citing Mary Koss, “The Ms. Magazine Campus Project On Sexual Assault.”) 21. The Koss study may also be cited directly as Koss, Mary P., Christine A. Gidycz and Nadine Wisniewski. “The Scope of Rape: Incidence, and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students.” *Journal of Consulting and Clinical Psychology* 55. (1987) 162-70. And see, Koss, Mary P. “Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education.” In Burgess, A.W. (ed.) *Rape and Sexual Assault II*. New York: Garland Publishing, 1988.

<sup>31</sup> Greendlinger, Virginia and Donn Byrne. “Coercive Sexual Fantasies of College Men as Predictors of Self-Reported Likelihood to Rape and Overt Sexual Aggression.” *Journal of Sex Research* 23. (1988) 1-11.

<sup>32</sup> Muelenhard, C.L. and S.W. Cook. “Men’s Reports of Unwanted Sexual Activity.” *Journal of Sex Research*. (1988) 24, 58-72.

- In 1986, 30% men questioned said they would commit rape if they knew there was no chance of being caught. 50% said they would force a woman into having sex if there was no chance that they would be caught.<sup>33</sup>
- Lawsuits against colleges by students held accountable in disciplinary hearings are increasing at a rate of 12% per year.<sup>34</sup>
- Lawsuits against colleges by rape victims have risen 240% in the last four years.<sup>35</sup>
- Reported rape increased 40% on the average college campus between 1991-1996.<sup>36</sup>
- Campus Security Act enforcement complaints to the Department of Education increased at a rate of 700% from 1996 to 1997.<sup>37</sup>

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<sup>33</sup> Malamuth, Neil M. "Predictors of Naturalistic Sexual Aggression." *Journal of Personality and Social Psychology* 50. (1986) 953-62.

<sup>34</sup> NCHERM, Ltd., internal study data. Ongoing. Unpublished.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

## THE SEXUAL ASSAULT RISK MANAGEMENT APPROACH

Risk management is a multidisciplinary field, crossing such diverse areas as law, insurance, management, law enforcement, and many others. Higher education risk management involves faculty, staff, administration and students within the campus environment, and many of the support organizations, groups and resources of the surrounding community. Risk management is exactly what it sounds like, the field or science associated with the management of risk. The management part extends to proactive efforts to prevent risk-causing events, and reactive efforts to address risk-related incidents as they occur. The risk part refers to events, acts, behaviors and attitudes that can lead to institutional liability/vulnerability, injury to a member(s) of the community, poor public relations and/or media coverage and other negative consequences. Risk management is a body of knowledge that identifies high-risk issues, and enables institutions to develop cohesive approaches to avoiding negative incidents and their negative consequences.

Today, higher education risk management is itself a hot topic, focusing on current hot button issues like binge drinking, fraternity/sorority relations, and campus diversity. These issues are often in the news, and colleges are endeavouring to find new and creative ways to address these volatile challenges. Among the top challenges colleges face is the issue of sexual assault. A cohesive sexual assault risk management strategy is essential in today's campus environment.

Envision a sexual assault risk management strategy as a large protective tent or canopy, supported by five pillars. Without each pillar, the tent will not stand. With a pillar at each corner, and a fifth at the center, the tent girds powerfully against all manner of wind, rain, snow, and other wrathful natural elements that seek to penetrate the protective zone under the canopy and pull it down. With the right five pillars, a college can create a protective canopy that enables it to effectively manage all the possible risks that sexual assault presents.

Metaphors aside, proactive risk management really is a win-win situation when approached properly.

## **THE GOALS OF THIS POLICY GUIDE**

Effective sexual assault risk management practices will decrease the likelihood of sexual assault on college campuses, thereby protecting students and helping to insulate colleges from a potential source of litigation. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by perpetrators, because college adjudications will be less likely to violate their rights. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by survivors of sexual violence, because the college will be less likely to violate their rights. Effective risk management practices will increase the likelihood that colleges will win lawsuits if they arise out of incidents of sexual assault. Effective sexual assault risk management practices will decrease the likelihood of lawsuits between survivors and perpetrators. Effective sexual assault risk management practices will help colleges to maintain a reputation for safety, and for dealing appropriately with campus crime when it occurs. Effective sexual assault risk management practices will decrease the likelihood of lawsuits against colleges by campus and local media seeking access to campus crime information. Effective sexual assault risk management practices will increase the likelihood that survivors and perpetrators receive vital services at a time of crisis. How will it do all this? By erecting these five pillars:

- **A Proactive Campus Sexual Misconduct Policy;**
- **Comprehensive Sexual Misconduct Judicial Procedures and Training For Judicial Officers;**
- **Creation of a Trained, Campus-Wide Sexual Assault Response Protocol/Network;**
- **Risk Reduction Through Education, Safety and Awareness;**
- **Compliance With Federal and State Tort and Sexual Assault-related Laws.**

It is important to understanding the supportive structure of the canopy as a team effort. Take one of the five pillars away, and the canopy will totter, perhaps fall. It will expose the protected underside to the elements. Take away two pillars, and the canopy is sure to collapse. For example, translating this metaphor into reality, even if a college has excellent educational programs, fair and comprehensive judicial procedures, and a campus-wide sexual assault response network at the ready, these elements cannot be brought into effective interrelation if the policy discourages victims from coming forward. Putting the five pillars into place creates a unified, cohesive system that will support a far sturdier canopy than the pillars could support individually.

This guide is designed to help you construct one of the pillars of a comprehensive approach; a proactive policy. Other NCHERM publications address the other four pillars.

## **OVERARCHING THEMES OF THE RISK MANAGEMENT APPROACH**

Campus sexual assault victims rarely make formal reports of their assaults. It is the legal and moral responsibility of the campus community to change that reality. Victims are reticent to report for many reasons, such as a lack of awareness that an incident constitutes campus sexual assault or rape (which we be referred to hereinafter generically as sexual misconduct), fear that friends and/or family will not support or believe them, fear that they will be blamed by authorities, or fear that they will be put on trial, opening their past and present behavior to public scrutiny. This last reason, fear of secondary victimization at the hands of those to whom reports are made, is the strongest "structural impediment" victims cite for not coming forward.

A structural impediment is a systemic factor that makes some aspect(s) of a college's sexual assault policies, procedures or protocol non user-friendly (simplicity and user-friendliness are hallmarks of the risk management ethic). Structural impediments discourage students from reporting incidents and accessing the college's response system. Structural

impediments can be minor and major. For example, take a look at the index of your college's student handbook. Look under "R." Is there an entry for "Rape"? A victim in a panic, trying to find out what she should do, looking for your policy in the handbook, will look under "R" if she thinks she was raped. In her distress, she may not think to look under "S" for sexual assault or sexual misconduct or sexual harassment. Even if there is no policy using the word "Rape," specifically, creating an index entry that reads, "Rape – see sexual assault" will eliminate a minor structural impediment. An example of a major structural impediment would be a college that limits its jurisdiction over incidents by imposing a short period of limitations in which reports must be made.

Structural impediments, considered in their totality, have a strong influence on the perception of how a college addresses campus sexual violence. 7 out of 10<sup>38</sup> students on college campuses, asked for their opinions on how their administration handles sexual assault cases, say that they do not have confidence in the process or those who administer it. This staggering and often undeserved vote of "no confidence" is typical of students on college campuses, whether based on rumor, implication, evidence, or assumption.<sup>39</sup> Moreover, students don't just see bias as the problem, but a perceived incompetence coupled with a desire to sweep sexual misconduct under the carpet.<sup>40</sup> Most victims feel that the costs of reporting clearly outweigh the benefits. Students and victims perceive the manner in which their campus approaches sexual misconduct negatively because of all the structural impediments they encounter, although their concerns are usually couched in less technical terms. While it is true that some small number of colleges create and maintain structural impediments intentionally, most others simply are not sensitized to their presence and operation, but student opinion does not recognize this nuance, and often, neither does the media. A negative perception is hard to overcome.

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<sup>38</sup>NCHERM, Ltd., internal survey instrument data. 1997-8. Unpublished.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.*

The topics in this guide evolve the policy risk management pillar with an eye toward identifying and eliminating structural impediments to the proper functioning of an effective sexual misconduct risk management strategy. Though most colleges do not intentionally create systems that discourage students from coming forward about sexual violence, there is much that colleges can and must do in order to create a fair, just, competent and truly user-friendly environment, for both victims and the students they accuse.

### **ELEMENTS OF A MODEL CAMPUS SEXUAL MISCONDUCT POLICY**

A thorough approach to campus sexual misconduct policy takes more than a paragraph in the code of conduct, student handbook, or a panel in a pamphlet. Yet, in a majority of the policies surveyed for this guide, there was often more information available on “Candles in Dormitories,” “Educational Record Privacy,” and “Sexual Harassment” than on sexual misconduct. Mostly, sexual misconduct information was buried in other sections, like “personal behavior rules”, “improper physical contact regulations”, or the favorite catchall, “conduct unbecoming a student.” All too often, the policies were hard to find for those at the colleges from whom this information was requested. The student handbook, code of conduct, a "What to Do If...Someone is Sexually Assaulted" pamphlet, and your annual Campus Security Act Report are excellent places for this information, because those are resources where students will go to look for it.

Consistency is important. Your policy should be stated in as many of these resources as possible, and the same policy should be included in each iteration. Frequently, colleges develop pamphlets, handbooks, and security reports at different times, and the policies listed in these resources reflect the stage of development of those policies, and therefore can be inconsistent, such as when a policy is revised for inclusion in a pamphlet, but the handbook has already been printed. Sometimes, it is also the case that policy statements are inconsistent because the resources are developed by different offices and departments. It is important to have centralized, quality controlled oversight of the policy development

process. Consistency is essential to legal defensibility. A good lawyer could successfully shoot down a policy on the argument that his/her student client did not have clear notice of what was expected, because of inconsistent or conflicting policy statements. If a later policy statement is meant to eclipse and replace an earlier policy, make sure this is clearly indicated to students, so that they have notice of what rules apply to them.

As you formulate a policy, keep in mind at all times who the audience is. Your policy is directed at students, and sometimes employees. But who specifically is the audience for your policy? Who is going to open up your handbook and read it through? None of us truly believes that every first-year student sits down on the second night of college to read the handbook cover to cover. If you're lucky, they'll keep it in their rooms, for later reference and occasional use as a doorstop. To be sure, some students will read or browse the policy, but most will not. Those who open the handbook to look at the sexual misconduct section usually do so for two reasons. One, they want to know if what happened to them is covered by the code of conduct. They are the possible victims. Two, the students who want to know what to do when they have been accused of violating the sexual misconduct policy. They are the alleged violators. Those who may be victims and those who may be policy violators are your audience. Write this policy for them.

The myth of college sexual misconduct policies is that they are only of a reactive nature, to be applied in judicial hearings to determine alleged violations. In fact, a well-constructed campus sexual misconduct policy is the best tool colleges have for creating proactive behavioral guidelines to which students may conform their behaviors. If done well, a policy will also have sound risk management grounding. Consider these four policy definition statements taken from actual college policies:

- 1) Sexual assault is sex without consent;
- 2) Rape is sex without the victim's permission;

- 3) Sexual misconduct is an intentional act of sexual contact against the will of the victim or without the victim's consent;
- 4) All sexual behavior must be preceded with clear verbal consent from each party. Otherwise a sexual assault occurs.

I chose to highlight these four because, with minor variation and elaboration, they occurred with some frequency in the policies that were surveyed during the researching of this guide. All four represent unsound risk management. Let's begin with definition #1. Sexual assault is sex without who's consent? The victim? The alleged violator? Suppose consent is given by the victim, but only because she was threatened. Does that violate this policy? Only if you read something unstated into it. What is sex? Is it just vaginal intercourse, or are other behaviors covered? What if a man is fondled without his consent? Is that sex? How is non-consent determined? By silence? By resistance? How much? There are too many unanswered questions here, enough to convince a court that a policy might be void for vagueness, or that it gave insufficient notice to students of what the college expects, and how the policy would operate against them.

In definition #2, we have sex without the victim's permission as the definition of rape. So, if a woman is so drunk that she is not even aware she is engaging in a sex act, but she gives verbal permission to the alleged violator, would this policy be violated? How is permission to be given? Verbally only, or otherwise? How much of an indication is sufficient? Again, the same notice and vagueness arguments can be used to defeat a college policy like this one, and it fails to be meaningfully educational as a guide by which students may set their behaviors. I set a very simple test for whether a policy is educationally effective. If a student wanted to have sex with his girlfriend, and wanted to make absolutely sure that he did not run afoul of campus policy in doing so, could he get clear enough information from reading the policy such that he could understand exactly how to do so?

What about definition #3, with its intentionality requirement? Couldn't the bright Ivy Leaguer this policy applies to argue that he didn't commit rape because he was so drunk he could not have formed the intent to commit sexual misconduct? Or, what if a male student fondles several women at a party? Couldn't he defeat this accusation pretty easily by arguing that he never intended to fondle anyone, he just "bumped" into them in a crowded room? Intentionality is an unnecessary distraction and added complication. It creates more problems than it ameliorates, which is not the goal of risk management.

In definition #4, the absurdities should be plain. "She verbally consented to the kissing and the oral sex and the intercourse. I guess I forgot to ask if I could touch her breast too." Or, how about the college in Washington that has narrowed this verbal consent standard so that students must gain verbal consent to kiss, and to have intercourse, but for all behaviors in between, no verbal requirement exists. The fact is that while verbal consent is an ideal to be aspired to, human beings are more likely to consent to sex through body language and through action. Any policy or law that seeks to regulate that behavior must to an extent reflect natural human behavior, or it is doomed to failure. The verity of this argument can be shown with an example. Imagine two fourth-year students who have dated since they were first-years. They cohabit, and have sex at least three times a week. Does it make sense to impose a verbal consent requirement on them? Will they abide by such a standard if it is imposed? What if they are two non-traditional married students? What if they are deaf?

Hopefully, your college policy does not look like any of the four above, or any of the hundreds of other inadequate policies in use on college campuses throughout the country. But, if it does, let's elaborate how a good sexual misconduct policy is shaped. Even if you have an excellent policy, any college's approach can be improved by attention to the following seventeen elements:

- a statement of intent;
- a statement of confidentiality limitations

- a statement of options for victims;
- a statement of options for alleged offenders;
- a statement of rights of the victim;
- a statement of the rights of the alleged offender;
- a statement of jurisdiction
- a campus statute of limitations
- a description of proscribed behaviors;
- definitions of terms;
- illustrative examples;
- possible sanctions;
- criteria for policy assessment and improvement;
- policy dissemination standards;
- a statement regarding group infractions;
- a statement of limited immunity;
- a Good Samaritan provision.

### **STATEMENT OF INTENT**

A statement of intent should set forth the institution's beliefs and approach toward sexual assault. For example:

"The College of Knowledge is a community of trust whose very existence depends on strict adherence to standards of conduct set by its members. Sexual misconduct is a crime punishable by both civil and criminal legal action and a serious violation of the College of Knowledge's Standards of Conduct. It will not be tolerated within our community. Students at the College of Knowledge are charged with the responsibility of being familiar with and abiding by the standards of conduct set forth herein."

## STATEMENT OF LIMITATIONS ON CONFIDENTIALITY

Every college strives to create an environment that encourages victims of sexual misconduct to come forward and report their victimization to someone, preferably an institutional official or law enforcement officer. Assuring complete confidentiality is the approach that would encourage the most victims to come forward, but such a policy is impossible. Confidentiality is a balancing act. Three factors weight on the balance. On one hand is the need/desire of the institution to respond to incidents. On the other hand are the needs of the victim. On another hand are the legal obligations and repercussion that demand institutional attention. Have you noticed that we're now balancing more hands than we have? That's because there is no ideal approach to confidentiality. At best, we can offer a model approach to confidentiality that blends and prioritizes these three factors as well as can be done. Because of the difficulties of this issue (and the inconsistencies across different institutional departments/positions) it is very important to state the institution's confidentiality policy clearly in written materials, and to make sure that each person who will serve as a resource for victims on your campus is clear on the bounds of confidentiality, and makes those bounds clear to victims at the outset of a reporting interaction. Otherwise, victims could experience a sense of betrayal because of an unreasonable expectation of confidentiality.

Ideally, victims should be empowered by a policy that lets them determine the bounds of confidentiality. To the extent possible, your policy should pursue this ideal. Your policy must also encompass the need and desire of the institution to make sure that it hears about as many incidents as possible, and addresses them. The policy must also ensure adherence to legal mandates and avoidance of negligence liability. Thus, the answer to the question, "will this report be confidential," is "maybe." If a victim wants to make as nearly an absolutely confidential report as possible, the only person she can tell is a member of the clergy. Counselors are also good repositories of confidentiality, but they are less sacrosanct. In order to be protected by confidentiality, the counselor must be a licensed therapist, psychologist,

social worker, or other counselor (such as a rape crisis counselor or victim advocate), functioning in that capacity at the time, who has either ethical or legal rules determining their ability/responsibility to maintain confidentiality. Even then, confidentiality has its exceptions, and these should be made clear to victims. The written records of counselors are sometimes admissible in court if subpoenaed, in certain states, though conversations usually are not. If a victim relates to a counselor a clear and present danger posed to an identified person (including him or herself), the counselor must breach confidentiality to protect the person endangered (under the generally accepted rule established by Tarasoff v. Regents of the University of California, 551 P.2d 334 (Cal. 1976)). For the most part, this same level of confidentiality can be provided by attorneys and certain medical providers.

Everyone else has less absolute confidentiality. Confidentiality is not an arbitrary designation or contractual arrangement. Courts can require most people to divulge what they know. But, confidentiality also has a level outside of court orders. Often, victims just want to know, "If I tell you, who else do you have to tell?" The answer to this question is governed by Title IX, medical reporting laws, negligence laws, and the Clery (Campus Security) Act.

If you are a doctor or a nurse in most states, you must call the police if a victim of a sex crime presents at the emergency room or other hospital department. The victim can choose not to speak to the police, but her or his name may be released. Some of these laws extend to campus medical facilities, and you must determine how your state governs this issue in order to determine the bounds of campus medical provider confidentiality.

If you are a college employee, you have a duty to help the victim, and an obligation to protect the institution. But, different employees have different constraints. For example, if a victim comes to you, and you tell no one of her report, and then the rapist repeats his crime the next evening, your actions may have placed other students in danger, and may have

brought negligence liability on to the institution. Depending on your official role, you may also have brought on Title IX liability.

First, understand that the institution has a duty to warn students of known, reasonably foreseeable dangers. It may also have a duty to actively protect students from those dangers in certain circumstances. Thus, when any college employee learns of an incident that poses a substantial threat of severe bodily injury or death to other students or employees, notification must be made to those at your institution who can warn and protect those in danger. In sexual misconduct cases, this duty trumps any non-legal promise of confidentiality you might otherwise extend to the victim. It may be possible to pass along information to student affairs or campus law enforcement that will enable the institution to protect students and employees, but still not release personally identifiable information about the victim. However, other information told in the course of the report, including incident locations, identities of perpetrators or witnesses, and other relevant facts may be divulged.

This common law and state statute-based duty to warn students became a federal mandate in 1990. The Clery (Campus Security) Act<sup>41</sup> cannot lead to negligence liability, but can result in the loss of federal Title IV funding when colleges fail to issue timely warnings regarding incidents that represent a substantial threat of injury to students. While important, these statutory and negligence issues are not as frequent a concern as the Title IX issues discussed below. Most campus cases involve isolated acquaintance assaults, and many never require the divulgence of any (especially personally identifiable) information in order to protect other students, so while absolutely confidentiality may not be maintained, some level of confidentiality can be assured.

The main legal issue with sexual misconduct arises under Title IX. Title IX is a federal law that provides financial sanctions and civil damages against public and private colleges

that engage in gender-based discrimination, including sexual harassment. Sexual harassment has been interpreted to include both verbal and physical harassment of a sexual nature. Physical sexual harassment is sexual assault (using the federal terminology). Thus, the mandates of Title IX with reference to sexual harassment also apply to sexual assault incidents. What this means, basically, is that institutions are under a duty to investigate and adequately resolve all sexual assault incidents. However, colleges can only address those incidents that are reported, and liability lies only in certain narrow circumstances. A college will be liable in money damages under Title IX when:

- The harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the institution; and
- The college had control over the context within which the harassment arose; and
- The college had control over the harasser; and
- The college had actual notice of and responded with deliberate indifference to (acted in a way that was clearly unreasonable in light of the known circumstances) the complaint(s) of harassment;

The impact of Title IX on confidentiality is strong, because of the mandatory reporting that actual notice provokes. When college officials (but only those who have the authority to provide a remedy) receive reports of incidents, Title IX requires a full investigation and an appropriate resolution of the incident, to the extent possible. In some cases, this will require that complete confidentiality cannot be maintained, though partial confidentiality may be possible. Of course, at the point where a victim, faced with a loss of confidentiality, refuses to cooperate with the college, it may mean a practical end to any further action on the report. But, the college must take it as far as it can to provide an appropriate resolution, with or without the consent and cooperation of the alleged victim.

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<sup>41</sup> 20 U.S.C. 1092(f)

There is also one universal legal requirement that affects the confidentiality of nearly all college employees in the same way. The Clery (Campus Security) Act requires RA's and other residence life personnel, judicial affairs personnel, campus law enforcement, local police, student affairs personnel, student activities, coaches, some faculty and others to report statistical information on campus crime, including sex offenses. This information includes only the information that an incident took place, but still requires that information received from a victim be divulged in an annual crime report, and often in monthly Uniform Crime Reports (NIBRS) and state crime reports. No personally identifiable information is revealed. This is also true of the campus police log. All sexual misconduct incidents reported to campus law enforcement (and on some campuses, also reports made to other departments) will be logged in a police log that is open to the public. This log cannot identify the victim, or give information that could easily lead to the revelation of his or her identity, such as an address, or in some cases, the names of witnesses or the perpetrator.

Given this extensive background, you should strive to create a comprehensive confidentiality statement for your campus that strikes a successful balance between legal obligations and encouraging victims to come forward.

## **OPTIONS FOR VICTIMS**

Colleges should include in their policy a statement of options for victims, and it is an excellent idea to include statistics and general information on sexual assault, which may help victims self-identify.<sup>42</sup> Options should be listed in time order of expiration, with medical

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<sup>42</sup>The following is a good example of a supplemental paragraph from the materials published by the University of Virginia Committee on Sexual Assault and Judicial Review:

"Anyone can be a victim of sexual assault. One recent survey reported that one in every four women has been the victim of rape or attempted rape. In another survey, one in two college women reported being the victim of some kind of sexual aggression. And it is estimated that 10% of all men will be sexually assaulted in their lifetimes.

The great majority of sexual assaults involve acquaintances. Incidents of

attention first. Make sure the 72-hour time requirement for a PERK or Rape Kit (Physical Evidence Recovery Kit) is included, as well as where to get it, how to get to the hospital, how much it costs, who can accompany the victim for support, what they will be subjected to, how long it will take, and the all-important clean paper bag in which to take physical evidence, such as clothing, to the hospital.<sup>43</sup> STD, HIV and pregnancy testing and treatment information should be included. Recommend which local hospital has the best victim-advocate program, or makes a forensic nursing program available.<sup>44</sup> Public funds are usually available to pay for PERK tests if the victim makes a report of the assault to the police. If not, will the hospital bill the insurer for “emergency medical procedures” or for a rape kit? Such billing can alert parents, and blind billing can be a comfort factor for victims who are not yet ready to tell their parents. Does the college have a fund for students without insurance? Even if 72 hours have expired, medical attention is still of great importance. Physical evidence might still be collectable at 74 hours, but the key to emphasize is that the evidence

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acquaintance rape are especially prevalent on college campuses.

When the assailant is an acquaintance, a survivor often has mixed feelings concerning both the incident itself and what to do about it.

Besides feeling hurt, frightened, angry, and ashamed, survivors can feel betrayed and even guilty for having ‘facilitated’ the assault. In some cases, they do not even acknowledge they have been assaulted until well after the incident has occurred.

Survivors can also be unsure of how to deal with the assault --administratively, legally, and otherwise --and can wonder what course or courses of action are available and appropriate for them.

An unfortunate result is that many sexual assault survivors elect not to tell anyone about their ordeal, and decline to seek the help they need -- on an emotional level and otherwise -- to deal with the terrible hurt they have suffered.

The University Committee on Sexual Assault and Judicial Review encourages all members of the University community to be aware of both the consequences of sexual assault and the options available to survivors. The Committee urges survivors to seek assistance using *any* of the resources listed in this brochure.

<sup>43</sup>Plastic bags do not allow air to circulate, and thus destroy the chemical composition of any evidence inside.

<sup>44</sup>Rape kits are really of two types. One is administered by a doctor or nurse, and is actually mis-named, at least in terms of acquaintance assaults. A rape kit cannot really prove rape. It can show that someone has had sex, and it can produce DNA evidence, but it cannot directly prove forced or non-consensual sexual contact. A second type of rape kit can be provided by a Sexual Assault Nurse Examiner (SANE). SANE nurses are specially trained for compassionate treatment of victims, and their forensic skills often allow them to determine, from microscopic patterns of bruising and tearing, or from the position of the body during sex, whether or not the sex would have been likely to have been consensual.

starts to degrade immediately, and victims should seek medical treatment as soon after the incident as possible. Even if the time for a PERK has elapsed, bruising and other physical symptoms can still be treated, and STD, HIV and pregnancy testing is still vital.

The second option for victims is reporting, because of the longer expiration period. Victims have three options for reporting:

- 1) On-campus. Victims may report a sexual assault to any number of members of the campus community. Through these initial contacts, victims may decide to access judicial or student affairs resources to pursue a complaint for a policy violation through the campus judicial system.<sup>45</sup> This option is not exclusive of the other reporting options. All or some may be pursued concurrently. On-campus adjudications are attractive alternatives for victims because they take less time than criminal prosecutions and civil suits, are easier to win than criminal prosecutions (because of the lower standard of proof), and are private and confidential, unlike the other options.<sup>46</sup> If you have a campus period of limitation for filing a complaint, it would be logical to note it in this section.
- 2) Civil suits. Campus officials and publications should notify victims of their right to pursue a civil suit for money damages against the perpetrator of a sex crime, and against any other negligent or tortious parties. Civil suits are easier to win than criminal prosecutions, and may be pursued concurrently with other reporting options. In order to pursue a civil suit, a victim should contact a civil attorney, who will often work for a contingency fee. This means that it will not cost the victim anything to sue unless they win. It may be helpful to notify victims of resources to locate attorneys, such as local bar associations, legal aid organizations, or referral services. If your college has a law school, there may be a legal clinic that can help. Additionally, some colleges provide students

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<sup>45</sup> At a very small number of schools, the judicial process is initiated through the residential life department.

<sup>46</sup> Campus judicial hearings are usually closed to the public, with the exception of all public colleges in Georgia. The recent skirmish in Ohio, while still subject to appeals, has at this point resulted in FERPA being upheld, and campus proceedings are closed.

with legal advice and advocacy, paid for through student activity fees, or by the student government. If such services are available, make sure the victim knows of this option. Not only should colleges make these notifications because it is the right thing to do, most of them are also required notifications under the Clery (Campus Security) Act. When discussing civil legal options, notify the victim of the statute of limitations for filing a claim in your jurisdiction (usually about two years). It might also be helpful to indicate that the nature of the suit and its proceedings could be a matter of public record and access, if the victim does decide to sue.

- 3) Criminal Prosecutions. Campus officials should notify victims of their right to have charges filed by a prosecutor, district attorney, or commonwealth's attorney, and to pursue criminal prosecution and conviction of the perpetrator. Criminal convictions are tough to obtain, but may be a significant step in the healing process. Victim advocates are often available to assist victims, and campus administrators must inform victims of their right to make a report to the police and pursue charges. Campus officials must also assist victims in contacting these resources. Criminal charges may be pursued concurrently with other reporting options. Pursuing a prosecution will not cost the victim money for an attorney, they are paid by the state. Notify the victim of the period of limitation for filing charges in your jurisdiction (usually between 5-8 years). The nature of the case and its proceedings will be a matter of public record and access. Victims often want to know what could happen as a result of a prosecution, and the possibilities typically include imprisonment of the perpetrator, fines, community service and/or probation. It is not possible to sentence someone to death for a sex crime (alone) in the United States.

The third and final option for victims is the one that expires last. Victims should seek counseling, and there is no time limit on when they can do this. Notify victims of campus counseling resources, and that it may benefit them to talk to someone, when they are ready. That someone could be a friend, family member, rape-crisis counselor, support group, victim advocate, psychologist, psychiatrist, social worker, or member of the clergy. If the college

makes access to clinicians available to students for free, they should be informed of this as well. Further, there are crisis hotlines, for students who do not prefer face-to-face encounters. There is a national helpline, 1-800-656-HOPE. There are also support groups on the world wide web, with chat rooms, news groups and listservs. There are also good books, such as The Courage to Heal by Ellen Bass and Laura Davis, Recovering from Rape by Linda Ledray, and Who's Afraid of the Dark by Cynthia Carosella.

- **JURISDICTION**

The policy is a good place to make a statement of jurisdiction.<sup>47</sup> Jurisdiction is a contractual relationship allowing colleges to govern student behaviors by codes of conduct and policies. Colleges are becoming more assertive about jurisdiction, but there is still a wide disparity among colleges as to whom, where, and when a college policy will be applied.

### **Physical/Personal Jurisdiction**

Some colleges will only adjudicate incidents that occur between students or between students and employees. This is the most conservative approach. Other colleges will take jurisdiction if the accused is a student, even if the victim of the breach is a non-student. This is a more liberal approach that makes sense. If some behavior is prohibited because it is wrong, it is as wrong to do it to a non-student as to another student. There is nothing that legally bars a college from hearing a complaint against a student by a non-student, and the college has a strong interest in hearing such complaints, in order to protect students from possible repeat policy infractions by the same violator. In instances in which the college has control over the perpetrator and the context of the incident, Title IX would require the college to take a complaint from a non-student (e.g., a 15-year-old sister

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<sup>47</sup> Although seemingly a procedural issue dealing with adjudications, this is really a policy issue and should be laid out for students here, rather than in the disciplinary hearing procedures section of a policy. Jurisdiction determines whether or not the policy applies to them, hence its placement under the policy heading.

of a student, visiting campus, is sexually assaulted by a male student at an on-campus fraternity party).

Some colleges take a limited jurisdiction against non-students as well, but this is rare. Colleges have no legal basis to apply campus conduct codes and judicial procedures to non-students. Yet, colleges may have an affirmative duty under Title IX to address such cases, which makes this issue complicated. Jurisdiction over non-students may only be taken when the behavior of these non-students is not only a policy violation, but also a violation of a local or state law. Some college law enforcement departments are empowered to enforce local and state laws, criminal and civil trespass violations, and may prosecute non-students, but this really is a legal, rather than policy-based jurisdiction, and it is not the college that enforces these laws, but the local legal authorities.

There is a confluence though in sexual assault cases, such as in the issuance of a campus restraining order. Sometimes, colleges will issue these restraining orders against non-students. While violations of these orders will not result in judicial jurisdiction, colleges are empowered to address this violation of college rules through local trespassing laws and court orders. Nothing less would be required by Title IX, which requires colleges to remedy to the extent possible all sexual harassment and assault of students on campus, whether by students, employees, or visitors.

Discussing this type of jurisdiction in your policy might seem to be giving too much information, but it actually serves an important deterrence purpose. It gives students notice that your policies will apply to their behaviors, whether they assault students or non-students.

### **Geographic Jurisdiction**

Colleges must take judicial jurisdiction over incidents of sexual misconduct, under the logic of the Supreme Court's Title IX decision, *Davis v. Monroe Cty. Bd. of Ed.*, when the

college has control over the context of the incident, control over the respondent, and the behavior is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the institution. This means that some of the incidents that meet this test will occur off-campus, and colleges must provide an adequate resolution, which in most cases will be a campus judicial resolution. Title IX does not require the taking of jurisdiction over reported off-campus incidents where the victim is a non-student and the perpetrator is a student. However, colleges would be well-advised to consider the state tort law implications of failing to take such a case, if the violating student's next victim could be a student.

Such a geographic jurisdiction policy has its practical limits. Colleges cannot be expected to take jurisdiction over every off-campus incident. Taking jurisdiction over an assault that occurs at an off-campus party is one thing, but taking jurisdiction over an assault between two students who are in Daytona Beach during Spring Break may be more difficult. But it is important that we do not automatically refuse jurisdiction over these incidents, especially when considering incidents between students who are studying abroad together. While physical evidence and witnesses may be hard to identify, it is possible to take such complaints if other students can give witness testimony, or if the local police can provide evidence from their investigation, or if medical evidence is available, or other circumstances make it possible. The best policy is to agree to take these complaints to the practical extent they can be heard. Where probable cause for a policy violation does not exist, or where it will be impossible to prove an allegation for lack of evidence, jurisdiction can be refused. But, physical distance alone should not be sufficient to deny jurisdiction.

Creating a policy that clearly states that your college will take geographic jurisdiction over off-campus incidents will help you to remove a structural impediment to reporting by victims, many of whom naturally assume that campus policies only apply to on-

campus behaviors. Knowing they can press a campus complaint will open up a possibility that might have otherwise been unknown to them.

### **Temporal Jurisdiction**

Temporal issues are the third type of consideration in the jurisdiction section. The temporal issue refers to the question of when your institutional sexual misconduct policy will apply. For example, if students arrive on campus for a July orientation, but classes do not start until August 20<sup>th</sup>, does your policy apply to the time that the students are on-campus in July? How about from the time between summer orientation and August 20<sup>th</sup>? Does your policy apply over Spring Break? Does it apply between the fall and spring semesters? Does it apply during Summer Break? The policy is likely to apply whenever students have matriculated and are on campus. But, should the policy apply to students who are off-campus during breaks? This is a tough question for colleges. For some arbitrary reason, taking jurisdiction over Spring Break incidents is more frequent than taking it over incidents during Summer Break. What is the distinction? Do your policies apply to govern the behavior of your students, because they are your students? If so, shouldn't it apply as long as they are matriculated? Consider a true case. Two students were living with their respective parents, in their hometown, during the summer. They had started a relationship during the previous semester where they were both students at the same college. Over the summer, the male student raped his girlfriend. She was afraid of pressing charges in her hometown, because she did not want her parents to know. She tried to file a complaint on campus, but the college would not take jurisdiction, because it happened between semesters. When the female student went to the administration the following semester with proof that the now ex-boyfriend was threatening to rape her again, there was nothing the college could do about the previous summer's incident. Why hamstring the institution with strict jurisdictional rules? If it is practical and necessary to take the complaint, empower your institution with the discretion to take it.

The other issue of temporal jurisdiction is the question of how to handle policy violations by graduates. Colleges approach this three ways. One, they refuse to consider it. Two, they take jurisdiction over policy violations occurring before graduation, even if the complaint is made post-graduation, creating a retained jurisdiction of sorts. Three, colleges will consider policy violations by graduates, no matter when the incidents took place, or when the complaint was filed, if the allegation is sufficiently serious. This third practice is exceptionally rare, and often only found at some Catholic and religiously conservative institutions. Taking jurisdiction over graduates is sticky, because the only way that a college can really punish a graduate is to withdraw their diploma, or withdraw it and place conditions upon its re-conferral. This practice should be weighed carefully, as it is highly likely to engender litigation, and there is no legal obligation to pursue a complaint against a graduate. The main reasons to take jurisdiction are moral, though there is a narrow practical reason, suggested by a recent incident. On the night before graduation, a student raped another, knowing that it would soon be too late for the college to do anything about it. Deterring these sorts of incidents might provide good cause to retain some form of jurisdiction. If you are going to do so, clearly spell out your intent to do so, because students must have clear notice of such a policy (Harwood v. Johns Hopkins Univ. 130 Md.App. 476, 747 A.2d 205 (2000)).

- **PERIOD OF LIMITATION**

Reporting the incident for a campus hearing should only be a matter of directing the victim to the appropriate dean or hearing officer to make a complaint. But, this is an area where many colleges have, often unwittingly, created a structural barrier to reporting. Some colleges create a 90-day period of limitation for bringing a complaint, while others have a one semester, one year, or two year limit. There is no good reason to so limit a victim's ability to access a campus hearing. This is especially true given the reticence to come forward of most campus sexual misconduct victims. As long as the incident occurred while the accused is still a student, a victim should be able to access the college conduct system, even if the victim has

graduated (or within a reasonable period after the accused's graduation, if you adopt post-graduation judicial jurisdiction). It is certainly true that the passage of time will make it harder for the victim to prove the allegation, but criminal prosecutions have a longer average period of limitation (6 years), without fatally hindering those cases. Most importantly, it is the victim who is potentially damaged by choosing to wait, not the accused. Thus, there is no unfairness to the accused in permitting the college policy to apply to them as long as they are enrolled. In fact, ensuring satisfaction of Title IX means not imposing artificial impediments to the college's ability to remedy incidents when they are reported. The campus period of limitation should be clearly explained in the policy section.

### **EXTENDING TITLE IX PROTECTIONS TO THE ACCUSED**

At the end of the statement of intent, or in another appropriate section, consider noting that the welfare of accused students is also a matter of great concern to the college, and note if administrators or advocates are available to them as advisors to guide them through the campus hearing process. Also, under a broad reading of Title IX, colleges should consider providing equity of access to resources and services for accused students if they are provided to victims, including counseling and other campus resources, if for no other reason than to stave off threats of nuisance suits making their way around the country.

### **STATEMENT OF VICTIM'S RIGHTS**

I feel strongly that we are in a period where student rights are taking on greater importance, and a number of organizations are collectively pushing student rights issues to the fore. I believe we should be setting the agenda for this debate, and not having it set for us by politicized interest groups. Therefore, we need to be proactive, and embrace the need to revisit the rights we accord students. Part of this proactivity is a matter of emphasis, and I believe colleges should prominently list the rights afforded to victims and accused students in the adjudicatory process. At a minimum, colleges should list the affirmative rights

afforded to victims in the 1992 Campus Sexual Assault Victim's Bill of Rights<sup>48</sup>. NCHERM suggests that the federal law represents a floor, rather than a ceiling, and that colleges can and should go further. We recommend accordingly at least the following rights for survivors of sexual violence:

### **STATEMENT OF THE RIGHTS OF THE ALLEGED VICTIM**

- The right to investigation and appropriate resolution of all credible complaints of sexual misconduct made in good faith to college administrators;
- The right to be treated with respect by college officials;
- The right of both accuser and accused to have the same opportunity to have others present (in support or advisory roles) during a campus disciplinary hearing;
- The right not to be discouraged by college officials from reporting an assault to both on-campus and off-campus authorities;
- The right to be informed of the outcome and sanction of any disciplinary hearing involving sexual assault, usually within 24 hours of the end of the judicial hearing;
- The right to be informed by college officials of options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the student so chooses. This also includes the right not to report, if this is the victim's desire;
- The right to be notified of available counseling, mental health or student services for victims of sexual assault, both on campus and in the community;

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<sup>48</sup>20 U.S.C. 1092f(A) and (B).

- The right to notification of and options for, and available assistance in, changing academic and living situations after an alleged sexual assault incident, if so requested by the victim and if such changes are reasonably available (no formal complaint, or investigation, campus or criminal, need occur before this option is available). Accommodations may include:
  - Change of an on-campus student's housing to a different on-campus location;
  - Assistance from College support staff in completing the relocation;
  - Arranging to dissolve a housing contract and pro-rating a refund;
  - Exam (paper, assignment) rescheduling;
  - Taking an incomplete in a class;
  - Transferring class sections;
  - Temporary withdrawal;
  - Alternative course completion options.
  
- The right not to have irrelevant prior sexual history admitted as evidence in a campus hearing;
  
- The right not to have any complaint of sexual assault mediated (as opposed to adjudicated);
  
- The right to make a victim-impact statement at the campus judicial proceeding and to have that statement considered by the board in determining its sanction;
  
- The right to a campus restraining order against another student who has engaged in or threatens to engage in stalking, threatening, harassing or other improper behavior that presents a danger to the welfare of the complaining student or others;

- The right to have complaints of sexual misconduct responded to quickly and with sensitivity by campus law enforcement.
- The right to appeal the finding and sanction of the judicial body, in accordance with the standards for appeal established by the institution;
- The right to review all documentary evidence available regarding the complaint, subject to the confidentiality limitations imposed by state and federal law, at least 48 hours prior to the hearing;
- The right to be informed of the names of all witnesses who will be called to give testimony, within 48 hours of the hearing, except in cases where a witness' identity will not be revealed to the accused student for compelling safety reasons (this does not include the name of the alleged victim/complainant, which will always be revealed);
- The right to preservation of confidentiality, to the extent possible and allowed by law;
- The right to a hearing closed to the public (except at public colleges in Georgia).
- The right to petition that any member of the judicial body be removed on the basis of demonstrated bias;
- The right to bring a victim advocate or advisor to all phases of the investigation and campus judicial proceeding;
- The right to give testimony in a campus hearing by means other than being in the same room with the accused student (closed circuit live audio/video is the recommended method);

- The right to present relevant witnesses to the campus judicial body, including expert witnesses;
- The right to be fully informed of campus judicial rules and procedures as well as the nature and extent of all alleged violations contained within the complaint;
- The right to have the college compel the presence of student, faculty and staff witnesses, and the right to ask questions, directly or indirectly, of witnesses (including the accused), and the right to challenge documentary evidence.
- The right to be present for all testimony given and evidence presented before the judicial body;
- The right to have complaints heard by judicial officers who have received annual sexual misconduct adjudication training;
- The right to a judicial panel comprised of representatives of both genders;
- The right to have college policies and procedures followed without material deviation;
- The right to be informed in advance of any public release of information regarding the complaint;
- The right not to have released to the public any personal information about the complainant, without his or her consent.

### **STATEMENT OF THE ACCUSED'S RIGHTS**

The rights of accused students should also be prominently indicated. These should include, among others particular to your college:

- The right to investigation and appropriate resolution of all credible complaints of sexual misconduct made in good faith to college administrators against the accused student;
- The right to be treated with respect by college officials;
- The right to be informed of and have access to campus resources for medical, counseling, and advisory services;
- The right to be fully informed of the nature, rules and procedures of the campus judicial process and to timely written notice of all alleged violations within the complaint, including the nature of the violation and possible sanctions;
- The right to a hearing on the complaint, including timely notice of the hearing date, and adequate time for preparation;
- The right not to have irrelevant prior sexual history admitted as evidence in a campus hearing;
- The right to make an impact statement at the campus judicial proceeding and to have that statement considered by the board in determining its sanction;
- The right to appeal the finding and sanction of the judicial body, in accordance with the standards for appeal established by the institution;

- The right to review all documentary evidence available regarding the complaint, subject to the confidentiality limitations imposed by state and federal law, at least 48 hours prior to the hearing;
- The right to be informed of the names of all witnesses who will be called to give testimony, within 48 hours of the hearing, except in cases where a witness' identity will not be revealed to the accused student for compelling safety reasons (this does not include the name of the alleged victim/complainant, which will always be revealed);
- The right to a hearing closed to the public (except at public colleges in Georgia);
- The right to petition that any member of the judicial body be removed on the basis of bias;
- The right to have the college compel the presence of student, faculty and staff witnesses, and the right to ask questions, directly or indirectly, of witnesses, and the right to challenge documentary evidence.
- The right to have complaints heard by judicial officers who have received annual sexual misconduct adjudication training;
- The right to have college policies and procedures followed without material deviation;
- The right to have an advisor or advocate to accompany and assist in the campus hearing process. This advisor can be anyone, [optional: including an attorney (provided at the accused student's own cost)], but the advisor may not take part directly in the hearing itself, though they may communicate with the accused student as necessary;
- The right to a fundamentally fair hearing;

- The right to a campus judicial outcome based solely on evidence presented during the judicial process. Such evidence shall be credible, relevant, based in fact, and without prejudice;
- The right to written notice of the outcome and sanction of the hearing;
- The right to a judicial panel comprised of representatives of both genders;
- The right to be informed in advance of any public release of information regarding the complaint;

For public colleges, many of these rights are required by due process, or state constitutions and laws. However, the value of these statements, apart for reassuring students and making the policy more user-friendly, is the value of contractual certainty to colleges. Once you publish these lists of rights in the student handbook, both public and private colleges become contractually bound to accord them to students. And while students may be able to sue for breach of contract if they are not accorded those rights, colleges gain certainty and predictability. If colleges do what they say they will, students will have no claim that they were given less than should have been given. Colleges gain a defense that student rights in sexual misconduct cases were contractually determined to be no more and no less.

### **PROSCRIBED BEHAVIORS**

First, a comment on format. Too many colleges bury their sexual misconduct offenses in sexual harassment policies. While rape and sexual assault are extreme forms of sexual harassment, they are independent and significant violations in their own right. There is a general perception in our society that sexual harassment is a lesser evil than rape. One may go to jail for rape in America, but not for sexual harassment, unless it occurs in a military context. These issues are both sufficiently serious to warrant separate mention. I favor a

format where both sexually violative behaviors and sexual harassment are separately labeled headings under the umbrella category of sexual misconduct.

What goes under the sexual violence heading is a broad question. Many state colleges choose or are required to use state legal definitions of sex crime categories or definitions established by the state higher education system. However, most colleges, both public and private, are under no obligation to follow state law. College conduct codes are separate entities. For example, colleges can prohibit practices like burning candles in dorm rooms, which certainly are not covered by most state laws. Given the antiquated and obsolete status of many state laws on sexual violence, it is strongly recommended that colleges set their own standards, without regard to state laws. Avoid the confusing terminology of degrees, sodomy, sexual battery and other duplicative nomenclature. In fact, it is advisable in policy definitions to avoid legal terms such as rape and sexual assault. Alternative phraseology is offered below, but whatever phrases you choose, never make separate categories that create a distinction between stranger-committed and acquaintance or date-committed offenses. Stranger offenses are not worse or deserving of greater punishment than offenses by a known offender. Consider the message you would send to your students if you pursued such a distinction.. There is no “acquaintance mugging” or “date murder.” Crimes are not lesser in severity because of the identity of the perpetrator, and neither are campus conduct code violations. Victims of known offender attacks do not suffer less therefor.

## **DEFINITIONS OF TERMS**

Defining proscribed sexual misconduct is difficult. Many colleges take the easy way out, adopting definitions derived from state laws. Yet, many state criminal codes are antiquated, at best. Colleges are on the cutting edge with so many issues, ideas, and research. Sexual misconduct should be no different, and is an area in which colleges really can and do lead the way. The shift in this country away from defining sexual violence as force-based conduct has been championed by many colleges, and is now the law in a majority of states. Consent-

based definitions of sexual violence should be the basis for college misconduct policies. The distinction is a subtle, but all-important one. Such a concept violates basic notions of our personal sovereignty. We have the right not to be acted upon unless we permit it. If a would-be mugger demands your wallet, he has no right to take it unless you permit it. Your silence is not consent to be robbed. Similarly, the silence of a victim is not consent to have sexual intercourse.

Often, force-based policies contain an evidentiary standard that the sexual action be against the will of the victim. This starts us sliding down a very slippery slope. How do we know if it is against the victim's will? If she says "No?" If she fights back? Must she leave a scratch or bite mark, or have his skin under her fingernails to prove her resistance? Might that provoke a sadistic perpetrator to cause greater harm? What if she is having a flashback to an instance of childhood sexual abuse? Should we still require her to fight back or otherwise demonstrate that the sexual action is against her will?

Or, is there a higher standard of personal sovereignty that shifts responsibility in these cases? Should it be the responsibility of the person being acted upon to announce their intention, or should it be the responsibility of the sexual initiator, the sexual aggressor--the one who wants to do the act--to get consent before proceeding? Put another way, if a fraternity brother awakens after passing out in the middle of the party to find a naked, HIV-positive woman on top of him having unprotected sex, is it okay if she stops when he objects, or should she be required to get his permission first? Why should sex offenses be the only offense where the resistance of the victim is required? Should we say that it is not murder unless the victim tried to stop it? You are not mugged unless you tried to thwart the thief. For all of these reasons, defining sexual misconduct as an offense of force is an antiquated, outmoded, senseless structural impediment to a victim's ability to self-identify and report incidents of sexual violence. Please consider adopting consent-based definitions for sexual violence.

Just below is a model definition set. This set is a clean, clear and direct statement of expected behaviors. It will help to increase the educational value of your policies, as a tool of prevention, and will help to insulate your institution from liability-associated risk. The definitions and rules offered below are designed for use in campus sexual assault pamphlets, and in the student handbook or sexual misconduct policy statement. The definition set below is very long, and is not meant to be copied verbatim. We've included everything needed to cover this offense comprehensively, but each college's policymakers should pick and choose to include those ideas that will best serve their community.

## **SEXUAL MISCONDUCT**

Included Offenses:

- 1) Non-Consensual Sexual Contact
  - 2) Non-Consensual Sexual Intercourse
  - 3) Sexual Exploitation
  - 4) Sexual Harassment (not developed here)
- Non-Consensual Sexual Intercourse is:
    - any sexual intercourse (anal, oral or vaginal);
    - however slight;
    - with any object;
    - by a man or a woman upon a man or a woman;
    - without *effective* consent.
  - Non-Consensual Sexual Contact is:

Any sexual touching;  
however slight;  
with any object;

by a man or a woman upon a man or a woman;  
without *effective* consent.

- Sexual Exploitation:

occurs when a student takes nonconsensual, unjust or abusive sexual advantage of another;

for his/her own advantage or benefit;

or to benefit or advantage anyone other than the one being exploited; and

that behavior does not otherwise constitute non-consensual sexual contact, non-consensual sexual intercourse or sexual harassment.

Examples of Sexual Exploitation include, but are not limited to:

- Prostitution

Male student convinces three female students to quit their jobs waiting tables so that they can make more money by working for his "dating service." He explains that they do not have to sleep with their dates, but that they will make more money if they do.

- Videotaping

John and Carla, both students, have been dating for two weeks, and have engaged in consensual sex. On Saturday night, John convinces Carla to come over to his room, rather than staying in her room as they usually do. Carla does not know that has concealed a videotape camera in his room. John tapes their consensual sexual intercourse, and without her knowledge or permission, shares the videotape with his friends. The videotaping, not the sex, violates this policy.

- Going beyond the boundaries of consent

John and Carla, both students, have been dating for two weeks, and have engaged in consensual sex. On Saturday night, John convinces Carla to come over to his room, rather than staying in her room as they usually do. Carla does not know that John has concealed two of his friends, Mike and Foster, in the closet in his room. Mike and Foster watch through a crack in the door as John and Carla engage in consensual sexual intercourse and other sexual acts.

- Peeping Tommery

Henry and Sam realize that an all-female Residence Hall backs onto a wooded area, and that the women who live in the rooms that face the back rarely draw their shades because of the private setting of the building. Henry and Sam take up station in two trees in the woods, with clear views into the open windows of the rooms on several floors. From their perches, Henry and Sam observe many female students in various states of undress.

- Transmission of HIV or STD

John meets Carla at a party. They "hook up" that night, and engage in consensual sexual intercourse. Carla knows, and does not tell John, that she has Syphilis. John contracts the venereal disease.

- Inducing incapacitation for the purpose of having sex with the incapacitated person (This type of sexual exploitation occurs regardless of whether sexual activity actually takes place).

- 1) John meets Carla at a party. He intentionally tells her she is drinking fruit punch, though he knows it is spiked with grain alcohol that Carla

will not be able to detect. John intends to engage in sexual intercourse with Carla later.

2) John meets Carla at a Bar. While she is not looking, he slips GHB, Rohypnol, Scopolamine, Burundanga, Ketamine, or other sedative or date rape drug into her drink.

3) John and Carla are drinking at a party. John is giving her Jell-O shots, and after a few, it is clear to John that she no longer knows how much she is drinking. John continues to encourage her to take more shots, intending to have sexual contact with her later.

#### DEFINITIONS OF TERMS:

- Intercourse

Intercourse is not synonymous with penetration. If it were, non-consensual french kissing could meet the definition of oral rape. Intercourse is more limited. Intercourse includes: vaginal penetration by a penis, object, tongue or finger; anal penetration by a penis, object, tongue or finger; and oral copulation (mouth to genital contact or genital to mouth contact).

- Sexual touching includes:

any sexual contact with the breasts, buttocks, groin, genitals, mouth or other bodily orifice of another, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; any bodily contact in a sexual manner, though not involving contact with/of/by breasts, buttocks, groin, genitals, mouth or other orifice.

- Effective consent:

informed;

freely and actively given;

mutually understandable words or actions;

which indicate a willingness to engage in mutually agreed upon sexual activity (or in more plain language--to agree to do the same thing, at the same time, in the same way, with each other).

**One may not engage in sexual activity with another who one knows or should reasonably know to be physically incapacitated.**

### WHAT CONSENT MEANS

- ⇒ In the absence of mutually understandable words or actions (a meeting of the minds on what is to be done, where, with whom, and in what way), it is the responsibility of the initiator, or the person who wants to engage in the specific sexual activity to make sure that he or she has consent from their partner(s).
- ⇒ Consent to some form of sexual activity does not necessarily imply consent to other forms of sexual activity.
- ⇒ Mutually understandable consent must be obtained by the initiator at every stage of sexual interaction.
- ⇒ Mutually understandable consent is almost always an objective standard. Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same thing, in the same way, at the same time, with one another. The only context in which mutually understandable consent may be considered in its subjective sense (what did Tom and Sue understand their words/actions to mean) is in the

context of long-term relationships where couples have established patterns of communicating consent that alter/replace the consent construct elaborated here.

- ⇒ Consent which is obtained through the use of fraud or force (actual or implied) whether that force be physical force, threats, intimidation, or coercion, is ineffective consent;
- ◇ physical force exists, for example, when someone acts upon you physically, such as hitting, kicking, restraining or otherwise exerting their physical control over you through violence.
  - ◇ threats exist where a reasonable person would have been compelled by the words or actions of another to give permission to sexual contact they would not otherwise have given, absent the threat. For example, threats to kill you, themselves, or to harm someone your care for are sufficient to constitute threats.
  - ◇ intimidation exists where someone uses their physical presence to menace you, though no physical contact occurs, or where your knowledge of prior violent behavior by an assailant, coupled with menacing behavior, places you in fear as an implied threat.
  - ◇ coercion exists when a sexual initiator engages in sexually pressuring and/or oppressive behavior that violates norms of respect in the community, such that the application of such pressure or oppression causes the object of the behavior to engage in unwanted sexual behavior. Coercion may be differentiated from seduction by the repetition of the coercive activity beyond what is reasonable, the degree of pressure applied, environmental factors, such as isolation, and the initiator's knowledge that the pressure is unwanted.

- Consent may never be given by:

- 1) A minor to an adult

Someone under the age of ?? (depends on the state) cannot give consent to someone over the legal age of consent (18), absent a legally valid marriage or court order.

- 2) Mentally disabled persons

Cannot give consent to sexual activity if they cannot appreciate the fact, nature, or extent of the sexual situation in which they find themselves. The mental disability of the party must be known or reasonably knowable to the non-disabled sexual partner, in order to hold them responsible for the violation. Therefore, when mentally disabled parties engage in sexual activity with each other, such knowledge may not be possible.

- 3) Physically incapacitated persons

One who is physically incapacitated as a result of alcohol or other drug consumption (voluntary and involuntary), or who is unconscious, unaware, or otherwise physically helpless, is incapable of giving consent. **One may not engage in sexual activity with another who one knows or should reasonably know to be physically incapacitated.** *Physically incapacitated persons are considered incapable of giving effective consent when they lack the ability to appreciate the fact that the situation is sexual, and/or cannot rationally and reasonably appreciate the nature and extent of that situation.*

- How incapacitation complaints are addressed

This should be a part of your judicial training, but you will need to decide if it merits inclusion in the policy or as an appendix to provide additional guidance and

information to students. Selective editing and inclusion of certain parts may be the best approach):

Incapacitation is a determination that will be made after the incident, in light of all the facts available. Incapacitation is difficult to assess because people reach incapacitation at different points and as the result of different stimuli. They exhibit incapacity in different ways. Incapacity is dependent on many or all of the following factors:

1. Body weight, height and size;
2. Tolerance for alcohol and other drugs;
3. Amount/type of alcohol/other drugs consumed/mixture taken;
4. Amount of food intake prior to consumption;
5. Voluntariness of consumption;
6. Vomiting;
7. Propensity for blacking-out (mentally or physically);
8. Genetic predisposition.

Assessing incapacity is completely fact-dependent. For complex allegations, the judicial board may ask an independent substance abuse, toxicology or chemistry expert to render an opinion. Understanding terms is important. With regard to alcohol, there are multiple levels of effect, along a continuum. The lowest level is impairment, which occurs with the ingestion of any alcohol at all. A synonym for impairment is "under the influence." Intoxication is the next higher level of alcohol ingestion. Also called drunkenness, intoxication corresponds to the state's drunk driving limit, and a blood alcohol level of .08 or .10. Incapacity is the next higher level of alcohol ingestion. The highest level is overdose, or alcohol or blood poisoning, which may lead to coma or death. Incapacity is a hazier state than drunkenness. Some drunk sex will violate this policy, but not all. Only when the drunkenness

produces incapacity will the standard be reached. Evidence of incapacity can be detected from context clues, such as:

- 1) One person may know how much the other person has consumed;
- 2) slurred speech;
- 3) bloodshot eyes;
- 4) the smell of alcohol on the breath;
- 5) shaky equilibrium;
- 6) vomiting;
- 7) outrageous or unusual behavior;
- 8) unconsciousness.

None of these facts, except for the last, will constitute--in and of itself--incapacitation. The process of finding someone responsible for a violation of the incapacitation clause of the sexual misconduct policy involves an accretion of evidence, amounting to a sufficient or insufficient meeting of the standard of proof. This standard may be met with some combination of the first seven, or all eight factors. For example, incapacity might exist if someone is passing in and out of consciousness, and there is a high probability they could pass out again. Or, it might exist 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. Sometimes, it may happen that a student has done things that, in the absence of the alcohol, would be clear indications of consent. There may even be unmistakable evidence of verbal and non-verbal consent. If the complainant is incapacitated, and the respondent knows or should reasonably have known of the incapacity, the indications of consent are irrelevant. *Because of the incapacity, the complainant is held at a disability where he/she cannot give effective consent, thus nullifying any factual consent that may be given.*

The eight context clues listed above will help the judicial board to assess and determine the extent of the respondent's 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 has two different possible manifestations, apart from being obviously unconscious. Black time does not effect all drinkers (only about 16%), 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. In contrast, some people who experience black time experience it as physical paralysis, with mental clarity. Thus, they have a mental awareness of the situation, but a physical inability to react to it, because the alcohol is inhibiting their motor skills. It is important to realize that both manifestations are possible, and that both describe someone who is incapacitated and cannot give effective consent.

#### ADDITIONAL CLARIFYING RULES OF THE DEFINITION

- A person who is the object of sexual aggression is not required to physically or otherwise resist a sexual aggressor;
- Silence, previous sexual relationships, and/or current relationship with the respondent (or anyone else) may not, in themselves, be taken to imply consent. Consent cannot be implied by attire, or inferred from the buying of dinner or the spending of money on a date.
- Intentional use of alcohol/drugs by the respondent is not an excuse for violation of the sexual misconduct policy.
- Attempts to commit these offenses are also prohibited under this policy, as is aiding the commission of sexual misconduct as an accomplice.

- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly (because you cannot be expected to read the mind of your sexual partner(s)), and all sexual activity must cease.
- An "intent" is not required under the Non-Consensual Sexual Intercourse policy. Unlike murder, for which there must be an intent to kill, sex offenses are not an intent-based concept. The requisite intent for Non-Consensual Sexual Intercourse is demonstrated by engaging in the act of intercourse intentionally. Intent may be an appropriate consideration in some Non-Consensual Sexual Contact complaints (such as when a man brushes up against a woman in a sexual manner in a crowded room), and in attempt-based offenses.
- *In the absence of the use of any type of force, a capable complainant's unreasonable failure to communicate his/her expectations to his/her partner may be grounds for departure from the standard recommended sanctions of this policy, but it is not, alone, grounds for a finding of no policy violation. This clause works together with the rules above regarding silence and resistance. It is to be applied to situations where there is some--usually nonverbal--communication from the complainant, but that communication is ambiguous. Instead of clarifying, the respondent acts on his/her incorrect assumptions, and engages in or heightens the level of sexual activity. The complainant, though not wanting to engage in this behavior, or heighten the level of sexual activity, does not indicate this clearly to the respondent, and passively endures the sexual activity. For example, this rule would not apply to a situation where two students are fooling around, they mutually kiss, mutually pet, and then the respondent simply engages in intercourse with an unresponsive complainant. In this case, the rules on silence and resistance would indicate a clear policy violation. However, it would apply to the case where the two students are fooling around, the respondent asks for sex (meaning vaginal intercourse, but an ambiguous demand), and*

the complainant responds by removing her clothes (an easily misunderstood response, but one meaning to her that she is willing to engage in mutual oral sex, but go no further), but the complainant does not communicate this to the respondent. He then engages in vaginal intercourse with her, during which she is passive, and to which she does not voice any complaint. This still represents an improper assumption on the part of the respondent, but it may not be a violation that warrants a sanction as strong as the standard recommended sanction.

- Consent has an expiration date. Consent lasts for a reasonable time, depending on the circumstances. For example, On Thursday night, Rob and Jenn are together in Jenn's room. Jenn consents to sex with Rob, but just at the point of intercourse, the phone rings. Jenn is on the phone with her mother for an hour. After the phone call, Rob and Jenn can engage in intercourse without re-consenting, though it is safest to check, just to be sure. However, suppose that after the phone call, Jenn is no longer in the mood. Rob goes home. He comes over again on Friday night. He cannot apply Thursday's consent to Friday night like a coupon. Jenn's consent on Thursday has probably expired, and they should check with each other before engaging in sexual activity.

After reading through all this, many college administrators have asked, "Why does this definition set need to be so long? Can't we just say that 'Sexual assault is prohibited, and leave the rest to judicial affairs?" Most emphatically, NO. Colleges are in a unique position because of the college judicial process. When a jury screws up a criminal or civil case in our society, they can't be sued for their errors. Colleges are uniquely vulnerable in that they can be and are frequently sued because of judicial decisions, especially in sexual misconduct situations. There are three main reasons why the definition must be comprehensive, if not as lengthy as what has been developed above.

The first, described above in this guide as the proactive element, gives students notice of what is expected of them and what is prohibited, so that they may conform their conduct accordingly. The greater the specificity of the rules, the greater the understanding and adherence to them by students. I'm not advocating making your rules so specific that you do not have needed wiggle room. There is an art to policy writing, and the art is in achieving a balance between too much specificity and too little guidance. If you simply tell students they must get consent to sex, they will use their own standards to interpret consent, and those standards will probably not match yours. Only by spelling out key details of this policy can you hope to eliminate some of the inherent "grayness" of this issue.

The second reason for such a detailed policy is for your college judicial affairs personnel. It is the responsibility of your judicial affairs personnel to apply the policy when complaints are brought. If your policy requires only that "students get and give consent to sexual activity," your judicial affairs personnel will have insufficient tools for making determinations on complaints. We must recognize that sexual misconduct incidents are the toughest, most complicated complaints we face. In the absence of guidance, each member of your judicial board will interpret consent according to their own personal feelings and standards. They will not know whether consent should be verbal or non, active or passive, or how it can be given and interpreted. A comprehensive definition set is an important tool judicial boards need to render consistent judgments based on soundly established fundamental principles of student sexual conduct. The duty of your judicial board, from a risk management perspective, is to issue a fair decision, based concretely on a reasonable definition. You must give them the tools to properly acquit themselves of this duty.

The third reason for comprehensive definition sets is defensibility. You cannot guarantee that you will not be sued as a result of a campus judicial hearing. In fact, if you suspend or expel a student for a sexual misconduct violation, the odds suggest that you are more likely to be sued than not. But, you can and must erect as secure a fortress around your judicial process and decisionmaking as possible, in order to defend these lawsuits successfully. A

student's defense attorney will shoot a vague policy full of holes like it is Swiss cheese (or more importantly, and more relevant today, they will use vagueness and loopholes as leverage for quick and painful settlements.

A policy written to be intentionally vague (as has been the standard of practice in student affairs for twenty years) leaves many issues open to interpretation. If those interpretations are reasonable, in an era of judicial deference to the college judicial process, the college will prevail. If you believe, however, as I do, and as Robert Bickel and Peter Lake and many others do, that the end of the era of judicial deference is approaching, and you seek to craft policies to anticipate a trend of greater judicial activism, interference and broader college liability, then vagueness increases the risk that your campus decision will not be upheld by courts, because it gives insufficient notice to students of proscribed conduct, and allows judges to supply their own interpretations for vague standards.

It is, therefore, my somewhat contrarian conclusion that in order to defend your decisions, they must be based on a well-defined set of rules. You gain further defensibility by establishing that your decisions are soundly based on those well-defined rules. Factual interpretation is necessarily subjective, but a judicial board's subjective view of the facts is defensible when that interpretation is a reasonable one, and well-supported by the evidence in the hearing. Finally, you get defensibility with respect to the sanction, when sanctions are clearly established, and are supported by the weight of the evidence and the consistent application of a clear policy. You owe to the complainant and respondent duties to base the decision on the technical definition, and to impose commensurate sanctions accordingly. If your decision is rendered in this manner, you gain much greater defensibility for your judicial actions.

## ILLUSTRATIVE EXAMPLES

The next element to include is illustrative examples of your policy provisions. I would suggest no more than three or four well-crafted examples of policy violations. Sexual misconduct is better understood not as a definition, but as a plausible situation between students at your college. The scenarios should demonstrate, for example, what is "mutually understandable" body language, where the line when "incapacitation" by the use of alcohol or other drugs is reached, and perhaps a coercion scenario. Make the scenarios realistic, and discuss not only the interaction between the students, but what the outcome of the incident would be under college policy. A Dean of Students once informed me that giving students examples is a terrible idea. He posited that as dualistic thinkers, students would not be well-served by examples, because they would only understand those situations covered by the examples, and would not be able to relate the rules to other contexts.

If you subscribe to this theory, by all means, avoid examples. I don't subscribe to this theory. I think it is nonsense (professors teach with examples all the time, don't they?) that does a terrible disservice to how students learn, and what they are capable of processing. Some students are dualistic thinkers about some things. That doesn't mean that all students always learn only within a dualistic mode. The challenge to make students into critical thinkers capable of abstraction is not a challenge from which colleges, of all entities, should shy.

Theories aside, I think there are some good practical reasons why we don't care if students are dualistic learners or not. First, I think four well-crafted examples can cover about 90% of the most common sexual misconduct situations on campus, give or take some minor details. So, if we lose 10% to the dualistic thinkers, at least we've covered the vast majority of situations. Second, even if students only learn the policy to the extent of the examples they recognize, isn't that always better than having no understanding of the policy at all, because no examples were given? Maybe this isn't a perfect method, but I would

always opt to convey some learning as opposed to none. Wouldn't you? Here are some sample scenarios as examples.

- 1) Todd meets up with Amy and her roommate at about 2:00am. It is obvious to him that Amy had been out drinking all evening. Todd is sober. Todd thinks Amy is tipsy, but has no idea that she's had over ten drinks that night. She appears to be okay, walking and talking without any problem. She mentioned that she threw up earlier, and that was why she was feeling better. She indicates interest in Todd, and back in her room, they engage in sexual intercourse to which Amy gives clear consent. The next day, Amy charges Todd with Non-Consensual Sexual Intercourse, stating that she was blacking out that night, and had no idea what she had done with Todd until her roommate told her the next morning. *Todd is not responsible for violation of the Non-Consensual Sexual Intercourse Policy. Although he had sex with someone, Amy, who was likely to have been incapacitated, Todd did not know that she was. She appeared in control and able to make decisions about consent. He had no way of knowing that she was blacking out.* What if the facts were slightly different. Instead of meeting Amy at 2:00am, Todd met her at 11:00pm, at a party and brought her at least 10 drinks over the course of three hours. Then, at 2:00am, just after Amy threw up, he walked her back to her room, and the two of them engaged in sexual intercourse. All else was the same as in the above example. *It is highly likely that Todd would be found responsible for violating the policy on Non-Consensual Sexual Intercourse. Although he did not know that she was having a blackout and was incapacitated, he should have known. He fed Amy 10 drinks over three hours, knew she threw up just before sex, and should not have engaged in sexual activity with someone in that condition. In this community, students must not take advantage of other students when they are down. Todd had enough information that he should have known that Amy was not in great condition because he gave her the drinks and knew that she was physically ill just before the sex.*

- 2) Sarah and Bill meet at a party. They spend the evening dancing and getting to know each other. Bill convinces Sarah to come up to his room. From 11:00pm until 3:00am, Bill uses every line he can think of to convince Sarah to have sex with him, but she adamantly refuses. Finally, it seems to Bill that her resolve is weakening. He convinces her to give him a "hand job" (hand to genital contact). Sarah would never had done it but for Bill's incessant advances. He feels that he successfully seduced her, and that she wanted to do it all along, but as playing shy and hard to get. Why else would she have come up to his room alone after the party? If she really didn't want it, she could have left. *Bill is responsible for violating the college Non-Consensual Sexual Contact policy. This is not a Non-Consensual Sexual Intercourse situation. Bill coerced Sarah into performing unwanted sexual touching upon him. Where sexual activity is coerced, it is forced. Consent is not effective when forced. Sex without effective consent is sexual misconduct.*
- 3) Will and Soo-Lin are best friends. Will has always been attracted to Soo-Lin, but he was already in a relationship. Shortly after he broke up with Nina, Will was despondent. He went to Soo-Lin, telling her that what he really needed to get over his pain was some "rebound" sex. Soo-Lin told Will she did not want to have sex with him. Will maneuvered Soo-Lin into the corner, using his large size to pin her against the wall, but he did not touch her. Will expressed his attraction to her, and Soo-Lin felt he would never let her go if she didn't give in to him, so she consented. *Will has not directly threatened Soo-Lin, but you could make a case that he coerced her. There is also a strong argument that he intimidated her. Although Soo-Lin might have felt coerced, Will didn't really say anything that would have coerced her. Physical coercion did exist, and it is correctly called intimidation. An intimidated consent is forced because it is not freely given. It is an invalid consent. Will has committed a Non-Consensual Sexual Intercourse policy violation.*

- 4) When Luke and Lila first met, their relationship was tumultuous. At first, Lila didn't want to have sex with Luke because she felt like their friends might find out. He kept trying to convince her. He implied that if Lila didn't sleep with him, he would break up with her. Lila finally gave in, and had sex with Luke. *Lila did not consent to Luke of her own free will. Whenever a threat is used to make someone consent, it is an invalid consent because it is forced. Lila consented not because she wanted to have sex with Luke, but because she feared that he would break up with her.*
- 5) Suppose that Angel and Jose have been dating for several years. Over that period of time, they have come to know each other very well, and have established non-verbal patterns of sexual communication that suit them well. For example, among other habits, Jose knows that if Angel puts on her green nightgown before bed, she wants to have sex with him. If she wears her pink nightgown, she does not want to have sex with him. For two years, they communicate sexually in this manner, which works just fine for them. Late one night in the third year of their relationship, Angel heads off to bed before Jose. Realizing that her pink nightgown is in the laundry, she puts on her green nightgown. She knows that Jose might assume the wrong thing, but she has nothing else to wear, and she figures she'll be asleep by the time Jose goes to bed, so he'll know that she is not really interested. Jose comes to bed, and sees that Angel has on her green nightgown. He knows what this means. He thinks it will be romantic to wake Angel up by beginning to have sex with her (as this has been the case with them in the past). When he does this, Angel is so annoyed that she breaks up with him and kicks him out. She also charges him with Non-Consensual Sexual Intercourse, arguing that he did not have "mutually understandable" consent from her, and that she was incapacitated at the time because she was asleep. Is Jose guilty of sexual misconduct? *No. The rules for sexual misconduct may be altered by long-term relationships. The rules for sexual misconduct are default rules for people who do not have established patterns of sexual communication. Jose and Angel have essentially replaced objective "mutually understandable" consent rules with their own subjective rules. Most couples do. In such cases, if Jose has relied*

*on this type of communication for several years, it is not fair of Angel to change the rules on him midstream without letting him know. There must still be consent for sex in long-term relationships, but couples have a way of expressing that consent through subtle cues and mannerisms that are mutually understandable to them, but maybe not to anyone else.*

6) Dianne and Bruce met at a movie. They started to date on and off. One night, Dianne and Bruce went out drinking. After the bars closed, they went to Dianne's dorm room. Dianne was very drunk, and engaged in sex with Bruce, despite his protests. Bruce was not as drunk as Dianne. Dianne argues that even if she might have had nonconsensual sex with Bruce, it's not her fault because of how drunk she was. She believes she was so drunk she didn't even know she was having sex with him, let alone that it was something he didn't want. Is Dianne guilty of sexual misconduct? *Yes, intoxication of a party is no excuse for violation of the sexual misconduct policy. If it were, drunk people could be excused for drunk driving, because they were so drunk they didn't realize they were driving. Further, Non-Consensual Sexual Intercourse is not an intent-based infraction. Whether or not Dianne intended to commit sexual misconduct against Bruce is irrelevant. The fact that she had sex with him without his consent is sufficient to satisfy the elements of the offense.*

7) John is a junior. Jodie is a sophomore. John comes to Jodie's dorm room with some mutual friends to watch a movie. John and Jodie, who have never met before, are attracted to each other. After the movie, everyone leaves, and John and Jodie are alone. They hit it off, and are soon becoming more intimate. They start to make out. John verbally expresses his desire to have sex with Jodie. Jodie, who was abused by a babysitter when she was five, and has not had any sexual relations since, is shocked at how quickly things are progressing. As John takes her by the wrist over to the bed, lays her down, undresses her, and begins to have intercourse with her, Jodie has a severe flashback to her childhood trauma. She wants to tell John to stop, but cannot. Jodie is stiff and unresponsive during the intercourse. *John would be held responsible in this*

*scenario for violating the policy on Non-Consensual Sexual Intercourse. It is the duty of the sexual initiator, John, to make sure that he has mutually understandable consent to engage in sex. Though consent need not be verbal, it is the clearest form of consent. Here, John had no verbal or non-verbal mutually understandable indication from Jodie that she consented to sexual intercourse. Of course, wherever possible, students should attempt to be as clear as possible as to whether or not sexual contact is desired, but students must be aware that for psychological reasons, or because of alcohol or drug use, your partner may not be in a position to provide as clear an indication as this policy requires.*

9. Hugh is a junior. Elizabeth is a sophomore. Hugh comes to Elizabeth's dorm room with some mutual friends to watch a movie. Hugh and Elizabeth, who have never met before, are attracted to each other. After the movie, everyone leaves, and Hugh and Elizabeth are alone. They hit it off, and are soon becoming more intimate. They start to make out. Hugh verbally expresses his desire to have sex with Elizabeth. Elizabeth isn't ready to do it with Hugh, since they just met. But, she likes him and doesn't want to scare him off either. She decides to satisfy him orally, hoping they can get to know one another better later before engaging in intercourse. Perceiving the oral sex as foreplay, Hugh stops Elizabeth, lays her back on the bed, takes off her clothes, and engages in intercourse with her. Elizabeth is unresponsive during the intercourse. *This behavior by Hugh would violate the sexual misconduct policy. Engaging in one form of sexual behavior does not necessarily imply consent to another. Clearly, Elizabeth consented by her actions to oral sex with Hugh. But, Hugh had no mutually understandable indication from Elizabeth that she consented to sexual intercourse. Some verbal or clear overt action would be necessary to show Hugh that Elizabeth wanted to have more than oral sex with him.*

## POSSIBLE SANCTIONS

The final element of a comprehensive policy is a listing of the possible sanctions that can be imposed following a determination that the accused student is responsible for violating the sexual misconduct policy. Such a listing is explicitly required by the Clery (Campus Security) Act (to be published in the Annual Security Report), and when done well and included in the conduct code as well, it can also serve to ameliorate another of the structural impediments often encountered by users of the policy.

Most colleges adhere to this requirement by listing that the possible outcomes range from warning or probation to expulsion. Is it any wonder that such a statement could prevent victims from ever coming forward? Let's see, says the victim, I could make the complaint, endure an investigation, go through the whole rigmarole of a campus hearing, have to face my assailant, place my own actions on trial, and then he might be given probation if I win? Most victims want to know that if they put themselves through all of this, the offender will be dismissed from college or dealt with severely. Otherwise, there is a strong disincentive to reporting. Clarifying punishments is also of benefit to accused students, who otherwise face uncertainty not only as to responsibility, but to sanction as well. If a student is contemplating an action from a deterrence perspective, is he more likely to be deterred by a policy that allows probation, or by one that usually assures expulsion? Establishing standard recommended sanctions will help to achieve these goals.

NCHERM suggests the following sanction statement:

- Any student found responsible for a violation of the Non-Consensual Sexual Contact policy will face a sanction ranging from warning to expulsion, depending on the severity of the incident, and taking into account any previous disciplinary infractions.\*

- Any student found responsible for a violation of the Non-Consensual Sexual Intercourse policy will typically face a sanction of suspension or expulsion, where the recommended sanction is expulsion, depending on the severity of the incident, and taking into account any previous disciplinary infractions.\*
- Any student found responsible of a violation of the sexual exploitation policy will face a sanction ranging from warning to expulsion, depending on the severity of the incident, and taking into account any previous disciplinary infractions.\*

\*The sanctioning body reserves the right to broaden or lessen any range of punishments or recommended sanctions in the case of serious mitigating circumstances or egregiously offensive behavior. The sanctioning body will not deviate from the range of recommended sanctions without compelling justification to do so.

## **ASSESSMENT AND IMPROVEMENT**

The most successful policies are those that are viewed by the college as living and breathing entities, capable of growing and changing. After you make changes or implement a new policy, consider it a good start, not a job well done. Student behaviors, societal expectations, laws and rules change quickly. A policy that can be rapidly adapted is an asset. Creating a review and assessment committee is very important to the creation, assessment, and updating of your policy. This committee or task force should include members of every group with a stake, from students to administrators to counselors to campus police to rape education staff, to local resources. The committee should be charged with policy development and implementation. Once that task is complete, the task force must begin the assessment process. By evaluating the success or failure of the policy in practice, the task force will be able to assess the effectiveness of the policy at achieving its intended purposes. At appropriate intervals, the task force should be charged with the responsibility for suggesting changes or for completely revamping the policy as necessary.

## **DISSEMINATION**

Colleges need to recognize that there is often an information gap, and that the majority of students will not know exactly what sexual misconduct is, or how it is defined on your campus. They may be operating from definitions used in other states in which they had previously resided or attended school. Thus, your college policy should be thoroughly explained to each new student upon his or her arrival. This can be effectively accomplished during an orientation program on sexual assault prevention. As part of this orientation, a college official should explain not only what the school's policies are, but also what to do if a student is assaulted. A sexual assault brochure that contains the school's policy, information on what to do if assaulted, area resources, and prevention tips should be distributed that time to the student body. Furthermore, the policy should be published in the first edition of the campus newspaper each semester, discussed at faculty meetings, incorporated into course material in appropriate classes, and distributed as part of Greek rush activities, RA training, and student-athlete meetings.

## **GROUP INFRACTIONS**

The campus sexual misconduct policy may also include collective punishments for sexual assaults by fraternity members or sports team members, or other student groups if the assaults occur collusively. A practice of holding the group responsible for individual actions will exert peer pressure on the group if they know their behavior could affect the whole group. In order to be able to exercise this possibility, you need to build it into your policy statement.

## LIMITED IMMUNITY FOR VICTIMS

Colleges should consider adopting a policy of limited immunity for victims. It is a well-documented fact that sexual assault victims report their victimization in less than 10% of all cases. Many victims are ashamed, embarrassed, filled with self-blame, or fearful of stigmatization. Because of this reluctance, schools should strive to create an environment that encourages victims to report assaults. Often, victims hesitate to come forward out of fear that they themselves will be punished for minor infractions of college policy that would be revealed in reporting their victimization. It has been estimated that alcohol consumption is involved in 70%-90% of all acquaintance rapes. If students feel they will be punished for underage drinking, the college will discourage reporting of more serious incidents. The school should make it known that while it does not condone underage drinking or violation of other college policies, it considers reporting assaults to be of paramount importance, and will therefore extend limited immunity to victims in order to foster reporting and adjudication of sexual assaults on campus. Limited immunity means just that. Depending on the nature of the victim's violation, it should still be dealt with, through education or counseling, if possible.

## GOOD SAMARITAN

Students should be encouraged to report incidents of sexual violence and assist victims in times of crisis. Having a campus Good Samaritan rule will enable you to empower students who may not otherwise make a report or lend a helping hand. A Good Samaritan rule is not unlike limited immunity for victims, except that it provides limited immunity to those who report assaults, or other behaviors which are violative of campus policies, or who assist victims of policy violations, but who might be policy violators themselves. For example, Scott, a junior at the College of Knowledge, is stumbling home from the pub, quite inebriated. He witnesses an assault, but fears going to the police to report it because he is drunk and underage. A Good Samaritan policy would allow Scott to report what he saw

without fear of disciplinary repercussions. Similarly, if Scott is a first-year, driving along in his unauthorized car, and he encounters a female student in need of help, this policy will encourage him pick her up and take her to the campus police, despite the fact that first-years are not allowed to have cars on campus.

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Brett Sokolow is a specialist in campus safety, security and high-risk student health and safety issues. He is the President of the National Center for Higher Education Risk Management (NCHERM), a national multidisciplinary risk management consulting firm. He serves or has served as outside counsel/advisor to LaSalle University, Warren Wilson College, The Colorado College, Loras College, Hamilton College, the University of the Incarnate Word, Central College, Saint Leo University and the University of Dayton. Mr. Sokolow is a risk management consultant, author, editor, and higher education attorney admitted to the Pennsylvania and New Jersey bars. He holds a Bachelor of Arts degree in East Asian Studies from the College of William and Mary (1993), and a Juris Doctorate from the Villanova University School of Law (1997). Mr. Sokolow founded NCHERM in 2000. NCHERM provides specialized consulting, seminars, training and publications on:

- Sexual assault/harassment
- Judicial Affairs
- Campus Security
- Hazing
- Problem drinking/drugs

NCHERM has provided services to over 500 college and university clients, including programs for campus and school district administrators, faculty and staff training, sexual assault and Title IX case management, risk management for fraternities and sororities, workshops and seminars. In addition to his consulting activities, Mr. Sokolow has also provided awareness and education programs for students at over 1,000 colleges, high schools and military institutions. Through NCHERM, Mr. Sokolow has published numerous books and articles on student affairs and risk management topics. He provides expert witness services, and lobbying efforts for campus crime and sexual assault-related legislation.

Mr. Sokolow holds memberships to the National Association of Student Personnel Administrators (NASPA), the Association for Student Judicial Affairs (ASJA), the University Risk Management and Insurance Association (URMIA), the International Association of Campus Law Enforcement Agencies (IACLEA), the Association of Fraternity Advisors (AFA), the American College Personnel Association (ACPA, where he sits on the Directorate Body of the Commission for Campus Judicial Affairs and Legal Issues), the Association of

College and University Housing Officers- International (ACUHO-I) and the Council on Law in Higher Education (CLHE), where he also serves as a member of the Board of Trustees and as Vice-President for Campus Security. He serves on the Advisory Board of the Higher Education Program at Old Dominion University. He is Editor of the *Report on Campus Safety and Student Development* and the founder and Editor-in-Chief of *The Chronicle of Campus Conduct*.

Mr. Sokolow is recognized for his expertise in campus judicial training and authoring codes of conduct. He has trained judicial officers from over 250 college campuses, and has created an Academy for advanced judicial training. He has also authored or revised the conduct codes of over 50 colleges, and runs intensive Institutes around the country for administrators who are working on code revisions. Additionally, NCHERM provides an active schedule of more than a dozen annual seminars hosted at colleges throughout the United States. Mr. Sokolow has presented at regional and national conferences throughout the country.